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EU law

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NOTES

Module descriptor

GENERAL INFORMATION

Module title

EU law

Module code

LA2024

Module level

5

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk

Credit

30

Courses on which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

EU law is one of the seven foundation modules required for a qualifying law degree (QLD) in England and Wales. Standard Entry and Graduate Entry students on a QLD pathway must pass an examination in this module in order to meet the requirements of their course.

This module presents an overview of the basic features of the EU legal system: the history of European integration; the role of law and the treaty structure; the institutions and court system; the EU's competences and legislative process; the core legal principles of direct effect and supremacy. The module then goes on to focus on areas of substantive law. In particular, it considers the provisions on free movement of goods and workers, and the provisions on the freedom to provide services are thoroughly analysed with reference to the case law of the European Court of Justice and to relevant secondary legislation. The module also examines the values and policies upon which the European constitutional architecture is founded, touching on issues such as: the protection of the environment; the relationship between trade and human rights; and the tension between market forces and sectors such as public health. The Brexit negotiations and their implications for the future of EU law are also discussed.

MODULE AIM

This module aims to equip students with the tools necessary to understand the underlying principles of European legal integration and enable them to work with European Union legal sources.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module are expected to have knowledge and understanding of the main concepts and principles of EU law. In particular they should be able to:

1. Contextualise the modern-day operation of European Union law and the internal market within its historical origins, its treaties and its institutional frameworks;
2. Explain the general principles of EU Law and highlight their relevance in judicial decision-making;
3. Identify the legal sources of the four freedoms and apply relevant statutes and case law to explore the ambit of these freedoms;
4. Understand the concept of abuse of EU law and the regulation of the internal market as related to competition policy;
5. Evaluate how the balance of fundamental rights and the freedoms is achieved as discussed in seminal jurisprudence and wider academic debates.

LEARNING OUTCOMES: SKILLS

On completion of this module students should be able to:

6. Paraphrase and critique key arguments advanced in judicial opinions and academic writings;
7. Use appropriate legal terminology and abbreviations specific to EU law;
8. Locate and interrogate key primary and secondary sources relevant to EU law;
9. Develop a consistent and critical argument both in relation to problem questions and to essay questions.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) Benchmark Statement for Law (2020).

MODULE SYLLABUS

(a) *Introduction*.

(b) *The Treaties and their significance*. History and reforms of the founding treaties. Present structure. Characteristics of the EU treaties. The Brexit negotiations.

(c) *The institutions of the European Union*. The political institutions structure and powers (European Council, Council of Ministers, European Commission, European Parliament) and the judicial power in the EU (European Court of Justice, General Court jurisdiction).

(d) *EU law making and sources of laws*. Secondary legislation. Regulations and Directives. General principles of law.

(e) *The constitutional principles of EU law*. Direct effect. Supremacy. The doctrine of consistent interpretation. State liability.

(f) *Free movement of goods*. Definition of 'goods'. Scope of application. Quantitative restrictions. Distinctly and indistinctly applicable measures. Derogations. Proportionality test.

(g) *Services and establishment*. Definition of 'services' and 'establishment'. Scope of application. Distinctly and indistinctly applicable measures. Derogations. Proportionality test.

(h) *Free movement of capital*. Definition of 'capital'. Scope of application. Access to market. Application to third countries. Derogations. Proportionality test.

(i) *Trade harmonisation*. Competence and approximation. The limits of EU power. Article 114.

(j) *Competition policy*. The notion of 'agreement'. 'Decisions by association of undertakings'. 'Concerted practice'. Exemptions under Article 101(3). Enforcement and Regulation 1/2003. The notion of dominance and abuse under Article 102.

(k) *Free movements of persons and citizenship*. Definition of 'workers'. Scope of application. Principle of non-discrimination on grounds of nationality. Derogations. Proportionality test. Emergence of concept of citizenship. Scope of application Articles 20 and 21.

(l) *EU human rights*. Human rights as general principles of law. The Charter of Fundamental Rights. Scope of application. The role of the European Court of Justice.

LEARNING AND TEACHING

Module guide

Module guides are the students' primary learning resource. The module guide covers the entire syllabus and provides the student with the grounding to complete the module successfully. It sets out the learning outcomes that must be achieved as well as providing advice on how to study the module. It also includes the essential reading and a series of self-test activities together with sample examination questions, designed to enable students to test their understanding. The module guide is supplemented each year with the pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- online audio presentations;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple-choice questions with feedback are available for some modules allowing students to test their knowledge and understanding of the key topics.

The Online Library

The Online Library provides access to:

- the professional legal databases and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core text

Students should refer to the following core text. Specific reading references are provided for this text in each chapter of the module guide:

- **Costa, M. and S. Peers *Steiner & Woods EU law*. (Oxford: Oxford University Press, 2020) 14th edition [ISBN 9780198853848].**

ASSESSMENT

Learning is supported through tasks in the module guide, which include self-assessment activities with feedback. There are additional online activities in the form of multiple-choice questions. The formative activities enable students to develop skills identified in learning outcomes 6–8 and help to prepare students to reach the module learning outcomes tested in the summative assessment.

Summative assessment is through a three hour and 15 minute unseen examination. Students are required to answer four questions out of eight including a choice of problem and essay questions. Summative assessment questions will test learning outcomes 1–7.

Please be aware that the format and mode of assessment may need to change in light of extraordinary events beyond our control, for example, an outbreak such as the coronavirus (COVID-19) pandemic. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

Students are permitted to bring into the examination room the following specified document:

- ***Hart core EU legislation 2022–23*** **(Bloomsbury).**

1 Introduction

Contents

Introduction

The course is designed as a general introduction to the legal system of the European Union. It covers both its constitutional and institutional structure and focuses on specific key areas of substantive law.

We will start by introducing the European Union's legal order, and then move into the EU's legislative process, where we will concentrate on the political and legislative functions of the various institutions and the division of competences between the EU and its Member States. We will pay particular attention to the role of the judiciary in shaping the EU's legal order. The Court of Justice of the European Union (CJEU) includes the Court of Justice (previously known as the European Court of Justice, a term often still commonly found) and the General Court (formerly the Court of First Instance). The European Court of Justice (ECJ) developed the fundamental notions of direct effect and supremacy of European law. Those notions, through which rights are created for individuals, will be examined, and we will subsequently turn to how those rights can be enforced.

The area of European trade law is then chosen as a 'test case' to analyse the legal, political and social developments of the European system. In particular, the provisions on free movement of goods, workers, services, capital and competition law are thoroughly analysed with reference to the case law of the ECJ and to relevant secondary legislation. This part of the course, by focusing also on specific issues such as the protection of the environment, the relationship between trade and human rights, or the tension between market forces and sectors such as public health, is not confined to legal themes only but indirectly examines the role of the EU and the values and policies upon which the European constitutional architecture is founded. Finally, we will discuss the emergence of the EU Charter of Rights.

The EU: from six to 28...minus 1

From the six original Member States, the European Union (EU) reached 28 countries, after 10 Eastern and Central European countries joined in May 2004, followed by Romania and Bulgaria in 2007 and Croatia in July 2013. However, see Section 2.5 for the discussion on the UK withdrawal from the EU. The Union encompasses nearly the whole Western European continent, with a sizeable population.

Within the boundaries of the EU, an internal market has been established, aiming to eliminate trading barriers between the participating Member States. The area comprises an internal market for goods and services and, within most of the area, for workers, self-employed persons and companies. A single set of trade rules applies across the EU and there is a Common Customs Tariff wherever goods from countries outside the EU enter its borders.

The European Economic Community (EEC) was created by the Treaty of Rome in 1957 with the aim of fostering economic growth and increased productivity among the six participating Member States (France, Germany, Italy, Belgium, the Netherlands and Luxembourg[†] – the UK was not one of the founder members but joined in 1973) and these figures reflect the success of this enterprise. The EEC built on the success of the earlier European Coal and Steel Community (ECSC) which had been established among the same six countries. The impetus behind this earlier Community had been to prevent another war in Europe by placing the production of coal and steel, the materials of war, under common control. The participating Member States, including the ancient enemies, France and Germany, signed the Treaty of Paris[†] in 1951, which established the ECSC and created a common market in coal and steel. Conflict in Europe ignited the two world wars of the 20th century, but in 2005, as well as celebrating the 60th anniversary of the end of the Second World War, Europe could also celebrate 'the longest period of peace Western Europe has ever known'.[†] This may also be attributed, to a large extent, to the success of the European Union.

[†] Belgium, the Netherlands and Luxembourg are often referred to collectively as the 'Benelux countries'.

[†] The Treaty of Paris was of 50 years duration. It came into force in 1952 and terminated in 2002 when its functions were taken over by the EC.

[†] Speech on 9 May 2005 by EU External Relations Commissioner Benita Ferrero-Waldner.

The European Economic Community was renamed the European Community in 1993, reflecting the development of aims and competences which were not purely economic but which increasingly reached into a wider social and even political sphere. In 1993, the broader European Union was founded on the European Community (see Chapter 2 for details) and this Union expanded cooperation between the Member States beyond the areas covered by the Treaty of Rome and into foreign policy, defence, policing and judicial cooperation. This further cooperation is governed by the other parts of the European Union Treaty, consideration of which is largely beyond the scope of this course.

EU law is supreme over national law (see Chapter 5). Where there is conflict between national law and EU law, EU law prevails and national law must be disapplied. The judgments of the ECJ are now the ultimate authority in the judicial hierarchy of the Member States. The role that EU law plays in the national legal systems is increasingly important.

There can be no question that the economic and social landscape of modern Europe has been shaped by the law which flows from EU law. It is this law which you will study on this course. It is fast-changing, with the case law of the Court of Justice of the European Union (CJEU) playing a very important role. The institutions and methodology of law making in the EU are unfamiliar and will require careful attention in the early stages of the course, but it is a subject where slowly the overall structure becomes clear. You are studying the emergence and development of 'a new legal order' which is still changing; many of the most important cases are recent and this makes EU law interesting, dynamic and relevant. The impact of EU law on many aspects of life is significant and growing.

The Lisbon Treaty

The coming into force of the Treaty of Lisbon on 1 December 2009 ended a long period of uncertainty, which started with the rejection of the previous attempt – the Draft Treaty Establishing a Constitution for Europe (see Chapter 2 for more details). Still, the decision of the United Kingdom to withdraw from the EU and the evermore frequent clashes between the EU and Poland and Hungary in respect of the rule of law in those countries have once again called into question the future of the European project. Despite that, the EU has vigorously reacted to COVID-19 by adopting a collective response in many areas and introducing new instruments to fight the economic repercussions of the pandemic, thus reaffirming the centrality of European solidarity.

We hope you will enjoy the module!

Learning outcomes

By the end of this chapter you should be able to:

- **explain the main topics in the EU law syllabus**
- **understand how the module guide develops the topic of EU law**
- **identify the key textbooks and readings that will be used.**

1.1 Using the module guide

The module guide has been specially written for you by experts who lecture and examine in the subject. It covers the entire syllabus.

The module guide will tell you which parts of the textbooks to read – and when to do so. **It is vital that you read the 'Core text' and 'Essential reading' when indicated within the guide**. It also contains a number of activities and sample examination questions to help you improve your skills.

These exercises have been designed to help you understand and remember the key points in EU law. It is very important that you do them. Answer the activities in your own words before you look at the feedback. If the feedback shows that you did not really understand the topic, you should work through those sections of the module guide again.

Please read carefully the note about Treaty Article numbers in Section 1.2.

1.1.1 Chapters of the guide

The guide contains the following chapters:

Chapter 2 The Treaties and their significance

Chapter 2 provides a historical overview of the foundation and development of the European Union, from the establishment of the European Economic Community (EEC) in 1957 to the present European Union (EU). The chapter includes a summary of the reasons behind the decision to establish the EEC in 1957 and gives an insight into the unique nature of the EU as a law-making entity, with competence to create supra-national law binding the participating Member States.

The effect of each of the treaties which have expanded the legal powers and altered the institutional structure of the EU since 1957 is outlined, with particular reference to the increasing competences of the EU, the introduction of new legislative procedures and the developing role and significance of the European Parliament.

Chapter 3 The institutions of the European Union

This chapter contains an account of the main features of the institutions of the EU, with reference to their composition, functions and powers, and the overall institutional balance is explained. The chapter gives a historical perspective on developments in the institutional structure since 1957.

Chapter 4 The courts

This chapter describes the various courts making up the structure of the EU judicial system, whose role is to ensure an efficient and uniform enforcement of EU law in the Member States. It then explores the preliminary reference procedure contained in Article 267 TFEU, empowering national courts to make a reference to question the validity or the interpretation of a point of law. The last section considers Article 263 TFEU, which allows individuals to bring direct actions before the Court. We will analyse rigid regimes of standing rules for both privileged and non-privileged applicants willing to challenge the validity of an 'EU regulatory Act'.

Chapter 5 The general principles of EU law

One of the most important sources of EU law are the 'general principles' of law. These general principles, which include the principles of direct effect, supremacy and state liability, are not found in the Treaty but have been incrementally developed by the ECJ to increase the effective implementation of EU law within the Member States.

This chapter discusses how these principles have sometimes provoked a strong reaction from national courts. It also explains how these doctrines empowered individuals as the 'guardians of the Treaties', by giving them the opportunity to enforce their EU rights in their national courts.

Chapter 6 Free movement of goods

The free movement of goods is one of the four freedoms guaranteed by the Treaty of Rome and is the cornerstone of the internal market. The treaty prohibits customs duties and charges having equivalent effect to customs duties (Articles 28–30 TFEU), discriminatory taxation (Article 110 TFEU), quantitative restrictions (quotas) and measures having equivalent effect to quantitative restrictions (Articles 34–36 TFEU). Judgments of the CJEU have defined the ambit of these provisions and this chapter examines the extensive case law on the free movement of goods.

Chapter 7 Services and establishment

EU law guarantees the right to provide services into other Member States (Article 56 TFEU) and the right of EU citizens to establish themselves as self-employed persons in other Member States (Article 49 TFEU) with their families (Directive 2004/38). Freedom of movement includes the right to mutual recognition of qualifications across the EU. The legal rights created by the law deriving from Article 49 TFEU also apply to legal persons (companies). Chapter 7 looks at the extensive case law and secondary legislation based on these two provisions.

Chapter 8 Free movement of capital

Free movement of capital is at the heart of the single market: it enables open, competitive and efficient European financial markets and services. This chapter explores the impact of the Economic and Monetary Union (EMU) and free movement of capital enshrined in Articles 63-66 TFEU on the transactions carried out by citizens and companies. It also considers how the supervisory mechanisms recently adopted to end the financial and sovereign-debt crisis have affected the free movement of capital within the EU.

Chapter 9 Trade harmonisation

The removal of technical barriers to trade has been one of the major institutional factors affecting trade within the EU. This chapter examines the role of Article 114 TFEU in providing a legal basis for the EU to adopt **positive** and **negative** integration measures to complete the internal market.

Chapter 10 Competition policy

Competition law in the EU is highly developed and is targeted at anti-competitive behaviour by undertakings (the course does not cover state aids). There are two key Articles that give effect to competition policy: Article 101 TFEU, which prohibits collusion by undertakings which distort or restrict competition in the EU, and Article 102 TFEU, which prohibits the abuse of a dominant position by undertaking(s) which have significant market power. In both cases there is a requirement that the prohibited behaviour should affect trade between Member States. The chapter examines the case law and secondary legislation governing this area and explains how the competition provisions are enforced.

Chapter 11 Free movement of persons and citizenship

This chapter covers the case law and legislation on free movement of persons in the EU (excluding the rights given under freedom of establishment and free movement of services, see Chapter 7). The free movement of persons, starting with free movement of workers (Article 45 TFEU), another of the fundamental freedoms established by the internal market, has been the central focus of this area for many years but now 'citizenship' of the EU, introduced by the Maastricht TEU and now Part Two of the TFEU, has become an important basis for case law of the ECJ and of secondary legislation; these developments have significantly extended the rights of non-economically active EU citizens and their families.

Chapter 12 EU human rights

This chapter considers the state of human rights protection in the EU. Although human rights protection was not a pressing concern in the early EEC Treaties, the ECJ gradually developed its fundamental rights jurisprudence. In 2009, the Lisbon Treaty introduced

significant changes to human rights protection in the EU, the most significant of which resides in Article 6 of the TEU. It provides that the EU Charter of Fundamental Rights is now legally binding, having the same status as primary EU law, and that the EU 'shall accede' to the European Convention on Human Rights (ECHR). This chapter thus examines the seminal jurisprudence on fundamental rights protection, and analyses the policy implications of the Charter of Fundamental Rights.

1.1.2 Other skills

Among the skills you are required to develop as part of your LLB studies are the use of IT in legal research and the practice of verbal skills. You should:

- use the internet to find out more about key topics, and to read and research cases and issues
- spend time developing verbal presentations of topics. You can practise verbal delivery either by yourself or with groups of friends and family.

1.2 Readings

Legislation and judicial decisions

The main primary legislative text to which you will refer is the consolidated version of the Treaty of Rome, the Treaty establishing the European Community (contained in your copy of EU legislation). The original Treaty of Rome has subsequently been amended by:

- the Single European Act (SEA)
- the Treaty on European Union (TEU) known as the Maastricht Treaty
- the Amsterdam Treaty (ToA)
- the Treaty of Nice (ToN)
- the Treaty of Lisbon (ToL).

These Treaties are important because of the number of changes they made to the Treaty of Rome. The Treaty numbers have changed several times, so the numbers in this module guide relate to the Lisbon Treaty with, where appropriate, the numbers since the Treaty of Amsterdam (themselves already changed from previous numbers) in brackets. That is why in cases and developments before the ToA you will find Articles referred to by different numbers, but the Lisbon Treaty Article numbers will always be cited as well. Likewise, you should always cite the Treaty of Lisbon numbers in examination answers.

There is a substantial amount of secondary legislation which you will study, together with the principal judgments of the ECJ and the General Court of the European Union.

Legal documents and statute books

- ***Core EU legislation 2022–23* (Hart).**

Information about the statute books and other materials that you are permitted to use in the examination is printed in the current Regulations, which you should refer to.

Core text

The textbook for **EU law** is:

- **Costa, M. and S. Peers *Steiner & Woods EU law*. (Oxford: Oxford University Press, 2020) 14th edition [ISBN 9780198853848] (hereafter 'Steiner & Woods').**

Detailed reading references in this module guide refer to the edition of the set textbook listed above. A new edition of the textbook may have been published by the time you study this module. You can use a more recent edition of any of the books; use the detailed chapter and section headings and the index to identify relevant readings. Also check the virtual learning environment (VLE) regularly for updated guidance on readings.

Further reading

You may wish to refer to the following books if you want to explore a particular subject in more depth.

- **Arnull, A. *The European Union and its Court of Justice*. (Oxford: Oxford University Press, 2006) second edition [ISBN 9780199258857].**
- **Barnard, C. and S. Peers *European Union law*. (Oxford: Oxford University Press, 2020) third edition [ISBN 9780198855750].**
- **Craig, P. and G. de Búrca *EU law: text, cases and materials*. (Oxford: Oxford University Press, 2020) seventh edition [ISBN 9780198856641].**

On EU constitutional and administrative law

- **Tridimas, T.*The foundations of European Union law*. (Oxford: Oxford University Press, 2022) ninth edition [ISBN 9780192896513].**

On substantive law

- **Barnard, C. *The substantive law of the EU: the four freedoms*. (Oxford: Oxford University Press, 2022) seventh edition [ISBN 9780192857880].**

On competitionoutloo

- **Whish, R. and D. Bailey *Competition law*. (Oxford: Oxford University Press, 2021) 10th edition [ISBN 9780198836322] (hereafter 'Whish and Bailey').**

Periodicals (journals)

The principal English language journals that publish articles on EU law are:

- *Common Market Law Review* (*CMLRev*)
- *European Law Journal* (*ELJ*)
- *European Law Review* (*ELRev*)
- *International and Comparative Law Quarterly* (*ICLQ*)
- *Journal of Common Market Studies* (*JCMS*)
- *Legal Issues of Economic Integration* (*LIEI*)
- *Modern Law Review* (*MLRev*)
- *Yearbook of European Law (YEL).*

The abbreviations given in parentheses will be used throughout this guide for references to these journals.

Current affairs

You are also strongly encouraged to develop the habit of reading a quality newspaper every day: an excellent regular source of information on EU law is the *Financial Times*.

Useful websites

- **Court of Justice of the European Union**
- **European Parliament**
- **Council of the European Union**
- **European Commission**
- **Commission Competition Directorate**
- **European Research Papers Archive (ERPA).**

Case citation

Decisions of the ECJ and General Court are identified by a number, unique to the case. This makes them very easy to look up in a textbook.

Case numbers have two parts, the second of which reflects the year in which the case was registered at the Court. Sometimes several cases are heard together. Cases have a letter C or T in front of the number, C for cases decided by the ECJ and T for those decided by the General Court. Cases before the ECJ have the page number preceded by a Roman I and those before the General Court a Roman II (for example Case C-262/88 *Barber* v *Guardian Royal Exchange* [1990] ECR I-1889).

Case references will usually be to the ECR (*European Court Reports*: the official reports of the ECJ). If the case is available in transcript only, it is usual to cite the date of the judgment.

A European Case Law Identifier (ECLI) has been created as part of a significant initiative to facilitate the consultation, as well as citation, of case law in the European Union –- see the Court's website at https://curia.europa.eu/jcms/jcms/P_126035/en/ on the method of citing the case law of the Court of Justice of the European Union on the basis of the ECLI.

In the examination, you are not expected to cite the number or the full name of the case. A shortened form of the name is sufficient, such as *van Gend en Loos*.

Cases of the European Courts are available on the 'curia' website that has a very easy search form: https://curia.europa.eu/jcms/jcms/j_6/en/

You can also access European cases through the Online Library at http://onlinelibrary.london.ac.uk/

Online Library and Virtual Learning Environment (VLE)

As mentioned above, you can access European cases through the Online Library. This will also give you access to many useful journals and other legal databases. You should use it regularly.

You should also regularly refer to the EU law section of the Laws VLE. You will find a number of helpful resources, including updates to the module guide.

1.3 The examination

Important: the information and advice given here are based on the examination structure for the session 2018–19. We strongly advise you to always check both the current Regulations for relevant information about the examination, and the VLE. You should also carefully check the rubric/instructions on the paper you actually sit and follow those instructions.

Assessment for this subject is by means of a three hour and 15 minute examination. You will be required to answer four out of a total of eight questions.

Always answer four questions and try to spend the same amount of time on each. A student who produces three first class answers (no easy task!) might end up with an overall low 2.2. Write clearly. You may lose marks for an illegible answer and bad handwriting makes it difficult for the examiners to follow your argument. It is worthwhile spending a few minutes writing a short plan of your answer so that it is structured and clear. Do try to structure your answers, with a clear introduction and conclusion. In a problem question, try to be methodical, addressing one issue after another.

Remember, it is important to check the VLE for:

- up-to-date information on examination and assessment arrangements for this course
- where available, past examination papers and *Examiners' reports* for the course which give advice on how each question might best be answered.

1.4 Terminology and abbreviations

CAP	**Common Agricultural Policy**
CCT	**Common Customs Tariff**
CFI	**Court of First Instance**
CFSP	**Common Foreign and Security Policy**
CJEU	**Court of Justice of the European Union**
Commission	**European Commission**
COREPER	**Committee of Permanent Representatives (French acronym)**
EC	**European Community (EEC is correct only pre-1 November 1993)**
EC Treaty	**Treaty of Rome**
ECB	**European Central Bank**
ECtHR	**European Court of Human Rights**
ECHR	**European Convention on Human Rights**
ECJ	**European Court of Justice**
ECOSOC	**Economic and Social Committee**
ECSC	**European Coal and Steel Community**
EEA	**European Economic Area**
EFTA	**European Free Trade Association**
EMS	**European Monetary System**
EP	**European Parliament**
EU	**European Union**
Euratom	**European Atomic Energy Community**
GATT	**General Agreement on Tariffs and Trade**
IRLR	**Industrial Relations Law Reports**
MEQR	**Measure equivalent to a quantitative restriction**
QMV	**Qualified Majority Vote**
SEA	**Single European Act**
ToA	**Treaty of Amsterdam**
ToL	**Treaty of Lisbon**
ToN	**Treaty of Nice**
TEU	**Treaty on European Union/Maastricht Treaty**
TFEU	**Treaty on the Functioning of the European Union**
WTO	**World Trade Organization**

Activity 1.1

Core comprehension – Justice as access to the markets

Using your Online Library resources, research the following journal article:

- **Bartl, M. 'Internal market rationality, private law and the direction of the union: resuscitating the market as the object of the political' (2015) *European Law Journal* 572–598 (available in Academic Search Complete).**

You may complete this learning activity by reading Section (d): 'Justice as access to the markets'.

a. **Why is commutative justice or corrective justice a narrow conception of justice in private law?**

b. **Why is social private law viewed as a broader conception of justice?**

c. **The author argues that the EU has transformed private law. Identify the key concept used to advance this argument.**

d. **Describe in fewer than 40 words what is meant by this concept.**

e. **List some examples of how European private law aims to deliver justice.**

f. What is access justice?

g. How does access justice contribute to the internal market?

h. Explain in fewer than 60 words why the concern with access is complementary to the concern of the EU internal market.

i. Identify three areas of concern with access as related to European private law.

Activity 1.2

Core comprehension: free movement in the EU

Using the internet, find the following document:

- Schiek, D., L. Oliver and G. Alberti 'EU social and labour rights and EU internal market law' (Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, 2015). www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU(2015)563457_EN.pdf

You can complete this learning activity by reading Section 1.3.2 'Social and labour rights in the Charter of Fundamental Rights' and Annex 1 'Free movement in the EU – some data'.

1.3.2 'Social and labour rights in the Charter of Fundamental Rights'

a. Liberal human rights protect liberty and property from state intrusion. Identify some examples of liberal human rights.

b. Which type of human rights are more concerned with the distribution of the 'public good'? Using the example of free literacy skills education for adults, identify how the public good is used to benefit both the individual in society and society as a whole. (Maximum 50 words.)

c. Why may the Charter be considered as transcending the compartmentalised approach to understanding human rights?

Annex 1 'Free Movement in the EU – some data'

d. Why are 2004 and 2007 important dates to benchmark developments in the free movement in the EU?

e. Which EU Member State hosts the highest proportion of EU citizens from other Member States (free movers)? State the statistics for 2007 and 2014.

f. Using the diagram 'Pre 2004 Member States – % of free movers in total population' on p.104, identify the states with the highest percentage and the lowest percentage of free movers in 2014 and list the numerical value.

g. Using the diagram 'Non EU Citizens in selected post-2004 Member States' on p.105, calculate the average annual percentage for Estonia from 2007 to 2014.

h. How does the general principle of free movement operate when there is a problem of high unemployment in one Member State?

2 The Treaties and their significance

Contents

Introduction

This chapter introduces you to the legal order of the European Union (EU). The EU itself was created by the Treaty on European Union (TEU, the Maastricht Treaty) in 1993 and included, apart from the European Community, two additional areas of cooperation between the Member States described briefly later in this chapter.

The legal system of the EU has been described as 'a new legal order' and '*sui generis*' by the ECJ, meaning that it is 'of its own, unique type', unlike any other legal system in the world.

The Member States belong to a supranational organisation governed by institutions to which the Member States have transferred certain powers and to which they have also given competence to enact legislation (within limited areas) which binds those signatory states.

The European Economic Community (later called the European Community) was established by the Treaty of Rome in 1957 (the EEC Treaty). The background to the creation of the European Economic Community (EEC) is described and the essential features of the common market which it created, and which is now called the internal market, are briefly explained. These are then described and analysed in detail in subsequent chapters. The effectiveness of EU law has been greatly increased by the case law of the ECJ, the main court of the European legal order and one of the original Community institutions. In its early case law, the ECJ created two principles of fundamental importance to the Community legal order, which are essential to the effectiveness of Union law. These are the twin principles of 'direct effect' established in Case 26/62 *van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1 and supremacy of Union law, laid down in Case 6/64 *Costa* v *ENEL* [1964] ECR 585. These principles are explored in depth in Chapter 5. Finally, this chapter provides you with an outline of the changes to the EEC Treaty and to the European Union legal order introduced by subsequent treaties. This is intended as an initial guide for you, but also as a point of reference in your studies of the later chapters. Developments of particular significance are highlighted; on this course you are not expected to know all the changes introduced by later Treaties in detail.

In effect, this chapter is intended to provide you with a map which will help you to find your way round EU law. Because everything in EU law is quite unfamiliar – the institutions, the forms of primary and secondary legislation, the structure of the Treaties – this can be a difficult subject to study at the beginning. However, you will find it quickly becomes clearer as you progress through the different areas.

The first part of the course covers the institutional and constitutional law (Chapters 2–5) whereas the second part deals with the substantive law, the four freedoms, competition, human rights and discrimination. The last section of this chapter gives some general guidance on studying EU law with reading lists and information about other sources of law which you will find helpful.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **list the six founding Member States of the EEC**
- **explain what the ECSC and Euratom are**
- **state what the Council of Europe, the European Convention on Human Rights and the European Court of Human Rights are**
- **explain why the European Convention on Human Rights and the European Court of Human Rights are not part of the European Union**
- **identify the essential elements that create a common market**
- **identify the key original institutions of the EEC and the institutions that have been added since**
- **state when the EEC became the EC, and then the EU**

- **describe the original three-pillar structure of the European Union**
- **explain what is meant by the principle of 'dual vigilance'**
- **describe the 'teleological' approach of the Court of Justice**
- **describe the benefits of a common or internal market and give a general account of what gives rise to these benefits**
- **state the essential features of the EEC created by the Treaty of Rome**
- **explain the original relationship between the European Community and the European Union**
- **explain what is meant by a qualified majority vote (QMV) in the context of Community law and why it was thought necessary to move from voting by unanimity to voting by qualified majority**
- **explain the developments brought about by the Treaty of Lisbon.**

2.1 Background to the establishment of the European Economic Community (EEC)

Core text

- **Steiner & Woods, Chapter 1 'From EEC to EU: a brief history of the development of the Union'.**

The European Economic Community was established by the Treaty of Rome in 1957 with the aim of establishing a common market within the signatory states. The establishment of the EEC was a momentous and historic step in the process of the integration of Europe, the final outcome of which is still to be determined. It must be remembered that the EEC was established in the aftermath of the devastation caused by the Second World War when the economies of the nation states of Europe lay in ruins.

2.1.1 Origins: common market in coal and steel

Essential reading

- **The Schuman declaration – available on the internet.**

An important step towards integration in Europe was taken by the French Foreign Minister, Robert Schuman, who promoted the plan put forward by Jean Monnet, who suggested putting coal and steel resources – in particular, those of France and Germany – under common ownership and control. Other countries were invited to join. It was intended that placing these raw materials, which were at the time the main ones used in the production of weapons, under common ownership would make it impossible for another world war to start in Europe.

Rivalry over the coal and steel producing areas of Europe would be contained. It was intended that the nations of Europe (France and Germany in particular) would be bound together in peaceful, economic cooperation.

The first step towards cooperation and integration took place in 1951 with the signing of the Treaty of Paris by the six founding Member States of the European Communities: Germany, Italy, France and the Benelux countries (Belgium, the Netherlands and Luxembourg). This Treaty created the European Coal and Steel Community (ECSC), which set out to create a common market in coal and steel.

The significance of the ECSC is that it created supranational institutions, the High Authority, an Assembly, a Council and a Court with powers over the signatory states. It represented an important first step in the integration of Europe. The UK objected to the supranational element with its implications for national sovereignty, and refused to join. Attempts by the same six countries (with the UK again not taking part) to create a European Defence Community with a common army led to the signing of the European Defence Community Treaty in 1952, but it foundered on French objections. The plan at that time to set up a common army – which also required a common foreign policy – was over-ambitious and the whole initiative finally came to nothing.

2.1.2 Euratom

However, the six Member States met in Messina in Italy in 1955 and an intergovernmental committee chaired by the Belgian Prime Minister, Paul-Henri Spaak, was set up. The committee published a report, called the Spaak report, which set out the plan for two further communities, the European Atomic Energy Community (Euratom) and the European Economic Community. Euratom was to place the development of nuclear energy for peaceful purposes under common control of the Member States but it was the establishment of the EEC, setting up a common market among the signatory states, which is of central significance for the purposes of this course.

2.1.3 The Council of Europe

Note that in 1949 the Council of Europe had been established. This is an **entirely separate organisation** from the European Community. It is an international organisation based in Strasbourg which aims to strengthen democracy, human rights and the rule of law; it is responsible for the ECHR which was drawn up in 1950 and was ratified in 1953. It allows individuals from signatory countries who have exhausted their domestic remedies to bring actions in the ECtHR, enforcing their human rights protected by the Convention. The Council of Europe and ECtHR are institutionally entirely separate from the institutions and Court of Justice of the EU. However, Article 6(2) of the Lisbon TEU now provides that the EU will accede to the ECHR (see further Chapter 12).

SELF-ASSESSMENT QUESTIONS

1. **Write down the names of the six founding Member States.**
2. **Write down the names of the three European Communities, stating which Treaty established each one and its date.**
3. **What were the ECSC and Euratom created to achieve?**
4. **State what was the underlying reason for establishing the ECSC.**
5. **State which two individuals are credited with creating the impetus towards an integrated Europe.**
6. **What is the purpose of the Council of Europe?**
7. **Explain what the ECHR is.**
8. **Explain why the ECtHR and the ECHR are separate from the European Union.**

Summary

After the Second World War, the economies of the nation states of Europe were in ruins. There was an overwhelming need to rebuild the economic viability of the countries of Europe, to ensure autonomy in food supply and to ensure that another world war could never break out because of conflict between Germany and France. To achieve the latter, six countries signed a Treaty to place coal and steel under common ownership and control and then to establish a 'common market' within their borders and to create a common agricultural policy. The European Atomic Energy Community, or Euratom, was also established for the six countries to jointly develop nuclear power. The European Coal and Steel Community (ECSC), Euratom and the European Economic Community (EEC) created by these treaties established institutions with supranational powers, the first step in the integration of Europe.

2.2 The European Economic Community established by the Treaty of Rome 1957

Core text

- **Steiner & Woods, Chapter 1 'From EEC to EU: a brief history of the development of the Union' , Chapter 19 'Citizenship: rights of free movement and residence' and Chapter 20 'Economic rights: workers, establishment and services'.**

The Treaty of Rome establishing the EEC was signed on 25 March 1957 with the aim of establishing a common market within the signatory states.

The aims of the Treaty of Rome were strongly economic in nature. In the aftermath of the war, the economic reconstruction of Europe was an overwhelming necessity. The economies of the nation states of Europe were devastated by the Second World War and the creation of a common market was perceived as a way to rebuild these economies and to make Europe economically independent. The purpose of establishing a common market was to increase wealth, growth and productivity in Europe. After the experience during the war of major food shortages, which had led to immense suffering by the population of occupied countries, it was also clearly necessary to establish a common policy for agricultural production in particular.

2.2.1 What is an internal market?

An internal market is a form of economic integration between participating states. The first and essential step in the establishment of an internal market is the removal of customs duties between the Member States. Thus, goods produced in any Member State are free to circulate and move across borders within the internal market without incurring custom duties. The internal market is the end result of a developed common market and the term 'internal market' (also referred to as the 'single market') has gradually replaced that of common market.†

What about goods produced outside the internal market? The Member States set up a Common Customs Tariff which sets common customs duties for goods imported into the internal market from third countries (i.e. countries outside the common market). Customs duties will be charged at the same rate on these goods wherever they enter the internal market, whichever country they enter into. So, for example, a watch from Russia will pay the same duty whether it enters Italy, France or Germany. Consequently, these imported goods are also free to circulate without incurring customs duties within the internal market.

The removal of barriers to trade within the internal market goes much further than this. The aim is to remove all barriers to free movement of goods, whether fiscal, physical or technical (see Chapter 6).

It is not only goods that are to circulate freely. The common market set up by the Treaty of Rome in 1957 guaranteed four freedoms:

- free movement of goods (Chapter 6)
- free movement of persons (Chapter 11)
- free movement of services and freedom of establishment (Chapter 7)
- free movement of capital (Chapter 8).

Underlying the whole idea of the internal market is the principle that there should be no discrimination between Member States (Article 18 TFEU). This means that there should be no discrimination against the goods or persons from other Member States.

The original Treaty of Rome also contained provisions establishing a Competition Policy (Articles 101–109 TFEU) to ensure competition was not distorted. This protects the consumer from, for example, cartels and monopolies artificially inflating prices. It also ensures that the internal market is not partitioned by companies deciding to share out national markets. A competition policy is an important element in the integration

† **Internal market:** the idea is that companies can produce goods and sell them throughout the whole area of the internal market, leading to economies of scale, greater competitiveness, higher growth and greater incentive to innovate, giving the consumer the benefits of lower prices and greater choice. The end result is a growth in productivity for all participating countries. Where an internal market is fully realised, the markets of the participating countries will become merged into one market, like that of a single country.

of the market as well as determining what sort of market – competitive and fair to consumers and small and medium companies – the internal market should be.

Further provisions aiming at the establishment of the internal market were rules prohibiting state aids, the establishment of a Common Commercial Policy, Common Agricultural Policy (CAP), Common Transport Policy and a Common Fisheries Policy.

Harmonisation and deregulation

It was expected that the internal market would partly be achieved by harmonisation of standards across the Member States, achieved by secondary legislation enacted by the Union institutions. In practice it has proved difficult to achieve agreement on common standards and the approach taken, led by the ECJ, has often been deregulation: the achievement of free trade by the removal of national laws which create obstacles to free movement (see Chapters 6, 7, 8 and 9). The original concept of an internal market also encompassed the gradual harmonisation of fiscal (tax) and social policy and ultimate convergence of economic and monetary policy.

2.2.2 European institutions and treaties

At the founding of the first Treaty, the ECSC Treaty, in 1951, four key institutions with legislative, executive and judicial powers were created to carry out the policies of the Community. These institutions were:

- a High Authority
- a Council of Ministers
- a European Assembly (soon to become the European Parliament)
- a European Court of Justice.

The Treaty of Rome followed this model and created an EEC and a Euratom Commission in parallel to the High Authority of that Treaty, while other institutions had their powers extended to become institutions for all three Communities.

The aims and objectives of the EEC were set out in the Preamble to the Treaty of Rome and in Article 2.

The Preamble talks of the determination to 'lay the foundations of an ever closer union among the peoples of Europe', the resolution of the Member States 'to ensure economic and social progress' and affirms the objective of achieving 'constant improvements of the living and working conditions' of the peoples of Europe.

Article 2 of the original EEC Treaty gave the aims of the EEC in 1957 as the establishment of a common market through which would be promoted 'harmonious development of economic activities, a continued and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it'. So, while there was always an idealistic strand in the impetus toward European integration, the primary aims and objectives of the EEC were largely economic in nature, centred on the creation of the common market.

Since 1957 the scope of competence of the EU has been greatly increased by a series of treaties amending the original Treaty of Rome. The EU itself was established by the Treaty on European Union which came into force in 1993. The competence of the EU, that is the fields of activities where it has powers to act, now extends into many, and ever increasing, areas, including many aspects of social policy. This development will be traced later in this chapter as we consider the various treaties.

The result is that there are few areas of life now untouched by European Union law which now even extends to some parts of the criminal law, for example. This expansion has deepened the concerns over the democratic accountability of the Union. This has been addressed primarily by increasing the powers of the European Parliament, which is another development traceable through consideration of the later treaties.

The law we are concerned with stems from the Treaty of Rome (the EEC Treaty) establishing what was originally the EEC and now is simply the EU (European Union).

Activity 2.1

a. What are the essential characteristics of the internal market?

b. State what benefits should come from this form of economic integration.

c. Explain what the Common Customs Tariff is.

d. Explain why there could not be free movement of goods from third countries (countries outside the common market) if there was no Common Customs Tariff. Think about this carefully! Can you see what the problems would be?

e. What are the main policies and institutions created by the Treaty of Rome?

Summary

The EEC Treaty founded a 'common market', now called an internal market. An internal market is a form of economic integration where there are no barriers to trade between the participating states. The common market in Europe established the four freedoms: free movement of goods, persons, services and capital. It set up a Common Customs Tariff and a competition policy, among other policies. The underlying principle is that of non-discrimination, enshrined in Article 18 TFEU. This prohibits discrimination against goods, persons or services from other Member States. The aim of an internal market is to increase wealth and productivity within the participating states by economies of scale and greater competitiveness.

2.3 The development of the EU legal order in subsequent treaties

Core text

- **Steiner & Woods, Chapter 1 'From EEC to EU: a brief history of the development of the Union'.**

2.3.1 Synopsis of development of the Community

This is a brief summary, as an introduction, and should be used in conjunction with reading the textbooks.

Activity 2.2

What were the main effects of the Treaty of Paris?

Treaty of Rome 1957

The Treaties of Paris (1951) and Rome (1957) created the three Communities, the ECSC, Euratom and the European Economic Community (see above).

In this course, we are not concerned with ECSC or Euratom, although a few pre-1965 cases are relevant which mention the earlier institutional structures of these communities.

The EEC (European Economic Community)

The EEC was established to create a common market in Europe based on the principle of non-discrimination between Member States (Article 7 in 1957 now Article 18 TFEU), characterised by the four freedoms (of goods, services, capital and people (both workers and self-employed persons)), a Common Customs Tariff, a Competition Policy, rules on anti-dumping and state aids, a Common Commercial Policy and Common Agricultural Policy; also a Transport Policy and the Common Fisheries Policy. The EEC originally had four key institutions: the Council, the Commission, the European Parliament and the Court of Justice. These will be described in detail in Chapter 3.

The Treaty sets out the structure and the powers of the institutions as well as the competences of the Community. It also outlines its legislative and judicial processes

and provides the legal base for the secondary legislation. However, it is what is known as a '*traité cadre*', a framework treaty, and it was always envisaged that it would be completed by case law of the Court of Justice and secondary legislation.

1965 The Merger Treaty

To begin with, the three Communities had separate institutions, but these were amalgamated in 1965 in the Merger Treaty. The High Authority of the ECSC was merged with the Euratom and EEC Commissions to form a single body, the present European Commission, and the Council was joined with the Council of Ministers.

The Luxembourg Accords

Voting procedure: qualified majority vote (QMV) and unanimity

Under the original Treaty of Rome in 1957, the Council (composed of representatives of the Member States) was the key legislative body (although legislation had to be initiated by the Commission).

Under unanimity, every country has a veto and no Member State is bound by any measure which it opposes. In these circumstances, any Member State can choose to be intransigent and refuse to compromise.

Where, however, the vote is by QMV then the decision-making is supranational and any country can be overruled and bound by a decision which it has opposed if the necessary majority is in favour. Because generally no single Member State can block the passage of legislation under a qualified majority vote, the pressure is on Member States to reach workable compromises whereby each Member State gets some, at least, of what it wants. Member States must trade concessions to reach an agreement among enough Member States to get the required majority. Such a consensus is far easier to achieve than unanimity.

The qualified majority voting system for the EU is based on an allocation of votes per Member State. The numbers of votes are allocated according to each country's population. These voting weights are set out in Article 238 TFEU. The numbers change when more countries accede to the European Union.

Under the Treaty of Rome it was intended that after a transitional period, there would be a move from unanimous to qualified majority voting in many areas. However, when the time came, France refused to give up the veto. Between 1965 and 1966 the protest took the form of the 'empty chair' policy where French delegates refused to attend meetings in the Council, leading to total legislative paralysis. A compromise was finally reached in 1966 called the 'Luxembourg Accords' or 'Luxembourg Compromise'. Where a matter was considered to concern important national interests, discussion would continue until agreement was reached. France further stated that discussions should continue until unanimity had been achieved.

Hence the threat of a country using the veto was preserved, sometimes causing difficulties in the decision-making in the Council, when Member States were faced with matters of great importance to them, and leading to periods of stagnation in the 1970s and 1980s.

1970 Budgetary Treaty and Own-resources Decision

Two Budgetary Treaties were passed. The first, in 1970, changed the basis of the Community's finances to the Community's own financial resources (instead of national contributions) and strengthened the role of the Parliament in the budgetary process.

1975 Second Budgetary Treaty

The powers of the Parliament in the budget were further increased in the second Budgetary Treaty of 1975.

This Treaty also established the Court of Auditors.

1973–86 The Community enlarges and develops

- 1973 Accession of the UK, Denmark and Ireland
- 1981 Accession of Greece
- 1986 Accession of Spain and Portugal.

1979 Direct elections to the European Parliament

The European Parliament became a directly elected international institution. Its democratic mandate gave it a new legitimacy.

1986 The Single European Act (SEA)

Nearly 30 years after the Treaty of Rome, the SEA was an important revision of the Treaty. The impetus for the SEA was a White Paper published by the Commission which enumerated the trade barriers, physical, fiscal and technical, which still existed within the Common Market. The White Paper concluded that all the Member States would greatly benefit in terms of productivity and wealth if these barriers were removed. The result was the decision to launch a programme to complete the 'single' or 'internal' market by a deadline of 31 December 1992.

Introduction of QMV under Article 95 EC (now Article 114 TFEU)

In order to achieve this target, the Single European Act introduced QMV (qualified majority voting) for measures to complete the single market in a new Article 100a (later Article 95 EC and now Article 114 TFEU). This broke the deadlock in the Council and was highly effective in getting the Community going again: the single market project has been largely judged a success.

The cooperation procedure

The SEA also introduced a new legislative procedure (the cooperation procedure) used for some areas of the Treaty which greatly increased the Parliament's role. Up to this time, the Parliament's key involvement had been the right to be consulted on legislation, where there was provision in the Treaty. Now it played a greater role.

This procedure has now been generally replaced by the 'co-decision' procedure (see below) throughout the Treaties but its introduction in the SEA is still significant as a very important step in the enhancement of the powers of the European Parliament.

Enlargement of Community competence

The SEA also began the process of enlarging the competence of the Community by adding research and development, economic and social cohesion and environmental policy to the competences listed in Article 2. The competences of the Union set out the areas where the Union has competence to legislate.

Court of First Instance

The SEA prepared for the introduction of the Court of First Instance. The Court of First Instance is now called the General Court of the European Union.

The European Council

The SEA referred to the European Council (this is now one of the Community institutions and is discussed in Chapter 3) and placed its meetings on a formal footing.

The SEA brought about these changes by amending the original Treaty of Rome.

1992 The Treaty on European Union (TEU) (Maastricht Treaty)

This Treaty was signed in 1992. However, its entry was delayed because of the 'no' vote in a Danish referendum on whether to ratify the treaty (it voted 'yes' in a subsequent referendum after a Protocol had been added to the TEU containing concessions in matters including defence), and legal challenges in the UK (*R* v *Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] 2 WLR 115) and in Germany (*Brunner* v *European Union Treaty* [1994] 1 CMLR 57).

The Treaty created the EU with a three-pillar structure. It substantially amended the Treaty of Rome adding citizenship, subsidiarity, economic and monetary union, many new competences, a new legislative procedure, co-decision, which made the Parliament a co-legislator as well as strengthening the role of the European Parliament in other ways. It also renamed the European Economic Community as the European Community (EC), reflecting its wider sphere of influence.

2.4 Establishment of the European Union

2.4.1 The three-pillar structure

The Treaty on European Union (the Maastricht Treaty), which came into effect in 1993, created the EU. The Union comprises the EC, which, together with ECSC and Euratom, constituted the first pillar of the Union.

Two more 'pillars' were added to the European Union. The second and third pillars were:

- the Common Foreign and Security Policy (CFSP)
- Justice and Home Affairs (JHA; called Police and Judicial Co-operation in Criminal Matters under the Nice Treaty).

These were areas of intergovernmental cooperation between the Member States which were governed by different institutional arrangements than the EC pillar.

The Council, usually acting by a unanimous vote, and the European Council (see below) are the most important institutions.

Although it is important to know that these pillars exist and when they were introduced, no detailed knowledge of the second and third pillars is required for this course.

The Common Foreign and Security Policy

The second pillar was the Common Foreign and Security Policy (CFSP). This was the beginning of a common foreign and defence policy for the EC. Because this was a sensitive area affecting national sovereignty, the framework of this pillar was intergovernmental. The leading institution was the Council; the European Council, although initially not an institution, played a leading role in providing the impetus for the development of general guidelines and principles for the CFSP. The default method of voting was by unanimity. The CFSP has retained its intergovernmental character under the Lisbon Treaty.

The third pillar

The third pillar was originally called Justice and Home Affairs (JHA) and was later called Police and Judicial Co-operation in Criminal Matters (PJCCM). This was concerned with policy matters relating to movement of persons across borders (asylum, immigration and third-country nationals, the control of international crime and cooperation by police and judicial authorities).

This pillar was also essentially intergovernmental. It was substantially amended by the Treaty of Amsterdam when it was re-named Police and Judicial Co-operation in Criminal Matters (PJCCM) and a large section dealing with visas, asylum and immigration, and judicial cooperation in civil matters was moved back into the EC Treaty, into a new Title, concerned with establishing an area of Freedom, Security and Justice.

To conclude, the EC became the first pillar of the Union and the two areas discussed above were the second and third pillars respectively. These two pillars were not governed by the same law and institutional framework as the EC pillar and they were intergovernmental in nature. The default method of decision-making is by unanimity and the institutions other than the Council had a reduced role. This remained true for

the CFSP, whereas in subsequent treaties the third-pillar provisions were gradually more subjected to the 'Community method'.

The Treaty of Lisbon has since abolished the three-pillar structure. Former third pillar matters are now part of the Treaty of Lisbon under Title V, 'An area of freedom, security and justice, Articles 67–89 TFEU'. This covers asylum and immigration, judicial cooperation in civil and in criminal matters, and police cooperation. It deals with bodies such as Eurojust and a European Prosecutor's office.

2.4.2 Changes to the Treaty of Rome by the TEU

The TEU substantially amended the Treaty of Rome. The main changes were as follows.

Introduction of citizenship of the Union

See Articles 17–22 EC (now Articles 20–25 TFEU); see also Chapter 11.

Introduction of the principle of subsidiarity

Introduction of the principle of subsidiarity in Article 5 TEU (ex Article 5 EC); the principle of subsidiarity in general states that decisions should be taken at the lowest possible level, as close as possible to the individual. The Treaty refers to the relationship between the Member States and the EU and states that, in areas of shared competence, decisions should be taken at the Member State level except where the objectives of the action cannot be sufficiently achieved by action by the Member States and therefore for reasons of scale or efficiency should be dealt with at a Union level.

The Commission has to justify proposed legislation with reference to subsidiarity.

Economic and Monetary Union (EMU)

Economic and Monetary Policy (EMU) Articles 98–124 EC (now Articles 120–144 TFEU).

The TEU introduced the aim of establishing EMU and introducing a common currency.

New competences added

Article 2 was amended to include: convergence of economic policies, social protection, economic and social cohesion.

Article 3 was amended to include: environment, health, education and training, flowering of cultures of Member States, development cooperation, consumer protection, energy, civil protection and tourism.

The co-decision procedure: a new legislative procedure was introduced by TEU which effectively makes the European Parliament a co-legislator with the Council. It gives the Parliament a veto over legislation.

Originally, this was only used in limited areas of the Treaty (see Chapter 3).

Enhanced role of the Parliament

The role of the Parliament was strengthened in other ways. It was enabled:

- to request the Commission to initiate a legislative proposal
- to appoint an Ombudsman.

The Commission as a whole was made subject to a vote of approval by the Parliament.

1995 Accession of Finland, Sweden and Austria

Norway rejected membership in a referendum.

2.4.3 The Treaty of Amsterdam

The Treaty of Amsterdam (ToA) came into effect in 1999.

Key Treaty of Rome amendments

New aims and objectives ToA added new aims and objectives under Article 2: Equality between men and women, 'sustainable' development, a high level of protection and improvement of the environment.

Co-decision procedure The ToA greatly simplified the co-decision legislative procedure. It also expanded the scope of application of the co-decision procedure (see TEU).

New competence to combat discrimination A new competence in this area was introduced by Article 13 EC giving the Council powers to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Several Directives have now been legislated on this legal base (see Chapters 3 and 12).

Enhanced cooperation (or variable geometry)[†]

The ToA marked the introduction of 'variable geometry', a new institutional procedure whereby groups of Member States may act on initiatives together, within the framework of the EU, to establish closer cooperation. This means that groups of States can decide to integrate further, creating a Europe of concentric circles.

[†] The procedure for enhanced cooperation was amended by the Treaty of Nice; see below.

Powers of the European Parliament in regard to the appointment of the Commission

Article 214 EC was amended so that the European Parliament's approval is required for the appointment of the President of the Commission.

Increased transparency and protection of liberty, democracy and human rights

The ToA marks a greater commitment to openness and freedom of information.

- Article 1 TEU: decisions are to be taken 'as openly as possible'.
- Article 2 TEU introduces the aims of promoting 'a high level of employment' and the aim of maintaining and developing the Union as an area of 'freedom, security and justice'.
- Article 6 TEU states that the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.
- Article 7 TEU: 'serious and persistent breach' of these principles leads to suspension of rights for a Member State.
- Protection of human rights under Article 6.2 TEU (Article F) is made justiciable under Article 46 TEU (Article L).

Provisions of the other important treaties mentioned, the SEA and Treaties of Amsterdam and Nice (ToA and ToN) are never referred to separately as they only amended the Treaty of Rome (SEA) or the Treaty of Rome and the Treaty on European Union (the Treaties of Amsterdam and Nice amended both the former Treaties).

2.4.4 The Treaty of Nice

The Treaty of Nice (ToN) came into force on 1 February 2003.

This Treaty **remained in force** until the ratification process of the Treaty of Lisbon (see below) was completed.

The changes made were largely designed to cater for an expanded and growing European Union pending further enlargement. The amendments included changes to the Commission's composition, the European Parliament's distribution of seats and the allocation of votes in the Council.

European Parliament's standing

The European Parliament became a privileged applicant for bringing an action for judicial review.

The judicial structure

In order to address the problem of a large backlog of cases and consequent long delays, certain changes to the judicial structure were introduced by the ToN.

Enhanced cooperation

The procedure for setting up enhanced cooperation (variable geometry) has been simplified by the ToN.

2004 Accession of Estonia, Lithuania, Latvia, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus

The next step in Treaty terms was the calling together of a Convention to consider the future of Europe. The representatives were drawn from governments, national Parliaments, the European Parliament and the Commission. The result was a text entitled Draft Treaty Establishing a Constitution for Europe. The Draft Treaty was adopted by all Member States in 2004 and the ratification process then commenced. A number of countries ratified. However, the text of the Draft Treaty was rejected in referenda held in France and the Netherlands, both founder members of the EC. This stalled the ratification process and a 'period of reflection' followed.

In the period following the rejection of the 'Constitution', the European Council decided to search for a compromise which would take account of the fact that the ratification process had been completed in several Member States and the remaining had reservations. The terms of the compromise were defined very clearly and were mainly of a technical nature. There were some differences of opinion of a political nature which were quickly overcome and this enabled the European Council to reach unanimous agreement.

The new Treaty was subsequently signed by all Member States on 13 December 2007 in Lisbon and it received the name of 'Reform Treaty' or 'the Lisbon Treaty'. Ireland initially voted 'No' to the Lisbon Treaty in a referendum.

For the purposes of your studies, you are expected to know about the events of the three years leading up to the rejection of the Constitution and the subsequent adoption and ratification of the Lisbon Treaty.

2007 Accession of Bulgaria and Romania

2013 Accession of Croatia

2.4.5 The Treaty of Lisbon

This Treaty amending the Treaty on European Union and the Treaty on the Functioning of the European Union was signed at Lisbon, 13 December 2007.

Brief overview

The Treaty of Lisbon (ToL) was established on the basis of a comparison between two sets of texts: the Constitutional Treaty (or 'Constitution') which served as its point of departure, and the existing Treaties.

A key difference between the ToL and the Constitution is that the former does not claim to be 'constitutional'. This is demonstrated in the terminology used in the new text: the 'Minister of Foreign Affairs' becomes the 'High Representative'; and the renaming of legislative acts is reconsidered, maintaining the present names 'Regulation' and 'Directive'. The supremacy of EU law is no longer expressly contained in the Treaty. Instead, a Declaration recalls that the supremacy of CJEU case law has been defined explicitly. This is accompanied by a legal opinion by the legal service

of the Council pointing out that the absence of the principle in the Treaty does not change anything in the existence of the principle or the case law of the CJEU. Any mention of symbols of the Union – flag, anthem, motto – are absent from the new Treaty. Significantly, the ToL is presented as a Treaty amending the previous treaties in force, not as a text replacing them.

The new Treaty appears as simply another step in the unbroken line of treaties since the Treaty of Rome. The Treaty on European Union (TEU) retains its title; whereas the title of the Treaty establishing the European Community is changed to 'Treaty on the Functioning of the European Union' (TFEU) containing articles on institutional procedures and policies of the Union. The new Treaty includes previous pillar areas in which the EU had little involvement. Finally, references to the EC were removed, as was the 'three-pillar' structure which was established in the Maastricht Treaty (TEU) in 1992.

The ToL made important amendments, including with respect to:

- Presidency of the European Council
- a High Representative (Foreign Affairs Minister in the proposed Constitution) to represent the Union in Foreign Affairs and who will be a Vice President of the Commission
- the extended scope of QMV
- the scope of co-decision with the European Parliament
- specific definition of Member State and EU competences
- according binding force to the Charter of Fundamental Rights
- a greater role for national Parliaments, including a subsidiarity check
- the EU acquiring a legal personality
- commitment to negotiations for EU accession to the ECHR
- amendment of EU accession conditions.

The contents of the Lisbon Treaty are to be found on the Europa website: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC

For a detailed analysis of the two parts to the Treaty (TEU and TFEU), see: House of Commons Library Research Papers 07/80 (TEU) and 07/86 (TFEU).

The provisions of the ToL yet again included a complete re-numbering of Treaty articles.

ACTIVITY 2.3

How did the Treaty of Lisbon change the Maastrict Treaty?

2.4.6 The Fiscal Compact Treaty

The sovereign debt crisis and the background to the Fiscal Compact Treaty

The future of the Eurozone was thrown into doubt by a recent sovereign debt crisis. Sovereign bond market pressures brought into focus the perilous condition of the finances of several Member States. The European Financial Stability Facility (EFSF) was set up in 2010 to provide assistance to Eurozone States in difficulty. Bailouts were organised by the EU in conjunction with the IMF.

The EFSF did not have enough money to bail out all of the Eurozone states in danger, and there was no agreement forthcoming on how to increase its size. There was also a general crisis in confidence and the global economy appeared to be heading for another recession.

The Fiscal Compact and the ESM Treaties

After several initiatives and various meetings during 2011 that achieved very little in the way of market stabilisation, a proposal for a Fiscal Compact was adopted whereby

participating Member States would submit to a requirement for national budgets to be in balance or surplus, and to a system for surveillance with penalties for states in breach. The final text was signed in 2012 by all EU Member States, except the UK and the Czech Republic.

The Fiscal Compact Treaty (or 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union') main tenets are:

a. The Member States have committed to a budgetary position in 'balance or in surplus'. The Treaty also requires participating states to pass a national law or an amendment of the national constitution that limits the structural budget deficit.

b. The Treaty extends the jurisdiction of the CJEU. A Member State can now bring an action against another Member State if it believes that the other state has not fulfilled its duties to balance its budget.

c. The Treaty provides for an excessive deficit procedure.

Another important development is the creation of the ESM mechanism. First, on 25 March 2011 the European Council adopted Decision 2011/199 providing for the addition to the Treaty of a new provision. Member States whose currency is the euro may establish a European stability mechanism (ESM) to be activated if indispensable to safeguard the stability of the euro area as a whole. Such a Treaty amendment was adopted under a simplified revision procedure. On 2 February 2012 the euro area Member States concluded the Treaty establishing the ESM. The purpose of the ESM is to make available funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems. That support may be granted only if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.

The establishment of the ESM has been challenged before the ECJ. An action was brought before the Irish court arguing that the amendment of the Treaties ought to have been undertaken through the ordinary and not the simplified revision procedure and so the European Council Decision was not validly adopted. As for the ESM Treaty, it was alleged that it was substantively incompatible with economic policy provisions of the TEU. The Irish court decided to refer the question to the ECJ.

In Case C-370/12 *Pringle* v *Ireland* [2013] 2 CMLR 2 the Court dismissed the action. The Court found that Decision 2011/199 applied to the internal policies and actions of the EU and did not increase the competences conferred on the EU in the Treaties. Thus it was lawfully adopted under the simplified revision procedure. The Court also rejected other arguments that the ESM Treaty was incompatible with obligations under the EU Treaties.

Activity 2.4

Core comprehension – EU Charter of Fundamental Rights

This learning activity reinforces your understanding of everyday words which have a more specific legal definition when used in your reading materials. By engaging in dictionary research, you support your ability to read and understand legal texts.

Read the Preamble to the EU Charter of Fundamental Rights here: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

You will be asked to research the dictionary meaning of some key terms to support your understanding. You can use any reputable online dictionary resource to complete this task; the answers provided are taken from https://languages.oup.com/

You should select the dictionary meaning which best relates to legal contexts to respond to the 'What is the dictionary definition?' questions. If you are unsure of how to use the word, read through the example sentences given in the dictionary.

You are then asked to identify statements in the Preamble which provide further context to the key word. In some cases you will be asked to identify relevant statements from which the meaning of the key word can be derived, even if the key word is not explicitly mentioned in the Preamble.

a. **What is the dictionary meaning of the word 'value'? (noun)**
b. **Identify upon which values the Union is founded.**
c. **What is the dictionary meaning of the word 'principle'? (noun)**
d. **Identify upon which principles the Union is founded.**
e. **What is the dictionary meaning of the word 'right'? (noun)**
f. **Identify obligations associated with the enjoyment of rights.**
g. **What is the dictionary meaning of the word 'freedom'?**
h. **Identify the four freedoms of the European internal market.**
i. **What is the dictionary meaning of the word 'autonomy'?**
j. **Identify any reference in the Preamble to the autonomy of Member States.**
k. **What is the dictionary meaning of the word 'derogation'?**

Activity 2.5

Core comprehension – The doctrine of consistent interpretation

Using your Online Library resources, research the following journal article:

- **Betlem, G. 'The doctrine of consistent interpretation – managing legal uncertainty' (2002) 22(3) *OJLS* 397–418 (available from JSTOR and LexisLibrary).**

You can complete the following learning activity by reading pp.397–98.

Article 249 ToN

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue Directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

a. **What is the conceptual definition of 'consistent interpretation'?**
b. **What is meant by the doctrine of direct effect?**
c. **Identify the desired outcome of the consistent interpretation approach.**
d. **In the analogy with the German legal system, which ranks higher: the German Constitution or national legislation?**
e. **How do national courts employ the doctrine of consistent interpretation in the context of the impact of public international law on domestic legislation?**
f. **In the Community legal order how does the doctrine of consistent interpretation work within each of the three different identified contexts?**

2.5 Exit from the European Union

Core text

- **Steiner & Woods, Chapter 28 'Brexit'.**

In June 2016, the UK voted to leave the European Union (EU) in a landmark referendum. The result took many by surprise. The UK government is now faced

with navigating an unprecedented withdrawal from a Union that has informed the domestic legal machinery for many years. As the Brexit aftermath plays out, some of the consequences are emerging, but there are significant questions as to what the economic, political and legal landscape will look like after Article 50 of the Treaty on European Union (TEU) has been triggered.

Article 50 sets out the procedure by which a Member State (MS) can withdraw from the EU. It is somewhat vague, as it merely provides for a set of procedural rules but does not detail the substantive conditions of withdrawal. The three essential procedural steps are: (1) the notification of withdrawal; (2) the negotiation of a withdrawal agreement; (3) either the conclusion of such an agreement or – failing that – automatic exit of the withdrawing MS. Article 50(1), moreover, states a MS may decide to withdraw from the Union 'in accordance with its own constitutional requirements'. The interpretation of such an expression has given rise to fierce legal debate.

In *Miller* v *Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) the sovereignty of Parliament, constitutional law and democracy were at issue. The judges agreed with the claimants, that the scope of government powers (the Royal Prerogative) is not wide enough to cover triggering Article 50 because withdrawal would change domestic law and effectively remove or limit the rights created by EU law. Thus intervention of Parliament is necessary. The government appealed but the UK Supreme Court confirmed the ruling, sanctioning the need for parliamentary approval (*R (Miller)* v *Secretary of State for Exiting the EU* [2017] UKSC 5).

On 29 March 2017, after obtaining a vote in Parliament, the United Kingdom notified the European Council of the EU of its intention to leave the European Union.

After notification, the negotiations started amid so many political controversies that it is sometimes difficult to discern what the real issues are.

Some clarification has been provided by the Court of Justice of the European Union, at least in relation to whether it is possible for a withdrawing Member State to revoke their notice submitted under Article 50 TEU. In case C-621/18 *Wightman* & *Others* v *Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999, Judgment of the Full Court 10 December 2018, the question posed in a preliminary reference for the Court to answer was:

> Where, in accordance with Article 50 [TEU], a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?

The substantive judgment of the Court can be summarised thus: Article 50 TEU allows the unilateral revocation of the notification of the intention to withdraw from the EU. A revocation will be possible until such time as a withdrawal agreement has entered into force, provided that the revocation has been decided upon in accordance with the Member State's constitutional requirements and is formally notified to the European Council. This must, however, also be done within the two-year time frame stipulated in that Article, unless this period is extended. Unilateral revocation is to be done in an unequivocal and unconditional manner; the purpose of that revocation is to confirm that the Member State concerned continues its membership under the same terms by which it has been a Member State. There is consequently no change in its status by virtue of the fact that it has essentially tried to leave the Union. The judgment was handed down very quickly before a vote in the UK Parliament had been scheduled on the withdrawal agreement.

2.5.1 The UK perspective

The official position adopted by the UK government in relation to the process of withdrawing from the EU was expressed in its two White Papers of 2 February 2017 and 30 March 2017 entitled 'The United Kingdom's exit from and new partnership with the European Union' and 'Legislating for the United Kingdom's withdrawal from the European Union' respectively. One of the priorities listed in the 2 February 2017 White

Paper is to provide 'business, the public sector and the public with as much certainty as possible'. In order to do so, the government would introduce:

> the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the '*acquis*' – the body of existing EU law – into domestic law. This means that, wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before. … This approach will preserve the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to our domestic law. This allows businesses to continue trading in the knowledge that the rules will not change significantly overnight and provides fairness to individuals whose rights and obligations will not be subject to sudden change. It will also be important for business in both the UK and the EU to have as much certainty as possible as early as possible.

This approach has now been embodied in the EU Withdrawal Act 2018 (which received Royal Assent in the UK on 26 June 2018) whose main function is to repeal the 1972 European Communities Act, which took the UK into the EU and that sanctioned the supremacy of EU law over domestic conflicting law. The Act aims at 'domesticating' existing EU law provisions into UK law to ensure a smooth transition. However, the Act grants wide powers to the government 'to correct retained EU law', meaning the power to repeal or amend specific areas or provisions.

2.5.2 The negotiations

We had two distinct phases in the negotiations: the first dealt with what is now called the EU–UK Withdrawal Agreement and it was aimed at concluding an agreement dealing with specific aspects only to guarantee an orderly withdrawal. These aspects were identified by the European Council and the European Commission and later accepted by the UK as including in particular:

1. The reciprocal protection for Union and UK citizens to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by a specified date.
2. The status of Northern Ireland and in particular the question of the preservation of the Good Friday or Belfast Agreement 1998 and the question of a possible hard border between Ireland and Northern Ireland.
3. Financial settlement of the UK contributions to the EU.

Amid challenges with the ratification of proposed solutions, the risk of disorderly withdrawal and amid extensions to the period envisaged under Article 50 TEU for the negotiations, ultimately the text of the negotiated Withdrawal Agreement, including a revised Protocol on Ireland/Northern Ireland together with the revised Political Declaration on the framework for future EU–UK relations, was endorsed by EU leaders at a European Council meeting on 17 October 2019.

The UK left the European Union on 31 January 2020.

The Withdrawal Agreement provided for a transitional period until 31 December 2020 (subject to the possibility of extension), generally preserving the application of EU law to the UK during this period. However, in this time the UK did not generally retain representation in the EU institutions and other bodies and decision-making processes.

The next phase of the negotiations revolved around the future relationship between the EU and the UK.

2.5.3 EU–UK Trade and Cooperation Agreeement (TCA)

Where the Withdrawal Agreement focused on 'tying up loose ends', the TCA looks to the future relationship between the EU and the UK and how future disputes between them are to be handled. The TCA was signed on 30 December 2020, entering into force on 1 May 2021 and it sets out the arrangements made between the EU and the UK in a variety of areas such as trade in goods and in services, intellectual property, social security coordination and citizenship.

The TCA is a 'classic' international agreement and thus it has to be applied and interpreted relying on principles of public international law. The TCA, for instance, specifically provides that the Agreement cannot create individual rights as it is directed to the two Parties only: the EU and the UK.

Its provisions can be divided into three main sections: (1) a Free Trade Agreement (FTA); (2) citizen security arrangements; and (3) an overall governance framework. The key feature of the FTA is that it provides that there shall be no tariffs or quotas on trade for goods as long as rules of origin are met. During negotiations, much time was spent on the provisions surrounding the fishing industry, the UK being driven by a wish to regain control of its fishing waters (cross reference Case C-213/89 *Factortame*) and the EU coastal Member States wishing to retain essentially all the rights they held in relation to fishing under the EU's Common Fisheries Policy. The conclusion sought to strike a fair balance with the parties' shares subject to yearly negotiation. The TCA contains very little on cooperation on services with limited provision on short supply of services only.

The EU and UK have also agreed to maintain a level playing field by ensuring that protection within sectors such as environmental protection, climate change and labour rights and the control on subsidies remains high and that there are efficient mechanisms for domestic enforcement or for either party to take remedial action.

A crucial element of the governance framework to highlight is that the CJEU retains no role in the governance or settlement of disputes under the TCA; future divergences will be submitted to UK–EU Partnership Council, supported by other committees. If a solution is not found, Parties can resort to an arbitration procedure and also to the adoption 'remedial measures' (such as retaliatory trade measures). The TCA provides for a 'new' remedy in case of a violation of one of the level playing field provisions. In case of 'significant divergences' between the Parties, one Party may take 'appropriate rebalancing measures' to address the situation.

A final remark must be made that the TCA provides for its provisions to be reviewed every five years and there is an option for either party to terminate it with 12 months' notice. Whether such provisions will be utilised remains to be seen.

Read a summary of the provisions and the full text of the TCA.

The operation of the EU–UK new relationship has been seen most starkly in the recent conflict surrounding the Northern Ireland Protocol (NIP). The NIP sets out special provisions to govern trade between Northern Ireland and the Republic of Ireland, which is still a member of the EU. It was intended to protect the 1998 Northern Ireland peace deal (the Good Friday agreement) and to prevent a hard economic border between the EU and Northern Ireland by keeping the latter in the EU's single market. This required that goods be subject to customs checks when crossing from Great Britain, which has subsequently led to conflict between the UK and the EU around the application of such customs checks. At the time of writing, negotiations surrounding this are still ongoing.

Quick quiz

QUESTION 1

Which of the following is an exclusive European competence?

a. **Common agriculture harmonisation.**

b. **Defence policy.**

c. **Nuclear approval.**

d. **Common fisheries.**

QUESTION 2

What is the Commission composed of? (Please consider the position pre-UK withdrawal and consider any impact of Brexit.)

a. **Twenty-eight representatives, one per Member State, possessing a portfolio of responsibility.**

b. **The ministers of the Member States.**

c. **The heads of state of the Member States.**

d. **A civil service representative of each Member State.**

QUESTION 3

Which of these is not considered a basic 'movement' right?

a. **Free movement of goods.**

b. **Free movement of service.**

c. **Free movement of capital.**

d. **Free movement of establishment.**

QUESTION 4

What is the main method of voting used in the Council?

a. **Super-majority voting.**

b. **Qualified majority voting.**

c. **Simple majority voting.**

d. **Alternative voting.**

QUESTION 5

Which of the following is not an EU institution?

a. **The Commission.**

b. **The European Council.**

c. **The ECtHR.**

d. **EURATOM.**

Answers to these questions can be found on the VLE.

3 The institutions of the European Union

Contents

Introduction

This chapter gives an overview of the composition, functions and powers of the institutions of the EU and the other bodies created under the Treaties. We will look at the evolution of powers and the interrelationship of these institutions, how they cooperate with each other and also the methods by which they scrutinise and act as checks and balances on each other, ensuring that the institutional balance of the EU is maintained.

Please note that, subject to the Regulations, you can take your copy of EU Legislation into the examination with you. Much of the content of this chapter is referred to in the relevant sections of the Treaty. Although you should refrain from directly quoting sections of the Treaties, as this wastes time and will not gain you any marks, referring to the relevant Treaty provisions in your answer and using the Treaty as a memory aid can be helpful.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **state which institutions are listed under Article 13 TEU and explain what their inclusion in this Treaty Article means about their powers**
- **give a brief account of the interaction between the Commission, the Council and the Parliament in regard to the adoption of the budget**
- **describe the European Parliament's role in the appointment of the Commission and explain how the Parliament exerts control over the Commission**
- **explain how the Parliament's powers have increased with regard to: legislative procedures; control and supervision of the Commission; control of the acts of the other institutions through participation in judicial review proceedings (in outline only – this is dealt with in detail in Chapter 4)**
- **describe the composition of the Commission and how it is appointed**
- **define the functions of the Commission (the details of this will become clearer as you progress through the other chapters)**
- **describe the European Council, explain the difference between the European Council and the Council of the European Union and distinguish between these and the Council of Europe**
- **describe the role of the President of the European Council**
- **define and explain the role of the Council of the European Union**
- **describe the role of the High Representative of the European Union**
- **describe how a qualified majority vote (QMV) is reached**
- **explain the significance of the Council Presidency**
- **define the composition and explain the function of COREPER**
- **list the main legislative procedures of the European Union**
- **describe how the institutional balance of the European Union (formerly the Community) has changed since 1957.**

3.1 The institutions

Core text

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

The institutions of the EU (listed in Article 13 TEU) are the European Council, the Commission, the Council, the Parliament, the Court of Justice and the General Court, the Court of Auditors and the ECB (see further Chapter 4).

We will consider the institutions listed in Article 13 TEU, starting with the European Council, a body which has become very significant in the political and constitutional development of the Union.

Article 13 TEU reinforces the unity of the institutions by providing expressly for a single set of institutions within an 'institutional framework' and subject to the principle of conferral.

Activity 3.1

List the institutions included in Article 13 TEU.

No feedback provided.

3.2 The European Council

Core text

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

Essential reading

- **www.consilium.europa.eu/en/european-council/**

The European Council is now one of the institutions of the EU and is listed in Article 13 TEU. It is of great importance. It originally arose out of informal meetings between the heads of state or government of the Member States during the 1970s. Since 1974, it has held regular summits and its composition has been formalised. At these meetings, high-level decisions about the future development of the EU are made and disputes between Member States (for example, over budget contributions) are addressed. The CFSP is subject to specific rules and procedures and is largely defined and implemented by the European Council and the Council of the EU (see Articles 24, 26, 27, 31 and 32 TEU).

The European Council, however, has no legislative powers, and any legislative action must be taken by the Council of the EU. The European Council was first given a legal basis by the Single European Act. Article 15 TEU sets out the tasks of the European Council and states that it is to 'provide the Union with the necessary impetus for its development and [to] define the general political directions and priorities' of the EU. It comprises:

- the heads of state or governments of the Member States
- the President of the European Council
- the President of the Commission
- the High Representative for Foreign Affairs and Security Policy.

3.2.1 The President of the European Council

The TEU provides (in Article 15 (5)) for an election by qualified majority of a President for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure. The President of the European Council prepares and chairs meetings of the European Council. The President 'drives forward' the European Council's work and represents the Union 'at his [or her] level' and 'without

prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'. The President may not hold national office.

3.3 The European Parliament (EP)

CORE TEXT

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

ESSENTIAL READING

- **www.europarl.europa.eu/**

3.3.1 The European Parliament (EP): Articles 13 and 14 TEU, Articles 223 and 224 TFEU

A key institutional change in the evolution of the European Union has been the development of the powers and status of the EP. The Parliament has gone from being merely a 'talking shop' in 1957 with the power, at most, to be consulted (sometimes) by the Council on legislative proposals, to being a co-legislator in many areas of the Treaty with real powers of scrutiny and supervision over the other institutions.

Note, however, that although it fulfils the two normal functions of a legislature, enactment of legislation and scrutiny of other institutions, unlike national legislatures it does not generally have sole power to enact legislation; even now, it is the less powerful legislator in key areas of Union competence and the Council remains the principal legislative body for the European Union.

3.3.2 Composition

The body that was to develop into the European Parliament was initially called the Assembly and was one of the institutions of the ECSC.

The first direct elections to the Parliament were in 1979.

The maximum number of seats is set by Article 14 TEU at 751 with 'degressively proportional' representation of a country's citizens. The maximum number of members per country is set at 96, the minimum being six.

For the latest composition of the Parliament, refer to the European Parliament website (www.europarl.europa.eu).

MEPs sit in transnational groups according to political affiliation.

Elections are held in accordance with national voting systems, subject to some conditions.

- The system must be a form of **proportional representation**, but the type is to be determined by the Member State.
- Parliament should propose either a uniform, Union-wide electoral procedure or 'in accordance with principles common to all Member States' (Article 223(1) TFEU (ex Article 190(4) EC)).

MEPs are elected for a five-year term. The Parliament elects a President. It draws up its own Rules of Procedure (Article 232 TFEU (ex Article 199 EC)). Much of the EP's work is done in political groups and committees. As mentioned above, MEPs are organised into transnational political groups, which are represented in the EP's standing committees. These standing committees do the preparatory work for the main sessions of Parliament. The committees are responsible for adopting reports on legislative proposals.

The European Parliament has been given the power:

- to set up temporary committees of inquiry (Article 226 TFEU, ex Article 193 EC)
- to appoint an Ombudsman (Article 228 TFEU (ex Article 195 EC)).

The Ombudsman's task is to consider allegations of maladministration by Union institutions or bodies, other than the Courts acting in their judicial role. It may initiate an investigation itself or respond to a complaint received direct or via an MEP. The Ombudsman will then report to the EP and to the institution concerned.

Article 227 TFEU allows citizens of the EU to petition the Parliament. Any citizen, resident or company with its registered office in the Union may petition the Parliament about matters which concern them directly.

The Parliament is peripatetic – most of its plenary sessions are held in Strasbourg (France) but most of the committee meetings are held in Brussels, Belgium; its Secretariat is in Luxembourg. Attempts to rationalise its organisation have met with resistance from the host Member States.†

† See: Case 108/83 *Luxembourg* v *EP* [1984] ECR 1945. A resolution was incompatible with the Member States' decision concerning the provisional location of the EP's places of work and was therefore void. See also Case 358/85 *France* v *EP (Re Brussels Meetings)* [1986] ECR 2149.

3.3.3 Powers and functions of the EP

In 1957 the European Parliament's main role in the enacting of legislation under the Treaty was to be 'consulted' when so required by the Treaty. This procedure applied in a limited number of areas of Community competence.

The ECJ, in a line of cases that strengthened and consolidated the Parliament's position in the EU legal order, ruled that the Parliament must be consulted when so required by the Treaty. Failure to observe this essential procedural requirement is a ground for annulment under Article 263 TFEU. See: Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333.

Also, over time, the budgetary powers of the Parliament have been considerably extended.

The SEA (1986) introduced a major extension of the EP's power with the introduction of the 'cooperation procedure'. This procedure gave the Parliament a 'say' in the legislative procedure but did not go far enough and has now been abolished.

The 'co-decision procedure' (Article 251 EC) was added to the EC legal order by the Maastricht TEU. The EP legislated in conjunction with the Council. This procedure was significantly extended in scope by the ToA. The ToA also greatly simplified the co-decision procedure in a way that strengthened the position of the Parliament so that the European Parliament finally became a co-legislator with the Council in those areas in the Treaty to which this procedure applies. This enhancement of the importance of the EP's role in the legislative process of the EU is a highly significant development in the history of the Union (legislative procedures are discussed in further detail in Chapter 4). The ToL extends the co-decision procedure to become the ordinary legislative procedure (see Article 294 TFEU).

The Parliament's role in the appointment of the Commission

The position of the Parliament has been significantly strengthened in regard to the appointment of the Commission. The appointment of the Commission as a whole is subject to a vote of approval by the European Parliament; the nominee for the President of the Commission has also to be approved by the Parliament.

For the censure vote under Article 234 TFEU (ex Article 201 EC) by which the European Parliament can, by a two-thirds majority, force the resignation of the Commission as a whole, see below where this is discussed in regard to the Commission.

The Commission must reply to oral and written questions from the Parliament (Article 230 TFEU, ex Article 197 EC); the Council has accepted that it should respond to questions from the Parliament. Each year, the Parliament poses many written questions and questions for oral response; this is a very significant part of its role as scrutineer of the other institutions.

Article 12 TEU sets out the role of national parliaments in the EU. This includes a 'yellow card' subsidiarity check for national parliaments. (See further the Protocol on the role of national Parliaments in the EU and the Protocol on the application of the principles of subsidiarity and proportionality.)

SELF-ASSESSMENT QUESTIONS

1. **When did the European Parliament become directly electable?**
2. **How many MEPs does it consist of and how are they organised?**
3. **Where does the Parliament sit?**
4. **What is the 'democratic deficit'?**
5. **List the primary functions of the European Parliament.**
6. **List its powers.**
7. **What role did the Parliament play in the legislative procedures of the Community in 1957?**
8. **Describe the Parliament's role in the consultation procedure.**
9. **Describe the European Parliament's role in the adoption of the Commission.**
10. **How does the Parliament exert control over the Commission?**

ACTIVITY 3.2

a. **What was the significance of the decision in Case 138/79 *Roquette Frères*?**
b. **In what way has Parliament's role in the legislative procedure been strengthened through case law and consecutive treaties?**
c. **Why has Parliament's role in the appointment of the Commission been increased?**

3.4 The Commission

CORE TEXT

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

ESSENTIAL READING

- **http://ec.europa.eu/index_en.htm**

3.4.1 Structure and powers of the Commission (Article 17 TEU and Articles 244–250 TFEU)

The European Commission is the institution which, above all, represents the Union's interest. Its role is:

- to propose new policies and initiate legislation
- to act as the 'Guardian of the Treaties' – the Commission is the 'watchdog' concerning infringements of Union law
- to enact delegated legislation
- to act as the executive of the Union, implementing Union policies and supervising their implementation by the Member States.

In certain areas, the Commission has the power to legislate in its own right. It also has powers:

- to mediate between Member States in the Council
- to represent the EU in external relations.

It was envisaged that, from 1 November 2014, when a new Commission is appointed, the number of members of the Commission will correspond to two-thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number (Article 17(5) TEU; see also Article 244 TFEU). However, a decision was taken by the European Council to the effect that the Commission shall continue to

include one national of each Member State (see Presidency Conclusions of the Brussels European Council of 11 and 12 December 2008 in Brussels, EU Bulletin 12-2008, I(4), at (2)). This was one of the factors which contributed to the positive Irish vote in their second referendum on the Lisbon Treaty.

The independence of the members of the Commission must be beyond doubt; this is a most important requirement (Article 17(3) TEU). They must act in the interest of the Union and be completely independent in the performance of their duties. They are not permitted to seek or to take instruction from any government. Their term of office is five years.

Appointment of the Commission

The President of the Commission is proposed to the European Parliament by the European Council acting by qualified majority and this person is then elected by the European Parliament by a majority of its component members. The Commissioners are then selected; the Commission as a whole is then subject to a vote of approval by the Parliament. The President then appoints the Vice Presidents from among the Commissioners. One of the Vice Presidents is the High Representative of the Union for Foreign Affairs and Security Policy (see Section 3.4.4 and Article 18 TEU). The Commission President also selects which Commissioner will hold which portfolio (see below). The Commissioners as a whole make up the College of Commissioners.

Although the Parliament does not have the power to veto the appointment of individual Commissioners, it can veto the appointment of the Commission as a whole. This power is rarely used but several proposed Commissioners have been forced to withdraw, or been withdrawn by the government which proposed them, after the Parliament had signalled its disapproval. Thus, the European Parliament demonstrated that it can effectively supervise the Commission and that its powers are to be taken seriously.

3.4.2 The Commission structure

Each Commissioner has a private office (or cabinet) headed by a *chef de cabinet*. The cabinet usually consists of several officials.

The President of the Commission has an important and influential position, being responsible for:

- policy initiatives
- shaping overall Commission policy
- coordinating Union policy.

The President of the Commission also has the power (see Article 17 TEU):

- to 'decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body'
- to appoint Vice-Presidents and to allocate portfolios among the Commissioners and to reshuffle them during the Commission's term of office
- to request a Member of the Commission to resign.

The Commission is divided into a number of departments called Directorates-General (DGs) or Services, which are similar to ministries, each covering different areas of policy (subject to reorganisation and change) such as:

- agriculture
- fisheries
- transport
- energy
- research

- environment
- the internal market
- competition
- employment and social affairs
- taxation and customs union
- education and culture
- trade.

The Director General of each area of policy is answerable to the Commissioner given responsibility for that area.

As well as the Commissioners and their cabinets, the Commission currently employs about 32,000 staff, equivalent to civil servants, many of whom are translators and interpreters (see the Commission's website).

3.4.3 Functions of the Commission: 'Watchdog of the Union' or 'Guardian of the Treaties'?

The Commission has a number of main roles as watchdog of the Union.

Under Article 258 TFEU (ex Article 226 EC)

The Commission is entrusted with the role of investigating infringements of the Treaties by the Member States. Where possible, the matter will be resolved informally by negotiation and discussion; where this is not possible, the Commission may bring the Member State before the ECJ. Under Article 260 TFEU (ex Article 228 EC), the Commission can bring a further action against a Member State that has not complied with the Court's Article 258 judgment, which may result in the Court imposing fines.

Under Articles 101 and 102 TFEU (ex Articles 81 and 82 EC)

These are the provisions that govern competition law in the Union and the Commission has the principal role in this area. It develops policy and legislates, and it has responsibility for enforcing these provisions against undertakings (companies) that are in breach. It investigates, comes to a decision and, where appropriate, imposes penalties.

Initiation of policies and legislation

The Commission has the very important role of initiating legislation – legislative proposals are drawn up by the Commission. The Council and European Parliament can propose policies for legislative action to the Commission under Article 241 TFEU (ex Article 208 EC) or Article 225 TFEU (ex Article 192 EC), respectively. Generally, however, the Commission has the final say on whether the proposal is drawn up into a legislative proposal. It is also responsible for drawing up the annual legislative programme.

The Commission's role in initiating and drawing up legislative proposals take the policies and objectives of the EU forward. Its proposals have the effect of furthering the aim of completion of the internal market which means further integration.

Legislative powers

The Commission can legislate unilaterally in a limited number of areas (i.e. under Article 45(3)(d) TFEU (ex Article 39(3)(d) EC)) and Article 106 TFEU (ex Article 86(3) EC). Where such a power is granted, these powers enable the Commission to enact legislation in a true sense. See: Joined Cases 188–190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545.

The ECJ has also determined that when the Treaty gives the Commission a specific task, it impliedly confers on the Commission the powers that are indispensable in order to carry out that task: Joined Cases 281, 283– 285, 287/85 *Germany, France, Netherlands, Denmark and the United Kingdom* v *Commission* [1987] ECR 3203.

The Commission also enacts delegated legislation under powers conferred. This accounts for a large proportion of the Union's legislation each year.

The Commission also proposes policy initiatives such as the White Paper on Completing the Internal Market put forward in 1985.

Executive powers

The Commission oversees and supervises the implementation of European Union policies in the Member States by the national authorities and seeks to ensure uniform application.

It has an important role in the drawing up and adoption of the Union budget in conjunction with the European Parliament.

It also has significant powers of expenditure, especially in regard to the Common Agricultural Policy (CAP) and to structural funds, through which funds are channelled to poorer regions of the Union.

External relations

The Commission represents the EU in its dealings with other states and with international organisations.

Censure of the Commission Article 234 TFEU (ex Article 201 EC)

The European Parliament has a power to dismiss the Commission as a whole in a vote of censure under Article 234 TFEU (ex Article 201 EC).

In 1999, as a result of allegations against the Commission, the European Parliament set up an independent Committee of Inquiry. When this Committee reported back, its report was highly critical of the Commission. The whole Commission resigned rather than face a further vote of censure from the European Parliament.

3.4.4 The High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU)

Article 18 TEU contains provision for a 'High Representative of the Union for Foreign Affairs and Security Policy'. This person is appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission. The High Representative conducts the Union's common foreign and security policy and contributes by their proposals to the development of that policy, which they carry out as mandated by the Council. The same applies to the common security and defence policy. The High Representative presides over the Foreign Affairs Council. They are one of the Vice-Presidents of the Commission and deal with the Union's external policies.

Thus, the High Representative represents the Council when chairing the Foreign Affairs Council, and coordinating Union action under the CFSP, but is also one of the Vice-Presidents of the Commission; a 'double-hatted' function. The High Representative is assisted by an External Action Service working in cooperation with the diplomatic services of the Member States and comprising officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States (Article 27(3) TEU).

Activity 3.3

a. How would you classify the Commission? Does it comply with the doctrine, according to constitutional theory, of separation of powers between the executive, the judiciary and the legislature within a State?

b. Explain the mechanism by which the Parliament can force the resignation of the Commission.

3.5 The Council of the EU

CORE TEXT

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

ESSENTIAL READING

- **www.consilium.europa.eu**

3.5.1 Role and composition

The Council represents national interests – the interests of the Member States. It is the main legislative and decision-making body of the Union. It considers legislative proposals from the Commission and, usually acting by qualified majority vote (QMV), it decides whether to enact them or not. Under the 1957 Treaty of Rome, it was the key legislative body, with power to enact legislation. As we have seen, this power has increasingly been shared with the European Parliament, reflecting the Parliament's status as a democratically elected institution of the Union.

The Council is composed of representatives of the Member States at ministerial level, authorised to commit the government of that Member State to specific action. Each government delegates to the Council one of its members according to the matter being discussed at any particular meeting. For example, national ministers of agriculture make up the Agricultural Council and national ministers of finance constitute the Economic and Finance Council.

Although there is now a permanent President of the European Council, the Council retains the practice of allowing each Member State to hold the presidency for a period of six months. This system has become increasingly high profile; the country holding the presidency will have an agenda and will initiate proposals. There is an informal arrangement whereby the current President of the Council works in conjunction with the previous and next President.

The General Affairs Council ensures consistency of the work of the different Council configurations and liaises with the President of the European Council and the Commission in ensuring the follow-up to meetings of the European Council.

Under Article 240 TFEU, the Council is to be assisted by a General Secretariat under the responsibility of a Secretary-General.

3.5.2 COREPER – Article 240(1) TFEU

COREPER is an acronym for the Committee of Permanent Representatives.

Clearly, ministers of the Member State governments are busy people. Much of the work in the Council is done by COREPER. These are permanently posted senior national officials, who address the issues and negotiate on behalf of their governments. Most of the business of the Council is effectively dealt with at this level. Those matters that are satisfactorily agreed by these representatives are sent to the relevant Council meeting as an 'A list' meaning that they require no further discussion but can simply be agreed at the Council meeting. Items which require further discussion at ministerial level are set on the agenda for discussion as 'B list' items.

There are two levels, COREPER I and II. COREPER II deals with political and institutional matters, economic and financial affairs, and external relations. COREPER I is composed of deputy permanent representatives who look at legislative proposals concerning the environment, social affairs, the internal market and transport. COREPER is assisted by working groups made up of national experts who advise on the proposals put forward by the Commission.

3.5.3 The relationship between the European Council and the Council

Although the European Council is now an institution (Article 13 TEU), it has no legislative function. Therefore, legislative action that may have been decided upon by the European Council may need to be carried out by the Council. The European Council therefore acts in conjunction with the Council. See, for example: Article 7(2) TEU (determination of a serious and persistent breach of fundamental values), Article 48 (Treaty revision), Article 50 (withdrawal of a Member State from the Union), the Common Foreign and Security Policy.

Activity 3.4

a. Define and explain the role of the Council.

b. Explain the significance of the Council Presidency.

c. Explain the functions of the High Representative and of the President of the European Council.

3.6 The European Central Bank (ECB)

Core text

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

Essential reading

- **www.ecb.europa.eu/home/html/index.en.html**
- **Articles 13 TEU, Articles 282–284 TFEU.**

The ECB has been included as an institution and is listed in Article 13 TEU. It was set up to introduce and manage the single currency, the euro, and then to determine and implement the Union's economic and monetary policy. It is part of the European System of Central Banks (ESCB), the other members of which are the national central banks. The ECB is located in Frankfurt, Germany.

The ECB has an Executive Board, composed of a President, a Vice-President and four other members. They are appointed by common agreement of the heads of state or government of the Member States and must be recognised experts in monetary matters. There is also a Governing Council, which is made up of the Executive Board and the Governors of the national central banks of the Member States whose currency is the euro.

The independence of the ECB is enshrined in Article 130 TFEU (ex Article 108 EC): the ECB is fully independent of any Member State government or other body.

The Governing Council is the highest decision-making body of the ECB: it defines the monetary policy of the eurozone and is responsible for setting the single interest rate which applies across the area. Article 127(1) TFEU (ex Article 105(1) EC) states that 'the primary objective of the ESCB shall be to maintain price stability'. The ECB is also instructed to support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the EU (i.e. to attain a high level of employment and sustainable and non-inflationary growth).

The members of the Executive Board of the ECB are appointed for a non-renewable term of eight years.

The ECB has legal personality; it is a semi-privileged applicant for the purpose of actions for judicial review under Article 263 TFEU (ex Article 230 EC) (see Chapter 4).

3.7 Sources of Union law, legislative acts and procedures

CORE TEXT

- **Steiner & Woods, Chapter 3 'Scope of the EU Treaty: laws and lawmaking'.**

ESSENTIAL READING

- **Articles 288–299 TFEU.**

3.7.1 Main sources of law

The sources of Union law include:

- the Treaties (primary legislation)
- secondary legislation enacted by the institutions
- the case law of the Court of Justice and the General Court
- general principles of law recognised by the Court of Justice
- international agreements with non-Member States (third countries).

The Treaties (primary legislation)

The Treaties (primary legislation) include:

- the ECSC Treaty (expired in 2002)
- the EC Treaty
- the Euratom Treaty
- the Merger Treaty (Convention Establishing a Single Council and a Single Commission of the European Communities)
- the first and second Budgetary Treaties
- the various Treaties of Accession (see Chapter 2)
- the Single European Act
- the Treaty on European Union
- the Treaty of Amsterdam
- the Treaty of Nice
- the Treaty of Lisbon, consisting of:
  - the Treaty on European Union (post Lisbon)
  - the Treaty on the Functioning of the European Union.

Secondary legislation

Article 288 TFEU (ex Article 249 EC) sets out the secondary legislation of the European Union. It defines three types of legally binding Acts (Regulations, Directives and Decisions) and two types of Acts that are not legally binding (Recommendations and Opinions).

Although Opinions and Recommendations are not legally binding, they are persuasive. They can be used as an aid to interpretation by the Court of Justice and as such must be taken into account by the national courts.

Regulations

Regulations are **directly applicable**. This means that they apply directly in the legal systems of the Member States when legislated by the Union, and are automatically incorporated in national legislation. This generally makes them the most powerful form of secondary legislation and they are used when there is a requirement for exact uniformity.

Note that under the terms of Article 288 TFEU **only Regulations are directly applicable**.

The Court of Justice has held that Regulations should be incorporated without change in national legislation by Member States. See: Case 39/72 *Commission* v *Italy (Re Slaughtered Cows)* [1973] ECR 101; Case 34/73 *Variola* v *Italian Finance Administration* [1973] ECR 981; Case 31/78 *Bussone* v *Italian Ministry for Agriculture* [1978] ECR 2429; Case 92/78 *Simmenthal SpA* v *Commission* [1979] ECR 777.

This is because the Union nature of the Regulations as part of Union law should not be disguised. This will make it apparent to those who are affected by it that it is subject to preliminary rulings on its interpretation and validity by the European Court. Regulations will also generally have direct effect (see further Chapter 5).

Directives

Directives, on the other hand, must be incorporated (or 'implemented') in national legislation in order to have legal effect in the Member States. They set out objectives to be achieved, but leave discretion to the Member States as to the form and method for achieving these objectives. Member States are required to do so by a time limit.

There is a problem because Member States frequently fail to implement Directives within the allocated time period. This has an effect on the uniformity of Union law and may also deprive individuals in the defaulting Member States of their Union law rights. In order to address the problem of unimplemented or wrongly implemented Directives, the European Court extended the principle of direct effect (see 26/62 *van Gend en Loos* [1963] ECR 1) to unimplemented Directives (Case 41/74 *van Duyn* v *Home Office* [1974] ECR 1337), which had passed their date of implementation (Case 148/78 *Pubblico Ministero* v *Tullio Ratti* [1979] ECR 1629). However, the direct effect of an unimplemented Directive is limited to use against the state (Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723) or an emanation of the state (Case 188/89 *Foster* v *British Gas* [1990] ECR I-3313) (for a detailed discussion, see Chapter 5).

There are few acceptable justifications for a Member State's failure to transpose Directives. The fact that a Directive may have direct effect, that is, that it may be invoked by an individual in a national court, does not excuse a Member State from transposition.

Decisions

Decisions are the third form of binding secondary legislation. They are often addressed to one or more Member States or to a single undertaking, particularly in competition proceedings where the 'Decision' of the Commission that an undertaking is in breach of Articles 101 or 102 TFEU is a piece of secondary legislation. It is therefore subject to judicial review proceedings.

It should be noted that the Court has held that the title of an Act does not necessarily determine its legal classification. The Court will look to substance rather than form. In Joined Cases 41–44/70 *International Fruit* v *Commission* [1971] ECR 411 a piece of legislation that had been enacted as a 'Regulation' was held by the Court to be, in fact, 'a bundle of decisions'.

Other Acts

The Article 288 TFEU list is not exhaustive. The Court of Justice has recognised other types of legally binding Acts. In addition to the Article 288 TFEU Acts, the institutions employ a variety of other Acts, such as Notices and Resolutions, which are usually persuasive rather than legally binding. These are sometimes referred to as Acts *sui generis*, of their own particular kind, which can be binding under certain conditions. The Court has held, for example, that certain Acts of the European Parliament, though not mentioned in Article 288 TFEU (ex Article 249 EC), bind third parties and because they have 'legal effects *vis-à-vis* third parties' are, therefore, judicially reviewable: Case 294/83 *Les Verts* v *EP* [1986] ECR 1339. As a result of this case the first paragraph of Article

230 EC (now Article 263 TFEU) was amended to read: 'and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.' In Case 22/70 *Commission* v *Council (ERTA)* [1971] ECR 263 a Council resolution was held by the Court to have legal effect.

Case law of the Court of Justice and the General Court

The case law of the European Courts is an important source of law. Preliminary rulings of the European Courts must be followed by the national courts under the doctrine of supremacy (see Chapter 5) and the ECJ generally follows its own case law, referring to its own 'consistent case law'. If it intends to reverse a previous ruling, it will usually announce very clearly that it is doing so. The Treaty of Rome was a '*traité cadre*' – a framework treaty – and it was always envisaged that it would be completed not only by secondary legislation but also by case law.

General principles of law recognised by the Court of Justice

See further Chapter 5.

International agreements with non-Member States (third countries)

Agreements with third countries are applied by the European Court as an integral part of Union law.

3.7.2 Legislative procedures

CORE TEXT

- **Steiner & Woods, Chapter 3 'Scope of the EU Treaty: laws and lawmaking'.**

ESSENTIAL READING

- **Articles 288–292.**

Although the Commission has the power to initiate legislation, the Council is the main legislative body of the Union. The legislative procedure that applies in any area of European Union competence is set out in the relevant Treaty Article. Under the original Treaty of Rome, generally the European Parliament's only power in the legislative procedure was to be consulted when legislation was enacted in limited areas of the Treaty. However, its powers of participation in the legislative process were greatly increased by the introduction of two new legislative procedures:

- the cooperation procedure (introduced in the Single European Act and now abolished)
- the co-decision procedure, introduced in the Maastricht Treaty on European Union, simplified and expanded in scope by the Treaty of Amsterdam, renamed 'ordinary legislative procedure' in Article 289 TFEU and described in detail in Article 294 TFEU (ex Article 251 EC).

The Commission also has limited powers to legislate on its own and it enacts delegated legislation under powers conferred.

Many different legislative procedures have been formalised within the Treaties.

The ordinary legislative procedure (formerly co-decision procedure) (Article 294 TFEU, ex Article 251 EC)

For a computer animated chart, see:

- **www.europarl.europa.eu/aboutparliament/en/**

An outline of the ordinary legislative procedure is as follows.

- The Commission submits a proposal to the EP (first reading) and the Council.
- The EP gives an opinion, which can contain proposed amendments.
- If the Council approves all the proposed amendments, or if there are no amendments, it can then decide to adopt the Act.

- If the Council does not like the EP's amendments or wishes to adopt others, it adopts 'a common position'. The Council submits its common position to Parliament, with its reasons for this position, and the Commission must also convey its position to the Parliament.
- The 'common position' replaces the Commission's proposal as the text that is to be considered.
- The EP now has its second reading. At this point, the Parliament can approve the measure (in which case it is legislated) or veto the measure, in which case it is rejected and falls.
- If, instead, the Parliament proposes amendments to the common position, they are sent to the Council with the Commission's opinion.
- The Council can approve the amendments in which case the legislation is passed. This is by QMV or by unanimity if the Commission gives a negative opinion.
- If the Council rejects the amendments, a Conciliation Committee is convened. This Committee is composed of representatives from the Council and MEPs. The Commission is represented at the meetings of the Committee and attempts to reconcile the positions of the Council and the Parliament. The Committee has six weeks to try to reach agreement on a text. If it does approve the text, that is then legislated by the Parliament, acting by a majority of the votes cast, and by the Council, acting by a qualified majority.

The original co-decision procedure in the Maastricht Treaty on European Union was very complex, and it was significantly simplified by the Treaty of Amsterdam. Under the co-decision procedure, the Parliament has much enhanced its position of a co-legislator with the Council. Under the ToL, the ordinary legislative procedure is now the usual procedure and the cooperation procedure has been abolished completely.

Requirement to state reasons for legislation: Article 296 TFEU (ex Article 253 EC)

Legislation requires the reasons on which it is based to be stated and the breach of this requirement – or any other procedural requirement – will be grounds for the Court of Justice to declare the legislation void if an action for judicial review is brought. The duty to state reasons includes a reference to the **legal basis** of the Act – this is the relevant Treaty Article, which gives the competence to act in any particular area. The legal basis is important because it identifies the proper legislative procedure – giving a greater or lesser role to the Parliament depending on which legislative procedure is used. The Parliament may wish to challenge the legality of an act when it believes that the legal base which has been used is incorrect and gives it a lesser role than the correct one. Similarly, a Member State may wish to challenge a piece of legislation enacted by QMV on the grounds that the incorrect Treaty Article has been used and the legislation should have required unanimity.

Increasing attention is now paid to procedural requirements. Particularly serious and manifest procedural deficiencies may render a putative Act non-existent in law. See: Joined Cases T79/89 *et al*., *BASF AG* v *Commission* [1992] ECR II-315; Case C-137/92 P *Commission* v *BASF* [1994] ECR I-2555.

The principles of subsidiarity and proportionality Article 5 TEU (ex Article 5 EC)

The principles of subsidiarity and proportionality are contained in Article 5 TEU.

The first and second paragraphs of Article 5 TEU confirm that the Union must act within the limits of its competence. The third paragraph sets out the principle of subsidiarity. This states that the Union should act only if:

- the objectives cannot be sufficiently achieved by the Member States, and
- action can be better achieved by the Union for reasons of scale or efficiency.

The principle of subsidiarity in general states that decisions should be taken at the lowest level possible, as close to the individual as possible. In the Treaty it refers

to the relationship between the Member States and the Union, and states that, in areas of shared competence, decisions should be taken at the Member State level except where the objectives of the action cannot be sufficiently achieved by action by the Member States and therefore for reasons of scale or efficiency should be dealt with at a Union level. This principle has to be taken into account by the Commission when proposing legislation: it has to justify proposed legislation with reference to subsidiarity.

The fourth paragraph of Article 5 TEU sets out the principle of proportionality stating that: 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The principle of proportionality is a general principle of Union law, and it finds expression in, for example, the exercise of the derogations to the fundamental freedoms.

The meaning and implications of subsidiarity are clarified in the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The Protocol specifically states that legislation can be reviewed for conformity with the principle. The EP and the Council must also examine proposals and their own legislative amendments in the light of the principle.

Mechanisms for subsidiarity compliance also include a subsidiarity check by national parliaments who can issue a 'yellow card' if they think the principle has not been complied with.

Activity 3.5

Core comprehension – Public international law in the EU courts

Using your Online Library resources, research the following journal article:

- **de Búrca, G. 'The European Court of Justice and the international legal order after *Kadi*' (2010) (51)1 *Harvard International Law Journal* 1 (available in HeinOnline and LexisLibrary).**

You can complete this learning activity by reading the section entitled 'Part II – The cases' at pp.11–15, which discusses the Court's approach before the *Kadi* judgment.

a. **In *Behrami* identify the grounds of complaint (paraphrase in fewer than 50 words).**

b. **In *Behrami* identify the alleged breach of the ECHR.**

c. **In *Saramati* identify the grounds of complaint (paraphrase in fewer than 50 words).**

d. **In *Saramati* identify the alleged breach of the ECHR.**

e. **Paraphrase in fewer than 40 words the issues of the extra-territorial application of the Convention and of the jurisdiction of the Court over the actions impugned as related to *Behrami*/*Saramati*?**

f. **Describe in fewer than 40 words the 'ultimate control' chain of reasoning used to determine whether the actions were attributable to the UN or to the individual European states involved.**

g. **Identify the approach of the Court to deal with challenges against an international organisation which is not party to the Convention and has no formal relationship with the ECHR.**

h. **In the *Bosphorus* approach which evidentiary threshold permits a review of the actions of an international organisation?**

i. **In *Behrami* identify the two reasons for deference advanced to preclude the possibility of the ECtHR exercising jurisdiction over acts of states ultimately controlled by the UN.**

Activity 3.6

Applied comprehension – Directives, basic precepts and underlying policy

Using your Online Library resources, research the following journal article:

- **Craig, P. 'The legal effect of Directives: policy, rules and exceptions' (2009) *ELRev* 349.**

You can complete the following learning activity by reading pp.1–4, 'Basic precepts', and 'Underlying policy/The textual argument'.

Basic precepts

a. **Why does the first basic precept place importance on the identification of the purpose or policy which a legal rule serves?**

b. **The second basic precept concerns the issue of certainty in the law. Why is the creation of exceptions and qualifications to legal rules problematic?**

c. **In the third basic precept how do policy objectives address concerns of coherency in the law?**

d. **In the fourth basic precept what does Craig mean by the 'fit'?**

Underlying policy

e. **What is meant by 'the textual approach' and the 'textual conclusion' in *Marshall*?**

f. **The first problem: Explain in fewer than 50 words the impact on the certainty of legal rules produced by the judicial approach in *Defrenne*?**

g. **The second problem: Why does Craig reject the applicability of the textual approach when interpreting the ambiguity in the wording of Article 249 EC?**

h. **The third problem: In the absence of a clear rationale for the denial of the horizontal effect of Directives in *Marshall*, identify possible reasons which could be advanced.**

i. **Which main justification was used later to create exceptions/qualifications to the denial of horizontal direct effect of Directives?**

Quick quiz

Question 1

Which of the following is not a member of the European Council?

a. **The President of the Commission.**

b. **Ministers of Foreign Affairs.**

c. **The Treasury ministers.**

d. **The High Representative for Foreign Affairs and Security Policy.**

Question 2

Which of the following is not a prerogative of the President of the European Council?

a. **Prepare and chair meetings of the Council.**

b. **Encourage and elicit progress from the Council.**

c. **Represent the Union at international level.**

d. **Oversee and direct the efforts of the High Representative for Foreign Affairs.**

QUESTION 3

Which of the following is not a power conferred to the European Parliament?

a. **Set up temporary inquiry committees.**

b. **Appoint the Ombudsman.**

c. **Approve the makeup of the Commission.**

d. **Setting the entire budget of the Union.**

QUESTION 4

Which of the following is not a function of the Commission?

a. **Initiate the legislation process.**

b. **Appoint the judges of the Court of Auditors.**

c. **Enact delegated legislation.**

d. **Represent the Union in foreign relations.**

QUESTION 5

Which of the following is a responsibility of the Directorate General?

a. **Research.**

b. **Social cohesion.**

c. **Fraud supervision.**

d. **Fisheries and competition.**

QUESTION 6

How does the presidency of the Council function?

a. **The president is elected by the commission on an annual basis.**

b. **The presidency rotates every six months, the current president working in conjunction with the next and preceding presidents.**

c. **The president is elected by QMV every three months.**

d. **The president is appointed by the Commission.**

QUESTION 7

Which of the following is not a prerogative of the ECB?

a. **Negotiate free trade agreements.**

b. **Maintain economic stability.**

c. **Set currency exchange rates.**

d. **Control monetary inflation.**

Answers to these questions can be found on the VLE.

4 The courts

Contents

Introduction

In this chapter we will analyse judicial power allocation in the EU. The European Union's judiciary has three tiers of courts: the Court of Justice (referred to as 'the Court'/ECJ), the General Court (formerly the Court of First Instance (CFI)) and a third tier of specialised courts.

The function of these Courts is to ensure that 'in the interpretation and application of the Treaties, the law is observed' (see Article 19(1) TEU). This wording provides grounding for the European Courts' dynamic case law which upholds the 'Rule of Law'.

We will look at their composition, functions and at the various judicial procedures which are available for the implementation and enforcement of EU law.

CORE TEXT

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers', Chapter 7 'Framework for enforcement', Chapter 10 'The preliminary rulings procedure' and Chapter 12 'Direct action for annulment'.**

ESSENTIAL READING

- **http://curia.europa.eu/**
- **Articles 19 TEU and 251-281 TFEU.**

4.1 Composition

The European Court of Justice (ECJ) consists of judges, one from each Member State, who are assisted by 11 Advocates General. The judges and Advocates General must be chosen 'from persons whose independence is beyond doubt and who possess the qualification required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence' (Article 253 TFEU).

For the General Court, Article 254 TFEU sets out the relevant criteria. Both Courts elect their own presidents. The term of office is a renewable six years; there is a partial replacement every three years. The Treaty requires that judges are chosen by 'Common Accord' of the governments of the Member States after consultation with a panel – composed of former members of the ECJ and the General Court, members of national supreme courts and lawyers of recognised competence – which gives an opinion on candidates' suitability to perform the duties required (see Article 255 TFEU).

The ECJ normally sits in chambers of five or three judges; it rarely sits in plenary session but it can for highly significant cases. Where a Member State or an institution is one of the parties, they can request the Court to sit in a Grand Chamber.

4.2 The methodology and jurisdiction of the European Court of Justice

The procedure generally consists of:

- a written stage
- brief oral argument
- presentation of the Advocate General's opinion
- judgment by the Court.

This procedure relies heavily upon written documents, and oral argument is intended mainly to fill gaps or elaborate on specific points.

4.2.1 The role of the Advocate General

The role of the Advocate General is to present a reasoned and exhaustive examination of the facts and the relevant law and to give their opinion on how the case should be decided. This opinion will clearly have a great influence on the Court but it is not binding. Although the Court in a majority of cases will follow the Advocate General's opinion, in some important cases the Court has chosen not to do so. See, for example: Advocate General Lenz in Case C-91/92 *Faccini Dori* v *Recreb* where the Court refused to follow his opinion proposing horizontal direct effect of Directives (see Chapter 5). Sometimes, however, opinions influence the future development of the law by the Court in later cases.

The judgment of the ECJ itself is always a single collegiate judgment; there are no dissenting opinions. Although a *de facto* system of precedent has developed, the Court will sometimes depart from its earlier case law.

As already mentioned in Chapter 2, the Court adopts a teleological or purposive approach, considering the overall aims and objectives of the Treaty, using the 'spirit' or 'inherent system' of the Treaty as grounds for a decision. The jurisdiction of the Court is divided between:

- Direct actions: Articles 263, 265, 268, 270 and 272 TFEU.
- Preliminary references from the national courts: Article 267 TFEU.

Where a case in a national court raises an issue of Union law, the national court may refer a question concerning the validity or interpretation of Union law to the ECJ, and in some cases to the General Court for a ruling under the Article 267 TFEU reference

procedure. The Court of Justice rules on the point of Union law in the form of answers to questions posed by the national court, but does not determine the outcome of the case. The decision on the point of Union law is sent back to the national court which applies it in the case before it. The national court determines the outcome of the case.

A brief summary of key Articles:

- Article 258 TFEU (ex Article 226 EC): Actions by the Commission against Member States in breach of their Union law obligations.
- Article 260 TFEU (ex Article 228 EC): Another action by the Commission if the Member State fails to remedy the breach.
- Article 259 TFEU (ex Article 227 EC): Action by one Member State against another for breach of Union law obligations.
- Articles 268/340 TFEU (ex Articles 235/288 EC): Actions for damages against the Union institutions.
- Article 263 TFEU (ex Article 230 EC): Action for judicial review.
- Article 265 TFEU (ex Article 232 EC): Action for failure to act against Union institutions.
- Article 267 TFEU (ex Article 234 EC): Where a question of the interpretation or validity of Union law arises in a case before the national court, the court may refer the matter for a preliminary ruling to the Court of Justice.

4.3 The General Court

The caseload of the ECJ has increased dramatically since the EC was established, with the result that it can take a long time for cases to reach the Court and judgment to be made. In order to alleviate this problem, the Court of First Instance (CFI) was established. The Court was renamed the General Court of the European Union by the Treaty of Lisbon, and the number of judges is determined by the Statute of the Court of Justice of the European Union. The current number is set at two per Member State. It usually sits in chambers of three or five judges. It does not have separate Advocates General but it may call on one of its members to perform the task of an Advocate General; this person may not then take part in the judgment of the same case.

When you study competition law, many of the cases you will consider will be actions brought by companies (undertakings) seeking judicial review of decisions of the Commission, brought in the CFI under Article 230 EC (now Article 263 TFEU).

The jurisdiction of the General Court has been extended so that it has jurisdiction over actions under Article 263 TFEU (judicial review), Article 265 TFEU (actions for failure to act) and Articles 268 TFEU and 272 TFEU, except for those reserved in the Statute of the Court of Justice for the Court of Justice itself.

Article 256(3) TFEU also permits the General Court to take preliminary rulings under Article 234 EC (now Article 267 TFEU) in certain areas to be laid down by statute.

4.3.1 Appeals from decisions of the General Court

Note that appeals from decisions of the General Court on points of law may be made to the Court of Justice.

4.4 The Court of Auditors

CORE TEXT

- **Steiner & Woods, Chapter 2 'Institutions of the Union: composition and powers'.**

ESSENTIAL READING

- **www.eca.europa.eu/Pages/Splash.aspx**

- **Articles 285–287 TFEU.**

The Court of Auditors is composed of one auditor per Member State who 'shall be chosen from among persons who belong or have belonged in their respective states to external audit bodies or who are especially qualified for this office' (Article 286 TFEU).

Its task is to examine the accounts of the Union and audit the accounts of revenue and expenditure of the EU. The Court of Auditors must examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. It has the power to request information and publishes an annual report. This is published in the Official Journal along with the response of the institutions.

The Court of Auditors is to present the Parliament and the Council with 'a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions' (Article 287 TFEU).

4.5 Article 267 TFEU The preliminary ruling jurisdiction

Core text

- **Steiner & Woods, Chapter 10 'The preliminary rulings procedure'.**

4.5.1 Introduction: Article 267 TFEU

A national court may make a reference for an interpretation of a point of Union law, or for a ruling on the validity of EU legislation, to the Court of Justice. The Court gives a ruling on the point of Union law **only** (it should not address questions of national law) and this is then applied by the national court in the case before it in giving its final judgment. The doctrine of supremacy established by the Court of Justice made it clear that the national courts are bound to apply these rulings. The Court frequently refers to its own 'consistent case law' and, if it intends to depart from its previous ruling, it will make this very clear and give the reasons for doing so.

Most actions for redress of the breach of Union law rights take place in the national court. There is no uniform set of remedies prescribed by Union law and the remedies available for breach of Union law rights are those available under national law. However, from the beginning, the Court of Justice laid down certain requirements that the national remedy must meet. These were expanded in later case law to include the necessity that the remedy should be adequate and effective and have a deterrent effect.

4.5.2 Article 267 TFEU

Article 267 TFEU provides that:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The bulk of preliminary rulings falls under the first indent of paragraph one. The second and third paragraphs deal with the type of 'court or tribunal' which either **may** make a reference (discretionary, para.2), or which **must** make a reference if the court or tribunal is a court of last resort (compulsory, para.3).

4.5.3 Functions of Article 267 TFEU

The function of Article 267 TFEU is to ensure the unity of interpretation of Union law. See: Case 28-30/62 *Da Costa* [1963] ECR 31 and Case 166/73 *Rheinmühlen* [1974] ECR 33.

The preliminary reference system has been very successful. It has depended for its success on the cooperation of the national courts and this has been forthcoming. Many of the most important cases, which you will consider, have come to the Court of Justice through an Article 267 TFEU reference, often from courts low down in the national judicial hierarchy (*van Gend en Loos* and *Costa* v *ENEL*, for example). This success has, however, led to a long wait – sometimes up to two years – for hearing cases at the ECJ.

The decision to refer

The trial judge has discretion as to whether to refer: Case 166/73 *Rheinmühlen* [1974] ECR 33 but see below, in regard to Article 267(3) TFEU, the compulsory reference.

What is a court or tribunal?

What a court or tribunal is for the purposes of Article 267 TFEU is determined by Union, not national, law. Even if the body or tribunal is not regarded as a court or tribunal under its own national law, it may be a court or tribunal under Article 267 TFEU if it meets certain requirements.

In Case 246/80 *Broekmeulen* [1981] ECR 2311 the Court of Justice indicated the factors it would take into account. The body in question was an Appeals Committee from the Registration Committee established by the Royal Netherlands Society for the Promotion of Medicine. All GPs (general practitioners) in the Netherlands had to register in order to be able to practise medicine there.

In deciding that it was a court or tribunal for the purposes of Article 267 TFEU, the Court of Justice took into account:

- that although the Appeals Committee was a private body and not recognised as a 'court or tribunal' under Dutch law, it 'operate[d] with the consent of the public authorities and with their cooperation' and it exercised great control over the practice of medicine in the Netherlands
- the procedure before the Committee was adversarial
- it allowed legal representation
- no one could practise as a doctor in the Netherlands without registration with the Royal Society; decisions of the Appeals Committee therefore have particular importance in regard to the individual's rights to earn a living
- the particular case concerned the qualification of a doctor trained in another Member State; there were likely to be issues raised in the Appeals Committee relating to freedom of establishment and freedom to provide services in Community law
- there was no appeal to the national courts from decisions of the Appeals Committee (its decisions were final).

The Court of Justice has indicated relevant factors – that the 'court or tribunal':

- is established by law
- is permanent
- is independent
- has compulsory jurisdiction

- has procedures that are *inter partes*
- applies rules of law.

Not all these factors have to be satisfied. See a restatement of the relevant factors in Case C-54/96 *Dorsch* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961 and Case 416/96 *El Yassini* v *Secretary of State for the Home Department* [1999] ECR I-1209.

In Case 24/92 *Corbiau* [1993] ECR I-1277 the Court of Justice decided that the Director of Taxation in Luxembourg was not a court or tribunal for the purposes of Article 267 TFEU. The Director of Taxation was hearing an appeal from a decision of the Luxembourg tax authorities. The Court of Justice held that he was not a court or tribunal as he was not independent. He had an institutional connection with those who made the original decision.

Case 102/81 *Nordsee* [1982] ECR 1095 showed that generally where the parties have decided by contract that disputes will be referred to an arbitrator and no public authority is involved in the decision to choose arbitration, then that arbitrator is not a court or tribunal for the purposes of Article 267 TFEU.

4.5.4 The discretionary reference

Article 267(2) TFEU

Under the second paragraph of Article 267 TFEU, all national courts and tribunals have a discretion to refer.

Guidelines by the Court of Justice

The Court of Justice has issued guidelines for national courts on when to make a reference.

4.5.5 The compulsory reference

Article 267(3) TFEU

Under the third paragraph of Article 267 TFEU a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law **shall** bring the matter before the Court of Justice (emphasis added).

The Court of Justice stated in Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957 that:

> in the context of Article 177 [now Article 267 TFEU], whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case law not in accord with the rules of Community law from coming into existence in any Member State.

The Court of Justice has held that it is not always mandatory for a court of last appeal to refer. First, in an early case, it held that where there had already been an Article 267 TFEU ruling it was not necessary to refer, although it was always open to the national courts to make another reference on the same or a similar point. See: Case 28-30/62 *Da Costa* [1963] ECR 31.

The Court has laid down what are known as the *CILFIT* exceptions to the obligation contained in the third paragraph of Article 267 TFEU.

In Case 283/81 *CILFIT* [1982] ECR 3415 the Court held that there is no obligation to refer:

- if it is not necessary – that is if the question of Union law will not determine the outcome of the case
- where the Court of Justice has already given a ruling on the question – even if the questions at issue are not identical
- where the matter is an *acte clair*.

The Court of Justice stated that the national court or tribunal must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice itself, and that the national court must bear in mind the multilingual nature of Union law.

The Court of Justice stipulated that the national court should compare the different language versions of the particular provision and reminded the national courts that every provision of Union law must be placed in its context and interpreted in the light of Union law as a whole.

Acte clair and *acte éclairé*

The expression *acte clair* means that the correct application of Union law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.

Acte éclairé applies where the Court of Justice has already given a clear ruling on the same point in a previous case (see *da Costa*).

State liability for the failure of a court of final instance to make a reference

In the very significant Case 224/01 *Köbler* v *Republik Österreich* [2003] ECR I-10239, the Court of Justice ruled that an action against a Member State for state liability was possible where the breach of Union law was by a court of final appeal, in particular where it failed to make a reference as required under Article 267(3) TFEU.

The Court of Justice referred to 'the essential role played by the judiciary in the protection of the rights derived by individuals from [Union] rules' and said that 'the full effectiveness of those rules would be called in question and the protection of those rights would be weakened' if individuals could not receive reparation for infringement of Union law by the decision of a court of a Member State adjudicating at last instance. It pointed out that there is no further possibility of protection of the rights of individuals beyond the decision of such a court so 'individuals cannot be deprived of the possibility of rendering the state liable in order in that way to obtain legal protection of their rights'.

It is in order to prevent the infringement of Union law rights that courts from whose decision there is no judicial remedy are obliged to make a reference under Article 267(3) TFEU. Where they fail to do so, an action for state liability must be available.

The question of liability would depend on the established criteria for state liability, but:

> State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has **manifestly infringed the applicable law**. [emphasis added]

The national court deciding the issue of state liability would apply the usual conditions for state liability (see Chapter 5).

- Did the rule of Union law that was infringed confer rights on individuals?
- Was the breach sufficiently serious?
- Was there a direct causal link between the breach and the loss or damage sustained by the injured parties?

The question of whether the infringement of Union law was sufficiently serious when caused by a decision of a national court was to be determined by whether the 'infringement was manifest'. In deciding what this meant, regard had to be given to the specific nature of the judicial function and to the legitimate requirements of legal certainty. Therefore, in order to determine whether the infringement was 'manifest', the national court must take account of all the factors which characterise the situation put before it.

The Court of Justice continued that:

> those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC [now Article 267 TFEU].
>
> In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter.
>
> (paras 55 and 56)

Nevertheless, on the facts presented in the particular case, there was not a 'manifest infringement' of Union law.

The *Köbler* judgment was further refined in Case C-173/03 *Traghetti del Mediterraneo* v *Repubblica Italiana* [2006] ECR I-5177, when the Italian court (Tribunale di Genova) asked whether state liability of a Member State towards an individual for harm caused by violation of Union law by a supreme court would be excluded if the violation arose from an interpretation of the national law, or an assessment of the facts and the evidence, and whether state liability therefore should only be incurred in case of fault or serious negligence. The Court stated that:

> Community law precludes national legislation which excludes State liability … for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.

4.6 Judicial review Article 263 TFEU

Core text

- **Steiner & Woods, Chapter 12 'Direct action for annulment'.**

Essential reading

- **Article 263 TFEU.**

4.6.1 Content of Article 263 TFEU

Annulment is the process by which the Court will declare that an Act has no legal effects and therefore no longer exists. Article 263 TFEU (ex Article 230 EC) is the key provision. The Treaty of Lisbon has introduced several changes.

Article 230(4) reads as follows:

> Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Article 263(4) TFEU now reads as follows:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures.

In Article 263(4) TFEU, the word 'decision' has been replaced by the word 'act' and the words 'against a decision which, although in the form of a Regulation or a Decision addressed to another person' have been replaced by the simpler formula 'or which is of direct and individual concern to them'.

The new s.4(2) of Article 263 TFEU refers also to a regulatory act which does not entail implementing measures (see below). We will discuss below the impact (if any) of the changes on the case law of the European Courts.

Finally, Article 263 TFEU has added a paragraph providing that acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by individuals (natural or legal persons) against acts of such bodies, offices or agencies of the European Union which are intended to produce legal effects in relation to them.

We will now consider the following questions in sequence:

1. What is the meaning of 'acts' in Article 263 TFEU?
2. Who can bring an action?
3. Within what time limit?
4. On what grounds?
5. What effect does annulment have?

4.6.2 What is the meaning of 'acts' in Article 263 TFEU?

The category of reviewable acts includes all acts that have legal effects. It is not limited to the acts listed in Article 288 TFEU. See: Case 22/70 *Commission* v *Council (ERTA)* [1971] ECR 263: 276–278. In the *ERTA* case the Court of Justice held that the meaning of 'acts' was not restricted to the secondary legislation of the Union under Article 288 TFEU, that is, Regulations, Directives and Decisions (Recommendations and Opinions are excluded because they are not legally binding), but could include any act which had legal effects.

What is a 'regulatory act' in the Lisbon version of Article 263?

This is a new term which has been brought into the Lisbon Treaty. It will be up to the Court to decide on its exact meaning and how much influence this will have on individual standing as defined in the *Plaumann* test (see below).

4.6.3 Who can bring an action (who has *locus standi* or standing)?

There are three classes of applicant under Article 263 TFEU: privileged, semi-privileged and non-privileged.

Privileged applicants

Under Article 263 TFEU, Member States, the Council and the Commission have always been **privileged applicants**. That is, they are accepted to have a sufficient legal interest to give them standing (*locus standi*) for such an action and thus they have automatic *locus standi*. Whilst this was not so traditionally, the Parliament also has the status of privileged applicant.

Semi-privileged applicants

Semi-privileged applicants have *locus standi* to bring actions for the purpose of protecting their prerogatives. The institutions that have this status under Article 263 TFEU are the Court of Auditors, the European Central Bank and the Committee of the Regions.

Non-privileged applicants

Under Article 263 TFEU, non-privileged applicants (i.e. natural and legal persons) may bring review proceedings under specified circumstances.

The difficulties that occurred with the original Article 230 (now Article 263 TFEU) were twofold. First, the term 'decision' 'in the form of a regulation or a decision addressed to another person', and second, which 'is of direct and individual concern to the former'. The word 'decision' has been replaced by the wider term 'act' in the first limb of 263(4)

and by 'regulatory act' in the second. The requirement of direct and individual concern remains for 'acts' not addressed to a person, but the requirement of individual concern has been dropped for a regulatory act, only leaving direct concern.

The Court has interpreted the wording of the original Treaty Article 230 very narrowly:

- the applicant had to show that the decision is of 'direct and individual concern' to them
- both individual concern and direct concern had to be established before the applicant could have standing to bring an action.

Individual concern

We will consider the two situations where changes have occurred together:

a. where the decision is a decision addressed to another person

b. where the decision is in the form of a Regulation.

(a) Where the decision is a decision addressed to another person

The leading case on individual concern is Case 25/62 *Plaumann* [1962] ECR 95.

Note that the decision addressed to another person is typically a decision addressed to a Member State which the individual applicant is seeking to annul. In this case, the German government asked the Commission for permission to suspend collection of duties on clementines imported from third countries (countries outside the Union). The Commission refused. This decision was addressed to the German government but clearly affected Plaumann, who was one of several importers of clementines into Germany. Plaumann tried to challenge the Commission decision. He therefore had to establish individual concern. He claimed individual concern as an importer of clementines.

The Court of Justice refused standing, saying that the decision was not of individual concern to Plaumann. The Court found that:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

That is, they must be 'singled out' in the same way as the initial addressee (in this case, Germany). Plaumann, as an importer of clementines, could be joined at any time by any other importer. He was not part of a 'closed group' but part of an 'open group'. In order to get standing it was necessary for the applicant to show that they were part of a closed circle of persons who were known at the time of the adoption of a decision. A closed group is one where the members are fixed at the time of the decision and probably defined with reference to a completed set of past events.

For a case where the Court did find the applicants had standing, see Case 11/82 *Piraiki-Patraiki* [1985] ECR 207. Here there were two groups of applicants and one group was held to have standing. Greek cotton undertakings challenged a Commission decision which had authorised the French government to introduce a quota on imports of yarn (cotton) from Greece between November 1981 and January 1982. The Greek applicants tried to distinguish themselves from *Plaumann* by arguing that their cotton manufacturing businesses had a complex infrastructure that could not be set up in a short time, therefore they fulfilled the *Plaumann* test. The Court of Justice held that they were not individually concerned.

Theirs was a commercial activity. They manufactured cotton yarn and could do so by any undertaking and at any time. The mere fact that the applicants exported goods to France was not sufficient to establish that they were individually concerned by the contested decision. However, those cotton manufacturers which had already entered contracts for sale into France to take effect during that period were given standing. They were a closed group – a group consisting of Greek cotton undertakings which had

entered contracts for sale of yarn which would take effect between November 1981 and January 1982.

It seems, therefore, that a measure is of individual concern to an applicant only if the class of people whom it may affect is closed on the date of its adoption and if the applicant belongs to that class. The class is closed if the number and identity of its members is in one way or another unalterably fixed and therefore ascertainable at the time when the measure is taken.

Criticism of the restrictive test for individual concern

As stated above, the restrictive interpretation of the meaning of individual concern, as interpreted in the case law of the Court, was criticised as being at odds with the requirement for effective judicial protection for Community law rights, a principle established and upheld by the Union courts.

Advocate General Jacobs' opinion in Case C-50/00P *UPA* v *Council* [2002] ECR I-6677, for instance, proposed a new test for individual concern.

UPA is a trade association representing and acting in the interests of small Spanish agricultural businesses. It sought annulment of a Regulation which reformed the common organisation of the olive oil market on a number of grounds. Among other changes, the Regulation discontinued both consumption aid and a specific allocation of aid to small producers.

The UPA put forward as one of its arguments to establish its individual concern that 'there is a risk that it will not receive effective judicial protection'. The CFI dismissed UPA's application for judicial review as manifestly inadmissible, as UPA was not individually concerned by the measure according to the case law on individual concern.

The present case concerned the appeal of UPA to the ECJ to annul the order of the CFI. One of its arguments was that the contested order, declaring its action inadmissible, violated UPA's fundamental right to effective judicial protection which, it claimed, was a recognised principle of Community law.

In his Opinion, Advocate General Jacobs confirmed that the principle of effective judicial protection is part of Union law. That principle is grounded:

> … in the constitutional traditions common to the Member States and in Articles 6 and 13 of the ECHR. Moreover, the Charter of fundamental rights of the EU, whilst itself not legally binding, proclaims a generally recognised principle in stating in Article 47 that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

Advocate General Jacobs concluded that the restrictive case law on individual concern is 'incompatible with the principle of effective judicial protection'.

He then proposed a new test for individual concern under Article 230 EC (now Article 263 TFEU):

> In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.
> (paragraph 60).

This would:

- 'considerably improve judicial protection'
- have the advantage of providing clarity to case law which has been criticised for its complexity and lack of coherence
- reduce Article 234 EC (now Article 267 TFEU) references
- have the advantage of shifting the emphasis of judicial review from question of admissibility to questions of substance

- remove the anomaly that the Court of Justice has taken an expansive view of some aspects of Article 230 EC (now Article 263 TFEU) – such as the meaning of 'acts' (see Case 22/70 *ERTA*) and the standing of the European Parliament while taking a very restrictive approach to the meaning of 'individual concern'.

(b) Decisions in the form of Regulations

Article 263(4) has amended Article 230(4) by replacing the term 'a decision which, although in the form of a Regulation or a Decision addressed to another person'.

Generally speaking, individuals could not challenge Regulations because their legal effects apply in a general and abstract manner. In order to successfully establish standing, the applicant claimed that although the challenged measure was **in the form of a Regulation**, it was in fact a disguised Decision of direct and individual concern to him or her. Non-privileged applicants could only bring actions to annul Regulations if they were, in fact, decisions and they were of direct and individual concern to them.

The ECJ has formulated two tests for whether such a measure is of individual concern to the applicant.

- **Test 1**: The general application/abstract terminology test.
- **Test 2**: The closed category test.

It seems that sometimes the Court applied the abstract terminology test and was not concerned with whether a closed category was involved.

Test 1: The general application/abstract terminology test

Whether the measure was a true Regulation was tested by whether it was phrased in general terms and applies to 'categories of persons viewed in a general and abstract manner'.

If it does, then it could not be a disguised Decision and cannot be of individual concern to an applicant (for an exception – see below, *Codorníu*).

The Court of Justice held that this was a true Regulation because it applied to 'objectively determined situations' and to categories of persons 'viewed in a general and abstract manner'.

The fact that it was possible to identify the persons affected by the measure did not prevent it from being a true Regulation rather than a Decision. As it was a true Regulation, the applicants did not have standing to challenge it.

See Case 6/68 *Zuckerfabrik–Watenstedt* [1968] ECR 409: 415.

When this test was 'passed', the applicant still had to show that he or she was part of a closed group (*Plaumann*). The latter still applies in respect of the word 'act' in Article 263, direct and individual concern would still have to be shown.

Test 2: The closed category test

Where the Regulation applied to a closed category, the Court of Justice would sometimes apply this test and hold that the measure was a disguised Decision of individual concern to some applicants. The Court has adopted this 'closed category approach' in cases which deal with a completed set of past events where the 'Regulation' related to a fixed, closed set of traders and was therefore a 'disguised Decision'. A Decision is characterised by the fact that the category of those to whom it is addressed is limited: Cases 41-44/70 *International Fruit Co* [1971] ECR 411: 422.

This case concerned the import of apples from non-Member States. Import licences were required and importers would apply for the licences to their Member State. The Member States would notify the Commission of the number of applications for import licences that it had received in the previous week. The Commission would then decide on the issue of licences on the basis of this information. The challenge was to a Regulation which implemented this scheme every week.

The Court held that the applicant was individually concerned; the number of those applications affected by this Regulation was fixed and known when the Regulation was adopted.

The Regulation applied to a closed category of persons: the fruit importers who had applied for import licences the week before. It was characterised as **a bundle of Decisions**.

The *Codorníu* exception

An exception to the general rule regarding challenges to Regulation was established in Case C-309/89 *Codorníu* [1994] ECR I-1853. Here, the applicant was given standing although the Court of Justice stated that the legislation challenged was a true Regulation. So a measure was held to be a true Regulation and yet to be of individual concern. The judgment turns on the particular facts of **the case**, in which the Court expressly acknowledged that a Regulation can be one of general application and yet could still be of individual and direct concern.

The contested Regulation said that the word '*crémant*' should be used exclusively for wines from France or Luxembourg. The applicant made sparkling wines in Spain. The trade mark contained the name *crémant*. Other Spanish makers also used this term. The Council claimed that it was a Regulation and could not be challenged even if it was possible to identify those affected.

The Court of Justice agreed that this was a true Regulation in substance as well as form: it was of a legislative nature and applied to traders in general. But this did not stop it from being of individual concern to some of them. The applicant was individually concerned, because of the use of the word *crémant* in his trade mark.

So it was a true Regulation by the abstract terminology test yet could still be of individual concern.

This appeared to be a significant relaxing of the rules on *locus standi*, heralding the amendment in Article 263(4) TFEU, but later cases have returned to a cautious and restrictive approach. In Case 209/94P *Buralex* v *Council* [1996] ECR I-615 the Court of Justice applied the 'abstract terminology' test to deny standing despite the fact that the identities of the companies (seeking to challenge a Regulation on the shipping of waste) could be determined.

It seems clear that the judgment in *Codorníu* was determined by its particular facts.

However, there is another exception where the applicant was part of a closed group which had previously been awarded a quota and was specifically mentioned in an annex to the Regulation. The company was held to be individually concerned: Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333.

Interest groups

In Case T-585/93 *Stichting Greenpeace Council (Greenpeace International)* v *Commission* [1995] ECR II-2205, Greenpeace and other applicants specifically argued for a liberalisation of the rules on standing, but this was rejected by the CFI (now General Court) which restated the *Plaumann* test.

It was held that interest groups do not have *locus standi* where the individuals that they represent are not individually and directly concerned.

The applicants sought the annulment of a Commission decision granting financial assistance from the European Regional Development Fund for the construction of two power stations in the Canary Isles in an environmentally sensitive area.

The applicants were individual fishermen, farmers and residents concerned with the environmental impact and the impact on tourism and also environmental groups.

They specifically advocated the use of a wider, more liberal test for standing.

The CFI applied the *Plaumann* test and stated that the existence of harm suffered or to be suffered (by the applicants) cannot grant *locus standi* since such harm may affect,

generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as an addressee of a Decision. For individual concern they would have to show that they were affected by the measure in a way that differentiated them from all other persons. The applicants were not affected by the Decision other than in the same way as any other local resident, fisherman, farmer or tourist who was or might in the future be in the same situation.

Making complaints to the Commission does not give standing.

Greenpeace claimed to represent the general interest in the matter of environmental protection and to represent the interests of the persons living in the Canary Islands. The General Court held that an association formed for the protection of a group of persons who themselves are not individually and directly concerned does not have standing.

The Court of Justice confirmed the CFI ruling: Case 321/95 *Stichting Greenpeace* v *Commission* [1998] ECR I-1651.

4.6.4 Direct concern

Direct concern means that there should be no exercise of discretion between the original Act and its application to the applicant. On direct concern, see Case 69/69 *Alcan* [1970] ECR 385. The Belgian government lobbied the Commission to increase the allocation of low tariff aluminium allowed into Belgium. The Commission refused to increase the quota and this decision was challenged by the applicant, which was an importer of aluminium.

The Court of Justice held that the decision was not of direct concern because even if the Commission had decided that the allocation could be increased, the decision would not have required Belgium to increase the quota and, said the Court, it might have decided not to do so.

The Court of Justice took a more lenient, and arguably a more realistic approach, in Case 11/82 *Piraiki–Patraiki* [1985] ECR 207. Here, as mentioned above, Greek cotton undertakings challenged a Commission decision authorising the French government to introduce a quota on imports of yarn from Greece between November 1981 and January 1982.

Although the French government had discretion as to whether to introduce the system of quotas, the Court held that this was entirely theoretical because the French authorities had applied for stricter quotas than had been authorised. The French government would clearly impose the quotas if authorised to do so. Therefore, there was no discretion to be exercised on the part of the French government and the decision of the Commission was of direct concern to the applicants.

In Case 62/70 *Bock* v *Commission* [1971] ECR 897 the applicant was held to be directly concerned because the German authorities had informed the applicant that they would refuse the application as soon as they received a decision from the Commission permitting them to do.

4.6.5 The Treaty of Lisbon changes and the meaning of regulatory act

In Case T-18/10 *Inuit Tapiriit Kanatami* v *European Parliament* [2011] ECR II-5599, the General Court considered the interpretation of Article 263(4) TFEU and in particular the meaning of 'regulatory act'. In this case the applicants brought an action for annulment of Regulation (EC) No. 1007/2009 on trade in seal products. The Parliament and the Council submitted that the application was inadmissible and the Kingdom of the Netherlands and the Commission supported this view. As the Treaty did not provide a definition of what a regulatory act meant, the General Court observed in para.40 that, 'in order to be able to rule on the admissibility of the present action, the Court must carry out a literal, historical and teleological interpretation of that provision'. The General Court determined that its scope is not limited to delegated acts as regulatory acts constitute a more general application. Thus:

> the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.

Rather than defining exactly what a 'regulatory act' is, the General Court does add some clarity on its meaning in asking how it was made – and from this case, that appears to be the deciding factor. In this case, the contested Regulation was adopted in accordance with the co-decision procedure (now the ordinary legislative procedure). As stated under Article 289(1) and (3) TFEU legal acts adopted according to the ordinary legislative procedure (Article 294 TFEU) constitute legislative acts. Therefore, the contested Regulation is categorised as a legislative act and accordingly, the only way for the applicants to assert their admissibility in this claim was to comply with the criteria for a legislative act; they had to prove that the contested Regulation was of direct and individual concern. The General Court held that some of the applicants satisfied the condition of direct concern, but of those, it was held that they were not individually concerned by the contested Regulation. Therefore, the General Court dismissed the action as being inadmissible.

Upon appeal against the decision of the General Court (Case C-583/11 *Inuit* ECLI:EU:C:2013:625), the ECJ confirmed the order of the General Court on the inadmissibility of the action for annulment, and therefore confirmed the restrictive reading of Article 263 TFEU: the regulation on trade seal products are considered a legislative act, not a regulatory act. It is therefore subject to more stringent rules.

4.6.6 Other elements of an Article 263 TFEU action

Within what time limit?

The action must be brought within two months (Article 263(5) TFEU).

On what grounds?

For **grounds of review** see Article 263(2) TFEU.

Two grounds which are commonly used are an 'infringement of an essential procedural requirement' and 'infringement of the Treaties or of any rule of law relating to their application'.

'Infringement of an essential procedural requirement' includes failure to comply with the duty to give reasons, used in, for example, Case T-105/95 *WWF* v *Commission* [1997] ECR II-313 concerning the failure to give reasons for a refusal of access to Commission documents. Also, recall Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333 where the failure to await the response of the Parliament when it had been consulted, as required under the Consultation procedure, resulted in the annulment of a Council Regulation.

'Infringement of the Treaties or of any rule of law relating to their application' includes actions for judicial review on the grounds of breach of the general principles; see, for example: Case 4/73 *Nold* v *Commission* [1974] ECR 491, discussed in Chapter 12.

What is the effect of annulment?

If an action is well founded, the ECJ will declare the act concerned to be void. Such a declaration of annulment will have *erga omnes* (general) and *ex tunc* (retroactive) effects.

4.6.7 Article 267 TFEU as an alternative means of challenging the validity of legislation

It is possible for an individual to wait until the legislation that is considered to be invalid is implemented at a national level by national rules. The validity of the national rules may be challenged in the national court and, where the basis of that claim is the invalidity of the parent Union legislation, an Article 267 TFEU reference may be made to the Court of Justice seeking a ruling on the validity of the act. This circumvents the requirement for *locus standi* and the time limit under Article 263 TFEU.

Note that where an applicant would have had standing to seek judicial review in order to challenge the validity of a Union measure under Article 263 TFEU but failed to do so within the time limit, they will not be allowed to use the Article 267 TFEU procedure to seek a ruling on its validity. See Case C-188/92 *TWD Textilwerke Deggendorf GmbH* v *Bundesrepublik Deutschland* [1994] ECR I-833.

Activity 4.1

a. How does the Article 267 TFEU preliminary reference procedure ensure the uniformity of EU law?

b. It has been suggested that, to cut the overload on the Court of Justice, only courts of final appeal should have the power to make references. Why do you think this suggestion has been rejected?

c. Another suggestion was to increase the number of judges in the Court of Justice. Why do you think the Court rejected this?

d. Why did the Court of Justice decide that the question of what is a court or tribunal for the purposes of Article 267 TFEU was to be determined by Union law not national law?

e. How difficult is it for an individual to challenge the validity of an EU Act? Can it be said that the ECJ has a narrow view of what is meant by 'individual concern'?

Activity 4.2

Applied comprehension – legal uncertainty and the role of the court

Using the VLE, research the following journal article:

- **Syrpis, P. 'The relationship between primary and secondary law in the EU' (2015) 52 *Common Market Law Review* 461–88 (available on the VLE).**

You can complete this learning activity by reading pp.482–87 in the section entitled: 'Towards a critical analysis of the "proper" relationship between primary and secondary law'.

a. On which basis is the assertion made that the EU possesses a legal rather than a political constitution?

b. Give two examples of approaches by the Court which have been characterised as 'unpredictable'?

c. Outline the framework of the most hierarchical account of the 'proper role' of the Court.

d. How does this hierarchy impact on the interpretation of EU legislation?

e. How do political institutions contribute to a less hierarchical account of the 'proper role' of the Court?

f. Give examples of areas of 'unresolved tensions' within the EU constitutional text which arguably are best addressed through the less hierarchical account.

g. According to the less hierarchical account how should the Court approach its task? Give three examples.

h. Characterise the main features of the EU legislature which render its intentions unclear and its operation capable of creating a 'murky legal picture'. Paraphrase the content in your own words and in less than 60 words.

i. How does ambiguous drafting of legislation add to the lack of clarity of the proper role of the Court?

j. Which two other elements contribute to the ambiguity of the Court's decision-making?

k. Identify other key factors which affect the uncertainty of the case law of the Court?

Quick quiz

Question 1

In which of the following does the General Court not have jurisdiction?

a. **All actions under Article 263 TFEU.**

b. **All actions under Article 265 TFEU.**

c. **All actions under Article 270 TFEU.**

d. **All actions under Article 272 TFEU.**

Question 2

What is the role of the Court of Auditors?

a. **It has judicial authority over budgetary disputes with the EU institutions.**

b. **It has oversight authority to ensure that EU spending is not prone to mismanagement.**

c. **It has investigatory power to ensure that Member States are spending EU investment wisely.**

d. **It has judicial power to ensure that corruption on a European scale is kept in check.**

Question 3

What is the doctrine of *acte clair*?

a. **The Court of Justice has already given a clear ruling on the same point in a previous case, therefore no doubt exists as to how to resolve the issue.**

b. **The issue is to be resolved according to Member State legislation, if allowed by EU regulations.**

c. **The correct application of Union law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.**

d. **The decision has to be taken in accordance with human rights.**

Question 4

Which of the following fictitious scenarios is valid *locus standi* to apply for Judicial Review to the court?

a. **A victim of discriminate treatment who has exhausted national remedies ten years ago and decides to apply in light of recent developments.**

b. **A public spirited Italian citizen wants to bring action against his government for having refused to increase their humanitarian budget.**

c. **A company CEO wants to bring action for alleged discrimination by the UK fiscal authority against his company.**

d. **A Portuguese fisherman wants to appeal to the ECJ because he believes his application to the ECHR was stifled by his government.**

Question 5

What is the *Codorníu* exception?

a. **A rule by which a true regulation could be challenged, as long as sufficient direct interest could be found within the regulation.**

b. **If the challenge purports to a regulation, then it must be shown that locus standi could be awarded if the authority applying the regulation was mistaken as to its powers.**

c. **On true construction of the regulation, locus standi will be given if there is a suspected breach of the principles of the EU within said regulation.**

d. **None of the above.**

Answers to these questions can be found on the VLE.

NOTES

5 The foundational principles of EU law

Contents

Introduction

Some of the most difficult and controversial questions in EU law concern the relationship between Union law and the law of the Member States. This chapter deals with the ways in which Union law is applied and enforced within the national courts, and the ways in which individual EU citizens can enforce their Union law rights. The ECJ has played a very important role in the development of the Community and the Union. In its judgments it often takes a 'teleological' or purposive approach.

Using the teleological approach, the ECJ looks at the preamble of the Treaty and to its aims and objectives as set out in Article 3 TEU and draws on these principles to determine the outcome of its cases. Two other principles underlie its case law: the requirement of effectiveness, and the requirement for the uniform application of Union law in all the Member States.

The Court may refer to the spirit of the Treaty or to principles inherent in the system of the Treaties to develop new doctrines. In this chapter we will be discussing how the Court has used the approach described above in its case law concerning the rights of individuals, giving the maximum possible effect to Union law. The most important cases in this respect will be discussed.

CORE TEXT

- **Steiner & Woods, Chapter 4 'Principle of supremacy of EU law', Chapter 5 'Principles of direct applicability and direct effects', Chapter 6 'General principles of law', Chapter 8 'Remedies in national courts' and Chapter 9 'State liability'.**

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **explain the impact of Union law on the national legal systems of Member States**
- **explain how the basic principles governing the relationship between Union and national law (direct effect, indirect effect, supremacy and state liability for breach of Union law) have developed and critically evaluate the legal basis of those principles**
- **evaluate the role of the Court of Justice in developing those principles through the concepts of effectiveness, integration and uniformity**
- **compare the requirements for the enforcement of individual Union law rights under the doctrines of direct effect, indirect effect and state liability**
- **apply these doctrines to problems, advising on the remedies available, and the limitations on those remedies**
- **explain the obligations of the Member States' authorities (especially national courts) in enforcing Union law.**

5.1 The doctrine of direct effect

CORE TEXT

- **Steiner & Woods, Chapter 5 'Principles of direct applicability and direct effects'.**

5.1.1 Direct effect

The principle of direct effect has been developed by the ECJ in a series of judgments. It has greatly increased the impact of European Union law within the Member States. Direct effect means that, subject to certain conditions, Union law creates rights and obligations which **individuals** may rely on and enforce in their **national courts**.

Arguably, the most important case in Union law is Case 26/62 *van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1. In this case the Court decided that an individual could rely directly on a Treaty Article and enforce it in their own national court. This is called the principle of 'direct effect'. Normally the question of

the operation of an international treaty in the domestic legal system is determined by the constitutional law of the individual country concerned. It looked as if the only way that individuals could use EU law to enforce their rights was by leaving it to the Commission and the Member States to do so. However, in *van Gend en Loos* the Court addressed this problem and at one stroke transformed the legal status of the Treaty from a conventional, if far-reaching, Treaty governed apparently by the normal rules of international law, into the foundation of a *sui generis* 'new legal order' that would operate directly for the benefit of the citizens of the signatory states.

The facts of the case took place in the first stage of the establishment of the EEC. There was a clear prohibition in Article 12 of the EEC Treaty (now Article 30 TFEU) of any increase in customs duties.

Van Gend en Loos was a company importing urea formaldehyde (a kind of glue) from Germany into the Netherlands, where a customs duty was imposed. The company, van Gend en Loos, forced to pay this duty, brought an action challenging its legality under Community law in the Netherlands Customs Court, the Tariefcommissie. The Dutch court made a preliminary reference to the Court of Justice.

The first question asked by the Tariefcommissie was whether Article 12 EEC had an effect within the territory of a Member State. On the basis of this Article, could citizens of the Member States enforce individual rights which courts of the Member States must protect? In other words: what was the effect of the EEC Treaty on national law and could an individual enforce the provisions of the Treaty directly in their national court? It was argued forcefully that this was a matter of national constitutional law.

The Court, however, in a ground-breaking judgment stated:

> The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

5.1.2 The need for direct effect

Direct effect, whereby an individual can enforce provisions of Union law, initially Treaty Articles, directly in their own national courts, was essential if the Union legal order was to be effective. In *van Gend en Loos* the Court held that an Article of the EEC Treaty could have direct effect if:

- it was clear
- it was unconditional
- its operation did not require a legislative implementing measure on the part of the state.

If those conditions were fulfilled, individuals could enforce the Article directly in their national court. This was a right conferred on individuals 'in addition to the supervision entrusted by Articles 169 and 170 (now Articles 258 and 259 TFEU) to the diligence of the Commission and of the Member States'.

In *van Gend en Loos*, the Court also imposed a fourth condition – that the Article must lay down a negative prohibition rather than a positive obligation – but this condition was dropped in later cases: see Case 57/65 *Alfons Lütticke GmbH* [1966] ECR 205.

Even the remaining three conditions, which suggest that provisions with direct effect will be the exception rather than the rule, have been whittled away. Generally, only provisions which are conditional in the sense that they confer a discretionary power on a third party (e.g. on the Member States or the Commission) would be excluded from having direct effect – because the national court cannot usurp that discretion.

Similarly, the requirement that a measure must not be dependent on further action is not the obstacle that it, at first, appears. This is because, generally, whenever the Treaty (or other measure) includes a time limit within which such further action should take place, the Court has held that, once that time limit has expired, the measure has direct effect: see Case 43/75 *Defrenne* v *SABENA* [1976] ECR 455.

The central idea, then, is whether a provision is capable of being applied by a national court (whether it is 'justiciable'). As a result, direct effect of Treaty provisions has become the norm, rather than the exception. Below, we look at how the doctrine operates in relation to the various kinds of Union measures.

ACTIVITY 5.1

Read the judgment in *van Gend en Loos* and examine the Court's reasoning.

- **List the reasons why the Court decided that Treaty Articles could have direct effect.**

5.1.3 Direct effect of Treaty Articles

In *van Gend en Loos*, the parties were in a 'vertical' relationship: that is, the case was between an individual and a Member State. The question of whether an individual could rely on an Article of the EEC Treaty in an action against another individual (horizontal relationship between the parties) was dealt with in Case 43/75 *Defrenne* v *SABENA* [1976] ECR 445. It was held that Ms Defrenne could bring an action against her employer for breach of a Treaty Article requiring equal pay for men and women.

5.1.4 Direct effect of Regulations

Article 288 TFEU (ex Article 249 EC) defines the relationship between the various types of Union secondary legislation and national law. Article 288 TFEU states that a Regulation is 'directly applicable' in all the Member States. Regulations, therefore, become automatically part of national law and this will normally mean that they can be relied on by individuals in their national courts and thus also have direct effect. The European Court has nonetheless recognised that in order to have direct effect, Regulations must satisfy the standard conditions to be enforced by a court: see Case 403/98 *Azienda Agricola Monte Arcosu* v *Regione Autonoma della Sardegna* [2001] ECR I-103. Sometimes Regulations need further legislation. See Case 39/72 *Commission* v *Italy (Slaughtered Cows)* [1973] ECR I-01 and Case 128/78 *Commission* v *UK (Tachographs)* [1979] ECR 419.

5.1.5 Direct effect of international agreements

The position with regard to international agreements is more complex and controversial. In Cases 21–24/72 *International Fruit Company* v *Produktschap voor Groenten en Fruit (No.3)* [1972] ECR I-219 the question was posed whether the GATT (General Agreement on Tariffs and Trade) provisions could have direct effect. The Court concluded that 'the spirit, the general scheme and the terms' of the provisions were different from those in the EEC Treaty and that its provisions were not sufficiently precise and unconditional for direct effect to apply. Free trade agreements were also held not to be capable of creating direct effect as their aim was not to create a single market. See Case 270/80 *Polydor Ltd* v *Harlequin Record Shops Ltd* [1982] ECR 329. However, in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641 another provision of the same agreement was found to have direct effect, as it did fulfil the conditions and fell within the purpose of the agreement. This concerned Portugal, which, although not a Member State at the time, did become one soon after. More recently, the Court ruled in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973 that under very limited circumstances a GATT provision could prevail over an EC provision, but only if the relevant EC provision expressly referred to the GATT provision.

5.1.6 Direct effect of Decisions

Although Article 288 TFEU does not state that Decisions are directly applicable, they are 'binding in [their] entirety'. The Court of Justice has held that they can have direct effect. A national of a Member State to which a Decision had been addressed could invoke that Decision in the national court: see Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825. In reaching this conclusion, the Court emphasised that this would increase the effectiveness ('*effet utile*') of the Community measure.

5.1.7 Direct effect of Directives

More controversial was whether a Directive could have direct effect. Directives are meant to be implemented, that is brought into effect by national legislation within a certain time period. Article 288 TFEU provides:

> A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed…

The plain interpretation of these words is that a Directive is addressed to the Member States. To say that it confers rights on individuals would be to blur the distinction between Directives, which require national implementing measures, and Regulations, which do not.

It was thought that Directives could never fulfil the *van Gend en Loos* conditions for direct effect because, by their nature, they require 'further implementing measures'.

However, in Case 41/74 *van Duyn* v *Home Office* [1974] ECR I-337, the Court held that an individual could rely on a clause in a Directive.

Activity 5.2

Read the judgment in *van Duyn* in relation to the issue of direct effect of Directives.

a. **Identify three reasons which the Court gave for its landmark decision that Directives could have direct effect.**

b. **Are the reasons convincing?**

5.1.8 Vertical but not horizontal direct effect

The Court later added to the reasoning used in *van Duyn*, basing the direct effect of Directives on the doctrine of estoppel. This principle, for our purposes, means that the state cannot rely on its own wrongdoing to frustrate the rights of individuals under Directives. Where the Member State is at fault (either because it has not transposed the Directive into national law at all, or because it has done so inaccurately) an individual can claim against that state the rights he or she should have had if the Directive had been correctly implemented. See: Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR I-629.

The logic of this reasoning is that a Directive can only be invoked vertically, by an individual against the state, and not horizontally, by one individual against another, because individuals are not to blame for the non-implementation of the Directive. This view was confirmed in Case 152/84 *Marshall* v *Southampton and South West Hampshire AHA* [1986] ECR 723.

This rule has been criticised because it can lead to inequality: an individual's ability to bring an action based on a Directive will depend on whether they are suing the state or a private person or company. See the Advocate General's Opinion in Case C-91/92 *Faccini Dori* v *Recreb srl* [1994] ECR I-3325 where he proposed that Directives should be given horizontal direct effect. The Court, however, did not follow the Advocate General but confirmed the original rule that Directives can only have vertical direct effect. However, in recent years the Court has increasingly resorted to other measures to give effect to Union law in what would, at first sight, be purely horizontal cases. For example, in Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I-7181 the Court in a judgment in a case between two individuals confined itself to dealing with the incompatibility of the national legislation with Community law where a general principle of Community law (non-discrimination) was concerned. It asserted that it was the responsibility of the national court to guarantee the full effectiveness of the general principle by setting aside the national legislation, even before the date of expiry of the implementation period. On the other hand, the Court has given a wide definition to 'the state' and thereby has extended the reach of the vertical direct effect of Directives. In Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, the Court laid down several criteria for national courts to use to decide whether a body was an 'emanation of the state':

- Does it perform a public service?
- Pursuant to a measure adopted by the state?
- Under the control of the state?
- Does it have special powers going beyond those of normal commercial undertakings?

The Court has recently clarified that, in *Foster*:

> the Court was not attempting to formulate a general test designed to cover all situations in which a body might be one against which the provisions of a directive capable of having direct effect might be relied upon (at [26])

and, consequently that

> the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State, and must possess special powers beyond those which result from the normal rules applicable to relations between individuals cannot be conjunctive (C-413/15 *Farrell* – ECLI:EU:C:2017:745).

5.1.9 Expiry of time limit

It also follows from the reasoning that direct effect is based on the Member State's fault, that a Directive can generally only be directly effective after the expiry of the time limit given for its implementation. This was confirmed in the Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR I-629.

However, the Court has held that, during the period prescribed for transposition of a directive, Member States must refrain from taking any measures liable to seriously compromise the attainment of the result prescribed by the directive (see Case C-129/96 *Inter Environnement Wallonie* [1997] ECR I-7411).

5.1.10 Summary

The doctrine of direct effect is an example of the ECJ developing principles which strengthen the impact of Union law within national legal systems. It enables Union law to be enforced, not just by the Commission under the Treaty rules for enforcement, but by individuals in their national courts – creating a system of 'dual vigilance'. Perhaps most important in increasing the effectiveness of Union law within Member States was the ruling that a Directive can have direct effect provided the following conditions are fulfilled.

- The Directive must be clear and precise.
- The Directive must be unconditional.
- The time limit for implementation of the Directive must have expired.
- The action based on direct effect of the Directive can only be vertical – against an 'emanation of the state'.

The Court has been willing to give 'incidental' horizontal direct effect of Directives in triangular situations: see Case 194/94 CIA *Security International* v *Signalson* [1996] ECR I-2201. Other cases on the 'incidental' horizontal direct effect of Directives are: Case 441/93 *Panagis Pafitis* [1996] ECR I-1829; Case 443/98 *Unilever Italia* v *Central Food SpA* [2000] ECR I-7535. This only applies in a very few situations, and these seem mostly to be a 'one-off', where private parties were concerned on both sides, but where no particular obligation was put on the defendant.

SELF-ASSESSMENT QUESTIONS

1. **Define what is meant by 'direct effect'.**
2. **Which Treaty Article defines the different forms of Union secondary legislation?**
3. **What is the main difference between a Regulation and a Directive?**

4. **What is the difference between vertical and horizontal direct effect?**
5. **What is the test for an 'emanation of the state'?**
6. **What are the conditions for direct effect of Directives?**

5.2 Indirect effect of Directives

Core text

- **Steiner & Woods, Chapter 5 'Principles of direct applicability and direct effects'.**

5.2.1 The duty of harmonious interpretation

Partly to deal with the problem for individuals who could not rely on Directives because the conditions for direct effect were not fulfilled, the Court developed the concept of indirect effect. The starting point for this doctrine is Case 14/83 *von Colson* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

Although this case concerned a vertical claim against the German prison service, the Directive in question did not have direct effect because the provision (concerning remedies for sex discrimination) was insufficiently precise to be enforced by a court. However, the ECJ held that the national court is under a duty to interpret existing national law, so far as possible, to achieve the result laid down by the Directive. The doctrine is based on the idea that national courts are part of the state and, consequently, are bound by what is now Article 4(3) TEU (formerly Article 10 EC). That Article requires Member States 'pursuant to the principle of sincere cooperation' to 'take any appropriate measure … to ensure fulfilment of the obligations' under the Treaties. The effect of the ruling is to shift the responsibility for giving effect to Directives on to national courts in situations where their governments have failed to introduce adequate national implementing measures.

The principle means that national courts are under a duty to interpret national legislation 'in the light of the wording and the purpose' of Union law. In *von Colson*, there was some national legislation, which purported to implement the Community Directive but that appeared to do so inadequately (the amount of compensation available was very small). As a result, it was initially thought that the duty of harmonious interpretation (giving indirect effect to the Directive) only applied to national legislation which had been intended to implement the Directive in question. Whether the rule applied to the interpretation of national law more generally was unclear. The ECJ has since made clear that the duty applies in relation to all national legislation, whether passed before or after the relevant Union legislation, and whether intended to implement it or not; see Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. Because it is a rule applicable to the court, rather than the parties, it applies irrespective of whether the action is 'vertical' or 'horizontal'.

5.2.2 Limits to the doctrine of indirect effect

There are limits to the usefulness of this doctrine from the point of view of the individual, however, since it presupposes the existence of some relevant national legislation that is capable of being interpreted to mean what the Directive requires. National courts are only required to carry out this duty 'so far as possible' – so if there is no relevant national law, or if the relevant national law is only capable of one interpretation, it may not be possible to use the doctrine.

The Court has also made clear that the application of the doctrine is subject to the general principles of law, such as legal certainty and non-retroactivity: see Case 80/86 *Kolpinghuis* [1987] ECR 3969.

The Court has held that the doctrine cannot be applied where it would give rise to, or aggravate, criminal liability: see Case 168/95 *Criminal Proceedings against Luciano Arcaro* [1996] ECR I-4705; Case C-387/02 *Criminal Proceedings against Berlusconi* [2005] ECR I-3565.

Yet such a limitation does not appear to exist in relation to the imposition of civil liabilities on individuals. In Case 456/98 *Centrosteel* v *Adipol* [2000] ECR I-6007, the ECJ said that the duty to interpret national law in the light of the wording and purpose of Community law applied even when this would impose a civil liability on private parties. On this point see also Case C-185/97 *Coote* v *Granada Hospitality* [1998] ECR I-5199, and Cases C-240–244/98 *Oceano Grupo Editorial* v *Rocio Murciano Quintero* [2000] ECR I-4491.

SELF-ASSESSMENT QUESTIONS

1. **What is the legal basis for the duty of harmonious interpretation imposed on national courts in the *von Colson* case?**
2. **For the doctrine of indirect effect to apply, is it relevant whether the action is horizontal or vertical?**
3. **To which kinds of national measure does the duty of harmonious interpretation apply?**
4. **Can the doctrine be used in circumstances where it would give rise to individual criminal liability – or to civil liability?**

The application of this rule of construction initially gave rise to difficulties in national courts as it appeared to require them to give effect to Union law that was not directly effective. The evolution of the UK courts' approach, and their eventual acceptance of the doctrine, can be traced in the following cases. These illustrate the tensions between the UK doctrines of Parliamentary sovereignty and the separation of powers on the one hand, and the Union doctrine of supremacy on the other (see Section 5.6 and the discussion in Chapter 2 on the withdrawal of the UK from the EU).

- *Pickstone* v *Freemans plc* [1987] 3 WLR 811 (CA).
- *Duke* v *GEC Reliance Ltd* [1988] AC 618 (HL).
- *Foster* v *British Gas* [1988] ICR 584.
- *Litster* v *Forth Dry Dock & Engineering Co Ltd* [1989] IRLR 161.
- *Webb* v *EMO Air Cargo (UK) Ltd* [1992] 2 All ER 43.
- C-32/93 *Webb* v *EMO Air Cargo (UK) Ltd* [1994] ECR I-3567.

5.3 Remedies for Union law rights

CORE TEXT

- **Steiner & Woods, Chapter 8 'Remedies in national courts' and Chapter 9 'State liability'.**

5.3.1 Basic principles

Individuals do not have extensive rights to enforce Union law directly in the Court of Justice of the European Union (see Chapter 4). Enforcement of Union law rights by individuals or legal persons (companies) therefore mainly takes place at the national level in the domestic court. The remedies obtainable in respect of Union law are those available under national law; generally there is no uniform set of Union law remedies. An exception to this is the remedy of state liability (see below).

In Case C158/80 *Rewe-Handelsgesellschaft Nord mbH* v *Hauptzollamt Kiel* [1981] ECR 1805 the Court reiterated:

> Community law… was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law.

However, the Court has, from the beginning, stipulated that the remedy obtained must comply with two principles (see Case 33/76 *Rewe Zentralfinanz* [1976] ECR 1989 and Case 45/76 *Comet BV* v *Produktschap* [1976] ECR 2043).

The two principles are:

- the principle of equivalence: the remedy for the Union law right should be no less favourable than those relating to similar domestic claims (non-discrimination)
- the requirement of practical possibility: that the remedy should not be such as in practice to make it virtually impossible or excessively difficult (added in later case law) to obtain reparation.

5.3.2 Real effectiveness and deterrence

Subsequently the Court has also insisted that the remedies provided by national law must be effective, adequate, should act as a deterrent and guarantee real and effective protection.

You will recall Case C-14/83 *von Colson* v *Land Nordrhein-Westfalen* [1984] ECR 1891, as the case which established the principle of indirect effect (see Section 5.2.1). It had been decided by the national court that the reason that the applicant was not appointed as a prison officer was unlawful sex discrimination, prohibited under the Equal Treatment Directive (Directive 76/207, later incorporated in 'recast' Directive 2006/54/EC). The Article 234 EC (now 267 TFEU) reference to the Court was in regard to the remedy available for this Community law right. The Directive had been transposed into German law but the implementing of national law appeared merely to give her the right to recover her travel expenses incurred in applying for the job.

The Court stated that the national court must interpret the national law 'in the light of the wording and the purpose' of the relevant Community law in order to ensure an adequate and effective remedy, as required by Article 6 of the Directive, which said the remedy must also have a 'deterrent effect'. The compensation must, therefore, 'be adequate in relation to the damage sustained'.

In the subsequent *Factortame* case it became clear that the requirement that national remedies for breach of Community law rights should be adequate and effective was a universal requirement to be applied to such remedies.

In Case C-213/89 *R* v *Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433 the Court stated that interim relief must be granted to the fishing companies challenging the validity of the Merchant Shipping Act 1988, pending a judgment as to the compatibility of that Act with European Community law.

The House of Lords had held that it had no jurisdiction to suspend an Act of Parliament (which is what interim relief in this case required) and under the fundamental doctrine of English law, the sovereignty of Parliament, that was correct. But the Court stated that in order to ensure the full effectiveness of Community law:

> a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must set aside that rule.

The principle of the requirement of effectiveness of even 'putative' Union law rights (the fishing companies' rights in the *Factortame* case had yet to be established) was now firmly entrenched.

Two examples of the application of the requirement for adequate and effective remedies are: Case 271/91 *Marshall (No.2)* [1993] 3 CMLR 293 and Case 222/84 *Johnston* v *Royal Ulster Constabulary* [1986] 3 WLR 1038. The *Marshall (No.2)* case was a claim for damages arising from Case 152/84 *Marshall* v *Southampton and South West Hampshire AHA* [1986] ECR 723. The applicant's early retirement had been held to be unfair dismissal. Her compensation was subject to an upper limit which prevented her from receiving full compensation. The Court said the application of the upper limit would therefore not provide for an adequate remedy. The Directive required that the remedy chosen by the state must be adequate and effective (Article 6) and since the remedy chosen here was compensation it must have no ceiling and include interest.

In Case 222/84 *Johnston* v *Royal Ulster Constabulary (RUC)* [1986] ECR 1651 the Chief Constable for the Royal Ulster Constabulary (RUC) in Northern Ireland decided that men in the RUC would carry firearms on a daily basis. Women would not be equipped with or trained to bear firearms and would not be asked to perform general duties which might include the use of firearms. The applicant had been an unarmed member of the RUC and when her contract came up for renewal it was not renewed. She sought to challenge this on the grounds of sex discrimination under the Equal Treatment Directive (ETD) Directive 76/207 (later Directive 2006/54) (see Chapter 12 for further discussion of this case). It was argued that a certificate relating to national security and public safety signed by the Secretary of State for Northern Ireland prevented the national court from hearing her case; the certificate was said to be 'conclusive evidence' that the refusal to employ her 'was for the purpose of safeguarding national security or of protecting public safety or public order', and was not subject to review by a court. The ECJ, in its ruling, referred to the requirement for 'effective judicial control' under Article 6 of the ETD and stated that this was also a general principle common to the Member States and required by Articles 6 and 13 of the ECHR. All persons had the right to obtain an effective remedy in a court against measures which they considered to be contrary to the principle of equal treatment as laid down in the Directive, and the certificate, therefore, could not be held to be 'conclusive'.

Note also the requirement placed on national authorities to give reasons for their decisions in regard to Community law rights, Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097.

5.3.3 The application of national procedural rules

The European Court has also considered the legality of the application of national procedural rules which affect the exercise of Union law rights.

Case 208/90 *Emmott* v *Minister of Social Welfare* [1991] ECR I-4269 is considered to be the high water mark of the Court's willingness to intervene and later cases have generally manifested a retreat from this position.

The case concerned Directive 79/7 prohibiting discrimination on the grounds of sex in regard to social security measures. When the applicant sought to bring an action relying on the Directive, she was told her action was time barred. On a reference as to whether it was contrary to Community law to rely on the time limits, the Court held that time limits do not start to run until after the proper transposition of the Directive. Although time limits are reasonable in principle, a national government cannot rely on its own default in implementing the Directive.

However, in Case 338/91 *Steenhorst-Neerings* [1993] ECR I-5475 the Court held that a national rule restricting the retroactive effect of a claim for benefits for incapacity for work was in accordance with Community law. The Court considered this with reference to the two principles (equivalence and practical possibility) and held that the national rule in question satisfied those conditions.

5.3.4 Procedural protection after the Lisbon Treaty

The Court of Justice's ability to contest the legality of national procedural rules affecting the exercise of Union law rights has been considerably strengthened by legislative change as a result of the Treaty of Lisbon. Under Article 19(1) TEU, the Court is obliged to 'ensure that in the interpretation and application of the Treaties the law is observed', whilst at the same time Member States (also under Article 19(1)) are obliged to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. In addition, under Article 51 of the Charter of Fundamental Rights, the Court, as an EU institution, is obliged to 'respect the rights, observe the principles and promote the application' of the Charter as part of its interpretive obligation. This includes Article 47, entitled a 'Right to an effective remedy and to a fair trial' which contains an entitlement to 'an effective remedy before a tribunal' if a Union law right is infringed, and a right to legal assistance for 'those who lack sufficient resources' (see Chapter 12 for a detailed analysis of the application of the Charter).

Case C-279/09 *DEB* v *Germany* [2010] ECR I-13849

In *DEB* v *Germany* Article 47 was applied by the Court in circumstances where the applicant was denied legal aid. A commercial company applied for legal aid in order to bring an action to establish whether the German state had incurred state liability under Union law. The company wished to bring an action for damages against the German state in order to obtain compensation for the damage allegedly caused to it by Germany's delay in transposing Directive 98/30/EC concerning common rules for the internal market in natural gas. The company was refused legal aid on the ground that the conditions laid down under the German law for granting such aid to legal persons were not satisfied.

Applying the Charter, in the light of Article 6 ECHR, the Court held that it is not impossible for legal persons to rely on the provisions of Article 47 of the Charter and that it was for the national court to ascertain whether the relevant provision in relation to legal aid constituted a denial of effective access to justice.

5.4 Action for damages against a Member State for breach of Union law

Core text

- **Steiner & Woods, Chapter 9 'State liability'.**

5.4.1 Legal basis for state liability in damages

Member States' liability to pay damages to individuals in respect of their breaches of Union law is not laid down in the Treaty and is yet another example of the Court promoting the rights of individuals and the effective enforcement of Union law. We have seen above what the problems were concerning the application of the principle of direct effect of Union law. The Court considered a different way of giving maximum possible effect to Community law by introducing a uniform remedy for breach of Community law, irrespective of whether legislation had direct effect or not.

The existence of this liability was first established in Joined Cases C-6/90 and C-9/90 *Francovich, Bonifaci* v *Italy* [1991] ECR I-5357.

The case concerned the failure of the Italian authorities to transpose a Directive into Italian law. The Court declared that the principle of state liability was 'inherent in the system of the Treaty', basing these observations on Article 5 of the Treaty (now Article 4(3) TEU) and the principle of effectiveness of Union law.

5.4.2 Conditions for liability for non-implementation of a Directive

The Court laid down three conditions for state liability where there has been a failure to transpose a Directive.

- The Directive must be intended to confer rights on individuals.
- The content of those rights must be ascertainable from the terms of the Directive.
- There must be a causal link between the loss suffered and the Member State's breach. In other words, there must be a link between the **cause** of the loss suffered and the breach of EU law by the Member State.

5.4.3 Liability for other breaches of Union law

In *Francovich*, the judgment was limited to Member States' failure to implement Directives. Whether a Member State could be liable in damages for breaches of other Community law obligations, such as under Treaty Articles, was the issue in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* v *Germany* and *R* v *Secretary of Transport ex parte Factortame* [1996] ECR I-1029.

The Court affirmed that the principle of Member State liability was available for all Community law provisions, whether or not they had direct effect. It also stated that 'in the absence of particular justification', the conditions for the liability of the state would be the same as for the Community institutions under Article 215 of the Treaty (now Article 340 TFEU).

A Member State will be liable to an individual for breach of its Union law obligations where:

- the rule of law breached is intended to confer rights on individuals
- the breach is sufficiently serious
- there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the parties.

As to whether the breach of Union law is sufficiently serious, the decisive point is whether the Member State has 'manifestly and gravely disregarded the limits on its discretion'.

It is for the national courts to decide whether this is the case, but the Court listed a number of factors to be taken into account by the national court. These included:

- the clarity and precision of the rule breached
- the measure of discretion left by that rule to the national or Union authorities
- whether the infringement and the damage caused was intentional or involuntary
- whether any error of law was excusable or inexcusable
- the fact that the position adopted by a Union institution may have contributed towards the omission
- the adoption or retention of national measures or practices contrary to Union law.

Furthermore, the Court held:

> on any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter, from which it is clear that the conduct in question constituted an infringement.
> (para.57)

ACTIVITY 5.3

Read the ECJ's judgment in *Brasserie du Pecheur/Factortame*. Summarise the reasons the Court gave for finding that liability in damages existed for Member States' breaches of Union law.

No feedback provided: the answer can be found in reading the judgment.

5.4.4 Application of state liability

In Cases 178–190/94 *Dillenkofer* v *Germany* [1996] ECR I-4845, the Court held that the non-implementation of a Directive is always a sufficiently serious breach, so only the *Francovich* conditions need to be fulfilled.

The procedure for bringing an action for damages against the state will be governed by national rules. Case 392/93 *R* v *HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631 is an interesting case concerning the incorrect transposition of a Directive. The breach was held not to be sufficiently serious because the wording of the Directive was unclear, and several other Member States had also unintentionally misinterpreted it.

In Case C-424/97 *Haim* v *Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, a public law body separate from the state could be held liable under the principle of state liability.

In Case 224/01 *Köbler* v *Republik Österreich* [2003] ECR I-10239, the ECJ ruled for the first time that it was possible for the principle of state liability to apply where the

alleged infringement stemmed from a decision of a national court of last instance. The question of liability would depend on the established criteria for state liability.

Whether the infringement of Community law was sufficiently serious depended on consideration of the same factors cited in the *Factortame* case: whether the national court had manifestly infringed the applicable law, that is, whether the 'infringement was manifest'. In deciding what this meant, regard had to be given to the specific nature of the judicial function and to the legitimate requirements of legal certainty. In order to decide whether the infringement was 'manifest', the national court hearing a claim for damages must take account of 'all the factors which characterise the situation put before it'.

The Court continued that:

> … those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and noncompliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter.

However, on the facts presented in the particular case, there was not a 'manifest infringement' of EC law.

Summary

The doctrine of state liability forms part of the package of doctrines (direct effect, indirect effect and state liability) developed by the European Court with the dual objectives of ensuring that Union law prevails and is enforced within the Member States, and on the other hand that individuals can obtain their rights under Union law. The availability of damages from the state applies to any individual who has suffered loss as a result of a sufficiently serious breach of Union law. Thus it overcomes the problems inherent in the direct effect doctrine where the conditions are not fulfilled and where direct and indirect effect cannot apply.

5.5 The supremacy of EU law

Core text

- **Steiner & Woods, Chapter 4 'Principle of supremacy of EU law'.**

The principle of supremacy or primacy of Union law has been developed by the ECJ. It is implicit in Case 26/62 *van Gend en Loos* [1963] ECR I which founded the doctrine of direct effect. It was stated explicitly in Case 6/64 *Costa* v *ENEL* [1964] ECR 585 where the Court said that, by entering into the Treaty, Member States had limited their sovereign rights and that Community law 'could not… be overridden by domestic legal provisions'.

In a further step, in Case 11/70 *Internationale Handelsgesellschaft GmbH* [1970] ECR I-125, the Court held that Community law took precedence even over a fundamental rule in the German national constitution.

The clearest statement of the implications of the supremacy of Community law came in Case 106/77 *Simmenthal SpA (No.2)* [1978] ECR 629 where the Court held that national courts have a duty to set aside provisions of national law which are incompatible with EC law. There was no need to wait for the national law to be amended in line with national constitutional procedures: the national rule had to be set aside immediately if it conflicted with a Community provision.

Nor does the obligation to set aside conflicting national rules only apply to national courts: even an administrative agency dealing with a national social insurance scheme was held to be required to do so in Case C-118/00 *Larsy* v *INASTI* [2001] ECR I-5063.

Although the national measure is rendered 'inapplicable', this does not absolve the Member State from the need formally to repeal it. In the interests of legal certainty, the Court said that Member States must also repeal the offending national rule: see Case 167/73 *Commission* v *France (French Merchant Seamen)* [1974] ECR 359.

Even if it is not yet clear whether a person actually has a right which they claim under Union law (i.e. it is a 'putative' right, not a definite one), the doctrine of supremacy requires a national court to set aside any national procedural rules which might prevent them from getting the full benefit of the Union right if it is eventually found that they have it!

This was laid down in Case C-213/89 *Factortame* [1990] ECR I-2433. A number of fishing companies claimed that the UK's Merchant Shipping Act breached certain EC Treaty articles and wrongly prevented them from fishing in British waters. They asked for interim relief (an injunction setting aside the offending clauses of the Act pending the full hearing of the case). The problem was that under English law, courts could not grant an injunction 'against the Crown', that is, they could not order the suspension of an Act of Parliament.

On the other hand, if the Act continued to be applied, the fishermen could be driven out of business and any subsequent judgment in their favour in the main proceedings would be undermined – their Community law right would be rendered 'ineffective'. The Court ruled that, in order to ensure the 'full effectiveness' of Community law, the English rule preventing suspension of the Act must be set aside.

The supremacy of Union law over national law is now stated in a Declaration attached to the Treaty of Lisbon. This reiterates the doctrine as stated by the Court as follows:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

There is also attached the Opinion of the Council Legal Service of 22 June 2007 which states:

> It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

5.6 EU law from the Member States' perspective

CORE TEXT

- **Steiner & Woods, Chapter 4 'Principle of supremacy of EU law'.**

5.6.1 Supremacy of Union law in the UK

The concepts of direct effect and supremacy, as developed by the Court of Justice, have sometimes provoked a strong reaction from national courts. The way in which Union law enters into the legal systems of the Member States depends, from a constitutional point of view, on whether the Member State is monist or dualist in its approach to international law. In monist states, the constitution provides for international law to enter into domestic law without the need for further national measures of incorporation or transposition. France is an example of a monist state. In dualist states, such as the UK, international law does not become part of domestic law until it is incorporated by a domestic statute. So when the UK joined the EEC, the European Communities Act 1972 had to be adopted to give effect to provisions of Community law within the UK. It has been amended, following the adoption of the SEA and all the subsequent treaties by the relevant European Communities (Union) (Amendment) Acts (but see further the discussion in Chapter 2 on the UK withdrawal from the EU).

The cases on the application of the principle of indirect effect in the UK courts show how the English judiciary has traditionally based its application of Union law on the rules laid down in this English statute, expressing the will of Parliament, rather than on any abstract notion of supremacy stemming from the Union Treaties. For the ways in which English courts have dealt with the interpretation of national law in accordance with Community law, see the following cases.

- *Pickstone* v *Freemans plc* [1989] AC 66 HL.
- *Litster* v *Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 HL.
- *Duke* v *GEC Reliance Ltd* [1988] AC 618 HL.
- Case C-32/93 *Webb* v *EMO Cargo (UK) Ltd* [1994] ECR I-3567.

However, the House of Lords accepted the Court's ruling in the landmark case of *Factortame* (see Section 5.5 above).

This case had far-reaching constitutional implications in the UK. It made it clear that any Act of Parliament had to be read as subject to directly enforceable rights under Union law.

See also Case C-221/89 *Factortame* [1991] ECR I-3905, and *Factortame (No.2)* [1994] 1 AC 603.

The cases in *Thoburn* [2003] QB 151 are also interesting on this issue. They concerned the so-called 'metric martyrs' who refused to use metric weights as well as imperial weights as required under EC law. The case was heard by Sir John Laws. He reiterated the traditional view about the basis of the supremacy of EC law in the UK, basing it on UK constitutional law rather than on principles of EU law. He stated that the European Communities Act 1972 is a constitutional statute which means that it cannot be impliedly repealed by a later inconsistent statute. Hence it would prevail over later statutes which were inconsistent. However, he went on to comment that:

> In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law.

See also Case C-32/93 *Webb* v *EMO Cargo (UK) Ltd* [1994] ECR I-3567.

It is instructive to compare the attitude towards Union law in other Member States.

See further the discussion in Chapter 2 on the UK withdrawal from the EU.

5.6.2 Germany

In Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, the ECJ had stated that the validity of Community measures could only be judged according to Community criteria, not according to principles enshrined in the German constitution. This ruling was not accepted by the German Federal Constitutional Court (FCC), however. It noted that the Community did not have a codified catalogue of human rights, and held that Community measures would, therefore, be subject to the fundamental human rights contained in the German constitution: see *Internationale Handelsgesellschaft* [1974] 2 CMLR 540.

In *Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, however, the Federal Constitutional Court acknowledged that Community law now had its own equivalent standard of human rights protection.

Nonetheless, in *Brunner* v *The European Union Treaty* [1994] 1 CMLR 57, when considering whether the Maastricht Treaty on European Union unduly extended the competences of the European Community and made too many inroads on German sovereignty, the Federal Constitutional Court again re-affirmed German constitutional sovereignty and its right to review the scope of Community competence.

In its judgment after various constitutional complaints had been brought before it by private citizens as well as by a political party in respect of the ratification of the Lisbon

Treaty, the FCC ruled in June 2009 that the Treaty was in accordance with the German Basic Law and simply objected to the domestic law which implemented the Treaty and annulled the law. As regards the Lisbon Treaty itself, it spelt out in a lengthy judgment the limits to which integration could go and emphasised the safeguards under the German Basic law which must be respected. It did not, however, consider that the Treaty as such exceeded the boundaries of what was acceptable under the Basic Law. A new implementing law was then passed in September 2009 and ratification duly followed.

5.6.3 France

France's legal order has two court systems: the judicial and the administrative courts. The Cour de Cassation (highest civil court) accepted the primacy of directly effective EC law, on the basis of Article 55 of the French constitution, see *Vabre and Weigel (Cour de Cassation)* [1975] 2 CMLR 336.

The Conseil d'Etat, the supreme administrative court, has shown reluctance to accept the primacy of Union law, and in particular has refused to accept that Directives can have direct effect (in the French Court's view, only a French implementing measure can give effect to a Directive according to Article 249 EC (now Article 288 TFEU): see *Minister of the Interior* v *Cohn-Bendit* [1980] 1 CMLR 543. However, in *Boisdet* [1991] 1 CMLR 3, it held that an EC Regulation took precedence over subsequent French regulations which conflicted with it, on the basis of the Court's case law. In *Rothmans and Arizona Tobacco* [1993] 1 CMLR 253, it awarded damages under the *Factortame* principle, for loss caused by a Ministerial order which conflicted with an EC Directive.

While, in practice, therefore, the French courts accept the primacy of directly effective Union law, their reasoning is frequently based on the French constitution, rather than on the European Court's doctrine of supremacy. This is a similar view to that expressed in UK and German courts that it is the national constitution which is at the head of the legal order and that Union law supremacy exists only in so far as it is provided for under national law.

5.6.4 Italy

The Italian Constitutional Court has accepted the supremacy of Union law, based on Article 11 of the Italian constitution, see *Frontini* v *Ministero delle Finanze* [1974] 2 CMLR 372. However, it reserved the right to ensure that the fundamental principles of the Italian constitution were not infringed by Union law. It reaffirmed this position in *SpA Fragd*, stating that if it found that a Community measure infringed those fundamental rights, it would declare it inapplicable – thereby giving precedence to the Italian constitution.

5.6.5 Poland

Despite the problems concerning the rule of law arising due to the interference of the political sphere with judicial independence (see the discussion in Chapter 12), the Polish Constitutional Court has, in the past, accepted the supremacy of EU law over national law. This has been justified on the basis of Article 90(1) of the Constitution (see Case K 32/09), which provides that the 'Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters'. However, the Constitutional Court made sure to assert that, by virtue of Article 8(1), the Polish Constitution remains the supreme authority and the courts will not allow EU law to conflict with it (see the decision in Polish Membership of the European Union (Accession Treaty) K 18/04, 11 May 2005). Subsequent cases have affirmed such assertions but also a willingness to alter Polish law to align with EU law nonetheless (see, for example, the Decision of the Polish Constitutional Tribunal (PCT) concerning the European Arrest Warrant (EAW): 27 Apr 2005, No P 1/05).

Contrastingly, in a more recent decision of the PCT, in October 2021, the Polish Constitutional Court held that Articles 1, 2 and 19 of the Treaty on European Union

(TEU) were incompatible with the constitution (see Case K 3/21) even though those provisions had previously been held to be compatible (Case K 18/04). This judgment was not accompanied by the same willingness to alter Polish law seen in earlier cases (EAW, as above) and has thus lead to speculations around 'Polexit', despite there being no indication of an intent on behalf of the Polish government to leave the EU.

The decision has been the subject of much criticism, most strikingly by previous judges of the Constitutional Tribunal, who echo the sentiments of one of the dissenting judges from the 2021 case that the decision of the Tribunal went beyond what was asked of them in the current circumstances, which was simply to interpret the TEU and thus had overstepped their competencies. It is unclear what the impact of this judgment will be on the relationship between Poland and the EU and, indeed, the EU as a whole but suffice it to say that it marks a significant movement in the area of EU law supremacy.

See the criticism by the previous Tribunal judges.

Summary

The supremacy of Union law over national laws of the Member States was not explicitly stated in the Union Treaties but the Court has held that it is implicit in Articles 10 and 249 EC (now Articles 4(3) TEU and 288 TFEU) and, on this basis, has developed the principle through a line of cases. National courts have generally accorded supremacy to directly effective Union law, and have accepted and followed the obligation to interpret national law as far as possible in the light of Union law (even if not directly effective) but frequently basing that supremacy on provisions of national law rather than on the Court's rulings. They have expressed particular reservations in relation to fundamental rights recognised in national constitutions, and pledged to uphold these in the face of conflicting Union provisions. Reservations have also been expressed by national courts that they would not give precedence to a Union measure that went beyond the scope of Union competence.

5.7 General principles of EU law

Core text

- **Stein and Woods, Chapter 5 'Principles of direct applicability and direct effects'.**

General principles such as proportionality, equality, non-discrimination and subsidiarity are derived from principles enshrined in the Treaty itself. Fundamental rights are derived from the constitutional traditions of the Member States and international Treaties on human rights, in particular the ECHR.

The general principles, including fundamental rights, apply within the scope of application of EU law and bind the EU institutions and their acts; acts of the institutions and EU legislation of the European Union which are not in accordance with these principles may be annulled. The Court of Justice has also held that the general principles and fundamental rights of EU law bind the Member States when giving effect to, or derogating from, provisions of EU law. The application of the rights enshrined in these principles has, however, to be balanced against the European Union interest and may be outweighed.

5.8 Proportionality, legal certainty and equality

Case C-36/02 *Omega Spielhallen* v *Bonn* [2004] ECR I-9609 concerned a company which franchised a laserdrome game from a company in the UK. The Bonn authorities (in Germany), issued a prohibition order, on the basis that by simulating murder, the game infringed the right to human dignity, protected by para.1(1) of the German Basic Code (the German constitution).

The Court of Justice held that although this was a restriction of the right to provide services, it could be justified under the public policy exception as 'the Community legal order undeniably strives to ensure respect for human dignity', as long as the measures taken were proportionate. It was not necessary that all the Member States should take the same view as to the precise way that a fundamental right, such as the protection of human dignity, should be protected. As the contested order only prohibited the variant of the laser game in which the object is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

See also Case C-60/00 *Carpenter* [2002] ECR I-9607 (discussed in Chapter 12) and Case C-413/99 *Baumbast* v *Secretary of State for the Home Department* [2002] ECR I-709 on the right to family life; both these cases concern the scrutiny of actions of a Member State (the UK in both cases) within the scope of application of the Treaty.

Proportionality is also addressed in: Case 114/76 *Bela-Mühle* [1977] ECR 1211 and Case 181/84 *R* v I*ntervention Board ex p Man Sugar (Ltd)* [1985] ECR 2889.

Legal certainty is also addressed in: Case 63/83 *R* v *Kirk* [1984] ECR 2689 (non-retroactivity) and Case 112/77 *Topfer* v *Commission* [1978] ECR 1019 (legitimate expectations).

5.8.1 Equality

The principle of equality means, in its broadest sense, that persons in similar situations may not be treated differently, unless the difference in treatment is objectively justified.

There are particular provisions in the Treaty prohibiting discrimination:

- Article 18 TFEU (ex Article 12 EC): on the grounds of nationality
- Article 157 TFEU (ex Article 141 EC): on the grounds of sex with reference to pay
- Article 40(2) TFEU (ex Article 34(2) EC): between producers or consumers within the Union.

A general principle of equality, which is wider in scope than these provisions, has also been developed by the Court. See: Case 103 and 145/77 *Royal Scholten Honig* v *Intervention Board* [1878] ECR 2037 and Case 13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143. Article 19 TFEU gives a legal base for the European Union to take action to combat discrimination.

A highly significant case in regard to discrimination on the grounds of age is Case C-144/04 *Werner Mangold* v *Rüdiger Helm* [2005] ECR I-7181. Although the case concerned a challenge to German law allegedly in contravention of Directive 2000/78/EC (prohibition on discrimination in employment in regard, *inter alia*, to age) which had not yet passed its date for implementation the Court of Justice stated that the principle of non-discrimination on grounds of age was to be regarded as a general principle of EU law.

5.8.2 Procedural rights

Procedural rights are covered in: Case 155/79 *AM&S Europe Ltd* v *Commission* [1982] ECR 1575 (this case illustrates that a right does not have to be recognised in all, or even a majority of, Member States for it to be included as one of the fundamental rights by the Court of Justice); Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063; Case 73/74 *Groupement des Fabricants des Papiers Peints de Belgique* v *Commission* [1975] ECR 1491 (duty to give reasons); Case 374/87 *ORKEM* v *Commission* [1989] ECR 3283.

The general principles of law as developed by the Court of Justice can be used as grounds for judicial review to challenge EU legal acts under Article 263 TFEU (ex Article 230 EC). They are often used as a basis to challenge the Commission's decisions under the competition law procedures.

Activity 5.4

Core comprehension – Human dignity: the Advocate General's Opinion

Using your Online Library resources, research the following judgment:

- ***Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* (Case C-36/02) [2005] 1 CMLR 5.**

You can complete this learning activity by reading the 'Held' summary and the section of the judgment entitled 'Features of human dignity as a legal concept' (at [AG74]–[AG81]).

a. **Identify the product which was subject to restrictions of freedom of services on public policy grounds.**

b. **In the *Omega* case why was it immaterial that the German constitution gave the principle of respect for human dignity particular status as an independent fundamental right?**

c. **Which two features of how we treat each human being are highlighted as aspects of the substance of humanity?**

d. **How does our understanding of human dignity contribute to the evolution of human rights?**

e. **Why is human dignity less negotiable than human rights?**

f. **Which features of human dignity require safeguards? Give some examples.**

g. **Explain what is meant by 'human dignity as a rule of law'?**

Activity 5.5

Applied comprehension – the doctrine of consistent interpretation and the *Von Colson* principle

Using your Online Library resources, research the following journal article:

- **Betlem, G. 'The doctrine of consistent interpretation – managing legal uncertainty' (2002) 22(3) *OJLS* 397–418.**

You can complete the following learning activity by reading Section 2, pp.399–402.

a. **Why does the doctrine of indirect effect have priority over direct effect?**

b. **Identify two requirements for the correct transposition of Directives.**

c. **In *Von Colson* how was the requirement of consistent interpretation defined?**

d. **In *Marleasing* how was the interpretation obligation extended?**

e. **In *Marleasing* how did the interpretation obligation effect the approach of the Spanish court?**

f. **In *Dekker*, a case concerning the Equal Treatment Directive and sex discrimination, which grounds of exemption provided by the Dutch legal system did the interpretation obligation prohibit?**

g. **Paraphrase in fewer than 50 words how the ECJ's interpretation of civil liability for the breach of the prohibition of sex discrimination impacted on the German employer in *Draehmpaehl*?**

h. **In Betlem's opinion why is uncertainty inevitable and an integral part of the Community legal order?**

Self-assessment questions

1. **In which case did the Court of Justice first state explicitly that European law takes precedence over conflicting national law?**
2. **Which Treaty Articles lend support to the notion of supremacy of Union law?**
3. **What is the difference between a monist and a dualist state?**

Further reading

- **de Cecco, F. 'Room to move? Minimum harmonization and fundamental rights' (2006) 43 *CMLRev* 9–30.**
- **Klamert, M. 'Judicial implementation of Directives and anticipatory indirect effect: connecting the dots' (2006) 43 *CMLRev* 1251–75.**
- **Lenaerts, K. 'Constitutionalism and the many faces of federalism' (1990) 38 *American Journal of Comparative Law* 205.**
- **Lenaerts, K. 'The rule of law and the coherence of the judicial system of the European Union' (2007) 44 *CMLRev* 1625–59 (available on the VLE).**
- **Nyssens, H. and K. Lackhoff 'Direct effect of Directives in triangular situations' (1998) 23 *ELRev* 397.**
- **Rasmussen, H. 'Present and future European Judicial problems after enlargement and the post-2005 ideological revolt' (2007) 44 *CMLRev* 1661–87.**
- **Sadurski, W. 'Solange, Chapter 3 Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14(1) *ELJ* 1–35.**
- **Schermers, H.G. and D.F. Waelbroeck 'The directly effective provisions of community law are the backbone of the Community's legal system' in their *Judicial protection in the European communities*. (Amsterdam: Kluwer Law International, 1991) [ISBN 9789041116314].**
- **Tridimas, T. 'The Court of Justice and judicial activism' (1996) 21 *ELRev* 199.**

Sample examination questions

Question 1 To what extent is it possible to distinguish between the concept of direct applicability and the concept of direct effect?

Question 2 Why might the European Commission consider that one of the most effective means of achieving economic integration was to encourage private parties to bring actions based on Union law in national courts?

Question 3 Discuss the significance of the *Factortame* case for Union law and for the constitutional law of the Member States.

Question 4 Evaluate the 'interpretive obligation', both from the standpoint of the European Union and from the standpoint of the Member States.

Advice on answering the questions

Question 1 Direct applicability is a concept which derives from Article 288 TFEU and refers to the operation of Regulations only. Direct effect, on the other hand, is a concept developed by the Court of Justice to give effect (and precedence) within national legal systems to a wider range of Union measures including Treaty Articles, Decisions and Directives. Define direct effect. This basic answer would need to be built on with a discussion of the case law on Regulations, such as the Case 403/98 *Azienda Agricola Monte Arcosu* v *Regione Autonoma della Sardegna* [2001] ECR I-103 which shows that the concepts are not synonymous – a Regulation may be directly applicable under Article 288 TFEU but that does not necessarily mean that all its provisions are directly effective.

This could lead on to a discussion of the conditions for direct effect as developed by the Court in *van Gend*, and in *van Duyn*, *Ratti*, and *Marshall*, in relation to Directives.

Question 2 This question involves a discussion of 'dual vigilance' – the idea that Union law will be more effective if its enforcement does not solely depend on the Commission's power under Article 258 TFEU (which is discretionary) to bring enforcement proceedings against Member States. The Commission does not have the resources to bring proceedings in every possible case of infringement. By introducing the concept of direct effect of Union law, the Court enabled individuals and companies throughout the EU to become 'enforcers' of Union law in the Member States without the need for Commission involvement. This answer could be expanded with a

discussion of the ways in which private parties can bring actions in national courts – on the basis of direct effect, indirect effect or in actions for damages on the basis of the state liability doctrine, citing relevant case law on each doctrine.

Question 3 This question does not say which of the *Factortame* cases it is referring to, so it would be necessary to cover both of the major *Factortame* rulings. The first of these concerned the relationship between national law and EC law, and whether the latter required the House of Lords to suspend the operation of the UK statute (the Merchant Shipping Act) pending a ruling on whether or not it was compatible with Community law. The significance of this case is that it went further than earlier case law on supremacy. The Court had ruled in the *Simmenthal* case that national courts had to set aside national laws which conflicted with directly effective Community rules. *Factortame* (1) concerned the availability of an injunction against the Crown, as an interim measure, pending the outcome of the case – in other words to protect putative EC law rights, the existence of which had not yet been confirmed by the Court. The Court held that the UK rule prohibiting injunctions against the Crown had to be set aside where it would otherwise prevent the granting of interim relief to protect putative Community law rights. The Court said this was necessary to ensure the 'full effectiveness' of Community law.

Another significant *Factortame* case for Union law is the *Factortame III*/*Brasserie du Pêcheur* judgment which established that Member States can be liable in damages for breach of any type of Union measure. It significantly extended the liability created by the *Francovich* case in relation to unimplemented Directives. Discuss the conditions laid down for state liability.

Question 4 Begin by explaining what the obligation is (*von Colson, Marleasing*). Discuss its purpose from the EU standpoint – it uses Article 10 EC (now Article 4(3) TEU) to enrol national courts in the task of giving effect to Union Directives where these have not been, or have been incorrectly, implemented by the Member State. It also avoids the problem that direct effect of Directives is only possible in vertical actions (*Marshall*, *Dori*) whereas the duty of interpretation applies in horizontal actions as well. As you are asked for an evaluation it is important to make a critical assessment of the fairness and usefulness of the doctrine. Cite the case law on the imposition of liabilities (criminal and civil) on individuals. Is this fair when the measure in question has not even been brought into law? Also cite *Kolpinghuis* and the problem that the doctrine may conflict with general principles of law such as legal certainty and non-retroactivity.

From the standpoint of the Member States, you could cite the example of the UK courts which had considerable difficulty accepting this doctrine. In traditional English constitutional law, Parliament is sovereign and there is the doctrine of separation of powers: national courts do not see themselves as substituting for the legislative prerogative of Parliament. See the cases in Section 5.6, such as *Duke*, *Litster* and *Webb* v *EMO Cargo*.

It is an example of the tension that exists between the approaches to supremacy of Union law of the ECJ on the one hand and the Member States on the other.

Quick quiz

Question 1

What is the most accurate definition of direct effect?

a. Union law takes precedence upon national law.

b. Union regulations have highly persuasive authority in the national courts.

c. Union law creates rights or obligations on which individuals can rely in court.

d. Union decisions are to be debated and passed by National Parliaments.

QUESTION 2

What did the case of *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641 expound?

a. **International agreements can have direct effect if fulfilling the direct effect conditions and if within the purview of the agreement.**

b. **International agreements do not have direct effect.**

c. **International agreements do not have direct effect unless said agreement had also been ratified by each individual Member State.**

d. **International agreements only have direct effect if made pursuing the exclusive competence of a EU institution.**

QUESTION 3

In what circumstances do Directives have vertical direct effect?

a. **When special provisions are made within the directive itself.**

b. **When a National Court has created a precedent, approved by the national constitutional court.**

c. **If the national parliament has badly applied the directive in question before the deadline.**

d. **If the Member State has failed to implement the directive within the deadline.**

QUESTION 4

Which of the following cases did not expand a 'back door' approach to horizontal effect for Directives?

a. ***Marleasing*.**

b. ***Foster* v *British Gas*.**

c. ***Mangold*.**

d. ***Ratti*.**

QUESTION 5

Which of the following is true?

a. **The case of *Von Colson* introduced the concept of indirect effect into EU law**

b. **Indirect effect is the national courts being under the obligation to interpret their national legislation in the light of EU law.**

c. **Indirect effect applies retroactively and independent of the will of the Member State to enforce the EU measure (according to *Marleasing*).**

d. **All of the above.**

QUESTION 6

What was held in the case of *Internationale Handelsgesellschaft*?

a. **EU law had primacy over national law only in so far as its constitution allowed it to.**

b. **EU law had equal standing to national legislation.**

c. **EU law had primacy over any national legislation.**

d. **EU law was subordinate to national legislation.**

Answers to these questions can be found on the VLE.

6 Free movement of goods

Contents

Introduction

The free movement of goods between the Member States is one of the four fundamental freedoms established by the Treaty of Rome. Although the original 1957 Treaty spoke of creating 'a common market', the Single European Act of 1986 used the term 'internal market' instead. This term is now defined in Article 26 TFEU:

> The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties...
> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of these Treaties.

Core text

- **Steiner & Woods, Chapter 16 'Customs union' and Chapter 17 'Free movement of goods'.**

Essential reading

- **Oliver, P. and W. Roth 'The internal market and the Four Freedoms' (2004) 41 *CMLRev* 407 (on the VLE).**

Further reading

- **Mortelmans, K. 'The common market, the internal market and the single market, what's in a market?' (1998) 35 *CMLRev* 101.**

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- **explain the main European Union rules which govern the free movement of goods as laid down in the Treaty, secondary legislation and case law**
- **explain the position of goods entering the EU from non-Member States**
- **distinguish between illegal charges and legal taxes on goods moving between Member States by applying the relevant legal tests**
- **identify the circumstances in which it is legal for Member States to impose charges on goods in internal or external European Union trade**
- **explain the difference between similar and competing products under Article 110 TFEU (ex Article 90 EC) and the legal consequences when such products are taxed differently**
- **explain the extent to which Member States are allowed to use policy reasons to justify indirectly discriminatory tax regimes**
- **identify national rules which breach Articles 34 or 35 TFEU (ex Articles 28 or 29 EC)**
- **distinguish between discriminatory and 'indistinctly applicable' rules, and explain the differences in the way such rules are dealt with under EU law**
- **explain the concept of derogation under Article 36 TFEU (ex Article 30 EC), the Cassis 'mandatory requirements' and the principle of proportionality**
- **produce, and weigh the merits of, arguments for and against the likelihood of derogation in any given circumstances in the light of the European Court of Justice's approach**
- **distinguish between a 'product requirement' and a 'selling arrangement'**
- **explain what type of 'selling arrangement' can breach Article 34 TFEU (ex Article 28 EC) .**

6.1 The legal basis of the single market

Core text

- **Steiner & Woods, Chapter 16 'Customs union'.**

6.1.1 The single market

The single market is an economic policy pursued through legal measures. As with all European Union policies, the legal basis of the single market for goods can be found in the European Treaties.

The authors of the original Treaty recognised that there were two main means to establishing an integrated single market. The first is the **removal of existing barriers**, be they in the form of customs duties, import quotas or other trade barriers. This is sometimes referred to as 'negative integration' because it involves the **removal** or **abolition** of existing trade rules.

This is not enough to achieve a single market for goods, however. Thus, the second aspect of achieving a single market involves the 'harmonisation' of national rules, including (for example) measures regulating technical standards and safety requirements. This is sometimes referred to as 'positive integration' because it requires the introduction of new EU-wide rules and standards to enable a particular product to be sold and used anywhere in the EU (see Chapter 9).

When considering the free movement of goods it is important to distinguish between monetary (or tariff) barriers and all other barriers to trade. The former include those barriers which involve some form of financial charge under Articles 28–30 TFEU or which are discriminatory under Article 110 TFEU. The latter are all other barriers which do not involve payment of charges and which may fall under the derogations provided for under Articles 34–36 TFEU. For example, if a national law requires an inspection for goods crossing a border and the importer is charged a fee for the inspection, the inspection itself is a barrier to trade falling under Articles 34–36 TFEU, and the charge for the inspection falls under Articles 28–30 TFEU.

6.1.2 Free movement of goods provisions in the TFEU

The TFEU lists the following main obstacles to the free movement of goods:

- customs duties on imports and exports (Articles 28 and 30 TFEU)
- charges having equivalent effect to customs duties (Articles 28 and 30 TFEU)
- discriminatory internal taxation on imported goods (Article 110 TFEU)
- quantitative restrictions on imports and exports (Articles 34 and 35 TFEU)
- state monopolies of a commercial character (Article 37 TFEU).

No definition is given in the EU Treaties for the term 'goods', which is used interchangeably with the term 'products'. However, the CJEU stated in Case 7/68 *Commission* v *Italy (Art Treasures)* [1968] ECR 423, that the free movement provisions apply to any product which can be valued in money and which forms the basis of a commercial transaction.

6.1.3 Article 35 TFEU and the purely internal situation

It was always presumed that the free movement of goods provisions were only applicable where there was inter-state trade but the Court has also recognised that the Article may apply in purely internal situations (i.e. when all the facts are confined within one Member State). Usually, purely internal situations do not engage EU law, as there is no cross-border element; however, in Case C-293/02 *Jersey Produce Marketing Organisation Ltd* v *States of Jersey* [2005] ECR I-9543, the Court held that there was a breach of Articles 28 and 35 TFEU in respect of the legal requirement imposed on exporters of Jersey potatoes from the Channel Islands to the United Kingdom.

Jersey producers were prohibited from exporting their potatoes to the UK market unless they had registered and entered into a market agreement with a body such as the Jersey Potato Export Marketing Board. The Court of Justice held that such a measure was a breach of Article 35 TFEU. Additionally, the requirement for all potato producers to pay a contribution to the Jersey Potato Export Marketing Board was a breach of Article 30 TFEU (see below).

6.1.4 Customs union

The creation of a **customs union** is provided for in **Article 28 TFEU** which states that:

> The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

Therefore, unlike a free trade area, in which members are free to set independent tariffs and restrictions on goods entering their territory from non-member countries, the EU is a customs union, in which the Member States can no longer set their own customs duties but instead must apply a Common Customs Tariff in trade with non-members.

6.2 Tariff barriers to trade within the EU

Article 30 TFEU provides the basic rule for trade between Member States of the EU:

> Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

This was the first Article relating to the free movement of goods to be found directly effective. In Case 26/62 *Van Gend en Loos* [1963] ECR 1, the Court held that Article 30 TFEU could be relied on by individuals before the national courts.

6.2.1 Charges having equivalent effect to a customs duty

A number of cases were brought against Member States by the Commission in the 1960s pertaining to the concept of 'a charge having equivalent effect' (CEE). The result of these cases was that the Court of Justice developed a very wide meaning to this phrase.

For example, Case 24/68 *Commission* v *Italy (Statistical Levy)* [1969] ECR 193 involved an Italian levy on imports and exports across its borders. The levy was a very small sum and it was used to pay for the gathering and publication of statistics on trade patterns.

The ECJ emphasised that it is the **effect**, not the **purpose**, of the levy that matters and, since extra fees and charges are likely to put imported goods at a disadvantage compared with domestically produced goods, the effect was equivalent to a customs duty. The Court found that:

> any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier... constitutes a charge having equivalent effect…

The key part of this test, therefore, is whether the sum of money has become payable **because the goods have crossed a frontier** within the EU. If it can be shown that the sum is payable for some other reason – such as payment for a specific service carried out for the trader, like the provision of storage facilities – then it will not fall within the Court's definition of an illegal charge.

The ECJ has held that the prohibition on CEEs also applies to goods imported directly from third countries (see, for example, Case 37, 38/73 *Diamantarbeiders* v *Indiamex* [1973] ECR 1609). This means that a common customs tariff duty can be levied on such goods, but no other charges can be added by the Member States.

6.2.2 Exceptions

The EU Treaty does not contain any defences to breaches of Article 30 TFEU since the prohibition is strict and absolute. However, the CJEU has recognised three instances where a charge may be lawful:

- when it is a proportionate payment for a genuine administrative service rendered to the importer/exporter
- when it is a charge for an inspection required by European Union or international law
- when it is a charge falling within the scope of internal taxation.

We will now examine each one of these exceptions in turn.

Payment for a service

For this exception to apply, there must be a specific benefit individually conferred on the importer or exporter. If it is a benefit in the 'general interest of all exporters', or to the public at large, it will not qualify (see Case 24/68 *Commission* v *Italy (Statistical Levy)* [1969] ECR 193).

Therefore the exception excludes inspections for public health reasons, or to ensure equality (see Case 63/74 *W Cadsky SpA* v *Instituto nazionale per il Commercio Estero* [1975] ECR 281 and Case 87/75 *Bresciani* [1976] ECR 129).

A charge for a service will be lawful where the benefit paid is for a service actually rendered to the importer **and** the cost charged for the service is based on the actual cost of providing it (see Case 132/82 *Commission* v *Belgium* [1983] ECR 1649).

Charges for inspections mandatory under European Union law

This exception applies when a Member State charges a fee for an inspection where the **inspection** is required under a European Union Directive and the Directive does not specify who should pay for it (see, for example, Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5 and Case 18/87 *Commission of the European Communities* v *Federal Republic of Germany* [1988] ECR 5427).

Domestic taxes apply to imported goods

If a charge applies equally to both domestic and imported goods, it may be legal as an 'internal tax'. Member States are largely free to decide their own level of taxes for products such as tobacco, cars, petrol, alcohol etc., provided these 'internal taxes' are 'origin-neutral'. In other words, as long as there is strict equivalence in the treatment of domestic and imported products, it is lawful to impose domestic taxes on imported goods.

Such taxes, however, fall under Article 110 TFEU and not under Article 30 TFEU. It should be noted that the two Articles are mutually exclusive and if a product is taxed when it crosses a border, such tax will be subject to Article 30 TFEU.

In some cases, taxes may apply where there is no equivalent domestic product. For example, in Case C-193/85 *Cooperativa Cofrutta Srl* [1987] ECR 2085, hardly any bananas were grown in Italy, but the ECJ still held that the Italian 'consumption tax' on imported bananas was part of the internal tax system. This, the Court found, was provided that the internal tax related to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products (para.10).

Self-assessment questions

1. **Can financial charges that are imposed on goods crossing a border within the EU ever be justified?**
2. **How did the ECJ define 'goods' in the 'Italian Art' case?**
3. **What is the legal test for deciding whether a financial charge is of 'equivalent effect' to a customs duty?**

4. **Is the purpose of the charge relevant?**
5. **How would you distinguish an illegal charge from a legal fee for service?**
6. **What test is used to decide whether a payment is part of the state's internal taxation system?**

6.3 Article 110 TFEU on discriminatory taxation

CORE TEXT

- **Steiner & Woods, Chapter 16 'Customs union'.**

6.3.1 The application of Article 110 TFEU

Article 110 TFEU prohibits discriminatory taxation which favours domestic production over imports from other Member States. The aim of the article is to achieve 'fiscal neutrality' between domestic and imported goods.

Article 110(1) TFEU prohibits any tax imposed on imported goods which is in excess of that imposed 'directly or indirectly' on 'similar' domestic products. Article 110(2) TFEU prohibits internal taxation which gives 'indirect protection' to domestic goods.

Definition of an internal tax

See Case C-193/85 *Cooperativa Cofrutta Srl* [1987] ECR 2085.

Direct effect of Article 110 TFEU

See Case 57/65 *Lutticke* [1966] ECR 205.

Methods of collection

The methods of collecting taxes can, in themselves, result in discrimination. See, for example, Case 55/79 *Commission* v *Ireland* [1980] ECR 481 where importers were required to pay the tax immediately, whereas domestic producers had several weeks to pay – a 'period of grace'. This was discriminatory and a breach of Article 110 TFEU.

6.3.2 The relationship between Article 110(1) TFEU and 110(2) TFEU: similar or competing products?

It can sometimes be difficult to decide whether products are 'similar'. For example, is wine similar to beer? After much controversy and lengthy litigation, the ECJ ruled, in Case 170/78 *Commission* v *UK (Wine and Beer)* [1980] ECR 417 that they were not. Different raw materials and production methods were used and the products had different characteristics.

If not 'similar' for the purpose of Article 110(1) TFEU, could wine and beer be regarded as 'competing' for the purpose of Article 110(2) TFEU? The test the ECJ uses to decide whether products are competing is whether customers regard those products as 'fulfilling the same consumer need'. At the time of the wine and beer case, tax on wine was higher than on beer. Despite this, the Court felt that consumer attitudes are not frozen in time. Due to the greater availability of imported products resulting from the free movement of goods in the EU, customers could try new things – and should not be deterred from doing so by high taxes. So, light wines at the cheaper end of the market were held to be 'competing' with beer.

In Case C-302/00 *Commission* v *France (Tobacco)* [2002] ECR I-2055, France imposed a higher rate of tax on light tobacco cigarettes than on dark ones. The ECJ decided that light and dark tobacco products were similar (despite the fact that they tended to be consumed by different age groups) because they were made from the same basic raw material (although different types); had similar properties; and fulfilled the same consumer need.

6.3.3 Direct discrimination or indirect discrimination?

If different tax rates apply depending on the country of origin of the goods, or on whether they are home-produced or imported, that is direct discrimination on the basis of origin and clearly breaches Article 110 TFEU.

For example, in case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, national rules required Danish ports to impose a 40 per cent surcharge on the basic charge paid for goods unloaded from ships. The tax was imposed only on goods loaded on ships arriving from outside Denmark and thus constituted direct discrimination on the basis of origin.

Article 110 TFEU also covers indirect discrimination. This is where the tax appears to be neutral and makes no reference to the origin of the goods, but the basis on which the tax is levied depends on a feature which, in practice, only occurs in imported products. This results in indirect tax protection for domestic products. In cases of indirect discrimination, it is necessary to prove that there is a protective effect. See Case 112/84 *Humblot* [1987] ECR 1367 and contrast with Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567.

See also Case C-383/01 *Danske Bilimportorer* v *Skatteministeriet* [2003] ECR I-6065 which concerned a very high registration tax on new cars sold in Denmark which were all imported. In this case there was no breach of Article 110 TFEU because there were no Danish products to be protected.

Direct discrimination can never be justified (see *Haahr Petroleum*, above). There are, however, some cases where indirect discrimination has been justified. See Cases 140/79 *Chemial Farmaceutici* v *DAF* [1981] ECR 1 (industrial policy justification) and 196/85 *Commission* v *France* [1987] ECR 1597 (regional policy justification to support poor regions of France).

Activity 6.1

a. What is the difference between 'free movement' and 'customs union'?

b. What is a 'quantitative restriction' and what is a 'measure having equivalent effect to a quantitative restriction'? Give two examples of each.

c. What is the difference between a discriminatory and an indistinctly applicable measure?

6.3.4 Consequences of a breach of Article 110 TFEU

This depends on whether the breach is of Article 110(1) TFEU or 110(2) TFEU. In the case of similar products under Article 110(1) TFEU, Member States are required to ensure strict equivalence in the tax applied or, if there is a sliding scale, that the imports are placed at the lowest point on the scale. (See, for example, the decision in Case 127/75 *Bobie Getränkevertrieb* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079.)

If the products are not similar but are competing, it is not necessary that the rates of tax be identical. Rather, the Member State must ensure that the rates are such that there is no 'protective effect' for the competing domestic product (see Case 356/85 *Commission* v *Belgium* [1987] ECR 3299).

6.3.5 Third country goods

Article 110 TFEU also applies to goods in free circulation (see Case 193/85 *Cooperativa Cofrutta* [1987] ECR 2085). However, generally, Article 110 TFEU does not apply to third country goods directly imported into a Member State. Even where provisions on non-discriminatory taxation have been included in the relevant Free Trade or Association Agreement, the Court has given a more limited interpretation to them: see Case 104/81 *Kupferberg* [1982] ECR 3641 at 3665.

Generally, where goods are imported from a third country with which the EU has no such agreement, Article 110 TFEU does not apply (see Cases C-114/95 and C-115/95 *Texaco* v *Danish Ports* [1997] ECR I-4263).

6.3.6 Exports

Although Article 110 TFEU does not mention exports, the ECJ has held that it could apply if goods to be sold on the domestic market had to pay less tax than those for export, as this might deter exports. See, for example, Case C-234/99 *Nygard* [2002] ECR I-3657.

6.4 Articles 34–36 TFEU on quantitative restrictions and measures having equivalent effect to a quantitative restriction

CORE TEXT

- **Steiner & Woods, Chapter 17 'Free movement of goods'.**

6.4.1 Quantitative restrictions and measures of equivalent effect

Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect to quantitative restrictions. Article 35 TFEU contains the same prohibitions in relation to exports.

Quantitative restrictions (QR) are 'quotas' or limits on the number of goods which can be imported from one country into another. Such quotas are prohibited **between** Member States by Article 34 TFEU on the grounds that, since it is aimed specifically at imports, it is discriminatory. Note that a total ban on imports can be regarded as a quota of zero.

An example of a quantitative restriction can be found in Case C-47/90 *Établissements Delhaize Frères et Compagnie Le Lion SA* v *Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669.

Here, Spanish law set quotas on the bulk export of its wine while placing no restrictions on domestic sales. When the Belgian Delhaize ordered 3,000 hectolitres of wine, the export was not permitted under the Spanish rules. The law was found to be a QR on exports and illegal under Article 35 TFEU.

The meaning of 'Measures having equivalent effect to a quantitative restriction' (MEQRs) is not provided by the Treaty but rather by Directive 70/50. The main focus of the Directive is on discriminatory measures (see Article 2). These are sometimes called 'distinctly applicable measures' as they only apply to imported goods and 'make importation more difficult or costly than the disposal of domestic production'.

In Article 3, the Directive says that Article 34 TFEU also covers:

> measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and **which are equally applicable to domestic and imported products**, where the restrictive effect… exceeds the effects intrinsic to trade rules.

These measures are otherwise known as 'indistinctly applicable'. The Commission, in Directive 70/50, appeared to accept that 'indistinctly applicable measures' will generally be acceptable unless they are 'out of proportion to their purpose' and 'the same objective can be attained by other means which are less of a hindrance to trade' – that is to say that they should be subject to a proportionality test.

The Directive is no longer in force but has been influential on the case law of the Court. See below for more on MEQRs.

The requirement for a state measure

For Article 34 TFEU to apply there must be a state measure. For example, in Case C-249/81 *Commission* v *Ireland (Buy Irish)* [1982] ECR 4005, the Irish Goods Council was found to have state funding and direct state involvement in the appointment of its Management Committee. As such, the Council was a public authority capable of issuing relevant state measures. The Court of Justice held that its activities were, therefore, subject to Article 34 TFEU. See also Case C-222/82 *Apple and Pear Development Council* v *KJ Lewis Ltd* [1983] ECR 4083.

While it is clear from this case that Article 34 TFEU only has vertical effect against actions of the state, in Case 265/95 *Commission* v *France* [1997] ECR I-6959, the Court of Justice held that **inaction** by the state in the face of organised and persistent disruption by activists could also breach Article 34 TFEU. This was because, over a 10-year period, the Member State had not done enough to prevent activists from obstructing imports into France of fruit and vegetables from other Member States.

6.4.2 Measures having equivalent effect to a quantitative restriction (MEQRs)

The ECJ's broad interpretation of the term 'MEQRs' has made Article 34 TFEU a powerful instrument for attacking national rules which impede the free movement of goods.

Article 34 TFEU is clearly intended to prohibit discriminatory measures against imports. However, the ECJ has nonetheless extended the reach of Article 34 TFEU to encompass measures which are not discriminatory **in law** (because they apply both to domestic products and imported goods) but which may have a discriminatory effect **in fact**. These are called 'indistinctly applicable' measures, because they apply without discrimination to domestic products and imported goods.

There are four key cases to read and remember.

- Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 in which the Court gave a very wide definition of an MEQR.
- *Cassis de Dijon* case – Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649 which extended the scope of Article 34 TFEU even further, to catch indistinctly applicable measures, while also creating a new set of exceptions for such rules. This case also introduced the principle of 'mutual recognition'.
- Joined Cases C-267 and C-268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097, in which the Court redefined the limits of the Article after *Cassis de Dijon*.
- The post-*Keck* case law. Case 405/98 *Konsumentombudsmannen (KO)* v *Gourmet International Products (GIP)* [2001] ECR I-1795.

Definition of an MEQR

In Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, Dassonville was prosecuted in Belgium for selling Scotch whisky without the certificate of origin required by Belgian law. He had imported the whisky from France where such a certificate was not required and thus argued that the Belgian rule prevented the free movement of whisky from France to Belgium. The ECJ agreed, and said that Article 34 TFEU covers:

> all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

This definition focuses on 'hindrance' rather than discrimination. Because the certificate was less easy to obtain for a foreign importer than for a Belgian distributor buying direct from the manufacturer, the Belgian requirement was a MEQR in breach of Article 34 TFEU. The Court acknowledged that Member States might need to have reasonable measures to protect consumers, but these should not be more difficult for some importers than others to comply with.

In the *Buy Irish* case there was not even a need to prove that imports had fallen – under the *Dassonville* formula, a potential effect was enough to satisfy Article 34. Therefore, in this case, the Irish Goods Council's publicity campaign to persuade Irish consumers to buy Irish goods as opposed to imported ones was held to be a MEQR.

Self-assessment questions

1. **What is a 'quantitative restriction'? Give two examples.**
2. **What is a 'measure having equivalent effect to a quantitative restriction'? Give two examples.**

3. **In the *Buy Irish* case, why was it relevant that the members of the Management Committee of the Irish Goods Council were appointed by a government Minister? (See Case 249/81 *Commission* v *Ireland*.) Why was the measure considered by the Court of Justice to breach Article 34 TFEU?**
4. **If a group of demonstrators tries to block the free movement of goods by 'direct action', is there a breach of Article 34 TFEU?**
5. **What is the difference between a discriminatory and an indistinctly applicable measure?**
6. **Are the following rules discriminatory or indistinctly applicable?**
   i. **margarine must be packaged in cube-shaped packages**
   ii. **importation of obscene materials is banned**
   iii. **cheese may contain no preservatives**
   iv. **cheese must bear a label stating fat content**
   v. **all imported beef must be inspected.**

   Can you think of a few rules of each kind that you have come across recently?

6.5 Derogations under Article 36 TFEU

CORE TEXT

- **Steiner & Woods, Chapter 17 'Free movement of goods'.**

6.5.1 Permissible derogations under Article 36 TFEU

Unlike Article 30 TFEU, the prohibition of quantitative restrictions and MEQRs in Articles 34 and 35 TFEU is not absolute. Article 36 TFEU therefore permits derogation from Articles 34 and 35 TFEU, allowing measures which are caught by those Articles to be justified so long as they are proportionate. The Treaty provides that such measures may be justified on one of six grounds listed in Article 36 TFEU:

- public morality
- public policy
- public security
- the protection of the health and life of humans, animals or plants
- the protection of national treasures possessing artistic, historic or archaeological value (not dealt with in this module guide)
- or the protection of industrial and commercial property (not dealt with in this module guide).

6.5.2 Examples of the Court's approach to Article 36 TFEU

Because it allows Member States an exemption from one of the fundamental freedoms and can be used to justify both distinctly applicable and indistinctly applicable rules, the Court has construed Article 36 TFEU narrowly.

Public morality

In Case C-121/85 *Conegate Ltd* v *HM Customs and Excise* [1986] ECR 1007, the Court confirmed that Article 36 TFEU must not be used to support 'arbitrary discrimination or disguised restrictions'. In this case, the UK ban on inflatable 'love dolls' from another Member State was disproportionate since, within the United Kingdom, sale of such products was not banned, although there were certain restrictions on how and where they could be sold.

Public policy

This ground has rarely been used successfully in the Court of Justice, which has made clear that it cannot be used for purely economic reasons (Case 95/81 *Commission* v *Italy* [1982] ECR 2187). It was, however, successfully pleaded in Case 7/78 *R* v *Thompson, Johnson, Woodiwiss* ECLI:EU:C:1978:209.

Public security

In Case 72/83 *Campus Oil* [1984] ECR 2727, importers of oil products into Ireland were obliged to buy a proportion of their requirements from the state oil refinery. It was argued that this was a breach of Article 34 TFEU. The Court of Justice said that the maintenance of regular oil supplies, which were fundamental to the existence of the state, was a legitimate aspect of public security. However, the Court questioned whether the compulsory purchasing requirement, at a price above the world market price, was necessary to ensure the survival of the state oil refinery. As it was a preliminary reference, these issues of fact were left to the national court but the judgment shows clearly the Court's approach to the Article 36 TFEU derogations. It is not enough for the Member State to invoke a legitimate objective covered by Article 36 TFEU, it has also to show that the measure in question is necessary for that purpose and proportionate. That means asking whether there is any other way of achieving the objective which would be less of a restriction on the free movement of goods.

The protection of health and life of humans, animals and plants

For this derogation to apply, the Court of Justice will consider whether the risk to health is genuine, or a disguised trade restriction (see Case 40/82 *Commission* v *UK (Re Imports of Poultry Meat)* [1982] ECR 2793).

Public health inspections of imports from other Member States have attracted close scrutiny from the Court. Any inspection is, in principle, an MEQR because even if there is no charge, it causes delay and is a hindrance to importation. The importing state must take into account evidence of any tests already complied with in the exporting state, and only if it can show those are insufficient can it require additional tests (see Cases 124/81 *Commission* v *United Kingdom* [1983] ECR 203 (UHT milk), 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277 and C-170/04 *Klas Rosengren* v *Riksåklagaren* [2007] ECR I-4071). The latter case concerned a Swedish measure prohibiting the import of alcoholic beverages into Sweden by private individuals. Instead the individuals had to ask the holder of the retail sale monopoly to supply and, if necessary, to import the alcoholic drinks in question.

The Court found that the measure was unsuitable for attaining the objective of limiting alcohol consumption generally and not proportionate for attaining the objective of protecting young people from the harmful effects of such consumption. Therefore, the measure fell under the scope of Article 34 TFEU and was not justified under Article 36 TFEU.

The Court will take into account the attitude of other Member States and of international health bodies such as the World Health Organisation when assessing whether particular products pose a real risk to health. So, in Case 178/84 *Commission* v *Germany (Additives in Beer)* [1987] ECR 1227 Germany prohibited a large number of additives in beer, which were permitted in other Member States. The Court of Justice was not swayed by the argument that they posed an increased danger to German consumers because so much beer was consumed in Germany!

Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 concerned the protection of the life of animals under Article 36 TFEU. It was held that a ban on imported bees into the Danish island of Laeso to protect the native bee from more aggressive species was justified and proportionate.

Where the available scientific evidence on the health impact of particular substances is unclear, the Member State concerned can decide what level of protection is appropriate, subject to the **precautionary principle**. In Case 174/82 *Sandoz* [1983] ECR 2445, which concerned vitamins added to muesli bars, the Court found that:

> … in so far as there are uncertainties at the present state of scientific research it is for the Member States, in the absence of harmonisation, to decide what degree of protection of the health and life of humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community (para.16).

In Case C-192/01 *Commission* v *Denmark* [2003] ECR I-9693, the Court confirmed that Member States can adopt their own precautionary measures in situations where the precise risks to health are uncertain, but said that any such precautions must be necessary and proportionate.

The greater the uncertainty, in science and in practice, the greater the Member State's discretion to apply the precautionary principle. It does not need to wait until the existence and extent of the risks are clearly established.

For example, in Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, the Court said that the proper application of the precautionary principle requires:

- the identification of the potentially negative consequences for health
- a comprehensive assessment of the risk for health based on the most reliable scientific data available and the most recent results of international research
- where data on the existence or extent of the alleged risk is insufficient, inconclusive or imprecise, 'but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures' (paras 53–54).

The burden of proving that a particular substance is harmful lies with the Member State. An example of a Member State failing to discharge this burden can be found in Case C-420/01 *Commission* v *Italy (Caffeine)* [2003] ECR I-6445.

6.5.3 *Cassis de Dijon*: the approach to 'indistinctly applicable measures'

In the *Cassis de Dijon* case the court developed the approach towards 'indistinctly' applicable measures. Although such measures apply to both domestic and imported goods equally in law, in fact they may impose an extra burden on imported goods.

The rule at issue was the German requirement that fruit liqueurs have an alcohol strength of 25 per cent. The French blackcurrant liqueur, *Cassis*, had a strength of 15–20 per cent and therefore could not be sold in Germany. The German rule, although apparently non-discriminatory, in fact made it impossible for French manufacturers to export *Cassis* to Germany, thus making it indistinctly applicable and in breach of Article 34 TFEU.

The Court reasoned that while domestic goods have been manufactured to comply with the rules applicable in their home state, imported goods must meet the standards set both in their home state and the importing state. Because of this double regulatory burden that imported goods must satisfy, indistinctly applicable rules create a 'dual burden' – in breach of Article 34 TFEU.

On the basis of its findings of a dual burden, the Court in *Cassis de Dijon* laid down the 'principle of mutual recognition', that is, that goods 'lawfully produced and marketed' in one Member State should be able to be freely marketed in all the others.

The Court also ruled that, where there are no harmonised EU rules (i.e. a Directive or Regulation) on the matter in question, Member States can still have their own rules for domestic producers. They can only require imported goods to comply with their national rules if the following conditions are fulfilled:

- the rule in question applies equally to domestic products
- the rule is necessary to protect an essential public interest (what the Court calls a '**mandatory requirement**')
- it is 'proportionate' (i.e. is not more restrictive/burdensome than necessary to protect that interest).

The *Cassis de Dijon* 'mandatory requirements'

The 'mandatory requirements doctrine' provides an additional list of grounds on which Member States can justify imposing national rules on imported goods. But, unlike Article 36 TFEU, mandatory requirements can **only** be used to justify indistinctly applicable rules.

The list of mandatory requirements is not exhaustive and will no doubt continue to grow as new issues of public concern emerge.

The original four 'mandatory requirements' were consumer protection, fiscal measures, public health and fairness of commercial transactions. Since then, other public interests have been recognised as sometimes justifying restrictions on the free movement of goods, including: environmental protection, media pluralism and preservation of national culture.

Consumer protection

In Case 261/81 *Walter Rau* [1982] ECR 3961 Belgian rules stated that margarine sold in Belgium must be packaged in cube-shaped containers. Belgium based its case on the mandatory requirement of consumer protection: that the packaging rule was to prevent confusion with butter. The result of the rule was to make imports of margarine from countries where margarine is normally packaged in tubs or rectangular blocks more difficult or impossible as repackaging would make the sale uneconomic. The Court held that the rule could not be imposed on imported margarine because it was disproportionate – clear labelling would be enough to prevent confusion with butter and thus protect the consumer.

Despite this, the consumer protection arguments were upheld in other cases such as Case 286/81 *Oosthoek* [1982] ECR 4575 (the use of free gifts to sell encyclopaedias) and Case 382/87 *Buet* [1989] ECR 1235 (doorstep-selling of educational materials). However, there is doubt as to whether these cases would be decided in the same way today, in view of the ruling on selling arrangements in *Keck* (see Section 6.5.4).

Public health

The Court of Justice has ruled that as Article 36 TFEU provides for derogation on this ground, the Treaty Article should be used in preference to 'mandatory requirements' (see Cases C-1/90 and 176/90 *APESA* v *DSSC (Aragonesa)* [1991] ECR I-4151).

Protection of the environment

In Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871 Austria had put in place a ban on lorries of over 7.5 tonnes transporting certain goods (such as waste, stone, timber) using the A12 highway for a distance of 46 kilometres. The road is a key transit route between the south of Germany and Italy.

The Court of Justice accepted that this was justified under the mandatory requirement of 'protection of the environment' but held that it was not proportionate. The Austrian measures therefore fell within the scope of Articles 34 and 35 TFEU and, although justified, were not proportionate. See also the more recent and factually very similar Case C-28/09 *Commission* v *Austria* [2011] ECR I-10413.

Culture

See Cases 60 and 61/84 *Cinetheque SA* v *Federation Nationale des Cinémas Français* [1985] ECR 2605.

Protection of national or regional socio-cultural characteristics

See Case 145/88 *Torfaen BC* v *B&Q plc* [1989] ECR 3851.

Plurality of the press

See Case 368/95 *Familiapress* v *Heinrich Bauer Verlag* [1997] ECR I-3689. Read, in particular, paras 10–12 and 18–34.

The protection of fundamental rights

See Case 112/00 *Schmidberger* v *Austria* [2003] ECR 1-5659 and in particular, paras 78–94.

The difference between the application of Article 36 TFEU and the *Cassis de Dijon* mandatory requirements: a summary

The six grounds listed in Article 36 TFEU can be invoked by Member States to justify **both** discriminatory **and** 'indistinctly applicable' national rules, but the list has been strictly interpreted and the Court has refused to extend it.

- **Discriminatory rules** are state measures and rules which only apply to imported goods and not to the equivalent domestically-produced goods (they are sometimes called 'distinctly applicable' measures). Such rules are always illegal under Articles 34 and 35 TFEU unless justified under Article 36 TFEU.
- **Indistinctly applicable rules** are rules which appear to apply equally to both imported and domestic goods in law but which in fact may impose an extra burden on imports because they then have to comply with two sets of rules: those of their 'home' state and those of the importing state. They are illegal under Article 34 TFEU unless justified under Article 36 TFEU or by a *Cassis de Dijon* mandatory requirement.

Mandatory requirements can only be invoked when the measure in question is indistinctly applicable. If the national rule is discriminatory then Article 36 TFEU must be used. For example, in Case 113/80 *Commission* v *Ireland (Souvenirs)* [1981] ECR 1625, the Irish government sought to justify a rule that imported souvenirs carry a label marked 'foreign'. There was no labelling requirement for domestically produced souvenirs. The Court refused to consider the justification on the basis of consumer protection as the rule only applied to imports (i.e. was discriminatory) and Article 36 TFEU, which was the only possible basis for justifying discriminatory measures, did not include consumer protection.

Article 35 TFEU and exports

Unlike the prohibition in Article 34 TFEU, the prohibition in Article 35 TFEU generally encompasses only discriminatory measures. Indistinctly applicable measures – that is, those that apply equally to national products and to exports – do not generally fall under the scope of this provision (see Case 15/79 *PB Groenveld BV* v *Produktschap voor Vee en Vlees* [1979] ECR 3409).

In Case C-293/02 *Jersey Produce Marketing Organisation Ltd* v *States of Jersey* [2005] ECR I-9543, the Court declared incompatible with Article 35 TFEU a series of rules imposed by Jersey on the export of potatoes to the United Kingdom. These included, for instance, the compulsory registration of growers with a local public organisation, the conclusion of marketing agreements between that organisation and the operators concerned and so on. The CJEU reaffirmed that the UK and Jersey are considered as one Member State for the purposes of the free movement of goods (Article 1, Protocol 3 of the Accession Treaty). The Court, reciting its previous case law, confirmed that in customs duties cases regional barriers are obstacles to be removed exactly as intra-EU ones. On Article 35 TFEU, the Court held that as it was conceivable that such potatoes, once within the United Kingdom, might then be re-exported to other Member States, an intra-EU element was established. In this case, the Court seems content to establish a mere potential obstacle on export without a detailed analysis of whether the measure had to be considered discriminatory.

6.5.4 Delineating the scope of Article 34 TFEU: *Keck*

The very wide definition of a MEQR in *Dassonville*, combined with its extension in *Cassis de Dijon* to cover indistinctly applicable measures, generated a huge number of challenges to national rules based on Article 34 TFEU. As was argued by Advocate General Slynn in *Cinéthèque*, some of these rules were not intended to restrict imports and did not in any way make things more difficult for the importer. Nonetheless, they

fell within the scope of Article 34 TFEU and required justification under either Article 36 TFEU or the *Cassis de Dijon* mandatory requirements.

This issue came to a head in the 'Sunday trading' cases (see Case 145/88 *Torfaen Borough Council* v *B&Q plc* [1989] ECR 3851 and Case C-169/91 *Stoke-on-Trent City Council and Norwich City Council* v *B&Q plc* [1992] ECR I-6635). In these cases a national law restricted what kinds of goods could be sold on Sunday. This rule restricted the sale of imported goods to the same extent as for the sale of domestically produced goods (i.e. it imposed an 'equal burden'). Yet the ECJ still required the rule to be justified.

However, in Joined Cases C-267 and C-268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097 the Court accepted that a clear limit should be placed on the types of measure encompassed by Article 34 TFEU.

The Court declared that 'contrary to what has previously been decided', Article 34 TFEU would not apply to:

> certain selling arrangements... [provided that they] apply to all relevant traders operating within the national territory... [and] affect in the same manner, **in law and in fact**, the marketing of domestic products and of those from other Member States (para.16).

The judgment therefore creates two categories of trading rules: those which lay down 'product requirements', and those which lay down 'selling arrangements'.

'Product requirements' affect the goods themselves and are still governed by the existing rules on discriminatory and dual burden measures. 'Selling arrangements' do not require any change to the product itself but only restrict the way it is marketed. As such the latter fall outside the scope of Article 34 TFEU.

A rule of thumb for distinguishing between a 'product requirement' and a 'selling arrangement' is to ask yourself whether, in order to comply with this rule, the importer has to make any physical alteration to the product, for example by changing the ingredients, packaging or labelling. If so, it is a 'product requirement'. If not, it is a 'selling arrangement'. In other words, 'selling arrangements' relate to where, when and how goods are to be sold.

Examples of selling arrangements

See, for example, the following cases: Case C-292/92 *Hünermund* [1993] ECR I-6787 (rules on advertising of products in pharmacies); Case C-69/93 *Punto Casa* [1994] ECR I-2355 (opening hours); Case C-391/92 *Commission* v *Greece* [1995] ECR I-1612 (restriction on where baby milk powder could be sold); and Case 412/93 *Leclerc-Siplec* [1995] ECR I-179 (restriction on TV advertising of retail products).

Some cases have concerned marketing rules which nonetheless have an effect on the product itself.

In Case 315/92 *Clinique* [1994] ECR I-317, a German law prohibited the use of the name 'Clinique' for cosmetics because the consumer might be confused and think that the product had medicinal properties. It was held by the Court of Justice to be disproportionate to the objective of consumer protection and the health of humans. See also Case C-470/93 *Mars* [1995] ECR I-1923 where a promotion printed on the wrapper of the Mars bar was part of the product itself.

Case 368/95 *Familiapress* v *Heinrich Bauer Verlag* [1997] ECR I-3689 concerned Austria's law on 'unfair competition' which prohibited the offering of large cash prizes for competitions in magazines. Familiapress (a publisher of newspapers in Austria) brought proceedings against a German publisher of weekly magazines which were being sold in Austria and which offered large cash prizes for crossword competitions.

This was held not to be a selling arrangement under *Keck*, because

> [the law] bears on the actual content of the products... the competitions in question form an integral part of the magazine... Since it requires traders... to alter the contents of the periodical… [it is an MEQR and therefore falls within the scope of Article 34 TFEU].

The Court has applied *Keck* in a formalistic way which has been criticised by many commentators, particularly in relation to advertising restrictions. In a highly influential Opinion in the case *Leclerc-Siplec*, Advocate General Jacobs identified potential problems with the *Keck* formula, pointing out that domestic products are probably already known to consumers, whereas products from other Member States are more dependent on advertising to penetrate new markets.

6.5.5 Refinement of *Keck*: the market access test

An interesting example of where the Court held that a 'selling arrangement' discriminated against foreign traders **in fact** is: Case 254/98 *Schutzverband gegen unlauteren Wettbewerb* v *TK-Heimdienst GmbH* [2000] ECR I-151. Under the Austrian Code of Business and Industry 1994, traders such as bakers, butchers and grocers were only permitted to sell on rounds from locality to locality or from door-to-door those goods which they also sold from a permanent establishment in the area or in an adjacent municipality.

The Schutzverband, an association for the protection of the economic interests of undertakings, brought an action against TK-Heimdienst to restrain it from offering for sale on rounds groceries which it did not sell in permanent establishments in that municipality or any adjacent one.

The Court held that the legislation in question related to 'selling arrangements for certain goods' but that it did not affect in the same manner the marketing of domestic products and that of products imported from other Member States. As such, the rule did not apply equally in law and in fact but rather **impeded access to the market** of the Member State of importation for products from other Member States more than it impedes access for domestic products. Therefore the Austrian law did fall within the scope of Article 34 TFEU despite being described by the Court of Justice as a selling arrangement.

Another key case concerning selling arrangements which do not apply equally in fact is Case C-405/98 *Konsumentombudsmannen* v *Gourmet International Products* [2001] ECR I-1795.

This case concerned an application for an injunction by the Swedish Ombudsman responsible for consumer protection, which prevented Gourmet International Products (GIP) from placing advertisements for alcoholic beverages in magazines.

The Swedish law was effectively a total ban on advertising alcoholic beverages, prohibiting their advertisment on the radio, television or in magazines and periodicals other than those sold at the point of sale. GIP published a magazine called *Gourmet* which contained advertisements for red wine and whisky.

In a reference the ECJ was asked whether Article 34 TFEU or Article 56 TFEU precluded legislation entailing a general prohibition on alcohol advertising and whether such a prohibition could be justified on the grounds of public health.

The Consumer Ombudsman and the intervening governments argued that such a law on advertising fell within the scope of a *Keck* selling arrangement, and was therefore not prohibited by Article 34 TFEU. The ECJ rejected this argument.

It pointed out that para.17 of *Keck* states that national provisions prohibiting certain selling arrangements must not impede access to the market for products from another Member State or must not impede access more than they impede the access for domestic goods.

The Court concluded that a rule such as the one at issue was liable to impede access to the market for products from other Member States more than for domestic products with which consumers are already familiar. Therefore the rule affected the marketing of products from other Member States more than that of domestic products and was prohibited by Article 34 TFEU.

With regards to the justification of the rule on the grounds of public health, the Court stated that it was for the national court to determine:

- whether it was proportionate
- whether 'the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade'.

6.5.6 The end of *Keck*?

The application of the *Keck* test continues to trouble the CJEU. Two rather peculiar cases were recently brought to the attention of the CJEU: in Case C-110/05 *Commission* v *Italy* [2009] ECR I-519 the Commission claimed that Italy had failed to fulfil its obligations under Article 34 TFEU by maintaining rules that prohibit mopeds, motorcycles, tricycles and quadricycles from towing a trailer. The European Court examined whether Italian law had to be considered as in breach of the Treaty with regard to trailers that were specifically designed to be towed by motorcycles and that were legally produced and marketed in Member States other than the Italian Republic. The Court found that the national prohibition constituted a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU. The interest of the decision lies in the Court's dismissal of a possible application of the *Keck* threshold. The Court implicitly rejected a possible extension of *Keck* to 'use arrangements' and embraced what could be concisely termed as an 'access to market' test. In Case C-142/05 *Mickelsson* [2009] ECR I-4273 the question was whether restrictions imposed by Swedish law (whose breach was strictly sanctioned) on the use of jet skis on inland waters could be considered as an obstacle to free movement of goods. The Court, relying on *Cassis de Dijon* case law, held that even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State. It is, therefore, to be concluded that restrictions on product uses will not be 'saved' under the *Keck* test. It should, however, be noted that in both cases, *Italian Mopeds* and *Mickelsson*, the Court found that the measures in question could be justifiable on the grounds of public aims such as road safety or protection of the environment. Such an approach has been confirmed in several recent high-profile cases. Thus, in Case C-333/14 *Scottish Whisky Association* v *Lord Advocate* ECLI:EU:C:2015:845 and Annex 9 the Court of Justice found Scottish legislation providing for the imposition of a minimum price per unit of alcohol (MPU) sold in Scotland to be in breach of Article 34 TFEU. The Court held that the effect of the Scottish legislation was to significantly restrict the market as it prevented the lower cost price of imported products being reflected in the selling price. Likewise, in Case C-148/15 *Deutsche Parkinson Vereinigung (DPV)* ECLI:EU:C:2016:776 the Court was confronted with yet another litigation on German rules regulating access to mail-order pharmaceuticals. An association of patients with Parkinson's disease challenged the restrictions imposed by Germany on the online sale of medications intended to treat such a disease. The association entered into contracts with the mail-order pharmacy, DocMorris, for ordering prescription-only medicinal products against Parkinson's disease. This was considered a violation of German law that imposed a strict price-fixing system for prescription-only medicinal products, which applied to the pharmacy's selling price to the patient as well as to the purchase price between the wholesaler or pharmaceutical companies and the pharmacy. The Court first held that the price-fixing system had a greater impact on pharmacies established in other Member States compared to those established in Germany. German pharmacies were still in a position of advantage as they were able to sell products in their dispensaries, whereas pharmacies established in other Member States were deprived of this possibility. The Court also felt compelled to specify that:

> in so far as mail-order pharmacies cannot, given the limited services that they offer, adequately replace such services, it must be held that price competition is capable of providing a more important factor of competition for mail-order pharmacies than for traditional pharmacies, since price competition lays the basis for their potential to access the German market directly and to continue to be competitive in it.

Thus, the national legislation directly restricted access to the German market in medicinal products.

Finally, it should be noted that judgments such as the *Italian Trailers*, *Scottish Whisky Association* and *Deutsche Parkinson Vereinigung* cannot be considered as a formal overruling of the *Keck* principle. Its importance is considerably diminished but, strictly speaking, the *Keck* 'exception' is still applicable.

Thus, in a recent judgment dealing with a requirement to hold a retail sale licence in order to import alcoholic beverages in Finland, the Court engaged in an analysis on whether *Keck* was applicable, despite ultimately dismissing it (Case C-198/14 *Visnapu* ECLI EU:C:2015:751). In Case C-221/15 *Colruyt E*CLI:EU:C:2016:704, a 2016 case dealing with Belgian minimum pricing legislation for tobacco products, the Court applied the *Keck* test and found that the measure did not violate Article 34 TFEU.

Activity 6.2

Consider whether the fictitious rules a–f below can be challenged.

In working out your answer you should follow these two steps:

Step 1 Decide which of these types of rule it is.

Step 2 Is the rule legal or is it *prima facie* illegal? If the latter, will the Member State be able to justify it under Article 36 TFEU or under a *Cassis de Dijon* 'mandatory requirement'? If so, what would the Member State have to prove according to the tests laid down in *Keck* and *Gourmet International*?

The trading rules in question:

a. **milk must be packaged in recyclable containers**
b. **fruit conserve must contain at least 60 per cent fruit**
c. **wine must bear a label stating alcohol content**
d. **all imported poultry must be inspected**
e. **tobacco can only be sold from licensed premises**
f. **advertisements for alcoholic drinks on street hoardings are forbidden.**

Activity 6.3

Core comprehension – *DocMorris*: selling arrangements and public health

Using your Online Library resources, research the following judgment:

- ***Deutscher Apothekerverband eV* v *0800 DocMorris NV* (Case C-322/01).**

You can complete this learning activity by reading [15]–[43].

a. **Identify the following key information about this case: (i) The relevant Treaty Articles (old/new), and (ii) the three most relevant Directives.**
b. **Identify the organisational aims and objectives of the claimant, the German Apothekerverband.**
c. **Identify the business activity of the Dutch defendant, DocMorris NV, in particular the type of goods it sells, the selling arrangements engaged in the home state and its relevant authorisations.**
d. **Identify the two types of products which DocMorris sells in Germany and the selling arrangement.**
e. **Identify two professions which may be involved in ensuring a high level of consumer protection for the general public in the advertising of medicines which are available on medical prescription only.**

f. **According to German national law how do pharmacists protect the general public when they supply medical products?**

g. **According to German national law on the advertising of medicinal products identify three examples of types of advertising of medicinal products which are illegal?**

h. **Outline the main submission of the German Apothekerverband in the proceedings in the German court.**

i. **Outline the main submissions of DocMorris in the main proceedings in the German court.**

j. **The German court, the Landgericht Frankfurt am Main, referred four questions for a preliminary ruling. Which justification for a national prohibition is raised in this context?**

Activity 6.4

Core comprehension – *DocMorris*: public health and proportionality

Using your Online Library resources, research the following judgment:

- ***Deutscher Apothekerverband eV* v *0800 DocMorris NV* (Case C-322/01).**

You can complete this learning activity by reading [AG100]–[AG114].

a. **Identify the justification for the restriction in selling arrangements advanced by the German Pharmacists Association (Apothekerverband).**

b. **What must be determined before examining any justification under Article 30 EC and why?**

c. **Outline the basis of the proportionality test.**

d. **What function does a measure taken have to fulfil to be deemed an 'appropriate' measure?**

e. **Identify how approaches by individual Member States can be used to consider the 'necessity of the national measure'.**

f. **Which test is used to examine the proportionality test in the narrow sense?**

g. **As applied in the current case, which question is asked to determine whether the measure taken by the Member State fulfils this test?**

Activity 6.5

Applied comprehension – Oliver: scope of Article 34

Using your online resources research the following article:

- **Oliver, P. 'Of trailers and jet skis: is the case law on Article 34 TFEU hurtling in a new direction?' (2011) 33(5) *Fordham International Law Journal* 1423–48 (available in HeinOnline and LexisLibrary).**

You can complete this learning activity by reading Section II 'The story so far', Subsection A 'Scope of Article 34 TFEU', pp.1427–41.

a. **In *Dassonville* how are measures of equivalent effect to quantitative restrictions on imports defined?**

b. **Identify examples of measures which have been held to constitute measures of equivalent effect.**

c. **In *Foie Gras* explain in fewer than 20 words the basis of the Court's rejection of the 'hypothetical and theoretical infringement' argument.**

d. **Which legal principle is underpinned by the rule of remoteness? Identify the examples of imponderables in *DIP*, a case concerning urban planning law restrictions on the opening of new shops.**

e. **Using the *Bluhme* case explain what is meant by the *de minimis* rule and its relevance to Article 34.**

f. Identify the main difference between the rule of remoteness and the *de minimis* rule.

g. In *Cassis de Dijon*, which provision in German law was held to be an indistinctly applicable measure of equivalent effect contrary to Article 34?

h. In *Cinéthèque SA*, was the Court's interpretation of the scope of Article 34 broad or narrow? Explain.

i. In *Keck* which 'unsatisfactory situation' did the Court seek to address?

j. Identify some categories of measures related to selling arrangements.

k. Which product was at the centre of the *Alfa Vita* dispute and why was the measure considered to be more 'product bound' than related to a selling arrangement?

Activity 6.6

Applied comprehension – Saydé: contradictions of free movement law

Read the following journal article on the VLE.

- Saydé, A. 'One law, two competitions: an enquiry into the contradictions of free movement law' (2010–11) 13 *Cambridge Yearbook of European Legal Studies* 365–413.

You can complete this learning activity by reading pp.365–77.

a. Which inconstancy does Sayde attribute to the evolution of specific versions of the free movement test?

b. In the absence of a unique free movement test, which two narrow approaches evolved initially?

c. Which two elements of the European law framework provide for a more holistic analysis of the free movement test?

d. Identify and define the two overarching conceptions of economic integration which Sayde argues are the cause of the contradictions of free movement law.

e. Explain the main focus of the regulatory neutrality paradigm and its main strategic goal.

f. Explain the main focus of the regulatory competition paradigm and its main strategic goal.

g. How did the *Cassis de Dijon* case contribute to the regulatory neutrality paradigm?

h. Explain in fewer than 50 words what is meant by 'regulatory arbitrage'.

Further reading

- Barnard, C. 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26(1) *ELRev* 35–59.
- Chalmers, D. 'Repackaging the internal market – the ramifications of the *Keck* judgment' (1994) *ELRev* 385.
- von Heydebrand, L. 'Free movement of foodstuffs, consumer protection and food standards in the EC: Has the Court of Justice got it wrong?' (1991) *ELRev* 391.
- Ludwigs, M. 'Case C-380/03, *Federal Republic of Germany* v *European Parliament and Council of the European Union (Tobacco Advertising II)*. Judgment of the Court (Grand Chamber) of 12 December 2006' (2007) 44 *CMLRev* 1159–76.
- Oliver, P. and S. Enchelmaier 'Free movement of goods: recent developments in the case law' (2007) 44 *CMLRev* 649–704.
- Roth, P. 'Note on *Keck* and *Hünermund*' (1994) 31 *CMLRev* 845–55.
- Tryfonidou, A. 'Case C-293/02 *Jersey Produce Marketing Organization Ltd.* v *States of Jersey and Jersey Potato Export Marketing Board*, Judgment of the Court (Grand Chamber) of 8 November 2005' (2006) 43 *CMLRev* 1727–42.

- **Tryfonidou, A. 'The Outer Limits of Article 28EC: Purely internal situations and the development of the Court's approach through the years' (2007), available at http://ssrn.com/abstract=1029248**
- **Weatherill, S. 'After *Keck*: some thoughts on how to clarify the clarification' (1996) 33 *CMLRev* 885–906.**
- **Weatherill, S. 'Recent case law concerning the free movement of goods: mapping the frontiers of market deregulation' (1999) 36 *CMLRev* 51–85.**
- **White, E. 'In search of the limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev* 235–80.**

Sample examination questions

Question 1 **ABC Ltd is the major French producer of goat's cheese. It sends a shipment of cheese to a distributor in the United Kingdom, but the shipment is refused entry at the port of Dover. The reasons given by the customs authority for refusing entry are: first, that the cheese is not labelled in English; secondly, that it is packed in cubic containers and therefore does not satisfy United Kingdom standards of consumer protection; and, thirdly, that it contains additives that are not allowed in cheese marketed in the United Kingdom.**

Advise ABC Ltd as to its rights, if any, under European Union law.

Question 2 **Evaluate the importance of the *Keck* case.**

Question 3 **Compare Article 36 TFEU with the *Cassis de Dijon* mandatory requirements.**

Advice on answering the questions

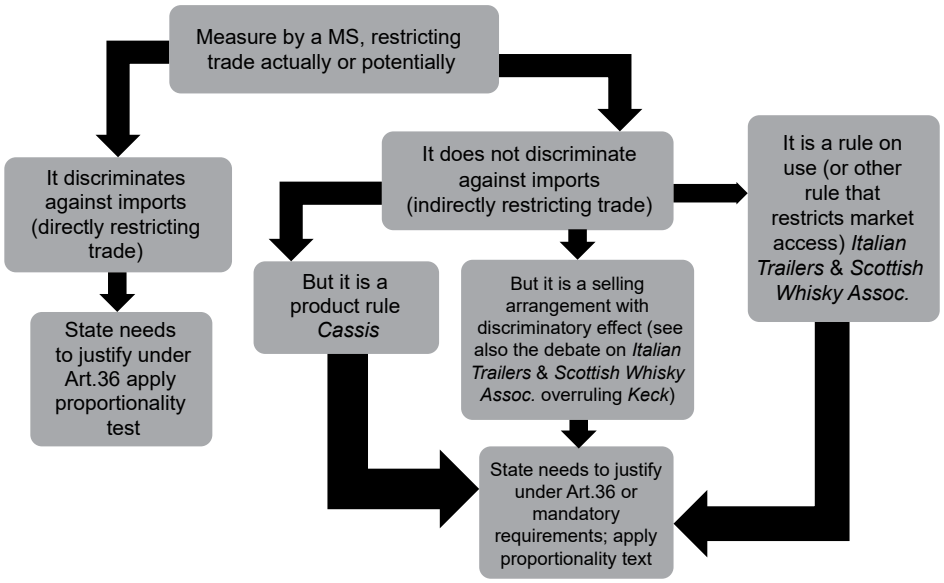

Figure 6.1: How to answer a problem question on Article 34 TFEU

Question 1

- **Labelling in English**: this is a product requirement, a MEQR contrary to Article 34 TFEU (ex Article 28 EC); *Cassis* indistinctly applicable/dual burden rule because it requires all cheese to be labelled in English (whether home produced or imported). It is a dual burden because ABC will have to have new labels affixed to the product. Possible justification on grounds of mandatory requirement of consumer protection; or possibly under Article 36 TFEU (ex Article 30 EC) public health grounds (it could be argued that customers need to know the ingredients, fat content, etc. in case they have health problems). Conclusion = probably justified.
- **Cubic containers**: indistinctly applicable/dual burden measure; probably disproportionate and so not justified on consumer protection grounds. Labelling would be enough (cite *Rau* case).

- **Additives rule**: again indistinctly applicable/dual burden content requirement, cite *Cassis*. Justified under Article 36 TFEU (ex Article 30 EC): cite *Commission* v *Germany*: burden of proof on the UK to prove its rules are in line with internationally accepted views or that it has scientific evidence of health risk. A good answer would also discuss the recent case law on the precautionary principle.

Question 2 You need in-depth knowledge of both pre- and post-*Keck* case law so that you can compare the Court's approach. The importance of the change should be illustrated by comparing, for example, *Cinéthèque*, *Buet*, *Oosthoek*, with post-*Keck* cases on selling arrangements. Discuss the issue of the Court's formalistic approach to the *Keck* test and critical commentary on this (*Leclerc-Siplec*). Finally discuss the refinement of the test (*Gourmet*) and whether this diminishes its importance.

Question 3 Article 36 TFEU (ex Article 30 EC) is a closed list and applies to both discriminatory and indistinctly applicable measures. *Cassis* mandatory requirements are non-exhaustive and evolve with time, but can only justify indistinctly applicable rules (*Commission* v *Ireland (Souvenirs)*). The main thing here would be to include plenty of case law examples and to demonstrate through those examples that the Court's approach is basically the same: is there a legitimate objective? Is the rule necessary? Is it proportionate?

Quick quiz

QUESTION 1

Which are the main treaty Articles partaking to free movement of goods?

a. **Articles 34 and 35 TFEU.**

b. **Articles 28 and 30 TFEU.**

c. **Articles 34 and 110 TFEU.**

d. **Articles 28 and 35 TFEU.**

QUESTION 2

Which of the following fictitious scenarios fall under the Keck exception?

a. **France imposes a ban on any wine products not contained in a 75cl bottle.**

b. **Austria bans any door to door selling of personal insurance.**

c. **Portugal puts a cap on the number of car dealers selling goods with a particular type of selling arrangement.**

d. **Cyprus decides to heavily restrict the sale of video games with non-Cypriot age recommendation rating.**

QUESTION 3

Which of the following fictitious breach of movement of goods has no derogation?

a. **Poland claims that it has blocked imports of Croatian Vodka because of concerns over a recent epidemic affecting Eastern Europe's potato crops, but did not block that of Slovenia (despite the fact that the WHO judges it more a risk).**

b. **Germany has banned the commercialisation of a new type of non-lethal weapon used in paintball type games stating that 'the realism of the contraption would be a breach to human dignity, a core German constitutional belief'.**

c. **Silvio, an Italian national, has had his favourite hair dye banned by the government. The justification advanced is that the importer has strong links with the Corsican mafia, and in order to fight organised crime, their main economic revenues were being shut down as a matter of policy.**

d. **The UK instates steeper taxes on a revolutionary Swedish cure for a specific cancer. The government claims it is to ensure that quality controls are correctly**

carried forward and that owing to the highly complex nature of that drug it had to increase the funding of its quality control lab in Cheltenham.

Question 4

Which of the following was judged to be a mandatory requirement in *Cassis de Dijon*?

a. **Environmental protection.**

b. **Pluralism of the press.**

c. **Preservation of national culture.**

d. **Consumer protection.**

Question 5

In which circumstances can the test of market access be applied (found in *Commission* v *Italy*)?

a. **Where the *Keck* test has failed.**

b. **Where the measure does not relate to the nature of the good or the method of sale, but substantially affects consumer behaviour in a negative way.**

c. **Where the state has introduced an indiscriminate and indistinctly applicable measure.**

d. **Where a yet unimplemented directive on the issue purporting to ban the state's measure has been passed by the EU.**

Answers to these questions can be found on the VLE.

NOTES

7 Services and establishment

Contents

Introduction

The general principle of non-discrimination in Article 18 TFEU applies to self-employed people, companies and service providers, entitling them all to equal treatment with nationals. As such, both the right of establishment and the freedom to provide services rest on the prohibition of discrimination. The key Treaty provisions are Articles 49 and 56 TFEU.

Case 55/94 *Gebhard* v *Consiglio Dell'Ordine Degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 sets out the criteria for determining whether a person or company is established in another Member State or is a provider of services in another Member State. The difference is that 'establishment' applies to an activity which is pursued on a 'stable and continuous basis' in another Member State, whereas services are temporary in nature. Whether the activity falls under establishment (Article 49 TFEU) or services (Article 56 TFEU) depends on the 'duration, regularity, periodicity and continuity of the provision of the services'.

Another key difference between services and establishment lies in the extent to which Member States are allowed to impose their own rules on non-nationals. The Court has held that, in the case of establishment, the host state can require compliance with its own rules governing the activity concerned, subject to the principle of proportionality. On the other hand, the host state's rules should not be applied to the same extent to a person providing services on a temporary basis, since they already have to comply with the rules in their home state and this would amount to a 'dual burden' (see *Cassis de Dijon* in Chapter 6).

7.1 The scope and *ratione materiae* of the freedom to provide services

Core text

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services' and Chapter 22 'Right to receive services'.**

7.1.1 Scope of the service provisions

The freedom to provide services is a 'residual' category. This means that it covers those areas not covered by other provisions relating to the free movement of goods, capital and persons. In 1957, when the Treaty of Rome was signed, services were regarded as a relatively marginal sector. Since then, the provision of services (including financial services and insurance) has become much more important and now constitutes a significant part of the EU economy.

The structure of the Treaty provisions is as follows.

Article 56 TFEU: contains the basic rule abolishing restrictions on the freedom to provide services.

Article 57 TFEU: defines services.

Article 58 TFEU: contains the specific provision for the transport sector.

Articles 59 TFEU: provides the power to issue Directives.

Article 61 TFEU: is the non-discrimination transitional provision.

Article 62 TFEU: applies to services, the derogations on grounds of public policy, public security and public health, and for activities connected with the exercise of official authority.

7.1.2 Non-discrimination, proportionality and the direct effect of Article 56

In Case 33/74 *Van Binsbergen* [1974] ECR 1299 the Court established that Article 56 TFEU has direct effect. The Court ruled that Article 56 TFEU specifically applied to a situation where a service provider was prevented from providing a service because of their residence in another Member State. In this case, a rule which required a person to be 'habitually resident' in the host state in order to provide legal representation services there would deprive Article 56 TFEU of all effect. As the requirement to be established in the Netherlands was easier for Dutch nationals to comply with, the rule amounted to indirect discrimination on grounds of nationality. And, although in some cases a residence requirement may be necessary to ensure the application of professional rules of conduct, this was only if supervision could not be achieved by less restrictive means (i.e. it must be proportionate).

The extension of Article 56 TFEU to non-directly discriminatory (or indistinctly applicable) rules was further developed in the Cases 279/80 *Webb* [1981] ECR 3305 and C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221. In particular, these cases elaborated upon the requirement that rules be necessary and proportionate to the desired objective.

One factor in deciding whether a host state's requirements are necessary and proportionate is whether the control or supervision is adequately carried out by the service provider's home state. In *Webb*, an employment agency in the UK provided temporary staff in the Netherlands. It had a licence under UK law but Dutch law also required it to have a Dutch licence. The Court accepted that the licensing of employment agencies was legitimate and in the public interest, as it was necessary to avoid abuse and to protect the workers involved. But, imposing the Dutch rules was only justified if those interests were not already protected by the home state.

In *Säger*, German law on the provision of patent renewal services reserved the right to operate this service – which consisted of sending out reminders that patents were

about to expire and then dealing with the renewal process – to patent agents and lawyers. Dennemeyer, a UK company, provided such services to clients throughout the EU, including Germany. It operated lawfully in the UK but did not meet the requirements of German law. A German competitor, Säger, brought an action to prevent Dennemeyer from operating in Germany. The Court held that Article 56 TFEU requires not only the elimination of all discrimination against a person providing services on the ground of their nationality but also the abolition of any restriction, even if it is non-discriminatory, if it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where the person lawfully provides similar services. The Court held that, while the German rules might be justified to protect the recipients of the services in question, the requirements were disproportionate. It also held that the freedom to provide services may be limited only by national rules which are: non-discriminatory; justified by imperative reasons relating to the public interest; necessary; and proportionate.

See also Cases C-369 and 376/96 *Arblade* [1999] ECR I-8453 and C-36/02 *Omega* [2004] ECR I-9609.

7.1.3 The meaning of services

According to Article 57 TFEU, two things characterise 'services': they are temporary in nature, and they are 'normally provided for remuneration'. The first characteristic was further developed in Case 55/94 *Gebhard* v *Consiglio Dell'Ordine Degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

The second characteristic of remuneration removes things like gifts and unsolicited activity from the scope of the Treaty articles.

It can be difficult to draw a clear line between services of an economic nature and non-profit-making ones and, in a series of cases, the Court has held that it is not essential that the person who receives the service be the person who provides the remuneration.

In Case 263/86 *Belgium* v *Humbel* [1988] ECR 5365, a state school operating within the national educational system was held not to be providing services. However, a school in the private sector, which is financed by private means for profit (i.e. the fees are paid by pupils and their parents), is a provider of services under Article 56 TFEU. See also, for example, Cases C-51/96 and C-191/97 *Deliège* (2000) ECR I-2549 and C-159/90 *SPUC* v *Grogan* (1991) ECR I-4685.

7.1.4 Services and cross-border activity

Three broad categories of cross-border activity are covered by Article 56.

- Cross-border activity with the service provider moving temporarily from State A to State B.
- Cross-border activity with the recipient of the service moving temporarily from State A to State B.
- Cross-border activity with no person moving. Instead the service itself moves (e.g. telecommunications).

The freedom to provide a service

Article 56 clearly states the freedom to provide a service and the scope of this freedom was demonstrated in Case 33/74 *Van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299. Also, Case C-224/97 *Ciola* [1999] ECR I-2517 concerned a restriction imposed by the Austrian authorities on the number of moorings on Lake Constance which could be held by boat-owners resident in other Member States. The Court found that the Austrian rule breached Article 56 since it interfered with the company's attempts to provide a service.

The freedom to receive a service

The Court of Justice has extended the scope of Article 56 to include the freedom to receive services. For example, in Joined Cases 286/82 *Luisi and Carbone* [1984] ECR 377, two Italians travelling to another Member State as tourists and for medical treatment were protected by Article 56 TFEU.

In Case 186/87 *Cowan* [1989] ECR 95, a French law provided compensation for injuries to French nationals and residents who were victims of crime. The Court found that this rule could not be dependent on a residence qualification and, as such, Mr Cowan who on a visit to Paris was robbed and injured could claim compensation as a recipient of services under Article 56.

This extension has been especially important in the field of education, see Case 293/83 *Gravier* v *City of Liege* [1985] ECR 593.

Health care

A number of cases have dealt with the freedom of patients to seek health services in another Member State and to be subsequently reimbursed by their national social security or insurance schemes.

In Case 158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, the Court of Justice held that a requirement for prior authorisation, for treatment to be provided in another Member State, as a prerequisite for reimbursement was contrary to Articles 56 and 57 TFEU. Such restrictions could only be justified if there was a risk of seriously undermining the financial balance of the social security system.

In Joined Cases C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, persons registered with social security sickness insurance in the Netherlands were subject to a requirement of prior authorisation to receive medical treatment in another Member State. The Court held that such a requirement could be subject to the following conditions:

- that the treatment is 'normal in the professional circles concerned', and
- that the medical treatment is necessary.

The Court went further to clarify that the phrase 'normal in the professional circles concerned' meant that the treatment must be 'sufficiently tried and tested by international medical science'. This ensures that it is assessed according to international, and not just national, criteria.

It also stated that authorisation can be refused on the grounds of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay in a hospital having a contractual arrangement with the insured person's sickness fund.

See also Case C-56/01 *Inizan* v *Caisse Primaire d'Assurance Maladie des Hauts de Seine* [2003] ECR I-12403, in which prior authorisation could be required for treatment outside France, but could only be refused if the 'same or equally effective treatment for the patient' could be obtained in France without undue delay. The Court stressed that because prior authorisation requirements hinder the exercise of a fundamental freedom, they must be based on objective, non-discriminatory criteria which are known in advance, so that national authorities do not use their discretion arbitrarily. Also, there must be:

> a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.

In Case C-372/04 *R on the application of Yvonne Watts* v *Bedford Primary Care Trust* [2006] ECR I-4325, the Court of Justice ruled that the UK National Health Service (NHS) was obliged to refund the costs of hospital treatment obtained in another Member State if the patient concerned was faced with an 'undue delay' in the UK. It held that although the prior authorisation system governing NHS reimbursement of the cost of hospital treatment elsewhere in the EU was a deterrent to patients from seeking

such treatment, it was justified. However, where the delay in offering treatment in the home state exceeds a medically acceptable time period, the competent authorities may not refuse authorisation because of any of the following:

- the existence of waiting lists
- the alleged distortion of the normal priorities
- the fact that hospital treatment is offered free of charge
- a comparison between the cost of the treatment provided in the host Member State and the cost of that treatment in the Member State of residence.

In Case C-512/08 *Commission* v *France ECR* [2010] ECR I-8833 the Court upheld a national requirement for prior authorisation in order for the competent institution to be responsible for payment for treatment planned in another Member State and involving the use of major medical equipment outside a hospital setting. According to the Court, due to the dangers to the organisation of public health policy and the financial balance of the social security system, such a requirement was a justified restriction.

Contrast with Case C-173/09 *Elchinov* [2010] ECR I-8889 in which the Court held that legislation of a Member State which is interpreted as excluding, in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorisation is not consistent with Article 56 TFEU.

Services that move, where the provider and recipient do not

In Case C-384/93 *Alpine Investments BV* v *Minister van Financien* [1995] ECR I-1141 the Netherlands had introduced rules which prohibited 'cold calling' (uninvited telephone sales) for the sale of certain financial services to potential customers.

The restriction was imposed by the home state of establishment, but restricted the freedom to offer services in another Member State. Despite this, the Court held that a company established in the Netherlands could plead Article 56 TFEU against its own home state in this situation, stating that:

> the right freely to provide services may be relied on by an undertaking as against the state in which it is established if the services are provided for persons established in another Member State.

Seeking to draw an analogy with the *Keck* ruling in relation to goods, the Dutch and UK governments argued that the Dutch rule merely affected the way in which the services could be offered. This was rejected by the Court of Justice because the rule 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'. Despite this, the Dutch rule was held to be justified and proportionate on the grounds of protecting the reputation of the Dutch financial sector.

7.2 Derogations from the free movement of services

CORE TEXT

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services' and Chapter 22 'Right to receive services'.**

Article 51 TFEU allows Member States to exclude activities 'connected' even occasionally 'with the exercise of official authority'.

Article 52 TFEU provides for derogation from the right of establishment and right to provide/receive services on the same grounds as for workers, namely: public policy, public security and public health. See further Article 62 TFEU.

The tension between the general right to provide and receive services and the state regulation of certain activities is similar to the development of case law regarding the free movement of goods. For example, the state may have determined that certain activities are illegal, despite being legal in other Member States, or that consumers

require protection in certain service sectors. As a consequence, the Court's approach is to set out the general right to provide or receive a service, but to acknowledge that certain obstacles to service provision can be acceptable.

As with the free movement of goods, discriminatory measures can only be justified under the specific Treaty provisions, whereas measures applying in a non-discriminatory way, indistinctly applicable measures or measures with an effect on trade can fall foul of Article 56 TFEU provided they are not objectively justified (see *Säger* (above)).

A national rule restricting the freedom to provide services must be compatible with the requirements of Article 56. To do so it must satisfy a four-part test, as follows:

- the rule must be non-discriminatory
- the rule must be justified by imperative requirements in the general interest
- the rule must be suitable for the attainment of the objectives it pursues
- the rule must not go beyond what is necessary to attain its objectives.

7.2.1 Public interest grounds

Restrictions to the freedom to provide services may be justified by the general good. In Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, the Court held that the right of a Portuguese company to provide construction services in France under Article 56 TFEU included the right for it to use its own employees to provide the services. The Court dismissed France's concern that this might threaten the stability of the labour market in France, as the activity would only be temporary (see also *Webb*, above).

In Cases 369/96 and 376/96 *Arblade and Leloup* [1999] ECR I-8453, two French companies providing services in Belgium were prosecuted for their alleged failure to comply with Belgian social legislation governing employment. Requirements to issue each worker with an individual record and other paperwork formalities in Belgium were held to be prohibited by Articles 56 and 57 TFEU since such paperwork was already maintained in the home state (i.e. it was imposing a dual regulatory burden). However, it was lawful to require that the companies kept such documentation available in the host state so that the latter could monitor compliance with national legislation on the safeguarding of workers.

However, the consideration of employee protection as a cross-border service rather than as a free movement of workers issue can create problems. Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 concerned collective action organised by the Swedish building and public works trade union against a Latvian company, Laval, which had posted construction workers from Latvia to work on its building projects in Sweden. The Swedish unions sought to impose a blockade against the Latvian company, intending to force the company to sign a collective agreement respecting Swedish wage conditions and employment terms. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene. The company was eventually forced to withdraw its work force. The reference was from a court hearing its action for damages.

Because of the temporary nature of the Latvian company's operations, the matter concerned the free movement of services under Article 56. The Court of Justice ruled that since the Latvian company protected its employees to the standards required by EU law, an attempt to force it to comply with further standards in Sweden breached its rights under Article 56 TFEU. In deciding this, the Court further expanded the scope of direct effect of Article 56 TFEU.

In addition to the protection of workers, the Court has recognised the following public interest grounds:

- professional rules intended to protect the recipients of services (see Joined Cases 110 & 111/78 *Ministère Public* v *Willy van Wesemael and others* [1979] ECR 35, and Case C-3/95 *Reisebüro Broede* v *Sandker* [1996] ECR I-6511)

- protection of intellectual property (Case 62/79 *Coditel* [1980] ECR 881)
- consumer protection (see Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, Case C-42/07 *Liga Portuguesa de Futebol Profissional* [2009] ECR I-7633 and Case C-234/12 *Sky Italia srl* v *Autorità per le Garanzie nelle Comunicazioni* [2013] below)
- conservation of national historic and artistic heritage (see Case C-180/89 *Commission* v *Italy* [1991] ECR I-709)
- dissemination of knowledge of the artistic and cultural heritage of a country (Case C-154/89 *Commission* v *France* [1991] ECR I-659 and Case C-198/89 *Commission* v *Greece* [1991] ECR I-727)
- cultural policy (Case C-288/89 *Gouda* [1991] ECR I-4007 and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069).

Note that any limitation on services arising because of a public interest must be applied proportionately, equally and without discrimination.

Case C-17/00 *De Coster* [2001] ECR I-9445 illustrates the application of the principle of proportionality to the public interest justification. This case concerned the differential taxation of cable and satellite services. The Court found that, because cable services were not subject to the same taxation, the tax on satellite services interfered with the provision of services.

The Belgian authorities justified the rule on the grounds that it was necessary to control the uncontrolled proliferation of satellite dishes and, thereby, preserve the quality of the environment. The Court decided that the tax exceeded what was necessary to achieve the objective of protecting the urban environment as there were a number of other less restrictive measures by which the aims could be achieved.

Lastly, in the recent Case C-234/12 *Sky Italia srl* v *Autorità per le Garanzie nelle Comunicazioni* [2013] the Court found that although the protection of consumers against abuses of advertising constituted an overriding reason relating to the general interest which may justify such a restriction, it was subject to the principle of proportionality. Therefore, an Italian measure on television advertising, which lay down shorter hourly limits for advertising for pay-TV broadcasters than for free-to-air broadcasters, was found to be, in principle, compatible with EU law.

7.2.2 Illegal services

Illegal services, such as betting or gambling, do not escape the application of Article 56. Yet it is often the case that such restrictions are based on the desire to protect the consumer and, in order to be justified on these grounds, they must be consistent with the principle of proportionality.

In Case 159/90 *Society for the Protection of the Unborn Child (SPUC)* v *Grogan* [1991] ECR I-4685, a student organisation illegally distributed leaflets in Ireland about abortion services available in the UK. The Court avoided having to decide whether a legitimate interest was being protected by holding that as the students were not themselves connected with the service providers, they were not covered by Article 56 TFEU.[†]

In Case 275/92 *Customs and Excise Commissioners* v *Schindler and Schindler* [1994] ECR I-1039 the Court held that the UK rules against large-scale lotteries, which prevented the promotion in the UK of a German lottery, were justified 'in the light of the specific social and cultural features of each Member State, to maintain order in society'.

In Case C-6/01 *Anomar* v *Portugal* [2003] ECR I-8621, Portuguese rules restricting gambling to casinos or other licensed venues fell within the margin of discretion enjoyed by Member States on grounds of social policy and the prevention of fraud. However, in Case C-42/02 *Lindman* [2003] ECR I-3519, Finnish rules that considered winnings from lotteries held in other Member States as taxable income while holding that winnings from lotteries held in Finland were not taxable, were contrary to Article 56 TFEU.

[†] It is interesting to note that Advocate General van Gerven, who did examine the merits of the case in his Opinion, concluded that protection of the unborn child was a legitimate objective and that the restriction was justified under Article 52 TFEU (the public policy exception) as a moral or philosophical choice which a Member State was entitled to make.

There have been a number of other cases concerning gambling such as Case 124/97 *Laara* [1999] ECR I-606, Case C-243/01 *Gambelli* [2003] ECR I-13031, Case C-203/08 *The Sporting Exchange Ltd, trading as Betfair* v *Minister van Justitie* and C-258/08 *Ladbrokes Betting & Gaming Ltd*, *Ladbrokes International Ltd* v *Stichting de Nationale Sporttotalisator* [2010] ECR I-4757. In the latter case, the Netherlands prohibited the organisation of gambling unless the organiser has been licensed by the state. It also limited the number of persons that can carry out such activity to one per each type of game. In both cases, the Court confirmed that it was legitimate for a Member State to restrict the ability of operators to organise gambling and that it was permissible for the state to issue exclusive rights to do so. While it constitutes a restriction of free movement rights, this could be justified for public order and consumer protection reasons. The Court found that the Netherlands was not obliged under the principle of mutual recognition to recognise the licences to operate granted in other Member States, given the necessity to protect national consumers. The Court's reasoning contrasted 'controlled expansion' with the dangers of gambling by applying the proportionality test (see also Cases C-42/07 *Lisa Portuguesa de Futebol Profissional* [2009] ECR I-7633; C-6/01 *Associação National de Operadores de Máquinas Recreativas* [2003] ECR I-8621; and C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921).

Lastly, in Case C-176/11 *HIT and HIT LARIX* v *Bundesminister für Finanzen* [2012] the Court of Justice held that a national measure prohibiting advertising of foreign casinos, although restricting the freedom to provide services, was justified by the objective of consumer protection.

For a case concerning a different illegal activity, see Case C-137/09 *Marc Michel Josemans* v *Burgemeester van Maastricht* [2010] ECR I-13019. Here, the Court was asked whether a prohibition restricting access to Dutch coffee-shops to residents only fell within the scope of Article 56 and, if so, was it justifiable on grounds of reducing drug tourism and public nuisance? The Court held that the general prohibition of illegal drugs in the EU, meant that a coffee-shop owner could not rely on the principles of free movement and non-discrimination regarding the marketing of cannabis. Thus the Court, contrary to its established case law, excluded *a priori* the application of the Treaty. *Josemans* is therefore one of the very few examples where the Court found that national regulatory policies fell outside the scope of the Treaty.

7.2.3 Protection of human rights

In Case C-36/02 *Omega Spielhallen* v *Bonn* [2004] ECR I-9609 the Court of Justice accepted that constitutional values protecting fundamental human rights could give rise to a justifiable limitation of the freedom to provide or receive services.[†] It was argued that a German measure prohibiting a laser game in which people simulate gun-battles with each other was in breach of Article 56 TFEU. However, in Germany, such games were regarded as trivialising violence and infringing the fundamental right of human dignity guaranteed in the German Constitution. The Court said that the protection of fundamental human rights is an obligation imposed by Community law, even in relation to the four fundamental freedoms. However, the way such rights were protected might vary between Member States:

> It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.

The German prohibition was therefore justified under Article 52 TFEU on public policy grounds.

From the cases in the above sections, we can see that in applying the proportionality test to rules on services, the Court pays great attention to the nature of the services involved: the more serious the risk of harm to the public, the more likely it is that restrictions will be allowed. The less the risk, the more likely that the restriction will be considered as in breach (see Cases C-154, 180, 198/89 *Commission* v *France, Italy and Greece* [1991] ECR I-659, 709, 727.)

[†] Compare with the *Schmidberger* case on this issue in Chapter 6.

7.3 The Services Directive

Broadly speaking, Directive 2006/123 on Services is aimed at facilitating the free movement of services by removing legal and administrative barriers to trade in the services sector. It places a number of procedural requirements on Member States to ensure that the procedures and formalities that apply to services are kept simple and that relevant formalities can be addressed at a single point of contact. Whilst named the Services Directive, it also contains provisions on establishment.

While the Services Directive is intended to be general in nature, several services activities, including many of those considered in case law by the Court, are excluded from its scope.

Since the entry into force of the Directive, the Court has ruled upon its application in cases such as Case C-119/09 *Société fiduciaire nationale d'expertise comptable* [2011] ECR I-2551 and Case C-357/10 *Duomo Spa* [2012] 3 CMLR 10. For a further example, see Case C-434/15 *Uber* ECLI:EU:C:2017:981.

7.4 The scope and *ratione personae* of the freedom of establishment

CORE TEXT

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services'.**

7.4.1 Freedom of establishment and people

Discrimination on grounds of nationality in relation to the freedom of establishment is prohibited under Article 49 TFEU. This principle was upheld in Case C-246/89 *Commission* v *UK* [1991] ECR I-4585, in which the UK's attempt to impose residence and nationality requirements for those operating fishing boats was held to be unlawful.

The wording of Article 49 TFEU suggests that it only applies to rules which discriminate against non-nationals. However, Article 49 TFEU has been extended to encompass national rules which are indirectly discriminatory. This is based on the understanding that such measures are more difficult for non-nationals than nationals to comply with (see Case 107/83 *Klopp* [1984] ECR 2971 and Case 19/92 *Kraus* [1993] ECR I-1663).

In *Gebhard* the Court of Justice held that Italian rules prohibiting the establishment of chambers by non-national lawyers in the host state could only be imposed on non-nationals if four conditions were met:

- the rules were applied in a non-discriminatory manner
- they were justified by an overriding general interest
- they were a suitable means of achieving the objective
- they did not go beyond what was necessary.

This is the same test as provided in the *Cassis de Dijon* 'mandatory requirements' doctrine. In this case, the Court of Justice explicitly widened the scope of Article 49 TFEU to cover non-discriminatory rules which are 'liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty'.

Freedom of establishment and companies

The right of establishment is described in Article 49 TFEU as the right of a natural person or a company to settle in a Member State and to pursue an economic activity there. This includes the right to set up and run a company and the right to pursue an occupation in a self-employed capacity. Article 49 covers the right for individuals as well as 'companies and firms', which are defined in Article 54 TFEU as those 'constituted under civil or commercial law'. This definition encompasses cooperative societies and other legal persons, but excludes non-profit-making organisations.

Primary establishment is where a person or company goes to another Member State and permanently establishes there; secondary establishment is where a person or company established in one Member State also establishes in another Member State.

Transfer of establishment to another Member State (primary establishment)

In Case 81/87 *Daily Mail* [1988] ECR 5500, the *Daily Mail* claimed that the UK statutory requirement that companies transferring their central management abroad must obtain Treasury permission first was an obstacle to their freedom of establishment. The Court held that, because of the wide variations in company law across the Union, Article 49 TFEU conferred no directly effective right to transfer a company's principal place of business to another Member State without restrictions.

In Case C-378/10 *VALE Építési* [2012] 3 CMLR 41, the Court ruled on the ability of companies to conduct cross-border conversion of their establishment into another Member State. This case concerned a cross-border conversion of a company established under Italian law, VALE Construzioni Srl, into a company incorporated under Hungarian law, VALE Építési kft. Under Hungarian law, only companies incorporated under Hungarian law were allowed to convert. The Court noted that in the absence of a uniform definition of companies in EU law, the host Member State may determine the national law applicable to such operations and apply the provisions of its national law that govern the incorporation and functioning of companies. However, the Court of Justice also found that national provisions which prohibit companies from another Member State from converting must be examined in light of the freedom of establishment. By providing only for the conversion of companies which already have their seat in Hungary, the Hungarian national legislation treated companies differently. Since such a difference was likely to deter companies which have their seat in another Member State from exercising the freedom of establishment, it amounted to an unjustified restriction on the exercise of that freedom.

Secondary establishment

In Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971 the Court ruled that the right to set up branches in other Member States included the right for a lawyer to set up more than one place of work, subject to professional rules of conduct. At that time, there was no directive coordinating national provisions governing access to and the exercise of the legal profession. The French rules restricted French lawyers to membership in only one local Bar. Nevertheless, there was the possibility for a foreign lawyer to have an office in another country. Therefore, even if national rules provide that someone may only have one professional location, this does not preclude a lawyer from another Member State from setting up an office in another Member State.

Differences in national company law mean that it may be easier to establish a business in another Member State. In Case 212/97 *Centros Ltd* v *Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459 the issue was whether a company could establish in the UK but then carry out its business activities in Denmark through a branch set up there. The Danish authorities refused to register the Danish branch on the basis that it would, in fact, be the principal establishment of the company.

The Court of Justice held that the Danish authorities were not entitled to refuse registration of the branch. It was not in itself an abuse of Article 49 TFEU for nationals of one Member State to choose to form a company in another Member State whose rules on company law were less restrictive.

In case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam* v *Inspire Art Ltd* [2003] ECR I-10155 a company established in the UK that sought to set up a secondary establishment in the Netherlands was subject to certain requirements under Dutch law (namely, a minimum share capital and a requirement of directors' liability). While accepting that some restrictions might be permitted if justified and proportionate, the Court held that these restrictions were disproportionate to the objectives of protecting creditors and ensuring effective tax inspections and fairness in business dealings.

Taxation of companies and Article 49 TFEU

In Case C-446/03 *Marks & Spencer plc* v *Halsey (Inspector of Taxes)* [2005] ECR I-10837 the Court was required to consider a UK tax law, according to which it was possible for a parent company and its subsidiaries which are all resident in the UK, to deduct losses incurred by one member of the group against the taxable profits of other companies of the group. This was not possible, however, when the subsidiary that has incurred the loss was established in another Member State. Subsidiaries of Marks & Spencer established in Belgium, France and Germany had incurred losses and had been closed down. It was argued that this UK tax law was in breach of the freedom of establishment. The ECJ agreed, finding that the fact that those losses could not be offset against the profits of the parent company in the UK was a breach of Article 49 TFEU.

The Court accepted the objective justifications put forward by the UK government, which included, for example, the argument that companies might always choose to use the tax relief from losses against taxable profits received in the country with the highest rate of tax. Nevertheless, these particular tax provisions were not proportionate in this case, as they extended to circumstances where the subsidiary had incurred losses but then had ceased business. Therefore, there was no possibility for those losses to be offset against taxable profits in the Member State in which the subsidiary was established. If the company could not do this, it would lose the benefit of being able to offset its losses against tax altogether.

Case C-196/04 *Cadbury Schweppes* v *IRC* [2006] ECR I-7995 was concerned with whether it was an abuse of the freedom of establishment for a company established in a Member State to set up and capitalise companies in another Member State solely to take advantage of a more favourable tax regime. The Court held that it was not an abuse. However, it did state generally that national measures to prevent an abuse could be objectively justified if they were designed to prevent artificial arrangements to escape the tax normally due on the profits generated by activities carried out in that country.

7.5 Derogations from the freedom of establishment

CORE TEXT

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services'.**

Article 51 TFEU allows Member States to exclude activities 'connected even occasionally with the exercise of official authority'.

Article 52 TFEU provides for derogation from the right of establishment and right to provide/receive services on the same grounds as for workers, namely: public policy, public security and public health.

In addition, the Court has recognised a broader category of additional public interest grounds or objective justifications similarly to the context of the free movement of goods (see Chapter 6) and the free movement of services (see above).

As with the other freedoms, derogations from the freedom of establishment are subject to compliance with the principle of proportionality.

7.5.1 Limitations on grounds of public policy, public security and public health

These exceptions, as well as being well established in the cases concerning the free movement of workers, also apply to establishment and services.

In Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* v *Saarland* [2010] ECR I-4171, the Court held that German rules that required that certain medicines could be supplied by qualified pharmacists could be considered as an obstacle to trade. However, these were, in fact, justified on grounds of the protection of human health. Since non-pharmacists by definition lack the training, experience and responsibility

equivalent to those of pharmacists and, consequently, do not provide the same safeguards, it follows that a Member State may take the view that the operation of a pharmacy by a non-pharmacist may represent a risk to public health.

Lastly, in the more recent Case C-575/11 *Nasiopoulos* v *Ipourgos Igias kai Pronoias* [2014] 1 CMLR 7 the Court found, subject to certain considerations, that the refusal to recognise a qualification as a masseur-hydrotherapist which enabled an autonomous profession to be exercised in the issuing Member State, constituted an obstacle to the freedom of establishment which could not be justified by the objectives of consumer protection or the protection of public health. According to the Court, there were less restrictive means to ensure consumer protection and public health than the exclusion of any partial access to the profession in the Member State.

7.6 Mutual recognition of qualifications

Core text

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services'.**

Essential reading

- **Directive 2005/36 on the recognition of professional qualifications.**

Articles 49 and 56 TFEU have both been found by the Court to have direct effect. Despite this, the Commission has embarked on a programme to give further substance to the Articles by drafting a number of specific Directives primarily intended to provide for the mutual recognition of professional standards.

Although such Directives are not a prerequisite for the right of establishment or the free provision of services, they do make it easier for non-nationals to exercise these rights in particular fields in other Member States. In the 1960s and 1970s a myriad of Directives were issued in various professional fields. However, many of these Directives took a long time to draft and adopt and did not succeed in eliminating all the problems which arose in respect of the recognition of professional training and qualifications. The Commission therefore adopted a different approach, developing a general directive recognising professional qualifications. The result was the three Directives adopted in this area (Council Directives 89/48, 92/51 and European Parliament and Council Directive 1999/42), all three of which have now been repealed and replaced by Directive 2005/36. This Directive also incorporates the sectoral Directives which cover the seven professions of doctor, nurse, dental practitioner, veterinary surgeon, midwife, pharmacist and architect. Note that this Directive is being reviewed by the Commission with a view to its modernisation (see further Directive 2018/958 on a proportionality test before adoption of new regulation of professions).

The Directive is based on two principles: (i) mutual trust and (ii) mutual recognition. For these to apply, however, the education or training must be comparable. For example, if there are significant differences between training periods, additional evidence of professional experience or additional examinations may be required.

The aim of the Directives was to facilitate matters, not to make the implementation of the fundamental freedoms dependent on it. This was confirmed in the case of establishment in Case 2/74 *Reyners* [1974] ECR 631, where the Court found that even if there is no Directive harmonising national rules on the qualifications required for a particular activity, Article 49 TFEU itself contains a directly effective prohibition of discrimination which can be relied upon (see *Van Binsbergen* (above) for a similar case concerning services).

In Case 71/76 *Thieffry* [1977] ECR 765 the Court said that in certain circumstances the authorities of a Member State should recognise a qualification obtained in another Member State. Thieffry, a Belgian national with a Belgian law degree, had been allowed to take the French professional examination, but was then refused admission to the Paris bar because he did not have a French law degree. As the authorities had accepted

his Belgian degree as equivalent for academic purposes, the Court found that it was indirect discrimination to then deny its equivalence when it came to professional practice (see also Cases 11/77 *Patrick* v *Ministère des Affaires Culturelles* [1977] ECR 1199 and C-61/89 *Bouchoucha* [1990] ECR I-3551).

Similarly, in Case 340/89 *Vlassopoulou* [1991] ECR I-2357, the Court took a step further. National authorities must compare the qualifications held with the national requirements and accept them it they are equivalent. If not equivalent, the Member State must also look at the additional knowledge and experience the person had gained in the host state. Reasons must be given for the refusal to recognise qualifications and there must be a right to judicial review of such refusal.

7.6.1 Can nationals rely on Article 49 TFEU against their home state?

Article 49 TFEU states that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited'. In the past, the Court of Justice has held that individuals may not rely on Article 49 TFEU against their home state for the recognition of qualifications received in another Member State (see Case 136/78 *Auer* (1) [1979] ECR 437). However, where the matter is governed by a Directive, they may rely on the Directive against their home state. See Case 115/78 *Knoors* [1979] ECR 399.

Generally, the individual will be able to use Article 49 TFEU, in conjunction with the Directive, against their home state.

In relation to services, there are many cases where the provider of services has used Article 56 TFEU against the home state. A notable example is the *Alpine Investments* case discussed above.

7.6.2 The gradual convergence between establishment and services

Despite the substantive difference between the two freedoms (services involve a temporary performance of an economic activity whilst establishment involves a permanent move to another Member State), the case law of the Court on occasion seems to deal with the two freedoms simultaneously. In Joined Cases C-94/04 and C-202/04 *Cipolla* v *Fazari* [2006] ECR I-11421 the Court had to consider an Italian law which prohibited any derogation from the minimum fees for lawyers' services. The Court of Justice held this to be a restriction on the provision of services under Article 56 TFEU. The prohibition deprived lawyers established in another Member State of the possibility of requesting fees lower than those set by the scale, and thereby competing more effectively with lawyers established in the Member State concerned who had greater opportunities for winning clients than lawyers established abroad. It also limited the choice of service recipients in Italy, because they could not choose to take advantage of the services of lawyers established in other Member States who would offer their services at a lower rate than the minimum fees set by the scale in Italy. The Court of Justice held that it was for the national court to decide whether the requirements were proportionate, but suggested it take into account any correlation between the level of fees and the quality of the services provided by lawyers and whether the setting of such minimum fees constitutes an appropriate measure for attaining the objectives pursued (namely the protection of consumers and the proper administration of justice).

In a later case, C-565/08 *Commission* v *Italy* [2012] ECR I-2101, the Court ruled that the Italian legislation imposing maximum fee tariffs for lawyers complies with the fundamental freedoms of the internal market. According to the Court, Italian law did not deprive other Member State lawyers of the opportunity of gaining access to the Italian market under conditions of normal and effective competition. The Court conceded that the Italian system of fees was characterised by a flexibility which appeared to allow proper remuneration for all types of services provided by lawyers. Such reasoning applied to both services and establishment.

7.6.3 Recognition of third country qualifications

In Case 154/93 *Tawil-Albertini* [1994] ECR I-451, a French national had qualified as a dentist in Lebanon. Although Belgium had recognised his qualification, the Court held that this recognition did not bind France. A bilateral arrangement whereby one Member State accepted the qualifications of a non-Member State did not oblige other Member States to accept them.

However, in Case 319/92 *Haim* [1994] ECR I-425, an Italian national had qualified as a dentist in Turkey. His qualification was not recognised under the EU Directive for dentists, but he had worked for eight years in Belgium. He was refused employment in the German social security scheme and told he needed two more years' training. Following *Vlassopoulou*, the Court said that Article 49 required the German authorities to compare his qualifications to see if he had covered the knowledge required, and to take into account the experience gained in another Member State when deciding whether its training requirements were met.

The basic principle of non-discrimination laid down by Article 49 TFEU, as interpreted in *Vlassopoulou*, cannot be limited by the terms of any Directive. So the mere fact that a particular qualification is not listed in the Directive, giving automatic right to recognition, does not mean a Member State can refuse to accept it – even if it was obtained in a non-Member State.

The adoption of Council Directive 2009/50/EC on the conditions of entry and stay of third country nationals for the purposes of highly qualified employment (the 'Blue Card' Directive) goes some way toward providing highly-qualified third country nationals with an efficient method for the portability of their qualifications among EU Member States. The Blue Card enables highly-qualified third country nationals to enter, re-enter and stay in the issuing Member State, pass through other Member States, work in a specific sector of employment, and enjoy equal treatment with nationals regarding, among other things, recognition of diplomas. After they have resided legally in a Member State for 18 months, they may move to another Member State to work in highly-qualified employment. Some restrictions apply, such as national limits on the number of non-nationals accepted under the Blue Card programme. It is important to note, however, that according to Protocols annexed to the Treaties, the UK, Ireland and Denmark do not take part in the Directive and, as such, are not bound by it or subject to its application.

Activity 7.1

a. How has the Court of Justice broadened the definition and application of Article 56 TFEU?

b. What are the main grounds on which a Member State can derogate from Article 56 TFEU? Give two examples of each. No feedback provided.

c. What are the main grounds on which a Member State can derogate from Article 49 TFEU? Give two examples of each. No feedback provided.

Activity 7.2

Write brief answers to the following questions, identifying relevant EU Directives and case law.

a. What is the distinction between the right of establishment and the freedom to provide services, and why is the distinction important in EU law?

b. How has the Court of Justice broadened or changed its focus on non-discrimination in protecting service providers/recipients?

Activity 7.3

Core comprehension – *Josemans*: public policy and illegality

Using your Online Library resources, research the following case:

- **Case C-137/09 *Josemans* v *Burgemeester van Maastricht* [2011] 2 CMLR 19.**

From the Judgment section, answer the following questions.

a. **Which shared concern of Member States is central to the issue of Dutch laws on the operation of cannabis cafes?**

b. **Identify some of the key European and international legislation which has evolved to address the drug problem in Europe.**

c. **Outline the policy of tolerance in the Kingdom of the Netherlands by highlighting the measures in place to control the sale and marketing of cannabis as a soft drug.**

d. **Which additional residency restriction is applied to users of the cannabis cafes in Maastricht?**

e. **Why does the illegal status of cannabis weaken arguments based on the freedom of movement or the principle of non-discrimination even if the Kingdom of Netherlands pursues a policy of tolerance?**

f. **Identify (i) which illegal activities the sale of cannabis in coffee houses may attract, and (ii) two objectives which the ban on sale of cannabis to non-residents attains.**

g. **On which grounds is the restriction on the freedom to provide services justified?**

Activity 7.4

Applied comprehension – Ortino: services and the principle of mutual recognition

Using your Online Library resources, research the following journal article:

- **Ortino, M. 'The role and functioning of mutual recognition in the European market of financial services' (2007) *International & Comparative Law Quarterly* 309–338 (available in the Online Library).**

You can complete this learning activity by reading the following section of the journal which is two pages long: II. The free movement of services and the 'judicial' principle of mutual recognition.

a. **Explain the impact of the concept of 'double regulation' or 'dual burden' in the context of the freedom to provide and receive services within the European Community.**

b. **How does the duty of mutual recognition contained in Article 49 EC protect services providers from breaches of the free movement of services?**

c. **In the Court's interpretation of Article 49 EC identify two grounds upon which a breach of the free movement of services could be disputed.**

d. **Which two conditions must providers of services fulfil to benefit from the principle of mutual recognition?**

e. **How can host states rebut presumptions of a *prima facie* breach of Article 49 related to a measure placed by the host state on other Member State providers of services?**

f. **Identify the three tests of the proportionality principle applied to ascertain whether restrictive measures are justified.**

g. **Using your own words, explain (in fewer than 50 words) how the mutual recognition principle protects service providers from barriers in the host state.**

h. **Identify the positive obligation for host states created by the principle of mutual recognition.**

i. **Identify the negative obligation for host states created by the principle of mutual recognition.**

Activity 7.5

Applied comprehension – SYRPIS: *Laval*, *Viking* and the right to strike

Using your Online Library resources, research the following journal article:

- **Syrpis, P. and T. Novitz 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) *European Law Review* 411–454 (available in Westlaw).**

You can complete this learning activity by concentrating on the sections highlighted below.

The source of conflict: rights to free movement and the right to strike

a. **In *Viking* and *Laval*, identify (i) the organisations which represented the complaints of the workers and employees, and (ii) the type of rights which they seek to protect.**

b. **Paraphrase, in your own words, the main thrust of the rationale for companies which choose to exercise their rights to free movement as employers (50 words maximum).**

A political solution?

c. **How does Article 28 of the EU Charter of Fundamental Rights 2000 (EUCFR) protect the right to strike?**

The Posted Workers Directive

d. **Which provisions of the Posted Workers Directive effectively established 'floor values' to protect posted workers from abusive 'race to the bottom' practices?**

The Services Directive

e. **Which wording was drafted into the Services Directive which embeds Community Law protection of the right to take collective action?**

The right to strike as a basis for justification

f. **Which overarching treaties recognise and protect the fundamental right to take collective action and the right to strike?**

g. **In *Laval*, identify the principled approach taken by the Court to the issue of blockading actions.**

h. **Paraphrase in fewer than 100 words how the *de minimis* approach impacted on the *Laval* outcome.**

Further reading

- **Biondi, A. 'Recurring cycles in the internal market: some reflections on the law of free movement of services' in Arnull, A., P. Eeckhout and T. Tridimas *Continuity and change in EU Law: essays in honour of Sir F. Jacobs*. (Oxford: Oxford University Press, 2008) [ISBN 9780199219032], pp.228–43 (available on the VLE).**
- **Fuchs, M. 'Free movement of services and social security – Quo vadis?' (2002) 8(4) *ELJ* 536–55.**
- **Hatzopoulos, V. and Thien Uyen Do 'The case law of the ECJ concerning the free provision of services 2000–2005' (2006) 43 *CMLRev* 923–91.**
- **Lee, R.G. 'Liberalisation of legal service in Europe: progress and prospects' (2010) 30(2) *Legal Studies* 186–207.**
- **White, R. *Workers, establishment and services in the European Union*. (Oxford: Oxford University Press: 2004) [ISBN 9780198267768].**

Quick quiz

QUESTION 1

What are the two requirements to make an activity a service according to Article 57?

a. **Provided for remuneration and a cross border element.**

b. **Interstate element and national regulation compliance.**

c. **Any activity made within course of trade.**

d. **An exchange of promises and remuneration.**

QUESTION 2

What is considered a 'cross border element'?

a. **A physical transition from one country to another.**

b. **Only the movement of the service receiver.**

c. **A movement across state borders of the service provided.**

d. **A movement across the border of the service provider, receiver or service itself.**

QUESTION 3

Which of the following is not part of the proportionality test?

a. **Suitability.**

b. **Necessity.**

c. **Proportionality.**

d. **Fairness.**

QUESTION 4

What is an imperative requirement?

a. **An indirect requirement of proportionality.**

b. **A reason the EU needs in order to pass legislation.**

c. **An alternative to the derogations in Article 52 for certain types of breach of free movement of services.**

d. **A criterion required to take advantage of freedom of establishment.**

QUESTION 5

Which of the following is not a derogation from Article 49?

a. **Public security.**

b. **Public health.**

c. **Public policy.**

d. **Public economic welfare.**

Answers to these questions can be found on the VLE.

8 Free movement of capital

Contents

Introduction

The Treaty of Rome recognised the need to remove restrictions on the free movement of capital between Member States – however, only 'to the extent necessary to ensure the proper functioning of the common market'. This was later confirmed in the seminal Case C-203/80 *Casati* [1981] ECR 2595, in which the Court found that, unlike the provisions on the free movement of goods, persons and services, the complete free movement of capital could undermine the economic policy of the Member States.

In view of this approach to the free movement of capital, many Member States chose to introduce and maintain safeguarding measures such as 'exchange controls' (i.e. controls to ban or restrict the amount of foreign currency or local currency that is allowed to be traded or purchased). However, it was not long before the damage such restrictions caused the Single Market was recognised. Stage one of the Economic and Monetary Union (EMU) introduced complete freedom for capital movements, scrapping all remaining restrictions and allowing for full liberalisation, first through Council Directive 88/361 (Article 1(1) of which prohibited all restrictions on the free movement of capital) and later on in the Maastricht Treaty.

The Treaty provisions on the free movement of capital were complemented by those on payments. Ex Article 106(1) EEC provided that Member States must authorise means of payment as consideration for the movement of goods, persons, services or capital. Now, Article 63(2) TFEU, the successor to Article 106 EEC, prohibits all restrictions on payments.

8.1 The scope and *ratione materiae* of the free movement of capital

The structure of the Treaty provisions is as follows:

- **Article 63 TFEU**: contains the basic rule abolishing restrictions on the free movement of capital
- **Article 64 TFEU**: extends the Article 63 prohibition to the free movement of capital with third countries, where relevant
- **Article 65 TFEU:** contains derogations from Article 63 TFEU
- **Article 66 TFEU:** contains grounds for derogation from Article 64 TFEU.

Further reading

- **Barnard, C., Chapter 14 'Free movement of capital and economic and monetary union', Section A 'Introduction'.**

8.1.1 The definition of 'capital movement'

The free movement of capital applies principally to capital movements which occur between EU Member States. The Court, recognising that there was no definition of 'capital movement' in the Treaty in Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, held that the nomenclature annexed to Council Directive 88/361 could be used as a point of reference when determining whether a measure constitutes a restriction on the free movement of capital.

In reference to this judgment and the Annex of Directive 88/361, the Court has declared that the following transactions fall within the notion of capital movement:

Mortgages (see Case C-464/98 *Westdeutsche Landesbank* [2001] ECR I-173 concerning the creation of a mortgage in a foreign currency).

Direct investment (see Case C-367/98 *Commission* v *Portugal (Golden Share)* [2002] ECR I-4731).

Financial investments (see Joined Cases C-282/04 and 283/04 *Commission* v *Netherlands* [2006] ECR I-9141).

Granting of loans and credits (see Case C-452/04 *Fidium Finanz AG* v *Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521).

Gifts in money or kind (see Case C-318/07 *Hein Persche* v *Finanzamt Lüdenscheid* [2009] ECR I-359).

The Court has also considered transactions not included in the Annex to Directive 88/361 as capable of falling within the definition of 'capital movement'. For example, in Case C-35/98 *Staatssecretaris van Financiën* v *Verkooijen* [2000] ECR I-4071, the Court found that the receipt of dividends from a foreign company fell within the scope of Article 63 TFEU.

8.1.2 The direct effect of Article 63

Although in *Casati* the Court ruled that Article 63 TFEU did not have direct effect, this position was later reversed in Joined Cases C-163/94, C-165/94 and C-250/94 *Criminal Proceedings against Sanz de Lera* [1995] ECR I-4830. Here, the Court held that the provisions of Article 63 laid down a clear and unconditional prohibition for which no implementing measure was required. This means that Article 63 does not require any implementing legislation at Member State level, but instead directly confers rights on individuals upon which they can rely before national courts.

This direct effect also extends to capital movement between EU Member States and third countries.

8.1.3 The scope of Article 63

According to Article 63, all restrictions on capital movements between Member States are prohibited. This prohibition extends to all obstacles, not just discriminatory ones, laying down a general prohibition which goes beyond the mere elimination of unequal treatment on grounds of nationality. Therefore, like the other fundamental freedoms, the Article covers measures of both direct and indirect discrimination, in addition to those which are non-discriminatory, but nonetheless hinder access to the market.

In relation to direct discrimination, the Court has found, in Case C-302/97 *Konle* v *Republik Österreich* [1999] ECR I-3099, that an Austrian measure which exempted only Austrian nationals from the need for prior planning authorisation was directly discriminatory (see the similar Case C-423/98 *Albore* [2000] ECR I-5965). The Court has also found that Article 63 precludes national rules which prevent investors from other Member States from acquiring more than a given number of shares in certain privatised undertakings in the banking, insurance, energy and transport sectors (see Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731).

The Court has further found that a provision that makes foreign investment subject to prior authorisation constitutes a restriction to the free movement of capital in Case C-54/99 *Association Eglise de Scientologie de Paris* v *The Prime Minister* [2000] ECR I-1335. Similarly, a stamp duty payable under Austrian tax law on loans taken out by Austrian companies from companies in Belgium was in breach of Article 63(1) TFEU (see Case C-439/97 *Sandoz GmbH* [1999] ECR I-7041).

Lastly, an inheritance tax on property inherited from an EU Member State other than Germany, which was higher than the tax payable on property inherited exclusively within Germany, was also deemed in breach of Article 63(1) (see C-256/06 *Jäger* v *Finanzamt Kusel-Landstuhl* [2008] ECR I-123). Contrast *Jäger* with the judgments in Cases C-11/07 *Eckelkamp* v *Belgische Staat* [2008] ECR I-6845 and C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957.

In Case C-443/06 *Hollmann* v *Fazenda Pública* [2007] ECR I-8491, the Court extended the application of Article 63(1) when it considered a Portuguese measure which stated that non-residents were subject to a higher rate of capital gains tax than residents when transferring immovable property from another Member State. The Court found that such a measure was precluded by Article 63 as it had the effect of making the transfer of capital less attractive for non-residents. In the golden share cases, the Court followed its approach in the services case, *Alpine Investments*, by finding that measures which, despite being non-discriminatory, hinder access to the market are in breach of Article 63(1). In a series of cases the Court established that a type of share (often owned by a government) which grants the shareholder special voting rights over ordinary shareholders is to be considered as a restriction to the free movement of capital. For instance in Case C-98/01 *Commission* v *UK* [2003] ECR I-4641 the Court found that provisions which limited the possibility of acquiring shareholdings in the British Airports Authority over a certain level were in breach of Article 63. This was because, despite applying equally to both nationals and non-nationals of the UK, they nonetheless affected the position of a person acquiring a shareholding to the extent that they were likely to 'deter investors from other Member States from making such investments and, consequently, affect access to the market'.

This approach to non-discriminatory restrictive measures has been extended to cover cases concerning the movement of dividends. So, in Case C-379/05 *Amurta SGPS* v *Inspecteur van de Belastingdienst* [2007] ECR I-9569 the Court found that a measure which treated dividends paid to companies established in another Member State less favourably than those established in the Netherlands was liable to deter companies established in another Member State from investing in the Netherlands. Thus the measure was precluded by Article 63.

8.1.4 The free movement of capital and third countries

Of all four fundamental freedoms, the free movement of capital is the only one that goes beyond the boundaries of the internal market to cover the movement of capital between Member States and third countries (Article 64).

Nevertheless, for capital movements between Member States and third countries, Member States have: (1) the option of implementing safeguarding measures in exceptional circumstances; (2) the possibility of applying restrictions that existed before a certain date to third countries and certain categories of capital movements; and (3) a basis for the introduction of such restrictions – but only under very specific circumstances.

In Case C-101/05 *Skatteverket* v *A* [2007] ECR I-11531, the Court considered the legality of a Swedish tax law which granted an exemption to taxpayers in respect of dividends distributed by a company established in Sweden or another Member State within the European Economic Area (EEA), but which refused to grant such an exemption where the distribution of dividends was made by a company established outside the EEA, unless that country had concluded a convention with Sweden providing for the exchange of information. The Court found that the Swedish measure was in breach of Article 63(1) as it was likely to discourage taxpayers from investing their capital in companies established outside the EEA. Nonetheless, in this case, the Court found that the measure was justified on the grounds of fiscal supervision.

8.2 Derogations from the free movement of capital

8.2.1 Public interest justifications

Mirroring its approach in other freedoms, the Court has found it appropriate, in some cases, to accept justifications for otherwise prohibited measures based on the grounds of public interest, subject to proportionality. This was confirmed in *Commission* v *Portugal* (above), whereby the Court stated that national rules may be justified by the reasons referred to in Article 65(1) (which are discussed further below) or by overriding requirements of general interest. The Court went further to say that for such measures to be justified, they must be suitable for securing the objective pursued, and must not go beyond what is necessary in order to attain it. In other words, any such measure must be proportionate.

The list of public interest justifications is open-ended, but to date the Court has accepted *inter alia* the following:

- **fiscal supervision** (see *Skatteverket* v *A* above)
- **the smooth transition from one system to another** (see Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299 where the Court considered a possible justification of the need for a seamless transition from one tax system to its replacement)
- **guarantee of services of general interest** (see Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141 in which the Court acknowledged the need to safeguard the solvency and continuity of the postal service)
- **maintaining a permanent population and economic activity independent of the tourist sector** (see *Konle* above)
- **safeguarding the supplies of the petroleum, telecommunications and electricity sectors** (see Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581).

However, as with the other fundamental freedoms, justifications of a purely economic nature are not accepted (see, for example, the Court's rejection of the public interest justifications provided in Cases C-319/02 *Manninen* [2004] ECR I-7477 and C-35/98 *Verkoiijn* [2000] ECR I-4071).

Furthermore, even if the justification is accepted on the facts, the Court often finds that the national measure concerned is not proportionate. This was the case in *Konle* whereby the Court found that although an Austrian measure requiring prior planning authorisation was justifiable on the grounds of maintaining a permanent population and an economic activity independent of the tourist sector, the risk of discrimination inherent in such a system was so high, the measure constituted a disproportionate restriction to the free movement of capital. This sentiment was further reinforced by the Court when it stated that if the requirement was a declaration (and not a need for prior authorisation) this would be proportionate and, thereby, in compliance with Union law (contrast this judgment with that in Case C-515/99 and 527/99 to 540/99 *Hans Reisch* [2002] ECR I-2157).

See also the judgment in *Commission* v *Netherlands* (above). Here, although the Court agreed that the guarantee of a service of general interest could justify a measure otherwise prohibited by Article 63(1) (in this case a golden share in the privatised post office), the special share went beyond that what was necessary to safeguard the solvency and continuity of the provider of a universal postal service.

FURTHER READING

- **Barnard, C., Chapter 14 'Free movement of capital and economic and monetary union', Section B 'Free movement of capital'.**

8.2.2 Treaty derogations under Article 65

According to Article 65, justified restrictions of the free movement of capital include:

- tax provisions distinguishing between resident and non-resident taxpayers or the place where their capital is invested (Article 65(1)(a))
- measures to prevent infringements of national law relating to taxation and the prudential supervision of financial institutions (Article 65(1)(b))
- measures to lay down procedures for the declaration of capital movements for the purposes of administrative or statistical information (Article 65(1)(b)) (not dealt with in this module guide)
- measures justified on the grounds of public policy or public security (Article 65(1)(b)).

These derogations are supplemented by Articles 75 and 215 TFEU which allow the adoption and imposition of financial sanctions against individuals, groups or non-state entities to prevent and combat terrorism.

In *Scientologie*, the Court listed a number of limitations to the use of the derogations under Article 65, including the following:

- such derogations had to be interpreted strictly so that their scope cannot be determined unilaterally by Member States
- such derogations cannot be misapplied so as to serve purely economic ends
- such derogations are subject to the principle of proportionality.

Article 65(1)(a)

Article 65(1)(a) provides a specific derogation which allows for different tax treatment of non-residents and foreign investment. In other words, under this Article national tax laws of the Member States can continue to distinguish between taxpayers according to their place of residence or where their capital is invested.

However, this derogation is not unlimited. As mentioned above in the *Scientologie* case, the provision must be strictly interpreted. This was confirmed in Case C-315/02 *Lenz* [2004] ECR I-7063 in which the Court found that the derogation did not mean that any tax legislation distinguishing between taxpayers was automatically compatible with EU law.

Furthermore, Article 65(1)(a) is expressly made subject to Article 65(3), which states that any tax differentiation measures must not represent a means of arbitrary

discrimination or a disguised restriction. Therefore, for any measure not to be considered as arbitrary for the purposes of Article 65(3) it must be objectively justified (i.e. it must be shown that the measure was intended to protect the integrity of the tax system and was necessary to achieve this end). This requirement has also been strictly interpreted and, in the cases of *Verkooijen* and *Manninen* (above), the Court stated two further considerations when determining whether a differential tax measure fell within the meaning of Article 65(3).

The first consideration is whether the situations of the resident and non-resident taxpayer are comparable. If they **are not** comparable, then any distinguishing tax measure could be **lawful** under EU law. If, however, the situations **are** comparable, then the second consideration is whether the differential treatment can be justified by overriding reasons in the general interest **and** whether it is proportionate. If that is not the case, then the national measure will be found to be arbitrarily discriminatory and contrary to Article 65(3).

In Case C-512/03 *Blanckaert* [2005] ECR I-7685, the Court looked more closely at the first consideration of whether the situations of different taxpayers are comparable. The case concerned a national law which provided tax credits in respect of national insurance only to taxpayers insured under the national social security system. The Court held that although such a measure was capable of hindering the free movement of capital, it could be justified under Article 65(1)(a) by the objective difference between the situation of a person who is insured under the national security system and that of a person who is not so insured.

Contrast this decision with that in Case C-318/07 *Persche* [2009] ECR I-359, in which the Court had to consider a national measure which provided for a tax deduction on gifts to charitable bodies. This rule applied only to gifts made to national charitable bodies and not to those made to charitable bodies established in another Member State. The Court found that:

> Since the possibility of obtaining a deduction for tax purposes can have a significant influence on the donor's attitude, the inability in [the Member State of taxation] to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of [taxpayers in the former Member State] to make gifts for their benefit [and] constitutes, therefore, a restriction on the free movement of capital prohibited, as a rule, by [Article 63(1) TFEU].

The Court then went on to find that the measure could not be justified under Article 65(1)(a) as the relevant charities were in an objectively comparable situation in terms of their tax treatment.

See also Cases C-443/06 *Hollman* [2007] ECR I-8491 and C-265/04 *Bouanich* [2006] ECR I-923. In *Hollman*, the Court found that a measure which subjected capital gains resulting from the transfer of immovable property to a greater tax burden for non-residents than for residents was precluded by Article 63(1). Moreover, it found that it could not be justified under the tax differentiation derogation of Article 65(1)(a). The Court stated that where: (i) the taxation in question concerns only one of the categories of income received by taxable persons, whether they are resident or non-resident; (ii) it concerns both categories of taxable persons; and (iii) the Member State in which the taxable income arises is the Member State concerned, there is no difference in situation which is capable of justifying the differential tax treatment for the purpose of the Article 65(1)(a) derogation.

In *Bouanich*, the Court considered a Swedish national tax law which provided that share repurchase payments made to resident shareholders were taxed as a capital gain with a right to deduct the cost of acquisition. The law also provided that the same payments made to non-residents were to be taxed as a dividend, with no right to deduct the cost of acquisition. The Court found the measure to be in breach of Article 63(1) and could not be justified under the Article 65(1)(a) derogation. According to the Court, since the cost of acquisition was directly linked to the payment made on the occasion of a share repurchase, there was no objective difference between the situations of residents and non-residents such as to justify differential treatment.

If the Court has found that the situations of the two groups of taxpayers **are** objectively comparable, it will then look at the second consideration, namely whether the measure is proportionate and whether it can be justified by an overriding reason of general interest. In Case C-242/03 *Ministre des Finances* v *Weidert and Paulus* [2004] ECR I-7379, the Court had to consider a national measure which provided income tax relief to persons for the acquisition of shares. However, this special relief was only available for shares acquired in companies established in Luxembourg, and not for shares acquired in companies established in another Member State. The Court found that such a measure was precluded by both Article 63(1) and Article 65(1)(a). Moreover, it found that in the absence of a direct link between the tax advantage in question and an offsetting fiscal levy, the justification relied upon by the Luxembourg authorities (namely that the measure was necessary to guarantee the cohesion of the Luxembourg tax system) was insufficient.

The Court has also rejected the justification that the measure was necessary to enable fiscal supervision. In Case C-386/04 *Walter Stauffer* [2006] ECR I-8203, the Court considered a measure which required a charitable body established in another Member State to meet certain conditions in order to be entitled to a tax exemption. The Court found that such requirements were precluded under Articles 63 and 65 as they could not be justified solely on the ground that, as the charity in question was established in another Member State, it had only limited tax liability in the host state's territory.

> ... before granting a foundation a tax exemption, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. Admittedly, where foundations are established in other Member States, it may prove more difficult to carry out the necessary checks. Nevertheless, these are disadvantages of a purely administrative nature which are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such foundations the same tax exemptions as are granted to foundations of the same kind, which, in principle, have unlimited tax liability in that State ...

Article 65(1)(b)

Article 65(1)(b) TFEU allows Member States 'to take all requisite measures to prevent infringements of national law and regulations', in particular in the field of taxation and the prudential supervision of financial institutions. It also allows Member States to lay down declaration procedures for purposes of administrative or statistical information, or to take measures which are justified on the grounds of public policy or public security.

It is important to note that this list of areas in which the Member States can take 'requisite measures' is not exhaustive. This was illustrated in Joined Cases C-358/93 and 416/93 *Bordessa* [1995] ECR I-361 where the Court held that Article 65(1)(b) could be extended to encompass measures such as those designed to prevent 'illegal activities of comparable seriousness, such as money laundering, drug trafficking or terrorism'.

However, as with Article 65(1)(a), measures under Article 65(1)(b) are also subject to Article 65(3) and must not represent a means of arbitrary discrimination.

Requisite measures to prevent infringements of national law and regulations in the field of taxation and the prudential supervision of financial institutions

In Case C-439/97 *Sandoz* [1999] ECR I-7041 the Court found that Articles 63(1) and 65(1)(b) did not preclude a requisite measure taken in order to prevent tax evasion. This case concerned a requirement under Austrian law to pay a stamp duty on a loan contracted in another Member State. According to the Court, such a measure was permissible under Article 63(1) as it prevented taxable persons from evading the requirements of domestic tax legislation (i.e. tax evasion). It also held that such a measure was justified under Article 65(3) as it applied without discrimination to all borrowers resident in Austria regardless of their nationality or the place where the loan was contracted.

Contrast this case with the judgment in Case C-478/98 *Commission* v *Belgium (Eurobond)* [2000] ECR I-7587. Here, the Court considered a national measure which prohibited residents from acquiring securities of loans which were issued abroad in another Member State. The Court refused to accept both justifications offered by Belgium, namely that the measure was necessary to preserve fiscal coherence and that it was necessary to ensure the effectiveness of fiscal supervision. The first argument was rejected because there was no direct link between any fiscal advantage and disadvantage which should be preserved in order to ensure fiscal coherence. The second argument was rejected as the national rule was disproportionate: a general presumption of tax evasion or tax fraud could not justify a measure that impeded a free movement right.

Public policy and security

In this part of Article 65(1)(b) the Court has largely drawn from the case law of the other fundamental freedoms. The exception is narrowly interpreted and the burden of proof lies with the Member State (i.e. the Member State must prove that the measure is necessary and proportionate for the objectives of public policy or public security).

In the *Scientologie* case (above), the Court decided that the difficulty in identifying and blocking capital once it has entered a Member State may, in principle, justify differential treatment of transactions involving foreign direct investment under Article 65(1)(b). The case concerned a measure which made foreign direct investment subject to prior authorisation. The Court found that such a measure could be justified provided the actions protected against posed a sufficiently serious and genuine threat to a fundamental interest of society. In this particular case, however, the measure was stated in very general terms and left the persons concerned unable to ascertain the specific circumstances in which prior authorisation was required. As such, the measure in question was in breach of both the principle of legal certainty and Article 63(1).

The Court has also established that the requirements of public security cannot justify derogations from Article 63(1) unless the principle of proportionality is observed. This means that any derogation must remain within the limits of what is **suitable** for securing the objective which it pursues and must not go beyond what is **necessary** in order to attain the pursued objective (see, for example, the decision in Case C-423/98 *Albore* [2000] ECR I-5965).

Contrast the decisions in the two golden share Cases C-503/99 *Commission* v *Belgium* [2002] ECR I-4809 and C-483/99 *Commission* v *France* [2002] ECR I-4781. In *Commission* v *Belgium,* the Court relied on its previous judgment in the *Campus Oil* case (see Chapter 6) to accept a public security justification given by the Belgian government in respect of its golden shares in two energy companies. The Court held that the Belgian government could continue to hold its golden shares in the company on the grounds that it would safeguard energy supplies in the event of a crisis, provided the shares enabled the country to maintain a minimum level of energy supplies and that the steps taken to guarantee that minimum level were proportionate.

In *Commission* v *France*, the Court held that a French rule requiring the prior authorisation of any direct or indirect shareholding over and above certain limits of a company in which the government had golden shares was disproportionate and contrary to the principle of legal certainty. This was because the investors were given no indication as to the specific, objective circumstances in which prior authorisation was applied and the wide discretionary power wielded by the authorities constituted a serious interference with the free movement of capital.

8.2.3 Other derogations

Free movement of capital versus freedom of establishment

Article 65(2) states that the provisions on the free movement of capital shall apply without prejudice to the applicability of restrictions on the right of establishment which conform with EU law. This provision is also subject to Article 65(3).

Capital movement to and from third countries

Article 64(1) allows Member States to apply lawful restrictions on agreements on capital movements to third countries that were in existence on 31 December 1993. Article 64(2) requires the Council only to endeavour to achieve free movement with non-member countries to the greatest extent possible.

Also, Article 66 empowers the Council to take safeguarding measures in exceptional circumstances where capital movements to or from third countries cause, or threaten to cause, serious difficulties which may affect the operation of the EMU. However, these restrictions are strictly limited in their application and duration.

In *Skatteverket*, the Court stated that, under certain circumstances:

> a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.

8.3 The Economic and Monetary Union (EMU)

8.3.1 The emergence of the EMU

The decision to form the EMU represented a major step forward in the integration of EU economies since it involves the coordination of economic and fiscal policies, a common monetary policy and a common currency (the euro). Some countries have taken integration further and adopted the euro. The EMU was to be rolled out in three stages:

Stage 1: the free movement of capital was introduced through Directive 88/361 and there was a push for the closer coordination of economic policies and greater cooperation between central banks

Stage 2: the coordination of economic and monetary policy was reinforced and the European Monetary Institute (the precursor to the European Central Bank) was established with the principal task of preparing the instruments and procedures necessary for carrying out a single monetary policy in the third stage

Stage 3: saw the fixing of exchange rates, the launch of the euro and the application of more peremptory Treaty provisions concerning economic policy – such as the obligation on Member States to avoid excessive government deficits.

In order for Member States to move from stage two to stage three, strict convergence criteria had to be met. This included requirements demonstrating the sustainability of the government's financial situation. Other criteria concerned the achievement of a high degree of price stability, demonstrated by a low rate of inflation; the avoidance of currency fluctuation; and durable economic convergence as reflected in long-term interest rates.

FURTHER READING

- **Barnard, C., Chapter 14 'Free movement of capital and economic and monetary union', Section B 'Free movement of capital'.**

8.3.2 The scope of the EMU

In practical terms, the EMU entails:

- the coordination of economic policy-making between Member States
- the coordination of fiscal policies, notably through limits on government debt and deficit
- an independent monetary policy run by the European Central Bank (ECB)
- the single currency and the euro area.

The provisions on monetary policy can be found in Articles 127–133 TFEU. The ECB has a number of key functions in this area.

With regard to economic policy, Article 121(1) TFEU provides that Member States must have regard to their economic policies as a matter of common concern and must coordinate them in accordance with the duties laid down in Article 120 TFEU. These Treaty-based procedures are supplemented by the Stability and Growth Pact (SGP) and related reforms on the prevention of excessive government deficit.

8.3.3 Recent developments in the EMU

The future of the eurozone was thrown into doubt by the recent sovereign debt crisis. The European Financial Stability Facility (EFSF) was set up in 2010 to provide assistance to Eurozone states in difficulty. Bailouts were organised by the EU in conjunction with the IMF.

In the wake of the financial crisis, the EU Commission proposed several mechanisms to regulate action in the European financial sector. One example is the Single Supervisory Mechanism (SSM) to increase EU oversight over systemically important banks.

Activity 8.1

Describe how the scope of the free movement of capital has been expanded over the years. In your answer, refer to the following:

a. **the evolution of the freedom**

b. **its application to direct, indirect and non-discriminatory measures**

c. **its application to capital movements with third countries.**

Activity 8.2

Read Cases C-302/97 *Konle* v *Republik Österreich* [1999] ECR I-3099 and C-515/99 and 527/99 to 540/99 *Hans Reisch* [2002] ECR I-2157 and complete the following tasks.

a. **Briefly summarise the facts of each case, the ruling and the rationale behind the Court's decision.**

b. **What is the difference between a prior authorisation procedure and a prior notification procedure?**

c. **How does this difference affect the application of Article 63(1) TFEU and, in particular, the principle of proportionality?**

No feedback provided.

Activity 8.3

Read Cases C-503/99 *Commission* v *Belgium* [2002] ECR I-4809 and C-483/99 *Commission* v *France* [2002] ECR I-4781 and answer the following questions.

a. **Define what is meant by the term 'golden shares'.**

b. **Briefly summarise the facts of each case, the ruling and the rationale behind the Court's decision.**

c. **Critically analyse the two judgments. What are the distinguishing factors which resulted in the two different decisions?**

Activity 8.4

Core comprehension – Craig: The Stability, Coordination and Governance Treaty

Using your Online Library resources, research the following journal article:

- **Craig, P. 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism' (2012) 37 *European Law Review* 231–48 (available in Westlaw).**

You can complete this learning activity by reading pp.231–33 of the article.

TSCG: POLITICAL IMPERATIVES

a. Name the 'Six Pack' of measures introduced in 2011 as a response to the 2008 financial crisis and the subsequent euro crisis.

b. In 2011 why was there a need to further strengthen EU oversight over Member State economic policy? What was the eventual legislative outcome?

TSCG: THE LEGAL PROVISIONS

c. How does Article 1 TSCG intend to strengthen the pillar of economic and monetary union?

d. How does Article 2 TSCG address the relationship between the TSCG and the Lisbon Treaty?

e. In Article 3(1) TSCG what is meant by the 'balanced budget rule'?

f. Identify the main features of the automatic correction mechanism as specified in Article 3(2) TSCG.

g. According to Article 4 TSCG how is 'excessive deficit' defined?

h. Which procedure decides the existence of an excessive deficit due to breach of the debt criterion?

FURTHER READING

- Flynn, L. 'Coming of age: the free movement of capital case law 1993–2002' (2002) 39 *CMLRev* 773.
- Kronenberger, V. 'The rise of the "golden" age of free movement of capital: a comment on the golden shares judgments of the Court of Justice of the European Communities' (2003) 4(1) *European Business Organisation Law Review* 115–35.
- Louis, J.V. 'The Economic and Monetary Union: law and institutions' (2004) 41 *CMLRev* 575.
- Louis, J.V. 'The review of the Stability and Growth Pact' (2006) 43 *CMLRev* 85.
- Ruccia, N. 'The new and shy approach of the Court of Justice concerning golden shares' (2013) 24(2) *European Business Law Review* 275–94.

Quick quiz

Question 1

Which of these fictitious scenarios is derogated from Article 63?

a. **France imposes a tax on any cash crossing the border if the value is higher than €10,000.**

b. **The UK imposes a hefty amount of paperwork to anyone wishing to invest over £10 million overseas, under the guise of statistical requirements.**

c. **Belgium restricts the marginal investments of foreign companies into a privately controlled, Belgian utilities company.**

d. **Spain requires that any entity register with a special authority if wishing to invest in its gambling industry following a new policy to fight fraud.**

Question 2

What type of test is applied to find a breach of Article 63?

a. **Proportionality test.**

b. **Discriminatory test.**

c. **Market access test.**

d. **Quantitative restriction test.**

Question 3

Which of the following was not considered by the court to be a movement of capital?

a. **Mortgages.**

b. **Gifts of money.**

c. **Financial Investment.**

d. **Transfer of investment paintings from one country to another.**

Question 4

Which of the following is not a limitation to the use of derogations of Article 65 TFEU (found in *Eglise de Scientologie* [2000] ECR I-1335)?

a. **The derogation must be in line with previously stated national policy.**

b. **The derogation is subject to proportionality.**

c. **The derogation is not valid if based on purely economical considerations.**

d. **Member States cannot unilaterally decide the scope of the derogations under Article 65.**

Question 5

Which of the following was one of the 'requisite aspects' stated in *Bordessa* [1995] ECR I-361?

a. **Terrorism.**

b. **Prostitution.**

c. **Money laundering.**

d. **Drug trafficking.**

Question 6

In which way is free movement of capital different from the other three major freedoms?

a. **It applies to both intra-EU and extra-EU countries.**

b. **It offers no derogations.**

c. **It does not have direct effect.**

d. **It applies only to incorporated entities.**

Answers to these questions can be found on the VLE.

NOTES

9 Trade harmonisation

Contents

Introduction

Article 114 TFEU was first integrated into the EU Treaties by the Single European Act (SEA). This Treaty gave new impetus to the achievement of the internal market, which was previously characterised by the ineffective harmonisation of all national measures contrary to free movement. The SEA abolished the need for unanimity to pass harmonisation measures, replacing it with qualified majority voting in all but the most sensitive fields.

With the implementation of the SEA, the EU was able to adopt a more effective approach, combining both positive and negative integration measures to establish the internal market. Negative integration involves the imposition of prohibitions on the Member States, particularly in relation to discriminatory and other restrictive practices. These prohibitions can be seen most notably in relation to the four fundamental freedoms and the subsequent case law and legislation, which sought to remove the remaining barriers to their full realisation (see Chapters 6, 7, 8 and 11).

Positive integration involves those measures which seek to harmonise Member State laws and standards relating to the internal market (otherwise known as the 'approximation' of law). Thus Article 114 TFEU provides the legal basis for the EU legislature to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

9.1 EU regulatory competences

The competences of the Union are defined in Articles 2–6 TFEU. These provisions provide that the EU's competences and the areas in which it can act are divided into three categories:

Article 3 TFEU (exclusive competences): covers areas in which only the EU can act and includes measures relating to the customs union, monetary policy, competition policy and the concluding of international agreements.

Article 4 TFEU (shared competences): covers areas where both the EU and the Member States can adopt legally binding measures, but the Member States can only act if the EU has chosen not to (i.e. in accordance with the principle of subsidiarity). Such measures include those relating to the internal market, social policy, the environment, consumer protection, transport, energy, security and justice.

Article 6 TFEU (supporting, coordinating or supplementing competences): covers areas such as the protection and improvement of human health, culture and tourism.

9.2 The scope of Article 114 TFEU

Article 114 TFEU is a broad provision which has been interpreted widely by the Court (see, for example, C-350/92 *Spain* v *Council* [1995] ECR I-1985).

Despite this, the Article does not give the Union general power to regulate the internal market. This limitation was recognised in Case C-376/98 *Germany* v *Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419 where the Court found that the EU had overstepped the limits of its competences to harmonise national laws on the advertising and sponsorship of tobacco products. The Court was required to consider the validity of EU Directive 98/43/EC which sought to impose an EU-wide ban on all forms of tobacco advertising and sponsorship. The Directive was challenged on the grounds that it had been adopted on the basis of human health – which was outside the EU's legislative competences. In its ruling, the Court found that recourse to Article 114 was only possible when a rule will genuinely improve the conditions for the establishment and functioning of the internal market. This means that the measure must either remove obstacles to trade that are the result of divergent national laws, or remove appreciable distortions of competition. In view of this, the Court found that the prohibition in the Directive went too far and did not help to facilitate the free movement of the products concerned. Moreover, the protection of the internal market was only an ancillary objective to that of public health. As such, the Directive in question did not satisfy the conditions for the application of Article 114 and was therefore annulled. However, such a judgment should not be interpreted as limiting the scope of power of the EU to introduce uniform laws. It simply established that in that particular case EU law went too far. This is confirmed by C-380/03 *Germany* v *European Parliament* [2006] ECR I-11573. The CJEU dismissed an action brought by Germany challenging Directive 2003/33, adopted to replace the previously annulled directive. Articles 3 and 4(1) of the new Directive prohibited the advertising of tobacco products in the press and other printed publications and in radio broadcasts. Article 4(2) barred the sponsorship of radio programmes by tobacco companies. Only publications intended for professionals in the tobacco trade and publications from non-member countries that were not principally intended for the EU market were exempted. Germany contended in particular that the Directive could not be adopted under Article 114. The CJEU, however, held otherwise, observing that at the time of the Directive's adoption, disparities existed between national rules on advertising and sponsorship in respect of tobacco products. This meant that intervention by the EU legislature was justified. The disparities both impeded the free movement of goods and the freedom to provide services, and were such as to present an appreciable risk of distortions of competition. What is more, in the view of the Court, the contested articles did actually have as their object the improvement of the conditions for the functioning of the internal market. This conclusion was not affected by Germany's claim that the prohibitions in the directive concerned only

advertising media of a local or national nature lacking cross-border effects. The CJEU emphasised that the term 'printed publications' covered only publications such as newspapers, periodicals and magazines, to the exclusion of bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various leaflets and prospectuses. Since the conditions for invoking Article 114 had been met, the choice of that legal basis could not be called into question by the fact that public health protection could have influenced EU legislature when adopting the Directive. The EU is required by the Treaty to ensure a high level of human health protection. Consequently, the express prohibition of any harmonisation of Member States' legislation in the area of public health did not preclude a harmonising measure adopted on another basis from having an impact on human health protection. Finally, the CJEU rejected the argument that the provisions were disproportionate, stating that the EU legislature could not exempt local or regional publications without rendering the field of application of the prohibition on advertising unsure and uncertain. In relation to the alleged prejudice to the fundamental right of freedom of the press and of expression, the CJEU observed that the prohibitions left journalistic freedom of expression unimpaired, and did not exceed the limits of the discretion accorded to the EU legislature.

In a more recent case, the Court upheld this approach to the application of Article 114 and found that an EU-wide ban could, in certain circumstances, be justified. Case C-398/13 *Inuit* ECLI:EU:C:2015:535 concerned a challenge to an EU-wide ban on trade in seal products on the basis that the ban was not aimed at improving the functioning of the internal market in line with Article 114, but rather at safeguarding the welfare of animals. The Court found that Article 114 could allow an EU-wide ban on the sale of seal products on the grounds that it improves the functioning of the internal market. This finding may appear surprising, since an outright ban would seemingly prevent, rather than facilitate, trade – as was considered in the T*obacco Advertising* case. Nonetheless, the case law pursuant to Article 114 TFEU suggests that a product ban may, on occasion, be seen as conducive to facilitating trade, for example, in other similar products (see also the reasoning of the Court in Case C-210/03 *Swedish Match* [2004] ECR I-11893).

Thus, Article 114 can be used to adopt measures harmonising national rules provided:

- there are not simply differences in national rules but differences which actually obstruct free movement
- the measure has the genuine aim of overcoming those obstacles.

For a further example, see C-358/14 *Poland* v *Parliament and Council* ECLI:EU:C:2016:323 (see further C-477/14 *Pillbox 38* ECLI:EU:C:2016:324; C-547/14 *Philip Morris Brands and others* ECLI:EU:C:2016:325). In this judgment, the Court of Justice was asked to consider the validity of Directive 2014/40/EU on tobacco and associated products. The particular provisions addressed in this case are those relating to the prohibition of flavoured tobacco. Poland, supported by Romania, challenged the validity of the prohibition of menthol tobacco products. The Court of Justice rejected Poland's argument and determined that the Directive was valid. The Court noted that the pleasant nature of the taste of menthol in tobacco products may contribute to higher consumption, and that reducing their attractiveness may thereby contribute to a decline in the usage of tobacco products among both new and current users. It was also noted that when the Directive was adopted there was a divergence of standards regarding flavoured tobacco products between countries and that its adoption has the dual function of harmonising the regulatory system and providing safeguards for human health, particularly for younger people. Furthermore, the Court held that it was within the broad discretion of the EU legislature to impose the restrictive measures.

9.3 Other forms of indirect harmonisation

Prior to the revised approach to the establishment of the internal market, unanimity was required for the adoption of harmonisation measures. Because of this need for unanimity, progress when adopting new harmonisation measures was slow and

cumbersome. In response, the Court introduced the principle of 'mutual recognition' in the seminal case, *Cassis de Dijon*. According to this principle, Member States are obliged to recognise goods which have been produced in another Member State, even in the absence of harmonised standards. According to the Court, this principle would automatically apply unless the Member State could justify a restricting measure by reference to a mandatory requirement or Article 36 TFEU.

An example of where the *Cassis de Dijon* approach to harmonisation has been applied is in Case C-457/05 *Schutzverband der Spirituosen-Industrie* [2007] ECR I-8075. Here the Court found that, in view of and having regard to the general scheme and purpose of Directive 75/106 regulating the packaging of liquids and the principle of the free movement of goods, a Member State cannot prohibit the marketing of pre-packages with a nominal volume of 0.071 litres. This was because packaging of this type was lawfully manufactured and marketed in one Member State and to prohibit its sale in another Member State was contrary to the principle of mutual recognition. Moreover, the Court reiterated that the burden lies with the Member State concerned to justify the prohibition by means of an overriding requirement which is proportionate to the objective pursued.

9.4 Derogation from EU harmonisation measures

While Member States can rely on either Article 36 TFEU or *Cassis de Dijon* mandatory requirements to justify restrictive measures, which would otherwise be prohibited under the principle of mutual recognition, Member States cannot rely on either derogation where fully harmonised EU rules exist. In Case 190/87 *Moormann* [1988] ECR 4689 there was a harmonised EU system of animal and plant health inspections. The Court said:

> [where] Community directives provide for the harmonisation of the measures necessary to ensure … the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified.

In *Moormann*, the rules were **totally** harmonised, but EU harmonisation measures frequently involve **partial** harmonisation or seek only to lay down **minimum** standards. In such cases, there may still be scope for the Member States to impose their own rules, relying on Article 36 TFEU or a *Cassis de Dijon* 'mandatory requirement' for justification. For example, Case 174/82 *Sandoz* [1983] ECR 2445, concerned an EU Directive on additives in food which did not deal with vitamins. According to the Court, because the scope of the Directive did not extend to cover vitamins, it was still possible for a Member State to invoke Article 36 TFEU to justify the imposition of its own rules on the vitamin content of imported goods.

Articles 114(4–9): TFEU also provide a strict procedure for Member States who wish to derogate from a harmonised measures and maintain or introduce their own rules.

Article 114(4): provides the right for Member States to derogate on the grounds laid out in Article 36 TFEU or for the protection of the environment or the working environment.

Article 114(5): provides the right for Member States to introduce restrictive measures after the adoption of harmonising measures on the basis of new scientific evidence on grounds of a problem specific to that Member State.

Article 114(6): states that the Commission generally has six months to approve or reject an application for derogation.

Article 114(7): states that, where a Member State is authorised to derogate from a harmonisation measure, the Commission is to consider an adaptation to the measure.

Article 114(8): states that when a Member State raises a specific problem on public health in a field already subject to harmonisation measures, it shall bring it to the attention of the Commission.

Article 114(9): provides the right of the Member States and the Commission to institute proceedings in case of suspected misuses of the derogation procedure by another Member State.

The Court has adopted a narrow approach to the interpretation of Member State derogations under Articles 114(4-9) TFEU. For example, see Cases 41/93 *France* v *Commission* [1994] ECR I-1829 and C-319/97 *Kortas* [1999] ECR I-3143.

In Case C512/99 *Germany* v *Commission* [2003] ECR I-845 the Court ruled on the procedure for derogations based on Article 114(5). It found that the conditions under the provision (i.e. that the restrictive measure be based on new scientific evidence, on grounds of a problem specific to that Member State arising after the adoption of the harmonising measure) are cumulative in nature and must all be satisfied if the derogating national measure concerned is not to be rejected by the Commission.

See also Joined Cases C-439/05 P and C-454/05 *P Land Oberösterreich* v *Commission* [2007] ECR I-7141, in which the Commission rejected Austria's request for derogation from the harmonisation measures provided under Directive 2001/18 on the deliberate release of genetically modified organisms (GMOs). The Court found that the Austrian authorities had not succeeded in proving the existence of a problem specific to the Republic of Austria – as required by Article 114(5). In particular, the Court held that the Austrian authorities had not proved, by means of substantiated evidence, that the territory of the Land Oberösterreich (i.e. the region of Upper Austria) contained unusual or unique ecosystems susceptible to GMO production.

Activity 9.1

Critically analyse the first and second *Tobacco Advertising* cases.

Activity 9.2

Core comprehension – Competences and tobacco control

Research the following UK government publication:

Review of the Balance of Competences: Health – Call for Evidence November 2012 at www.gov.uk/government/uploads/system/uploads/attachment_data/file/211286/review-of-the-balance-of-competences-health-documents-call-for-evidence.pdf

You can complete the learning activity by reading the following sections: 'Introduction' (pp.3–8); Legal annex 6 'Tobacco' (pp.36–37).

Introduction (pp.3–8)

a. **State the broad definition of competence.**

b. **Identify the general legal basis and limitations of the EU's competence.**

c. **Rank the three types of competence according to the degree of autonomy which Member States retain to take action on their own, from the highest autonomy to the lowest autonomy. Give a reason for your selection.**

d. **How does the principle of subsidiarity impact on the EU's ability to act in Shared and Supporting areas of competence?**

e. **How does the principle of proportionality impact on the EU's ability to act?**

f. **Explain in fewer than 60 words the need for the European Commission Health Strategy and the 'Health in all Policies' approach, listing a few examples of inter-relationships.**

Legal annex 6 'Tobacco' (pp.36–37)

g. **There are three Directives related to tobacco control. Name each Directive and state:**

   i. **the main focus of the Directive**

   ii. **examples of the related issues which the Directive seeks to address**

   iii. **if mentioned, any measures which are prescribed.**

   iv. **Identify the main UK legislation which has implemented the EU Directives.**

Activity 9.3

Applied comprehension – Weatherill: Legislative harmonisation and Article 114

Using your Online Library resources, research the following journal article:

- **Weatherill, S. 'The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court's case law has become a "drafting guide"' (2011) 12(3) *German Law Journal* 827–64 (available in HeinOnline).**

You can complete this learning activity by reading pp.829–37.

a. **Using your statute book resource, identify the overriding objective which underpins the approximation of laws.**

b. **Identify the novel aspect of the *Tobacco Advertising* judgment.**

c. **Which principle of EU law is applied to the limitation of competences held by the Union and the Member States?**

d. **Why is a 'functionally driven' provision, such as Article 114, less limited in application than a 'sector-specific' provision such as Article 168 TFEU?**

e. **In *Vodafone, O2 et al* v *Secretary of State* which two situations were identified as triggers for the application of the functionally driven Article 114?**

f. **Which concern does Weatherill express about the vagueness of qualifying descriptors such as 'genuinely', 'abstract', 'appreciable' and 'likely'?**

g. **Which sector of the single strategic framework of EU policy making is relevant to *R* v *Secretary of State ex parte BAT and Imperial Tobacco* and how does Directive 2001/37 improve the functioning of the internal market for tobacco products?**

h. **Why did the court find that the measure was a valid measure of legislative harmonisation?**

i. **In *Swedish Match* why did Directive 92/59 further underpin the ban of the tobacco product, 'snus'?**

Further reading

- **Weatherill, S. 'Pre-emption, harmonisation and the distribution of competence to regulate the internal market' in Barnard, C. and J. Scott (eds) *The law of the Single European Market, unpacking the premises*. (Oxford: Hart Publishing, 2002) [ISBN 9781841133447] Chapter 2.**
- **Weatherill, S. 'The limits of legislative harmonization ten years after tobacco advertising: how the Court's case law has become a "drafting guide"' (2011) 12(3) *German Law Journal* 827–64.**

Quick quiz

QUESTION 1

Which of the following areas cannot be subject to harmonisation?

a. **Competition law.**

b. **Free movement of goods.**

c. **Tax law.**

QUESTION 2

When can Article 114 TFEU be used to adopt measures harmonising national rules?

a. **If the Member States so decide.**

b. **Every time there is a mere difference in national rules.**

c. **If the measure has the genuine aim of overcoming obstacles to trade.**

QUESTION 3

Article 114 allows Member States to derogate from it under what circumstances?

a. **When there are important matters of national economic policies.**

b. **On environmental protection grounds.**

c. **If harmonisation might clash with fundamental human rights.**

Answers to these questions can be found on the VLE.

10 Competition policy

Contents

Introduction

EU competition policy is one of the original policy areas of the 1957 EC Treaty and has a number of objectives, some of which are common to all competition systems and some of which are particular to the EU. A key function of EU competition law has been to help establish a single Union-wide market while promoting economic efficiency, the efficient allocation of resources and innovation.

Effective competition also enhances 'consumer welfare' by protecting consumers from excessive prices, poor quality or limited choice of products. EU competition law has also focused on the need to protect small and medium-sized enterprises from being driven from the market by larger companies.

Primary competition law of the EU is set out in Articles 101–109 TFEU; however, we will focus on Articles 101 and 102 TFEU which contain the rules that apply to companies (the remaining Articles include provisions on public undertakings and state aids).

CORE TEXT

- **Steiner & Woods, Chapter 26 'Introduction to competition law' and Chapter 27 'EU competition law'.**

10.1 The enforcement procedure prior to 1 May 2004

The enforcement of EU competition law was originally entrusted solely to the Commission, the powers and procedures of which were set out in Council Regulation 17/62. However, Regulation 17/62 has since been replaced by Council Regulation 1/2003 which applied as of 1 May 2004.

10.2 The scope and *ratione personae* of Article 101 TFEU

Core text

- **Steiner & Woods, Chapter 27 'EU competition law'.**

This Article regulates anti-competitive behaviour in a wide range of scenarios and has been applied to enable a level playing field for competition within an internal market. This aim of achieving market integration between the Member States is apparent in many rulings of the Commission and the European courts. Agreements which breach Article 101 are void unless they can be exempted.

There are three requirements to prove a violation of Article 101.

1. Agreement/collusion between undertakings or decision of association of undertakings.
2. An effect on trade between Member States.
3. The agreement/collusion has the object or effect of preventing, restricting or distorting competition within the internal market.

10.2.1 Key elements of Article 101 TFEU

The meaning of 'undertakings'

> The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.
> (C-41/90 *Höfner and Elser* [1991] ECR I-1979)

This means that any entity conducting a commercial or economic activity (e.g. company, partnership, sole trader, cooperative) is subject to the competition rules.

The EU courts have, however, made it clear that state bodies which purchase goods from public funds for use in the public health systems of the Member States might not be undertakings. In C-205/03 *P FENIN* [2006] ECR I-6295 the Court of Justice found that the purchasing of goods is not an economic activity as defined in *Höfner and Elser* when the goods are not offered for resale but used to perform a public function (such as social welfare). Rather, the Court stated that 'it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity'.

Parents and subsidiaries within the same corporate group are also regarded as a 'single undertaking':

> [Article 101 TFEU] is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.
> (Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147, para.41)

So, for example, in Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* [2012], the Court held that the mere fact that a parent company and its subsidiary exercised, during a certain period, joint control of the subsidiary which has allegedly committed the infringement can satisfy a finding that those companies formed an undertaking. However, this is provided the parent companies did, in fact, exercise decisive influence over the commercial policy of the subsidiary which allegedly committed the infringement.

In relation to the first requirement for violation, Article 101 requires either an agreement between undertakings, a decision of an association of undertakings, or a concerted practice between undertakings.

Meaning of the term 'agreement'

This concept has been given a wide and flexible interpretation. In Case C-56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 it was argued that the term should only apply to agreements between companies operating at the same level in the chain of production/distribution (i.e. 'horizontal agreements'), such as between competing manufacturers of televisions. The Court of Justice saw no reason to limit its scope in this way and held that it also applies to 'vertical agreements', that is, agreements between parties operating at different levels, such as between a manufacturer of televisions and its distributor.

There is no requirement that there be a written or legally enforceable contract for there to be an agreement. This means that an informal 'gentlemen's agreement' is covered so companies cannot evade Article 101 by, for example, agreeing things orally. See, for example, Case 41, 44 and 45/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661.

An agreement need not necessarily be a 'one-off' event. It can also be the result of a process lasting years. In *Polypropylene* [1988] 4 CMLR 347 (upheld on appeal in C-51-92 *Hercules Chemicals* v *Commission* [1999] ECR I-4235) the Court held that the dealings of a cartel in the petrochemicals sector formed part of a single, overall agreement. All firms involved were part of this agreement, even those that had not attended every meeting of the cartel.

On the burden of proof, see Case C-49/92 *Commission* v *Anic Partecipazioni* [1999] ECR I-4125 in which the Commission established that an agreement had been concluded at a meeting. The Court found that the burden of proof was on the undertaking concerned to prove that it did not intend to participate in the implementation of the agreement.

The issue often arises where a manufacturer unilaterally imposes allegedly anti-competitive terms on its distributors. The Court must therefore consider whether the distributors can be said to have tacitly 'agreed' to the terms by simply continuing to deal with that manufacturer. The position of the Court is that if they (i.e. the distributor) have acquiesced and continued to deal with the manufacturer, there is an agreement (see Commission Decision IV/35.733 *Volkswagen* which was upheld in T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707).

However, the Court has held that there is no agreement if there is no 'common interest' between the manufacturer and its distributors. This was the case in Commission Decision 96/478 *Bayer/Adalat* OJ 1996 L201/1, which was annulled by the General Court in T-41/96 *Bayer* v *Commission* [2000] ECR II-3383 and on appeal to the Court in C-2/01 and C-3/01 [2004] ECR I-23. The General Court annulled the Commission's Decision on the grounds that it had not established that there was an agreement. Upholding this judgment, the Court of Justice held that:

> the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers, is not sufficient for a finding that such an agreement exists.

Unilateral behaviour will not, therefore, suffice to create an agreement under Article 101 TFEU unless there is at least tacit acquiescence or a 'concurrence of wills' on the part of both parties.

Decisions by associations of undertakings

This term can encompass decisions, recommendations and codes of practice – even if they are not formally binding on the members – where it is shown that members have tended to comply with them: see Case 96/82 *IAZ International* v *Commission* [1983] ECR 3369.

The Commission has also considered restrictive rules of professional bodies. In Case C-309/99 *Wouters* [2002] ECR I-1577, the Court held that individual members of the Dutch bar association were 'undertakings' and that the bar association was an 'association of undertakings'. Its rule preventing lawyers from entering partnerships with other professionals such as accountants was therefore capable of breaching Article 101 TFEU. However, the Court did find that the rule would only breach the provision if it went 'beyond what [was] necessary in order to ensure the proper practice of the legal profession' which, in this case, it did not.

Also, in Case 1/12 *Ordem dos Técnicos Oficiais de Contas* [2013], the Court held that a regulation adopted by a professional association putting into place a system of compulsory training for chartered accountants to guarantee the quality of their services could, in principle, constitute a restriction under Article 101 TFEU.

Concerted practice

An **oligopoly market** is one in which there is a small number of producers/suppliers. This small number leads to 'interdependence' between the members of the oligopoly and thus makes it is very difficult for any new producer to enter. According to this theory there is little point in trying to increase market share by lowering prices since the other members will promptly respond by lowering their prices too, depressing profits all round. On the other hand, an independent price rise runs the risk of customers switching to one of the other suppliers. The result, it is argued, is a practice of 'price following' in which, as soon as the 'price leader' raises its prices, the others immediately follow suit, enabling them all to retain their existing market shares but at a more profitable price. In this scenario, simultaneous price increases are not evidence of collusion by the companies, but merely a rational response to the market structure ('conscious parallelism').

However, in the *Dyestuffs* case, the concept of 'concerted practice' extends the scope of Article 101 TFEU even further to include:

> co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.
> (Case 48/69 *ICI* v *Commission (Dyestuffs)* [1972] ECR 619 para.64)

The Court of Justice upheld the Commission's finding that this was a case of concerted practice. The companies' argument that the simultaneous price rises were the result of rational 'price following' in an oligopolistic market was rejected by the Court.

Another important case in which the Court of Justice refined the definition of concerted practice was Case 40/73 *Suiker Unie (Sugar Cartel)* [1975] ECR 1663. Here, the Commission had decided that a number of sugar producers had engaged in 'concerted practices'. The producers appealed, arguing that there was no actual plan to restrict competition. The Court of Justice held that it was not necessary to prove that there was an actual plan, since Article 101 TFEU strictly precludes:

> any direct or indirect contact … the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt … on the market.

All that is required, therefore, is some contact between the companies concerned, and some **conscious** cooperation.

See also Case C-68/12 *Protimonopolný úrad Slovenskej republiky* v *Slovenská sporitel' ňa* AS [2013] in which the Court held that an alleged agreement to exclude a competitor is still in breach of Article 101 even when the competitor is allegedly operating unlawfully on the market.

The oligopoly argument that failed in *Dyestuffs* was accepted as a defence in Case C-89 etc/85 *Re Woodpulp* (*Ahlstrom Oy* v *Commission*) [1994] ECR I-99. The Commission supported its finding of concerted practice between woodpulp producers on the basis of simultaneous price increases, despite the fact that the producers were based

in different parts of the world. The Court annulled the Commission decision, holding that the parallel price rises could be evidence of collusion but parallel behaviour would only amount to proof of concerted practice if there was no plausible alternative explanation. Price following in an oligopoly market did constitute a plausible alternative explanation in this case and so was a valid defence.

Exchanging commercially useful or sensitive information can, in itself, amount to a concerted practice when it enables competitors to see what strategy other competitors are pursuing and to respond accordingly.

This confirms the 'joint classification' approach that it is not necessary for the Commission to characterise an infringement of Article 101 TFEU as exclusively an agreement or a concerted practice. This reflects the understanding that in a long, complex infringement it is often difficult to make a clear distinction.

It is also not necessary for the Commission to prove the actual effects of the concerted practice on the market. See on this point Case C-199/92P *Huls AG v Commission* [1999] ECR I-4287.

Because of the difficulties involved in uncovering secret cartel activity, the Commission has sought to provide an incentive to members of such cartels to whistleblow on the others by promising them immunity from fines (see Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the 'Leniency Notice') OJ C-298 of 8 December 2006).

Horizontal or vertical agreements

Horizontal: involves two or more undertakings at the same level of supply or distribution.

Vertical: involves undertakings at different levels of supply/distribution. See, for example, Case C-32/11 *Allianz Hungária Biztosító Zrt* v *Gazdasági Versenyhivatal* [2013] where the Court held that agreements concerning the price of repairs of insured vehicles concluded between insurance companies and repair shops could, in certain circumstances, be considered to have an anti-competitive object prohibited under Article 101.

From an economic perspective, vertical agreements pose less of a threat to competition than horizontal agreements. Vertical agreements can actually increase or encourage competition. They are often economically beneficial as they permit the penetration of new products into areas where they have not previously been sold, thus increasing the choice of products available to the consumer and so increasing competition between different brands (otherwise known as 'inter-brand' competition). Because of this positive effect on trade, it was originally thought that Article 101 only applied to horizontal agreements. However, the Court of Justice has since determined that it does also control vertical agreements.

In *Consten and Grundig* the Court had to consider an exclusive distribution agreement. The Court of Justice found that, despite being a vertical agreement, it could be reviewed under Article 101.

Object or effect?

The Commission's early, very broad interpretation of Article 101 to cover all restrictions on conduct has since been replaced by an 'economics-based' approach, examining agreements in their economic context to see if there are actual or potential anti-competitive effects.

The Court found in *Consten and Grundig* that if an agreement, decision or concerted practice does not affect trade between Member States then it will fall within the relevant national competition rules and not EU law. It does not matter whether the effect is positive or negative.

The object of prevention, restriction or distortion of competition

Debate has focused on whether it is enough to show an anti-competitive 'object' or whether an anti-competitive effect on the market must also be shown. The Court held in *Consten* and *Grundig* that the 'or' means that these requirements are alternative, not cumulative. Therefore, where an obvious anti-competitive object can be deduced from the clauses of the agreement itself, it is illegal *per se* and there is no need to examine its actual effect on the market.

In this case, the agreement had actually increased inter-brand competition by introducing a new brand of electrical goods into France.

The case establishes that the wording 'object or effect' is disjunctive, so where the agreement is found to have as its object 'the prevention, restriction or distortion of competition' there is no requirement to establish an effect.

In Case C-8/08 *T-Mobile Netherlands BV* v *Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, the Court stated that a concerted practice can be found to pursue an anti-competitive object for the purposes of Article 101 TFEU where, according to its content and objectives and having regard to its legal and economic context, it is capable of resulting in the prevention, restriction or distortion of competition within the common market. Therefore the potential to prevent, restrict or distort competition is sufficient to breach Article 101. It is not necessary 'for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices'.

The effect of prevention, restriction or distortion of competition

Case 56/65 *STM* v *Maschinenbau Ulm* [1966] ECR 235 concerned an exclusive distributorship. As the agreement did not have the 'object' of the prevention, restriction or distortion of competition, its 'effect' on competition had to be determined. The Court stated that the effect on competition had to be considered by comparison with the competitive situation had the agreement not been implemented. The Court found that to determine the effect on competition, reference could be made to a number of factors, including:

- the nature and quantity of the products covered by the agreement
- the position and importance of parties on the product market concerned
- the isolated nature of the disputed agreement or its position in a series of agreements
- the severity of the clauses intended to protect the exclusive dealership
- the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.

Even if the parties are all within one Member State, there will likely be an effect on trade between Member States where the arrangement makes market penetration more difficult for companies from other Member States. See, for example, Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977.

The *de minimis* rule

This rule is not contained in the text of Article 101 TFEU but was established by the Court in Case 5/69 *Volk* [1969] ECR 295. It means that certain breaches of Article 101 TFEU will be disregarded if the companies involved are relatively small and the effect of their activities on the overall competitive situation on the market is negligible.

See further the Commission Notice on Agreements of Minor Importance [2014] OJ C 291/1.

The Notice also sets out the hard-core restrictions which will always be prohibited under Article 101 and which, if included in the agreement, will make the application of the *de minimis* rule invalid. These are agreements concerning things like fixed prices.

10.2.2 The *per se* prohibition versus the rule of reason test

The Commission's broad interpretation of Article 101 has meant that a vast array of ordinary commercial agreements (such as franchises, exclusive purchase/supply or distribution agreements) were *prima facie* illegal under EU law.

Agreements that are prohibited under Article 101(1) can be exempted under Article 101(3). In order to permit exemption under this provision, it was considered necessary to weigh up the pro- and anti-competitive effects of the agreement concerned. Under such a system, there is a two-step process, whereby an agreement must first be considered as prohibited by Article 101(1) before it can be considered for exemption under Article 101(3) through an analysis of its pro- and anti-competitive effects. This two-stage process can be contrasted with the US 'rule of reason' approach which balances the pro- and anti-competitive consequences of an agreement **before** a finding of infringement is made.

The General Court confirmed the two-stage approach and rejected the 'rule of reason' alternative in Case T-112/99 *Metropole Television (M6)* v *Commission* [2001] ECR II-2459. The Court then went on to say that those cases where the courts had shown a flexible approach to the application of Article 101(1) 'cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law'. Article 101(1) could not be applied, 'wholly abstractly and without distinction', to any agreement restricting freedom of action of one or more parties. Therefore a certain measure of economic analysis can take place in the initial application of Article 101(1) but 'it is only in the precise framework of [Article 101(3)] that the pro- and anti-competitive aspects of a restriction may be weighed'.

See further Case C-307/18 *Generics* ECLI:EU:C:2020:52.

10.2.3 Exemption under Article 101(3) TFEU

Individual exemptions

Agreements or decisions which fall within the prohibition of Article 101(1) are void under Article 101(2), unless it is possible to sever the offending clause (*Consten and Grundig*). Article 101(3) provides instead that agreements that satisfy four requirements are not void under Article 101(1). There are two positive and two negative requirements.

The positive requirements are:

1. The restriction contributes to improving the production or distribution of goods or to promoting technical or economic progress.
2. Consumers receive a fair share of the resulting benefit from the restriction.

The negative requirements are:

1. The restriction on competition must be indispensable for the achievement of the improvement or progress claimed in (1) above (i.e. there must be a causal link between the restriction on competition and the improvement gained).
2. The restriction must not put the parties in a position to eliminate competition 'in respect of a substantial part of the products in question'.

Until 1 May 2004, Regulation 17/62 (now repealed) provided the system for exemption. The Commission had exclusive power to grant exemptions after prior notification of the agreement from the undertakings.

In 1999 the Commission published a White Paper on the modernisation of these rules. Based on the White Paper, a new system of enforcement has been applied since 1 May 2004 under Regulation 1/2003. Under this regime, the requirement for prior notification has been abolished and Article 101(3) is directly effective, meaning that a national competition authority, court or tribunal can grant individual exemptions.

Block exemptions for vertical agreements

In order to reduce the quantity of applications for exemption, the Commission issued a number of 'block exemptions'. These were regulations which set out a number of requirements and prohibited clauses for contracts, which, when fulfilled, automatically lead to exemption from the application of Article 101(1).

However, following criticism of these regulations, the Commission initiated a reform, the most important outcome of which being the general block exemption on vertical agreements and concerted practices, Regulation 2790/99.

The Regulation is accompanied by *Guidelines on Vertical Restraints* (OJ C 291, 13 October 2000, p.1) designed to help undertakings to carry out their own assessment of their position in respect of Article 101. These were revised in 2010 and accompanied Regulation 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices.

Additional block exemptions

There are additional block exemptions, including:

Regulation 316/2014 relates to categories of technology transfer.

Regulation 1217/2010 relates to categories of research and development agreements.

Regulation 1218/2010 relates to categories of specialisation agreements.

10.3 Enforcement: Regulation 1/2003

Core text

- **Steiner & Woods, Chapter 27 'EU competition law'.**

Essential reading

- **Regulation 1/2003, [2003] OJ L1/1.**

10.3.1 Key articles of Regulation 1/2003

Regulation 1/2003 marked a major decentralisation of the enforcement of EU competition rules. The move was intended to relieve the Commission of its huge workload and allow it to concentrate its resources on investigating the most serious infringements. The system is one of 'parallel competences' in which a case may be dealt with by a single National Competition Authority (NCA), **or** by several NCAs in parallel **or** by the Commission. The Commission and NCAs together form the European Competition Network (ECN), applying the EU competition rules in close cooperation.

The system places responsibility on the undertakings themselves to assess whether their agreements or activities are compatible with the EU competition rules.

Some of the key articles of the Regulation are as follows.

Article 1: provides that the whole of Article 101 is directly effective. Once an infringement has been established, the Article 101(3) defence is available.

Article 3: states that whenever dealing with an agreement or practice covered by Article 101 or 102 **which may affect trade between Member States**, NCAs are obliged to apply EU competition law, either on its own or alongside their national provisions. However, the supremacy of the EU rules over any conflicting national provisions is protected.

Article 5: NCAs can apply Articles 101 and 102 in individual cases; decide whether the conditions of Article 101(3) are satisfied; order the ending of an infringement; order interim measures; accept commitments; and impose fines, penalty payments or **other national law penalties**.

Article 6: gives the national courts the jurisdiction to apply Article 101(3) as well as Article 101(1) and (2) and Article 102.

The Commission can take four decisions under the new regime, which are the following:

Article 7: includes a power to impose 'behavioural or structural remedies'.

Article 8: allows the Commission to order interim measures in cases of urgency 'due to the risk of serious and irreparable damage to competition'.

Article 9: allows the Commission to accept commitments from the undertaking(s) to meet its concerns.

Article 10: allows the Commission to decide that there has been no breach, or that the Article 101(3) conditions for exemption are fulfilled.

Chapter IV lays down the rules for the close cooperation between the Commission and the NCAs:

Article 11: includes various requirements to exchange information and to inform each other before adopting any decisions.

The detailed arrangements for the allocation of cases between the Commission and the NCAs are set out in a separate notice: Commission Notice on Co-operation within the network of Competition Authorities [2004] OJ L 1123/18. Article 8 of this Notice introduces the concept of the 'well-placed authority' for dealing with a case. The Commission will be 'well-placed' if the agreement or practice has effects in more than **three** Member States.

Article 12: provides for the exchange of information between the Commission and the NCAs.

Article 13: deals with the situation where two or more NCAs all receive the same complaint.

Article 14: states that representatives of the NCAs make up the Advisory Committee on Restrictive Practices and Dominant Positions which must be consulted and may give an Opinion before the Commission takes any decision on a case.

Article 15: provides that a national court can ask the Commission for information or an opinion on a case before it and must send copies of its judgments under Article 101 or 102 TFEU to the Commission without delay. NCAs and the Commission can submit observations to the national court where relevant.

Article 16: imposes on national courts and NCAs an obligation not to take decisions that conflict with decisions of the Commission.

The Commission's powers to search premises in Chapter V of Regulation 1/2003 include:

Article 20(5): states that officials of the NCAs are obliged to assist the Commission in carrying out searches, affirming the duty of Member States under Article 105 TFEU to afford assistance to the Commission in the exercise of its functions under the Treaty.

Article 21: provides the right to search the homes of directors, managers and other members of staff where a reasonable suspicion exists that certain documents which might be relevant to the investigation are stored there. This power is subject to review by the Court of Justice.

Chapter VI deals with penalties:

Article 23(1): increases the maximum fine for supplying incorrect or misleading information and other procedural offences to 1 per cent of the total turnover in the preceding business year.

Article 23(2): empowers the Commission to impose fines of up to 10 per cent of the total turnover in the previous business year of each of the undertakings involved in an infringement of the competition rules.

Article 24: increases the periodic penalty payment which can be imposed to compel undertakings to terminate such breaches to a maximum of 5 per cent of the average daily turnover in the previous business year.

10.3.2 Guidance notices for Regulation 1/2003

The Commission, in 2004, issued a raft of Notices to provide guidance and to try and achieve consistency of approach. These include:

- Commission Notice on cooperation within the network of National Competition Authorities (Antitrust) Guidelines [2004] OJ C-101/43, [2004] 4 CMLR 32-1651, dealing with the European Competition Network, work-sharing, exchange of information, pending cases, evidence, fines, leniency.
- Commission Notice on the cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C-101/54, [2004] 4 CMLR 33-1669.
- Other Notices on:
  - handling of complaints by the Commission
  - novel questions that arise in individual cases
  - the effect on trade concept
  - guidelines on the application of Article 81(3) EC [Article 101(3) TFEU].

There is also procedural Regulation 773/2004, [2004] OJ L123/11, which deals with the initiation of proceedings, complaints, access to the file, rights of the defence, hearings and confidentiality.

10.4 Article 102 TFEU

Core text

- **Steiner & Woods, Chapter 27 'EU competition law'.**

This Article provides for the punishment of undertakings in a position of strength on the market when they abuse their position. It is not dominance or strength which is unlawful but its abuse. However, behaviour which may be lawful when practised by a non-dominant company may be unlawful when carried out by a company in a dominant position.

Neither the Commission nor the General Court can reach a conclusion that a firm has abused a dominant position without a detailed economic analysis. First the Commission or the Court must ascertain the extent of the relevant product market and its geographic market and then assess the undertaking's market power (or share). Other factors are also considered when concluding whether or not the undertaking is dominant (see below).

10.4.1 Dominant position

In order to assess dominance within the meaning of Article 102 it is necessary to examine the key factors of the relevant product and geographical market.

The relevant market

The key question here is: which other products is this product in competition with? If the product market is widely defined, it is less likely that a particular undertaking will be dominant. Conversely, if the market is narrowly defined, the likelihood of dominance increases.

Products within one product market are those which are regarded as 'interchangeable' by consumers 'by reason of their characteristics, price and intended use'. In Case 27/76 *United Brands* [1978] ECR 207 the issue was whether, in economic terms, there was cross-elasticity of demand between bananas and other kinds of fruit. If the price of bananas rose significantly, would customers readily switch to buying other fruits (i.e. seeing them as interchangeable)? Or did the banana have particular characteristics distinguishing it from other fruits so that customers would continue to buy bananas

despite the price rise (i.e. not interchangeable)? The Court of Justice agreed with the Commission's finding that bananas are not interchangeable, fulfil specific consumer needs and are in a product market of their own.

The Commission and Court also consider questions of cross-elasticity of supply: can suppliers of other products quickly and easily switch to making the product in question? If so, they can readily compete in the same product market. For example, in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461 it was not easy to switch from producing tyres for cars to producing tyres for heavy goods vehicles so there was no elasticity of supply between them. They were therefore in separate product markets.

In Case 6/72 *Continental Can Co Inc* v *Commission* [1973] ECR 215 the Commission's decision, finding that Continental Can was dominant on the market for light metal cans for meat and fish, was annulled because, *inter alia*, it had not shown that customers could not easily manufacture the required cans themselves.

The Commission's methodology is set out in: Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (1997) OJ C372. The Commission explains how it assesses substitutability of demand on the basis of the 'SSNIP' test: if there is a 'small but significant non-transitory increase in price', will so many customers switch to another product that the price rise will have been unprofitable? Substitutability of supply is also taken into account.

The geographic market

The key question here is: over what geographical area are producers in competition with each other? Some markets are global and others may be local. The relevant geographic market is the area in which available and acceptable substitutes to the product exist. This is a practical, not theoretical, question which depends on empirical evidence of consumption and production patterns, volume and purchasing habits.

In Case 27/76 *United Brands* v *Commission* [1978] ECR 207, the Court of Justice defined the geographic market as 'an area where the objective conditions of competition [are] the same for all traders'.

The Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (1997) OJ C-372 details the Commission's method of deciding the geographic market.

10.4.2 Dominance

In *United Brands*, the Court of Justice defined a dominant position as:

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

Market share

Dominance is determined firstly by the undertaking's market share of the relevant market. In Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, the Court held that a company with a 50 per cent share or above will normally be dominant.

The market share must have been held for a period of time (see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). It is also important to compare the market shares of other companies on the market (see, for example, Case C-95/04 *British Airways* v *Commission* [2007] ECR I-2331).

Barriers to entry

In assessing the dominance of an undertaking, barriers to the access to the market of new companies must be taken into account. This requires an assessment of the prevailing barriers to entry for potential competitors which might enter the market. Whether the barriers are high or low affects the constraints on the dominant company and will determine the ambit of its autonomy.

Possible 'barriers to entry' include:

- **Legal provisions** (see Case 333/94P *Tetra Pak Int SA* v *Commission* [1996] ECR I-5951).
- **Superior technology** (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461 and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).
- **Deep pocket** (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and Case 6/72 *Continental Can Co Inc* v *Commiss*ion [1973] ECR 215).
- **Economies of scale, vertical integration and well-developed distribution systems** (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207 and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).
- **Product differentiation/brand image** (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207).

'Substantial part' of the common market

Article 102 TFEU also requires that an undertaking must be dominant 'within the internal market or in a substantial part of it'. This has been interpreted as a *de minimus* threshold.

Part of a Member State is 'substantial'. See, for example, Cases 40 etc/73 *Suiker Unie* [1975] ECR 1663 in which Southern Germany was sufficient to fulfil the requirement.

Collective dominance

In Joined Cases C-395/96P and C-396/96P *Compagnie Maritime Belge* v *Commission* [1996] ECR II-1201, the Court held that

> a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That is how the expression collective dominant position … should be understood.

What was required to establish such a collective entity was whether there were 'links' or other 'factors which give rise to a connection between the undertakings concerned' that 'enable them to act together independently of their competitors, their customers and consumers'.

The Court stated that the existence of an agreement or concerted practice between the undertakings does not necessarily create such economic links. However, an agreement or concerted practice between the undertakings can 'result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors'. The Court then made it clear that the 'parallel behaviour' of oligopolies, which might be legal under Article 101, may be scrutinised under Article 102 to see whether it constitutes collective dominance.

In Case C-497/99 P *Irish Sugar* v *Commission* [2001] ECR I-5333, a finding of 'vertical' collective dominance was upheld.

10.4.3 Definition of abuse

As mentioned above, Article 102 does not prohibit dominance, but rather the abuse of a dominant position. What constitutes 'abuse' is flexible. Article 102 lists some examples but this list is not exhaustive. The Court of Justice has defined it broadly as behaviour which has 'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461).

Normal competitive activity, such as offering better quality products or lower prices than your competitors, is not an abuse. That is 'competition on the merits'. An abuse is where the dominant company uses other means to outflank or exclude competition.

Article 102 covers not only 'exploitative' abuses which exploit consumers, such as excessive prices, but also 'anti-competitive' abuses which affect the competitive structure of the market by excluding actual or potential competitors (see para.70 of the judgment in *Michelin*).

Although dominance is not illegal in itself, the Court held in *Michelin* that a dominant company has a 'special responsibility' not to act in a way that will lead to a decrease of competition on the market.

There is no equivalent of the exemption in Article 101. Instead, abuse can never be exempt from Article 102. However, conduct which might in some circumstances amount to abuse may, in other circumstances, be 'objectively justified'.

Types of abuse

Excessive prices

Using power on the market to charge customers excessively high prices can be an abuse, albeit difficult to prove. For a recent example of consideration of this ground, see Case C-177/16 *AKKA* ECLI:EU:C:2017:689.

Predatory pricing

Price cuts designed to drive out the competition can constitute abuse. Again, it can be difficult to decide whether the lower price is the result of 'fair' competition (i.e. the dominant company is simply more efficient and able to produce the goods more cheaply), or whether it is a below-cost price to force competitors out. (See, for discussion, Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359.)

Selective pricing

A policy of selective pricing can constitute an abuse (see, for discussion, Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969).

Fidelity discounts

Offering discounts in return for customers agreeing to buy all their requirements from a dominant company can constitute an abuse (see, for discussion, Case 85/76 *Hoffmann-La Roche & Co AG* v *Commission* [1979] ECR 461).

Other examples of discount systems considered can be found in Cases 322/81 *Michelin* v *Commission* [1983] ECR 3461; *310/93P BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865; and Case C-95/04 *British Airways* v *Commission* [2007] ECR I-2331.

And, in Case C-209/10 *Post Danmark* [2012] the Court had to consider a policy pursued by an undertaking in a dominant position of charging low prices to certain former customers of a competitor. The Court held that such a policy cannot be considered to amount to an exclusionary abuse merely because the price the dominant undertaking charged was lower than the average total costs of the activity concerned. Instead, it was necessary to consider whether that pricing policy produced an actual or likely exclusionary effect, to the detriment of competition and, thereby, consumers' interests. Furthermore, the Court also ruled that it is open to an undertaking in a dominant position to provide justification for behaviour liable to be caught by the prohibition laid down in Article 102 either by demonstrating that its conduct was objectively necessary or that the exclusionary effect produced may be counterbalanced or outweighed by advantages that also benefit consumers.

Tying

Tying might occur when a dominant company obliges customers to buy another product as a condition of supplying the 'main' product. This can have the effect of extending the dominance from the main product market to the second product (see, for discussion, Case 333/94P *Tetra Pak* v *Commission* [1996] ECR I-5951).

Refusal to supply

It may be considered an abuse for a dominant supplier of raw materials to cut off supplies to a company that uses those materials to make another product, so that the dominant company can start making that product itself (see, for discussion, Case 6 & 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223).

In Case 27/76 *United Brands* v *Commission* [1978] ECR 207, the Court held that, generally, it is an abuse to refuse to supply 'a long-standing customer who abides by regular commercial practice'. See also Case 310/93P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865.

Refusal to supply 'essential facilities'

In Case T-69 etc/89 *RTE* [1991] ECR 61-485, the Court made clear that an abuse does not only arise where the refusal to supply is against a 'long-standing' customer. Refusing to grant a copyright licence to a new customer might also constitute an abuse.

The extent to which competition law should oblige a dominant company to share its facilities with other companies to enable them to compete is controversial. For example, if a company owns a port facility and operates ferry services from that port, is it obliged to allow another company access to that port so that it can provide a competing ferry service? Although the Commission has held in several decisions that to refuse access to such facilities is an abuse, the Court of Justice has adopted a cautious approach. In Case 7/97 *Bronner* v *Mediaprint* [1998] ECR I-7791 the Court laid down the strict test that the facility must be indispensable and that there are 'technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult' to compete without access to the facility concerned.

Case 418/01 *IMS Health* [2004] ECR I-5039 concerned a refusal to grant a licence for a data system which was protected by copyright. The Court held that for a refusal to supply to be abusive, three cumulative conditions had to be fulfilled:

- the refusal must prevent the emergence of a new product for which there was a potential consumer demand
- the refusal must be unjustified
- the refusal must exclude any competition on the secondary market.

In Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-2977 the General Court held that while the

> refusal by the owner of an intellectual property right to grant a licence, even where it is the act of an undertaking in a dominant position, cannot in itself constitute an abuse of a dominant position, the exercise of the exclusive right by the owner might, in exceptional circumstances, give rise to abusive conduct.

10.5 Compensation

Infringements of antitrust law can cause serious harm to consumers and businesses. Under EU law the victims of infringements of competition law can claim compensation. Actions for damages for an infringement are largely governed by the national law of the Member States.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union is intended to facilitate damages actions. See further case C-435/18 *Otis* ECLI:EU:C:2019:1069.

10.6 Mergers

CORE TEXT

- **Steiner & Woods, Chapter 27 'EU competition law'.**

Articles 101 and 102 have been applied in the context of mergers and acquisitions. For example, in Case 6/72 *Continental Can* [1973] ECR 215, the Court of Justice held that it could be an abuse of a dominant position under Article 102 for a dominant company to take over a rival company on that market. However, Article 102 could only apply to mergers where one of the parties was in a dominant position.

In Cases 142 and 156/84 *BAT* [1987] ECR 4487, it was suggested that Article 101 might apply where companies acquired cross-shareholdings as this would reduce competition between them. The precise circumstances in which Article 101 would be breached were unclear, however, and this led to considerable uncertainty.

In 1989 the Council enacted the Merger Regulation 4064/89 on the control of concentrations between undertakings. This has now been replaced by Council Regulation (EC) No.139/2004 of 20 January 2004. The detailed examination of its provisions and application are beyond the scope of this course.

ACTIVITY 10.1

a. Define the following terms:

i. dominant position

ii. abuse of dominant position

iii. relevant product market

iv. cross-elasticity of supply and demand

v. relevant geographic market

vi. predatory pricing

vii. 'undertaking'

viii. 'agreement'

ix. 'concerted practice'.

b. Explain the powers of the national courts when enforcing EU competition law under Regulation 1/2003. What are the maximum fines and penalty payments that can be imposed on undertakings for breaches of the competition rules under this Regulation?

c. What are the four conditions to be met for exemption under Article 101(3) TFEU?

d. Why were the 'old style' block exemptions criticised?

e. What is meant by a 'hard-core restraint'? Give two examples.

f. If the agreement is between companies based in the same Member State, can there be an effect on trade between Member States?

No feedback provided.

ACTIVITY 10.2

Discuss the significance, both for EU law in general and for EU competition policy in particular, of the following:

a. Case 27/76 *United Brands* [1978] ECR 207.

b. Case 48/69 *ICI* v *Commission (Dyestuffs)* [1972] ECR 619.

c. Joined Cases 116–117, 125–129/85 *A. Ahlstrom Osakeyhtio* v *Commission* [1988] ECR 5193.

No feedback provided.

Activity 10.3

Read Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 and answer the following questions.

a. What is the difference between inter-brand and intra-brand competition? To which of these does Article 101 TFEU apply?

b. What is the difference between 'vertical' and 'horizontal' agreements? To which of these does Article 101 TFEU apply?

c. What is the purpose of the requirement that an agreement must 'affect trade between Member States'? Is it necessary to show a negative effect on trade?

d. For an infringement of Article 101 TFEU, is it enough to show an anti-competitive **object** or purpose, or is it necessary to prove that the agreement has also had the **effect** of restricting competition on the market? (See also Case 56/65 *STM* v *Maschinenbau* [1966] ECR 235.)

No feedback provided, the answers can be found in the judgment.

Activity 10.4

Would the following fictitious terms infringe Article 101 TFEU? If so, are they vertical or horizontal restraints?

a. Washco, a German washing-machine manufacturer, agrees with its distributors in France, Italy and the UK that the one-year parts and labour warranty can only be redeemed in the country where the washing machine was bought.

b. Motorco's agreement with its distributors in Spain provides for 5 per cent commission on each vehicle sold there. This commission is not payable for sales to customers outside Spain as Motorco has appointed distributors in other Member States.

Activity 10.5

How do the Commission and the Court of Justice determine the relevant market when considering whether a company is dominant under Article 102 TFEU? What factors other than market share may be taken into account when determining whether a company is dominant? Why is a definition of the relevant market a vital first stage in assessing whether Article 102 TFEU has been breached?

Activity 10.6

What factors did the Court of Justice take into account when deciding that bananas were in a separate product market from the fruit market in general in the *United Brands* case?

No feedback provided.

Activity 10.7

Look at the *Hoffmann-La Roche* case and list the factors that the Commission/Court of Justice took into account when deciding whether the undertaking concerned was dominant in the relevant market.

No feedback provided.

Activity 10.8

Core comprehension – concerted practices

Using your online resources research the following case:

- Case C-8/08 *T-Mobile Netherlands BV* v *Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] 5 CMLR 11.

The *T-Mobile* case concerns the competition behaviours of five Netherlands operators of mobile telecommunications. You can complete this learning activity by reading Section B of the Advocate General's Opinion on 'concerted practices' and Article 101 TFEU, ex Article 81 TEC, pp.15–21.

Substantive appraisal of the questions referred

a. Identify the established definition of a 'concerted practice'.

b. Identify the alternative conditions used to determine whether practices are concerted practices.

General observations concerning the concept of an anti-competitive object

c. How does the per se prohibition of concerted practices which prevent, restrict or distort the market underpin the functioning of the internal market?

d. Identify the correct interpretation of the concept of a restricted practice having an anti-competitive object.

e. Why is the actual suffering of harm in the individual cases irrelevant to the prohibition of such practices?

Objects restrictive of competition in cases such as the present

f. Why is the exchange of information between two competitors in an oligopolistic market capable of breaching the requirement of independence for the purposes of competition?

g. Why is the 'consumer welfare' perspective of the direct impact on consumers and prices too narrow when considering the issue of concerted practices?

Influence of market conditions on the behaviour of competitors

h. To what extent may an exchange of information between participants in the market constitute anti-competitive behaviour when market conditions are uncertain?

i. According to Article 81(1) when does an exchange of confidential information between competitors undermine the rules of free competition?

j. State in fewer than 50 words the objective of European competition law and give an example of how consumers and the public at large may benefit indirectly from the objective.

Activity 10.9

Core comprehension – Article 102: AECT, CHT and ToI

Using your Online Library resources, research the following journal article:

- Makris, S.S. 'Applying normative theories in EU competition law: exploring Article 102 TFEU' (2014) 3(1) *UCL JL and J* 30–57 (available in Westlaw and HeinOnline).

You can complete this learning activity by reading Section D: 'Article 102 under the microscope: the legal tests'.

a. The As-Efficient-Competitor Test (AECT)

   i. What does the As-Efficient-Competitor Test (AECT) examine and why?

   ii. When applying the AECT at which point do pricing practices which are not per se exclusionary become abusive?

b. The Consumer Harm Test (CHT)

   i. Which societal group is protected by the CHT and how?

c. The Element of Intent

   i. What is the purpose of the Test of Intent (ToI)?

   ii. How does the 'profit sacrifice test' assist in determining whether a dominant firm's behaviour is abusive?

   iii. In *Akzo* how did the profit sacrifice test inform the outcome?

   iv. Which extra safeguards may the ToI offer?

Further reading

- **Ehlermann, C. 'The modernization of EC antitrust policy: a legal and cultural revolution?' (2000) *CMLRev* 537–90.**
- **Korah, V. *An introductory guide to EC competition law and practice*. (Oxford: Hart Publishing, 2007) ninth edition [ISBN 978141137544].**
- **Korah, V. *Cases and materials on EC competition law*. (Oxford: Hart Publishing, 2006) third edition [ISBN 978141136448].**
- **Whish and Bailey.**

Quick quiz

QUESTION 1

Which of the following fictitious scenarios falls within the scope of Article 101 TFEU?

a. **An agreement between major gambling houses to restrict access to a number of people from entering their establishments.**

b. **An agreement between top banks to keep their interest rates at a certain levels, in order to control said interests.**

c. **An agreement between local French farmers to market their milk together.**

d. **A collusion between different major airlines to provide a unified customer service.**

QUESTION 2

What is the definition ascribed to an 'undertaking'?

a. **Decisions, recommendations and codes of practice which are binding upon their members.**

b. **Decisions, recommendations and codes of practice which, though not binding, have been consistently applied.**

c. **Decisions, recommendations and codes of practice which, though not binding, have been applied once.**

d. **Decisions, recommendations and codes of practice which have been agreed upon, with no need to prove that any of the members carried them out.**

QUESTION 3

Which of the following best describes the 'oligopoly' argument?

a. **A single player controlling the market.**

b. **A large number of players, divided into coalitions competing with each other, but preventing independent players from thriving.**

c. **A small number of companies controlling local supplies of goods, preventing bigger companies from taking control of the local market.**

d. **A small number of entities creating 'interdependence' between them, making it is very difficult for any new entity to enter the market.**

QUESTION 4

Which of the following cannot be taken into consideration when determining the effect of an agreement on competition?

a. **The nature and quantity of the products covered by the agreement.**

b. **The severity of the clauses intended to protect the exclusive dealership.**

c. **The position and importance of parties on the product market concerned.**

d. **The motives behind the agreement.**

QUESTION 5

Which of the following fictitious scenarios is not exempted under Article 101(3) TFEU?

a. **A cartel of electronics companies is formed to ensure a higher degree of consumer protection, although other effective consumer protection methods exist.**

b. **An association of industrialists, in order to increase their profit margins, agree to collectively reduce their wages but there is substantial doubt as to whether this will be reflected in the price of the products.**

c. **The association of German Fisheries make small, *de minimis*, rules regulating paperwork for fishing quotas, attempting to enforce them upon smaller fisheries.**

d. **None of the above.**

Question 6

What did the courts describe as a 'dominant position' (*United Brands*)?

a. **A position of economic strength of an undertaking enabling it to prevent competition in the relevant market by giving it the power to behave independently of its competitors, customers and ultimately of its consumers.**

b. **A position of influence allowing it to lobby to such an extent as to ensure that it is in a privileged position with the market.**

c. **A financial position whereby the entity possesses a substantial share of the market.**

d. **A position where if the entity collapses, heavy harm would befall the market as a whole.**

Answers to these questions can be found on the VLE.

NOTES

11 Free movement of persons and citizenship

Contents

Introduction

The free movement of persons is one of the four fundamental freedoms of European Union law and is one of the essential components of the internal market. To achieve the objectives of an increased standard of living and economic expansion, and to be able to achieve one market where goods could move freely, it was necessary to attain the fullest possible mobility of the economically active part of the population. This understanding is reflected in the basic provisions on the free movement of persons set out in Articles 45, 49 and 56 TFEU, which divide people into three 'economic categories'.

- Article 45 TFEU – workers.
- Article 49 TFEU – self-employed people and companies established in another Member State.
- Article 56 TFEU – people or companies providing services in another Member State.

(N.B. Chapter 7 looks at establishment and services under Articles 49 TFEU and 56 TFEU.)

As the Union developed into much more than just an economic unit, there was a growing realisation that there should be greater integration of all the peoples of Europe. As a consequence, the free movement articles were interpreted expansively by the Court of Justice and in secondary legislation. This trend reached its first high point in the adoption of Directives on the rights of residence for employees and self-employed persons who had 'ceased their occupational activity'.

Moreover, citizenship of the Union was added to the Treaties as part of the changes agreed at Maastricht. Although there was initially doubt as to what, if anything, this concept added to the existing free movement of persons provisions, it emerged as a dynamic set of entitlements which recognised that a union should involve all of the people.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States marked another milestone in the development of Union citizenship. The Citizenship Directive repeals and replaces most of the older Directives. In several instances, the Directive goes beyond what was provided in prior legislation and case law, but in other instances it is more restrictive.

11.1 Geographical scope of the free movement of persons

The European Economic Area Treaty between the EU Member States and a number of Scandinavian states came into force on 1 January 1994. It extends Article 45, 49 and 56 TFEU free movement rights to nationals of all EEA Member States (i.e. all the EU members plus Iceland, Liechtenstein and Norway).

11.2 The scope of the free movement of workers

Core text

- **Steiner & Woods, Chapter 20 'Economic rights: workers, establishment and services', Chapter 21 'Free movement: social rights' and Chapter 25 'Discrimination'.**

Article 45 TFEU does not actually say that a worker must be a national of a Member State. However, Regulation 492/11 implementing Article 45 made clear that it applies only to 'workers who are nationals of the Member States'.

Article 45 lays down the principles of free movement prohibiting any forms of discrimination based on nationality. The Court has interpreted the provision very broadly to include job-seekers, family members of workers and so on. The Treaty Article contains certain derogations that Member States can rely upon to justify a breach of the free movement principle: public policy, public security and public health (Article 45(3)) and in respect of employment in the public service (Article 45(4)).

11.2.1 The application of Article 45 TFEU to indistinctly applicable measures

Article 45(2) prohibits any discrimination against migrant workers, but the Court has held that even rules which apply to both nationals and non-nationals can breach Article 45 where they affect access to employment in another Member State. In Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL* v *Bosman* [1995] ECR I-4921, the applicant successfully argued that the UEFA transfer rules hindered him from transferring to play for another club. The rules affected transfer to another club whether in the same Member State or in a different Member State, and affected all players (i.e. they were non-discriminatory). Nonetheless the Court held, echoing language familiar in the context of the free movement of goods, that the rules were capable of hindering access to employment in another Member State and would be covered by Article 45 unless objectively justified and proportionate.

This application of a 'hindrance of access' rather than a discrimination test characterises the Court's approach to all the fundamental freedoms. As Advocate General Lenz stated in his Opinion in *Bosman* (para.200):

> … in examining the compatibility of national provisions with the provisions of Community law on the fundamental freedoms, it is not so important which specific fundamental freedom a particular factual situation is to be measured against. What should be decisive is rather whether the provisions in question hinder trans-frontier economic activity and – if that is the case – whether those restrictions are justified.

This approach was applied in C-109/04 *Kranemann* [2005] ECR I-2421, where part of the prescribed training for lawyers in Germany involved a practical placement for which trainees received a subsistence allowance and were reimbursed their travel expenses to the placement. The applicant decided to do his placement in the UK but was only reimbursed for travel within Germany – as far as the border! The Court held that he was covered by Article 45, as the training was essential for access to employment in the judiciary. Citing *Bosman*, the Court held that:

> Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

This approach, though, does have its limits and the Court has ruled that, in certain cases, non-discriminatory barriers may not be substantial enough or are too remote to fall within the scope of Article 45 TFEU. For instance, in Case C-285/01 *Burbaud* [2003] ECR I-8219, a requirement to take an exam to work in the public service was not itself an obstacle to free movement.

11.2.2 Who is a worker?

'Workers' of course refers to the notion of employed persons. However, the Court has interpreted such a notion very broadly. In Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177 the Court held that the definition of a 'worker' is not exclusively someone who is currently employed, but that the concept may also cover those persons 'likely to remain in the territory of a Member State after having been employed in that state'.

Then, in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 the Court found that the concept of 'workers' applies to those engaged in part-time work for less than the minimum wage. The applicant was a British national residing in the Netherlands. She had part-time employment as a chambermaid, and earned a wage which was below the minimum considered necessary for subsistence in the Netherlands. The Court rejected the interpretation of 'workers' as 'in full-time employment'. It held instead that anyone whose objective is their improvement of their standards of living should be considered as a worker. Part-time work, although it may provide an income lower than the minimum subsistence wage in the country concerned, constituted for a large number of people an effective means of improving their living conditions. In Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, the Court of Justice held that the work engaged in by a 'worker' must be provided for remuneration and be effective and genuine, not marginal or ancillary. According to this test, remuneration was deemed to include the situation of trainee teachers working under supervision and receiving remuneration for giving lessons to pupils in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121.

The work itself must be an economic activity. In Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, the applicant worked in a religious community and, in return, he was looked after by the community. According to the Court, this was sufficient to constitute an economic activity. Contrast the judgment in this case with that in Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621.

In more recent cases, the Court has clarified the concept further, applying objective criteria to the test of 'effective and genuine' work. This could include someone in occupational training if there was proof that the trainee had worked long enough to become fully acquainted with the job performed (see Case C-3/90 *Bernini* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071).

In its judgment in Case C-138/02 *Collins* [2004] ECR I-2703 the Court drew a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State and those who are already working in that Member State. The applicant possessed dual Irish and American nationality. After studying for one semester in the UK in 1978, he returned to the UK for a stay of approximately 10 months in 1980 and 1981, during which he did part-time and casual work. In 1998 he returned again to the UK in order to find work in the social services sector. He claimed jobseeker's allowance which was refused on the ground that he was not habitually resident in the UK. The Court stated that the applicant could not be regarded as a worker because no link could be established between his stay in the UK in 1981 and his search for another job more than 17 years later. His position in 1998 must therefore be compared with that of any national of a Member State looking for his first job in another Member State. Only those who have already entered the employment market could claim the same social and tax advantages as national workers, based on the relevant legislation.

11.2.3 The job-seeker

The Court has also interpreted the expression contained in Article 45(3)(a) TFEU 'to accept offers of employment actually made' as covering job-seekers. In Case C-292/89 *R* v *Immigration Appeal Tribunal, ex p Antonissen* [1991] ECR I-745, the Court held that

> a strict interpretation of [Article 45(3) TFEU] would jeopardise the actual chances that a national of a Member State who is seeking employment will find it in another Member State and would, as a result, make that provision ineffective.

The Article therefore had to be interpreted as giving a non-exhaustive list of rights for nationals of Member States in the context of free movement, including the right to move and stay within the territory of the Member State for the purposes of seeking employment.

A person cannot stay indefinitely in another Member State while looking for work. However, the Court said in *Antonissen* that Member States must allow a 'reasonable time' for them to do so. Therefore, in this case, the six months allowed by the UK was reasonable. Nonetheless, the Court held that the expiry of that time-limit did not give a Member State the automatic right to deport job-seekers. If they could show that they were actively seeking work, and had a genuine chance of success, they must be allowed to stay. This rule is now incorporated into Article 14(4)(b) of Directive 2004/38 which precludes expulsion of a job-seeker or family member at the end of the three-month period laid down in Article 6 if they are still seeking work and have a genuine chance of finding it.

11.3 Equal treatment for workers and their families

11.3.1 Equal treatment for workers

Access to employment

In principle, migrant workers are entitled to equal access to employment with nationals of the host state, and there must be no discrimination in recruitment. However, there are exceptions to the principle of equal access, notably Article 45(4) TFEU, dealing with employment in the public service (see below) and Article 3(1) of Regulation 492/11, which covers recruitment conditions relating to 'linguistic knowledge required by reason of the nature of the post to be filled'.

In Case 379/87 *Groener* v *Minister of Education* [1989] ECR 3967, the Court made clear that the level of linguistic knowledge must be proportionate (i.e. it must relate to the actual demands of the job and not be set too high).

Case 281/98 *Angonese* [2000] All ER (EC) 577 concerned an application for employment with a private bank in Italy. One of the conditions for entry to the competition to the post was a specific certificate confirming that the holder was bilingual in German and Italian. This certificate was issued exclusively by the local authorities of Bolzano, a province in Northern Italy where both German and Italian are spoken. The applicant was bilingual but did not possess the certificate and was not allowed to be considered. It was held that this was contrary to Article 45 TFEU as the requirement was disproportionate.

In Case C-40/05 *Kaj Lyyski* v *Umeå Universitet* [2007] ECR I-99, the Court held that national rules on teacher training courses, intended to address the need for qualified teachers in a Member State, could require applicants for that training to be employed in a school in that State. However, such legislation could not entail the automatic exclusion of all applications by teachers who were not employed in such a school without individual assessment.

The right to reside

Article 45 provides workers with the right to reside in another Member State for the purpose of employment. The right of a worker to enter a Member State and reside there is conferred directly from the Treaty and is not the result of a Member State's conferral of

a residence permit (see Cases C-36/75 *Roland Rutili* v *Ministre de l'Intérieur* [1975] ECR 2009 and C-100/01 *Ministre de l'Intérieur* v *Aitor Oteiza Olazabal* [2002] ECR I-10981).

Directive 2004/38 now lays down the specific rules for residence permits for both the Union citizen themselves and their family members.

Access to social advantages and other benefits

Article 7(1) of Regulation 492/11 states that the migrant worker must not be discriminated against

> in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or reemployment.

Equal treatment with nationals more generally is required by Article 7(2) which says that the worker 'shall enjoy the same social and tax advantages as national workers'.

Definition of 'social advantages'

In Case 207/78 *Even* [1979] ECR 2019, the Court defined social advantages as being advantages

> which, whether or not linked to a contract of employment , are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory.

Social advantages have included an entitlement to railcards for discounted rail travel for large families (see Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085); the right to speak a particular language in proceedings conducted in a Member State where such a right is available to that Member State's nationals (see Case 137/84 *Mutsch* [1985] ECR 2681); an interest-free 'childbirth loan' granted to nationals in order to stimulate the birth rate (Case 65/81 *Reina* v *Landeskreditbank Baden-Württemberg* [1982] ECR 33).

See also the recent case C-333/13 *Elisabeta Dano* v *Jobcenter Leipzig* (2014) and C-442/16 *Gusa v Minister for Social Protection and Others* ECLI:EU:C:2017:1004.

Residence requirements

Conditions for access to benefits such as a requirement for a period of residence may also infringe on the free movement of persons. In Case C-299/01 *Commission* v *Luxembourg* [2002] ECR I-5899, making entitlement to income support dependent on a person having resided in Luxembourg for five years out of the past twenty years was held to breach Article 45 TFEU and Regulation 492/11 Article 7(2).

Not all benefits will be covered, however. In Case C-386/02 *Josef Baldinger* [2004] ECR I-8411 Austria was entitled to make a benefit for former prisoners of war dependent on applicants being Austrian nationals at the time of application. This was because it was not a social advantage under Article 7(2) of Regulation 492/11, available generally to Austrian nationals, but a benefit for war victims only.

Education and vocational training

In *Kaj Lyyski* v *Umeå universitet* (above) the Court confirmed that conditions of access to vocational training fall within the scope of the Treaty.

In Case 39/86 *Lair* [1988] ECR 3161 the Court ruled that a person does not cease to be a Union worker just because they give up work in order to become a full-time student. Nevertheless, in order to retain worker status, there must be a connection between the course of study and their previous work. Such continuity may not be required, however, if the worker became involuntarily unemployed and had to retrain in another occupational activity in order to obtain another job.

Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205 concerned a work placement that was only available to students who had been offered a university place. The Court found that the applicant was not entitled to a maintenance grant as a worker because the employment was merely incidental to the university course.

Tax advantages

An increasing number of cases concerning direct taxation have come before the Court. In Cases C-279/93 *Schumacker* [1995] ECR I-225 and C-80/94 *Wielockx* [1995] ECR I-2493 the Court interpreted Article 45 TFEU as meaning that a Union national who gained his main income and almost all of his family income in a Member State other than his state of residence was discriminated against if his personal and family circumstances were not taken into account for income tax purposes in the home state.

Case C-152/03 *Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais* v *Finanzamt Germersheim* [2006] ECR I-1711 confirms that all forms of direct tax discrimination which impede the exercise of a fundamental freedom (in this case the free movement of workers) are, in principle, precluded by EU law.

11.3.2 Equal treatment for workers' families

The rights granted in the Treaty regarding the free movement of workers have resulted in a variety of derived rights enjoyed by various groups of people.

Right of residence

Certain members of a migrant worker's family have the right to install themselves with the migrant. Pursuant to Directive 2004/38, family members are:

> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Article 13(2)(a) of Directive 2004/38 states that annulment of a marriage or partnership will not entail the loss of the right of residence of an EU citizen's family – who are not nationals of an EU Member State – as long as the registered partnership lasted for at least three years prior to annulment and that the family also spent at least one of these years in the host Member State (see Case 267/83 *Diatta* v *Land Berlin* [1985] ECR 567).

See also the recent case C-673/16 *Coman and Others* ECLI:EU:C:2018:385 Judgment of the Court 5 June 2018. The Court held that the term 'spouse', for the purpose of family reunification rights, should include the same-sex spouse of a Union citizen who has exercised his/her right of free movement.

Education rights of workers' children

Children of migrant workers are fully protected by the general clause of non-discrimination. Article 12 of Regulation 1612/68 (now absorbed in Directive 2004/38) states that children residing in the same host Member State as their parents enjoy the same educational rights as nationals of that state, including connected rights such as grants.

The Court has consistently interpreted Article 12 widely. In Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 773, for instance, the Court held that access for workers' children to education in Article 12 of the Regulation also included any 'general measures intended to facilitate educational attendance' such as an educational grant for a secondary school in Germany.

Even if the parent(s) of the child are no longer resident in the host state, the child continues to be entitled to education and financial support on the same terms as children of nationals (Case C-390/87 *Echternach* [1989] ECR 723), and this right does not cease at the age of 21: see Case C-7/94 *Gaal* [1996] ECR I-1031. Article 12(3) of Directive 2004/38 states that children in education retain the right to reside even if

the EU national parent has left or died, as does the parent who has custody of them, regardless of nationality, until their education is completed.

Case C-413/99 *Baumbast* v *Secretary of State for the Home Department* [2002] ECR I-7091 is also particularly significant. The Court held that children of migrant workers should be allowed to continue their education in the host Member State, even if their primary carer parent was in danger of losing residence either due to divorce or because the migrant worker had ceased to work there. The Court went on to hold that the child's primary carer should be allowed to reside in the Member State. The Court heavily relied on Article 8 of the ECHR, which contains the requirement of respect for family life (for more on this see *Zambrano* and *McCarthy* discussed further below).

11.3.3 Rights of the unemployed

Right of residence for job-seekers

In the *Collins* case the second question posed to the Court concerned whether Directive 68/360 granted a right of residence to a person seeking work. In line with *Antonissen*, the Court held that the right of residence derived from Article 45 TFEU may be limited in time but if after expiry of that period the person concerned provides evidence that they are continuing to seek employment and that they have a genuine chance of being employed, they cannot be required to leave the territory of the host Member State.

Article 6 of Directive 2004/38 appears to be less generous in providing for a right of residence of up to three months (but see further the discussion above on job-seeker rights). Chapter IV of the Directive also provides for a right of permanent residence after five years of continuous residence for Union citizens and their family members who are not Union citizens. This applies to both workers and the self-employed.

Article 7 of Directive 2004/38 lays down the conditions for a right of residence for more than three months for primary movers and family members. If they are not workers or self-employed they must have sufficient resources not to become a burden on the financial system of the host state and must have comprehensive sickness insurance. This includes students (Article 7(1)(b)). The status may be retained in case of sickness, involuntary unemployment or taking up vocational training connected with the previous employment.

Equal treatment for job-seekers

In Case 316/85 *Lebon* [1987] ECR 2812, the Court said that the job-seeker does not enjoy the same rights as the worker and that, except for the provisions on equal access to employment, ex Regulation 1612/68 (now Regulation 492/11) did not apply to job-seekers. It therefore held that entitlement to the same social and tax advantages as nationals under Article 7(2) of Regulation 1612/68 did not apply to the job-seeker in this case.

However, in *Collins* (above) the Court extended the fundamental principle of equal treatment in Union law to benefits of a financial nature such as jobseekers' allowance.

In Case C-456/02 *Trojani* [2004] ECR I-7573, a French national did various jobs in a Salvation Army hostel in Belgium as part of a 'personal socio-occupational reintegration programme'. It was for the national court to decide whether he was a 'worker' under Article 45 TFEU, but even if he was not, the Court said that as he was an EU citizen lawfully resident in Belgium, he could not be discriminated against when accessing the *minimex* subsistence allowance. While in *Collins*, decided in March 2004, the Court of Justice was clearly moving in the direction of holding that job-seekers are entitled to social security benefits, Directive 2004/38, adopted on 29 April the same year, heads in the opposite direction. It provides in Article 24(2) that:

> the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided [for job-seekers] …

Until the right of permanent residence is acquired, only workers, the self-employed and their families are entitled to grants or loans for study, including vocational courses

(Article 24(2)). The Court has, though, limited the exception in Article 24(2) by ruling that benefits 'which are intended to facilitate access to the labour market' do not constitute social assistance and are covered, instead, by Article 45(2) TFEU (see Case C-22/08 *Vatsouras* [2009] ECR I-04585).

In Case C-535/19 *A* v *Latvijas Republikas Veselī bas ministrija* EU:C:2021:595 held that economically inactive Union citizens residing in a Member State other than their home Member State have the right to be accepted into the public sickness insurance system of the host Member State. However, the Court acknowledged that the host Member State would be entitled to impose conditions on this acceptance, subject to the principle of proportionality, to ensure that, along the lines of Article 7(1)(b) of Directive 2004/38, the individual does not become an unreasonable burden on the public finances of that Member State.

A more restrictive approach?

The Court was asked to revisit the issue of whether economically inactive European Union citizens who relocate to another Member State should be excluded from certain social benefits. In Case C-333/13 *Dano* v *Jobcenter Leipzig* EU:C:2014:2358, the ECJ held that with respect to access to benefits, nationals of Member States can claim equal treatment with nationals of the host Member State only where their residence complies with the conditions stipulated in the Directive on free movement of EU citizens. Under the Directive, the host Member State is not required to grant social assistance during the first three months of residence and, where the period of residence exceeds three months but is less than five years, an economically inactive resident must have 'sufficient resources of their own'. Therefore, the Court held that a Member State is not precluded from refusing to grant social assistance to economically inactive EU citizens who move to another Member State. The Court added, however, that each case must be examined individually without taking account of the social benefits claimed.

In C-67/14 *Jobcenter Berlin Neukölln* v *Alimanovic* the Court reiterated the principle that an EU citizen cannot claim equal treatment regarding access to social assistance benefits with nationals of the host Member State unless their residence in the host Member State is in compliance with the conditions in the Citizenship Directive. Therefore, it held that denying applicants – whose right of residence in the host Member State arises out of the search for employment – entitlement to social assistance does not contravene the principle of equal treatment.

11.4 Derogation from the free movement of persons

Core text

- **Steiner & Woods, Chapter 23 'Free movement of persons: limitations on grounds of public policy, public security, or public health'.**

Essential reading

- **Directive 2004/38, Chapter VI.**

Article 45(3) TFEU lists three possible grounds for refusing entry to, or expelling, a national of another Member State: public health, public security or public policy. These exceptions also apply to establishment and services (see Chapter 7).

The provisions in Articles 27–33 (Chapter VI) of Directive 2004/38 take into account the case law of the Court of Justice. The grounds of derogation will be subject to the principle of proportionality and Member States are required to take into account a number of specific factors before a person can be expelled.

More generally, the Court has recognised a broad category of additional public interest grounds or objective justifications similarly to the contexts of the free movement of goods (see Chapter 6) and the free movement of establishment and services (see Chapter 7). As with the other freedoms, derogations from the free movement of workers are subject to compliance with the principle of proportionality.

11.4.1 Limitations on grounds of public policy, public security or public health

Public health

Public health is one of the express derogations provided by Article 45 TFEU. Furthermore, Article 29 of Directive 2004/38 identifies two public health situations that may justify restrictions on free movement:

- 'diseases with epidemic potential', recognised as such by the World Health Organisation
- other infectious or contagious diseases but only if restrictions are also being imposed on nationals of the host state suffering from these conditions.

Article 29(2) states that if the disease occurs after three months from the date of arrival, the sufferer cannot be expelled on this ground. Article 29(3) allows Member States to require a medical examination within three months of arrival to check whether a person is suffering from a proscribed disease, but only if there are 'serious indications' that it is necessary, and not as a matter of routine.

Public policy and public security

The interpretation of the concepts of public policy and, to a lesser extent, public security, has not been straightforward.

Early on in Case 41/74 *van Duyn* v *Home Office* [1974] ECR 1337 the Court held that Member States had some discretion as to whether an individual's conduct was contrary to public policy. The Court referred to Article 3(1) of Directive 64/221 (later absorbed by Directive 2004/38), which provided that:

> Measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.

The Court considered that a person's ongoing association with a body or organisation could in itself constitute a voluntary act, which may be considered as personal conduct. The fact that the relevant organisation was not prohibited, and thus nationals could work for it, was then considered by the Court. The Court recognised a certain amount of discretion for the Member State and held that it could still refuse entry to an individual on the basis that their conduct was 'socially harmful', although the organisation by which the individual was to have been employed was not prohibited in the Member State. The Court pointed out that the right of residence may be refused to nationals of other Member States who wish to take up employment, even when it could not refuse its own nationals.

However, in Cases 115 and 116/81 *Adoui* and *Cornuaille* v *Belgium* [1982] ECR 1665 the Court did not accept that a Member State could deport those who were working in a non-prohibited job.

In Case 30/77 *R* v *Pierre Bouchereau* [1977] ECR 1999, the Court considered the amount of discretion available to Member States when restricting the free movement of persons. The Court found that

> in so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Joined Cases C-482 and 493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257 concerned Greek and Italian nationals who were long-term residents in Germany who had been served with deportation orders. As is increasingly the case, the Court considered the free movement Articles as well as Article 21 TFEU and the general principles, in particular fundamental rights and respect for family life. The Court stated that Article 45 TFEU and Directive 64/221 (now absorbed by Directive 2004/38) precluded national legislation which provided for the expulsion of foreign nationals without taking into

account factual matters which may have contributed to the 'substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy'. Instead, the national authorities should balance the threat and the fact that the person had received a particular sentence for specific offences against the fact that they had resided for many years in the host Member State and could plead family circumstances against the expulsion.

The Citizenship Directive repealed and replaced Directive 64/221. Article 28(3)(a) of the Citizenship Directive inserts a specific provision against an expulsion decision against a Union citizen who has resided in the host state for the previous ten years, unless such a decision is based on imperative grounds of public security.

In Case C-145/09 *Land Baden-Württemberg* v *Panagiotis Tsakouridis* [2010] ECR I-11979 the Court clarified that when a Member State makes an expulsion order, the national authorities should look to all relevant factors, in particular, the length and frequency of individual absences from the host Member State and the reasons for the absences. The Court also held that, in order for the expulsion to be proportionate where the individual has spent most of his life in the host state, the reason for expulsion must be based on serious and objective reasons.

Lastly, Article 27(2) of the Citizenship Directive indicates that measures taken on grounds of public policy or public security must be proportionate and must be based exclusively on the personal conduct of the individual concerned. Pursuant to Article 27(2), such conduct

> must present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted (see *Bouchereau*, above).

In Case C-718/19 *Ordre des barreaux francophones et germanophone* v *Conseil des ministres* EU:C:2021:505 the CJEU held that enforcement measures taken on the grounds of public policy or public security do constitute restrictions on the free movement of citizens and the right of residence enjoyed by Union citizens. However, they may be justified if they are based solely on the personal conduct of the relevant individual and comply with the principle of proportionality (as is provided in Article 27 of Directive 2004/38); the measures must also be no less favourable than those measures in national law that to third-country nationals in the same situation. The Court then went on to hold that period of eight months' detention goes beyond what is necessary to achieve such public policy/security aims.

11.4.2 The public service exception

Article 45(4) TFEU provides an exception to the provisions on free movement of workers in relation to employment in the public service.

This exception has also been interpreted narrowly by the Court. The Court has held that there should be a Union interpretation of the concept. The Court has defined the scope of 'public service' narrowly, finding that it is a question of the nature of the post, not the institution which is the employer.

In Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, concerning employment in the postal service, the Court stated that the aim of the exception was the protection by Member States of rights to exercise state sovereignty by restricting access to certain parts of the public service.

The application of Article 45(4) TFEU could not depend solely on the designation of the legal relationship between the employee and the administration. If it did, this would enable Member States to determine at will what posts should be covered by the exception.

As the Court had pointed out in Case 149/79 *Commission* v *Belgium (No 2)* [1980] ECR 3881 'employment in the public service' must be understood as meaning those posts which involve:

> Direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality.

For further examples on the interpretation of the public service exception, see: Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121 (trainee teacher); and Case 307/84 *Commission* v *France* [1986] ECR 1725 (nursing posts in public state hospitals).

11.5 Citizenship and free movement rights

CORE TEXT

- **Steiner & Woods, Chapter 19 'Citizenship: rights of free movement and residence'.**

ESSENTIAL READING

- **Directive 2004/38.**

The concept of EU citizenship was first introduced by the Treaty of Maastricht. Such a concept is not an autonomous one but, as specifically mentioned in the Treaty, 'Citizenship of the Union shall be additional to and not replace national citizenship'.

Thus EU citizenship is totally dependent upon nationality of a Member State. Conferral of nationality is an exclusive competence of Member States (Case C-369/90 *Micheletti* [1992] ECR I-4239).

When exercising competence with regard to the acquisition and loss of nationality, Member States must have due regard to EU law, such as the principle of proportionality (Case 135/08 *Janko Rottmann* v *Freistaat Bayern* [2010] ECR I-1449).

The Court of Justice has reiterated the need for a proportionality assessment in the recent case C 221/17 *Tjebbes* ECLI:EU:C:2019:189. The Court held that Article 20 TFEU does not in principle preclude national legislation that provides, under certain conditions, for the loss, by operation of law, of the nationality of that Member State, which entails the loss of Union citizenship. However, the competent national authorities, including national courts, where appropriate, must be in a position to examine the consequences of the loss of that nationality, particularly with reference to the principle of proportionality, including the consequences of that loss for the person concerned and, if relevant, for that of their family members, from the point of view of EU law.

Article 20 of the TFEU gives a definition of citizenship and sets out the rights protected. Article 9 of the TEU further states that:

> Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

The Treaty also confers to EU citizens certain 'political' rights such as: the right to diplomatic or consular protection by authorities of any Member State on the same conditions as the nationals of that Member State (Article 23); and the right to petition the European Parliament, to apply to the European Ombudsman and to write to the institutions or bodies in any of the official European languages and receive an answer in that language (Article 24).

In Case C-182/15 *Petruhhin* ECI:EU:C:2016:630 the Court of Justice addressed the question of whether in the application of an extradition agreement with a non-member State, the nationals of another Member State must enjoy the same protection against extradition as its own nationals, under the principle of non-discrimination on grounds of nationality and the freedom of movement and of residence of Union citizens.

The Court of Justice found that, in the absence of EU law to regulate this situation, it is necessary to implement all the cooperation and mutual assistance mechanisms provided for under EU law.

11.5.1 Directive 2004/38 on rights of Union citizens and their families

This Directive replaces the following Directives.

- Directive 68/360 on rights of entry and residence for workers and their families.
- Directive 73/148 in relation to establishment and service providers.
- Directive 90/364 on the general right of residence.
- Directive 90/365 on residence rights of retired persons.
- Directive 93/96 on residence rights of students.
- Directive 64/221 on the refusal of entry or residence on the grounds of public policy, public security and public health.
- Directive 2004/38 amended Regulation 1612/68 on free movement for workers, in turn repealed by Regulation 492/2011 on freedom of movement of workers.

The basic concept behind the Directive is that EU citizenship is the 'fundamental status' of those exercising their right to free movement (Preamble para.3), rather than their particular status as worker, self-employed, student, etc.

The Directive applies to Union citizens (and their family members) but only if they 'move to or reside in a Member State other than that of which they are a national' (Article 3(1)). This would still exclude the purely internal cases, such as Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.

Which family members are covered?

Article 2(2) defines family members covered by the Directive. It includes the spouse (2(2)(a)). Interpreting the concept of 'spouse' under ex Regulation 1612/68, the Court held that it means husband or wife, not co-habiting partner, see Case 59/85 *Netherlands* v *Reed* [1986] ECR 1283. The Directive gives registered partners the status of family members as well as spouses but only where legislation in the host Member State recognises registered partnerships, and only on the terms of the relevant national legislation (Article 2(2)(b)). There is also acknowledgment of co-habitees in Article 3(2)(b) of the Directive which says that Member States should 'facilitate' the entry of a 'partner with whom the Union citizen has a durable relationship, duly attested'. However, no definition is provided of 'durable', nor are there details of how the relationship may be attested. Member States must carry out an extensive examination of the personal circumstances and justify any refusal of entry or residence to partners.

The provision in relation to children (Article 2(2)(c)) covers, direct descendants who are under the age of 21 or are dependants', but also specifically includes those of the spouse or partner. This recognises the fact that with divorce and remarriage, the children of the family may not necessarily be the children of both the spouses/partners.

Other family members such as siblings, uncles, cousins, etc. still have no automatic right to accompany the worker, but under Article 3(2)(a), Member States should also 'facilitate' the entry of other family members not covered by Article 2(2), who are dependent on the EU national or members of their household, or 'where serious health grounds strictly require the personal care of the family member by the Union citizen'. Again the Member State must carry out a detailed investigation and justify any refusal of entry.

N.B. If a person has worked in another Member State and then returned home, their family members keep their EU law rights even after returning to the home state, see C-370/90 *Surinder Singh* [1992] ECR I-4297. See also Case C-109/01 *Secretary of State* v *Akrich* [2003] ECR I-9607.

Administrative requirements

In its case law, the Court had made clear that a residence permit was merely documentary evidence of the right to reside – the source of the right being the Treaty itself (see Case 48/75 *Procureur du Roi* v *Royer* [1976] ECR 497).

The Directive sets out certain administrative requirements for Union citizens and family members.

Consequences of death, departure, divorce or termination of registered partnership

Article 12 provides for the retention, subject to certain conditions, of the right of residence by family members in the event of death or departure of the Union citizen.

Article 13 provides for the retention, subject to certain conditions, of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership.

The right of permanent residence

Article 16 creates a right of permanent residence once an EU citizen or family member (EU or non-EU) has been lawfully resident in the host state for five years. Once the right of permanent residence has been acquired, it is no longer necessary to establish that the person is a worker, self-employed or has sufficient own resources. The right can be lost if the person is absent from the host state continuously for two years. Articles 17–23 then go on to describe the various situations when permanent residence can be acquired.

11.5.2 Facets of EU citizenship

Extension of the principle of equal treatment

Article 18 TFEU prohibits discrimination in matters within the scope of EU law and Article 21 TFEU sets out the right of all citizens to move and reside freely within the territory of the Union. The latter Article functions in tandem with Article 45 TFEU on the free movement of workers and extends the freedom of movement to the non-economically active.

The Court has found that, where an EU citizen is, in fact, lawfully resident in another Member State, their situation is within the scope of the EU Treaties. They therefore have a right not to be discriminated against under Article 18 TFEU, even if they do not fall into one of the economic categories recognised by EU law (see Case-C-85/96 *Martinez Sala* v *Freistaat Bayern* [1998] ECR I-2691).

However, note that Article 24(1) of Directive 2004/38 provides that only those living in another Member State on the basis of the Directive 'shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty'. This only confers a right to equal treatment to people covered by the Directive and falls short of the application of equal treatment generally for citizens of the EU lawfully resident in another Member State.

Right of residence and primary carers

Over time the Citizenship concept began to have an impact on the rights of residence of the non-economically active. One of the most important cases in this respect is Case C-413/99 *Baumbast* v *Secretary of State for the Home Department* [2002] ECR I-7091.

The Court considered the situation of a mother who was the primary carer for the children, who had been refused leave to remain because she was married to an EU national who was no longer a migrant worker. The Court found that the right conferred by Article 12 of Regulation 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, their education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is their primary carer and, accordingly, that that person is able to reside with the child in that Member State during the child's studies. To refuse to grant permission to remain to a parent who is the primary carer of the child while the child completes their education infringes that right.

Secondly, the Court also considered that a citizen of the EU who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the EU, enjoy a right of residence there by relying on the citizenship provisions. While the exercise of that right was subject to certain conditions (in particular, having sufficient resources and sickness insurance), any limitations on the right would need to comply with the principle of proportionality.

Case 200/02 *Zhu and Chen* [2004] ECR I-9925 is also worth mentioning. Mrs Chen, a non-EU national, travelled to Northern Ireland where she gave birth to a baby. Under Irish law of that time, nationality was conferred on every child born on the island, Northern Ireland included. Baby Catherine – an Irish national – became, therefore, an EU citizen. When they moved to England and were not granted a residence permit, they challenged the decision on the basis of the daughter's right of residence within the EU. The Court found that to deprive the mother of residence would be to effectively deprive the child of its right to residence as provided under Article 21(1) TFEU.

In a recent case, the Court seems to have embraced a wide concept of citizenship. In Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, the Court held that EU law conferred a right of residence to a non-EU national parent of an EU citizen in order to prevent the deprivation of the child's enjoyment of the benefits of citizenship. The Court of Justice held that Article 20 TFEU would only preclude a Member State from refusing to grant a right of residence to an individual whose children are EU citizens with nationality and residence in the Member State concerned, if such a refusal would deprive the children of the 'genuine enjoyment of the substance of the rights' attached to their status as EU citizens.

The potentially wide scope of the *Zambrano* judgment has been restricted in later rulings. In Case C-434/09 *Shirley McCarthy* v *Secretary of State for the Home Department* [2011] ECR I-3375, the applicant had dual UK and Irish nationality. She was born and had always lived in the UK. In 2004 she and her husband applied to the Secretary of State for a residence permit and residence document under EU law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the ground that she was not a 'qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that her husband was not the spouse of a 'qualified person'.

The Court ruled that Directive 2004/38 is not applicable to a Union citizen who has never exercised their right of free movement, who has always resided in a Member State of which they are a national and who is also a national of another Member State. It held, further, that Article 21 TFEU is not applicable either, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving them of the genuine enjoyment of the substance of the rights conferred by virtue of their status as a Union citizen or of impeding the exercise of their right of free movement and residence within the territory of the Member States.

The Court later confirmed this very restrictive reading of *Zambrano* in Case C-256/11 *Dereci* [2011] ECR I-11315. This was a joint case of five applicants, each of whom was a third country national wishing to reside in Austria with their Austrian family member. None of the applicants' family members had exercised their right to free movement within the Union. The Court, in interpreting the test of 'genuine enjoyment of the substance' of citizenship rights, stated that such a criterion refers only to situations in which the Union citizen has to leave not only the territory of the Member State of which they are a national but also the territory of the Union as a whole. The finding was without prejudice to the question of possible infringement of the right to respect for private and family life with the Court leaving the issue of whether the current situation fell within the scope of EU law to be determined by the referring court.

See also Case C-40/11 *Iida* v *Stadt Ulm* [2013] Fam 121 and Joined Cases C-356/11, C-357/11 *O, S & L* [2013] Fam 203.

See further the recent ruling of the Court of Justice in Case C 93/18 *Ermira Bajratari* v *Secretary of State for the Home Department* ECLI:EU:C:2019:809, where the Court considered the requirement for sufficient resources for residence purposes under Directive 2004/38 with respect to a Union citizen minor.

Right to education

The Court has increasingly demonstrated a desire to create a single market for education within the Union under the basis of Union citizenship.

In Case C-184/99 *Grzelczyk* v *Centre Public d'Aide Sociale* [2001] ECR I-6193 the Court considered the requirement to demonstrate sufficient resources. It concerned the availability of a Belgian social assistance allowance, the *minimex* (the Belgian minimum wage), to an EU citizen residing as a student in Belgium. Under Article 1 of the Directive on the Right of Residence for Students, students were required to make a declaration that they have sufficient resources for themselves and their families (this same rule is now in Article 7(1)(c) of Directive 2004/38). For the first three years of his studies the applicant worked to support himself but was unable to do so in his fourth and final year and applied for the *minimex*. He was refused it as he was not a worker and so was not covered by Article 7(2) of Regulation 492/11.

The Court found that a Belgian student in the applicant's position would qualify for the *minimex*. The prohibition on discrimination under Article 18 TFEU must be read in conjunction with the provisions on citizenship under Article 21 TFEU and precluded a Member State from refusing a benefit such as the *minimex* to EU nationals from other Member States in circumstances where it would have been available to the Member State's own nationals. The Court said that, while Member States may withdraw rights of residence from students if they have insufficient resources to support themselves, such a measure must be proportionate and not automatic.

The Court adopted a similar approach in Case C-224/98 *D'Hoop* [2002] ECR I-6191. The applicant was a Belgian national attending school in France. She was denied unemployment benefit. The Court agreed that she was not a worker and not entitled under Regulation 492/11 Article 7(2). However, it held that education is within the scope of the Treaty and that the applicant was exercising her right to free movement as a citizen of the EU under Article 21 TFEU. She therefore had a right not to be discriminated against in access to benefits.

In Case C-209/03 *Bidar* [2005] ECR I-2119 the Court ruled that a provision requiring students to be 'settled' in the host Member State for the purposes of obtaining a student loan was incompatible with Article 18 TFEU. However, in a rather restrained mood, the Court added that the Member State could require that the student had 'established a genuine link with the society of that Member State'.

In Case C-158/07 *Jacqueline Förster* [2008] ECR I-8507 the Court confirmed that the requirement of a 'genuine link with the society of that Member State' could be interpreted as necessitating residency for five years before a grant is paid to assist with studies.

Activity 11.1

a. To what extent does EU law guarantee an EU national the right to work in any other EU country?

b. Describe the test used by a national court to decide whether a person is a 'worker' for the purposes of EU law.

c. Describe how the rights of job-seekers differ from those in employment.

d. Which members of an EU citizen's family have the right to accompany them to another Member State?

Activity 11.2

Find substantive arguments to debate the following questions.

a. Is it true to say that, in the realm of freedom of movement, EU citizenship adds nothing to the rights already contained in other provisions?

b. Would you say the power of European citizenship is merely a symbolic one?

To enhance your arguments, look up Article 20 TFEU case law.

Activity 11.3

Read the Court's judgment in the case of *Zhu and Chen* and answer the following questions:

a. **Why was Catherine's situation treated as coming within the scope of the EU free movement provisions even though she had never moved to another Member State?**

b. **Article 21(1) TFEU is subject to restrictions and limitations. What was the limitation placed on the right to reside conferred by Article 21 TFEU in the circumstances of this case?**

c. **What was the legal basis on which Catherine's mother was allowed to reside?**

Activity 11.4

'The free movement of persons means that any citizen of a Member State should have the right to travel anywhere in the European Union and live there on equal terms with nationals' (Horspool, M., M. Humphreys and M. Wells-Greco *European Union law*. (Oxford: Oxford University Press, 2018) 10th edition [ISBN 9780198818854]). To what extent does this statement reflect the current position in EU law?

No feedback provided.

Activity 11.5

Read the cases *Carpenter, Zambrano, McCarthy* and *Dereci*. For each case summarise the facts and the findings of the Court. What distinguishes these cases? Is the potential impact of such case law on the right of residence of EU and non-EU citizens likely to be welcomed by the Member States? What does it reveal about the protection of family life in the EU?

Activity 11.6

Core comprehension – Social benefits and economic inactivity

Using your Online Library resources, research the following case:

- **Case C-333/13 *Elisabeta Dano, Florin Dano* v *Jobcenter Leipzig***

a. **Explain the source of financing of 'non-contributory social security benefits' and their purpose in regard to job-seeking as stated in Regulation 883/2004.**

b. **According to Directive 2004/38 under which circumstances can job-seekers who have recourse to social benefits remain in host states without being expelled?**

c. **According to German law which two important conditions must economically inactive Union citizens demonstrate if they wish to reside in Germany as a host state beyond an initial period of three months?**

d. **On which grounds can host states justify the expulsion of EU migrant workers?**

Activity 11.7

Core comprehension – C-202/13: Concepts of nationality, citizenship and residency

Using your Online Library resources, research and read this case:

- **Case C-202/13 *Regina (McCarthy)* v *Secretary of State for the Home Department***

This learning activity reinforces your understanding of everyday words which have a more specific legal definition when used in your reading materials, in particular your understanding of the legal concepts of nationality, citizenship and residency. You are asked to relay the broad thrust of the concepts in your own words and in a clear and concise manner.

a. **In your own words, explain the difference between national citizenship and EU citizenship in the context of the citizens who do not exercise their freedom of movement and citizens who do exercise their freedom of movement.**

b. Which adjectives are used to describe (a) the state which EU citizens leave behind when they exercise their freedom of movement; and (b) the state to which they move?

c. In your own words, explain how nationality is generally determined. (Word limit 100 words.)

d. In your own words, explain how residency is generally determined. (Word limit 150 words.)

Activity 11.8

Applied comprehension – Verschueren: benefit tourism and ambiguity

Read the following journal article:

- Yong, A. 'Driving a wedge between friends?: The Court of Justice of the EU and its citizens in the case of welfare benefits' (2016) 6 *European Human Rights Law Review* 664–71 (available in Westlaw via the Online Library).

Before commencing this task, the best approach is to complete your reading of the C-333/13 *Dano* case and then the linked Activity 11.6.

a. Which principle protects economically inactive migrating Union citizens from being denied access to social assistance benefits and other non-contributory benefits such as student maintenance grants?

b. Identify two established concepts in EU citizenship case law which are associated with ascertaining the motivation of economically inactive EU citizens who exercise their freedom of movement when they apply for social assistance in host states?

c. According to Verschueren which two aspects of the earlier *Brey* case increased legal uncertainty and confusion concerning the determination of an 'unreasonable burden' to a national social assistance system?

Section 4.3: 'Some questions left to be answered'

d. What is meant by the narrow interpretation of the *Dano* judgment?

e. Identify three areas of ambiguity which have resulted from the *Dano* judgment. Give each area a short 'label' (e.g. the X issue).

f. According to Verschueren, why might disapplication of the proportionality test to the expulsion measure run contrary to the Union's objectives?

Concluding remarks

g. In your own words, why might some Member States favour the broad interpretation of the *Dano* judgment? (20 words.)

Activity 11.9

Applied comprehension – Strumia: European citizenship and the genuine substance doctrine

Using your Online Library resources, research the following journal article:

- **Strumia, F. 'Looking for substance at the boundaries: European citizenship and mutual recognition of belonging' (2013) 32(1) *Yearbook of European Law* 432–59 (available in ABI/Inform Global).**

You can complete this learning activity by reading Section I 'Contemporary European citizenship: the genuine substance doctrine and its discontents', pp.434–41.

a. **What is the essential characteristic of 'purely internal situations'?**

b. **Identify the main practical implication of purely internal situations.**

c. **According to Strumia, why does the new concept of 'genuine enjoyment of the substance of the rights of European citizenship' nurture various uncertainties?**

d. **How has the 2010 *Zambrano* case contributed to the new doctrine of genuine substance?**

e. **In the 2012 *Dereci* case identify (i) two important facts and (ii) the rationale of the Court's decision.**

f. **In the 2013 *Iida* case, which principle underpinned the grant of derivative rights to TCNs even if the EU citizen's situation is a purely internal situation?**

g. **Identify some factors which may be considered relevant when assessing the relation of dependency between an EU citizen child and a TCN parent caregiver who seeks a residency permit.**

h. **Which rights-based shift is associated with the more recent judgments on the doctrine of genuine substance?**

Further reading

- **Hailbronner, D. T. 'Case C-34/09 *Gerardo Ruiz Zambrano* v *Office national de l'emploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2011) 48 *CMLRev* 1253–70.**
- **Tryfonidou, A. 'Redefining the outer boundaries of EU Law: the Zambrano, McCarthy and Dereci trilogy' (2012) 18(3) *European Public Law* 493–526.**

Quick quiz

QUESTION 1

How did the courts interpret Article 45 TFEU?

a. **Widely, including family members and job-seekers.**

b. **Widely, including family members and non-EU distant relatives.**

c. **Narrowly, including family members but not job-seekers.**

d. **Narrowly, not including family members.**

QUESTION 2

What was decided in the case of *Levin* v *Staatssecretaris van Justitie* [1982]?

a. **Non-EU family members have the same citizenship rights.**

b. **People working with zero hour contracts are covered by Article 45.**

c. **The concept of workers has been expanded to cover part-time contract workers.**

d. **The term 'workers' does not include civil servants.**

QUESTION 3

Which are the two exceptions to the principle of equal employment of migrant workers?

a. **Civil servants and location of education.**

b. **Convictions from another Member State and language ability.**

c. **Language ability and previous country of employment.**

d. **Language ability and civil servant positions.**

QUESTION 4

How does the Court define 'social advantages' (Case 207/78 *Even*)?

a. **Advantages granted to workers as part of a contract of employment.**

b. **Advantages granted to migrant workers who are residents.**

c. **Advantages granted to migrants with a genuine economic link to the Member State.**

d. **Advantages granted to migrants through objective status as workers or because of residence.**

QUESTION 5

Who is not a family member for the purpose of Directive 2004/38?

a. **Adopted children.**

b. **Spouse.**

c. **Co-habiting partner.**

d. **Civil partner.**

QUESTION 6

What are the minimum requirements to obtain permanent residence?

a. **Employment in an approved employment for three years.**

b. **Five years of residence in a country.**

c. **No unemployed periods for at least four years.**

d. **Payment of a certain sum of taxes followed by an application.**

Answers to these questions can be found on the VLE.

12 EU human rights

Contents

Introduction

The original Treaties contained no explicit provisions on the protection of human rights. However, the situation has since changed significantly, with the Court of Justice declaring that the 'general principles' of EU law include protection of fundamental rights, such as human rights and dignity, freedom, democracy, equality, proportionality and the rule of law, all of which are values common to EU Member States.

Key provisions in the field of fundamental rights include the following Articles of the TEU:

- **Article 6(1) TEU:** declares that respect for fundamental rights and freedoms stated in the Charter of Fundamental Rights constitutes one of the basic principles upon which the Union is founded.
- **Article 6(2) TEU:** declares that the EU will accede to the European Convention on Human Rights.
- **Article 6(3) TEU:** states that fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.
- **Article 7 TEU:** provides a mechanism for sanctioning EU Member States who violate the principles in Article 6 in a grave and persistent manner.

Also, the Charter of Fundamental Rights defines further the fundamental rights applicable at Union level.

The European Fundamental Rights Agency monitors respect for the Union's core values. In particular, it provides assistance and expertise to Member States and the Union bodies implementing EU law on fundamental rights.

12.1 The emergence of fundamental rights in EU law

CORE TEXT

- **Steiner & Woods, Chapter 6 'General principles of law'.**

12.1.1 Background

In the beginning, there was little focus on human or fundamental rights in the Treaties. However, it was not long before the EU established itself as a powerful entity, the express competences of which extended beyond the boundaries of economic integration. In view of this, the Court of Justice recognised that the interests of the Union were spread so wide that it was not possible to disregard human rights in EU law.

The approach adopted by the Court of Justice was characterised by a realisation that the absence of written provisions relating to fundamental rights in EU legislation did not negate their existence in EU law. Rather, the position was that Union law needed to be supplemented by unwritten legal principles, including basic rights, which have equal status with primary Union law. The Court therefore adopted a gradual approach to the incorporation of fundamental rights into Union law.

In Case 29/69 *Stauder* v *City of Ulm* [1969] ECR 419, the Court had to consider a Commission Decision providing butter at reduced prices for consumers, a measure introduced to stimulate the sale of surplus butter on the common market. In some, but not all, language versions of the Decision, an applicant had to present a form bearing their name. The Court held that, properly interpreted, the contested Decision contained 'nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court'. So, although no fundamental right was found to have been violated in this particular case, the Court nonetheless recognised fundamental rights as a general principle of Union law.

This approach was further developed in Case 11/70 *Internationale Handelsgesellschaft* (1970) ECR 1970 concerning an EU measure establishing a cereal export licensing scheme linked to a system of deposits, which was challenged with reference to the German constitutional rights of economic liberty and proportionality. The Court of Justice found that:

> The protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the member states must be ensured within the framework of the structure and objectives of the [Union].

Although the Court did not find a violation of the fundamental rights in this case, this decision again affirmed the view that these rights, although based on national constitutions, were part of the general principles of EU law.

In line with the judgments of the Court, the Treaties, as they were amended, began to include greater reference to human rights standards, with Article 6 first being introduced in the Maastricht Treaty. Article 7 TEU was later added by the Treaty of Amsterdam.

12.1.2 Sources

In Case 4/73 *Nold* v *Commission* [1974] ECR 491, the Court found that there were two primary sources for the general principles of EU law: (i) the common national constitutional traditions; and (ii) international human rights agreements.

National constitutional traditions

The Court of Justice will refer to common national constitutional provisions when developing general principles of EU law. However, this can give rise to challenges, including for two principal reasons: (i) the inherent difficulty in finding common traditions across the Member States; and (ii) the risk of compromising the supremacy of EU law by deferring to national law.

This reluctance to base a decision solely upon common national constitutional provisions is apparent in Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727 in which the Court considered the right to make use of one's property. Here, the applicant, who wished to plant vines on her land, was prevented from doing so by an EU Regulation restricting the planting of vines in order to avoid the overproduction of wine. In its decision, the Court made reference to both the ECHR and the specific constitutional provisions of particular national constitutions, concluding that the right to make use of one's own property had to be weighed against the Community interest.

Case 155/79 *AM & S Europe Ltd* v *Commission* [1982] ECR 1575 is arguably indicative of potential challenges in identifying a common national tradition as a source of law. Here, the Court partly based its finding of a general principle of lawyer-client confidentiality on a comparative survey of the laws of the Member States.

The Court is prepared to recognise a particular right on the basis of common traditions in several (although not necessarily all) Member States. Thus there is no guarantee that the interpretation of a right based on national constitutions will be accepted by all Member States.

These difficulties seem to have been partly recognised in Case 36/02 *Omega* [2004] ECR I-9609 whereby the Court of Justice stated that it was 'immaterial' whether a fundamental human right had its source in a national constitution or the Union legal order as a general principle of law, since EU law would protect such a right whatever its source.

International human rights agreements

The Court of Justice has consistently treated the ECHR as a special source of inspiration. On occasion, the Court has also referred to other international or regional agreements, such as the European Social Charter (see Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365); the International Covenant on Civil and Political Rights and the International Convention on the Rights of the Child (see Case C540/03 *European Parliament* v *Council* [2006] ECR I-5769).

12.2 The application of the fundamental rights

CORE TEXT

- **Steiner & Woods, Chapter 6 'General principles of law'.**

Over time, the Court has heard a growing number of challenges to both EU legislation and Member State legislation which allegedly violate fundamental rights.

12.2.1 Challenges to EU legislation

Although numerous challenges have been brought before the Court alleging that EU legislation violates fundamental principles of EU law, the number of cases where the Court has actually annulled legislation is relatively small.

In the sphere of property rights, the Court has often followed the reasoning given in *Nold* and *Hauer* (above), whereby such rights could be justified if the restrictions concerned are intended to protect other legitimate interests and are proportionate in achieving that end. In Case C-84/95 *Bosphorus* v *Minister for Transport* [1996] ECR I-3953, the Court had to consider the legality of an EU regulation which implemented UN-mandated sanctions against the former Yugoslavia, under which a Yugoslav-owned aircraft was impounded. According to the Court the fundamental interests of the international community were sufficient to justify such restrictions of property or trade rights. This reasoning was later confirmed in the initial *Kadi* and *Yusuf* cases (Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649 and Case T-306/01 *Yusuf and Al Barakaat Int'l Found* v *Council and Commission* [2005] ECR II-3533) which involved the freezing of assets by an EU regulation implementing a UN Security Council resolution. However, in contrast to the 2005 *Kadi* judgment, the Court held in Case C-402/05 P

Kadi v *Council of the European Union* [2008] ECR I-6351 that the obligations imposed by an international agreement cannot prejudice the general principle that EU measures must respect fundamental rights. Consequently, the Court annulled the EU regulation on the grounds that it infringed a number of EU fundamental rights, including the right to defence and the right to effective judicial protection.

This case once again resurfaced in 2013 (Joined Cases C-584/10, C-593/10, C-595/10 *Kadi* ECLI:EU:C:2013:518) following the applicant's re-listing on the UN Security Council's sanctions list. In this instance, the Court found that the majority of the reasons provided by the UN (via the EU) justifying their decision to re-list the applicant were sufficiently detailed and specific to allow the effective exercise of the rights of defence and of judicial review. Nonetheless, the restrictive EU measures were annulled on the basis that the reasons provided had not been substantiated by evidence.

In relation to competition law, enforcement proceedings have often been the subject of challenges on the grounds of alleged violation of fundamental principles. These cases have related to, *inter alia*: the rights of the defence (see Case C-397/03 P *Archer Daniels Midland* v *Commission* [2006] ECR I-4429); the right to a fair hearing (see Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417); and the principle of non-retroactivity (see Case C-189-213/02 P *Dansk Rorindustri* v *Commission* [2005] ECR I-5425).

The rule of Law in Poland and Malta

Amid the cries for justice from the respective publics, there have been a series of cases referred for preliminary ruling to the Court of Justice challenging provisions of Polish and Maltese law on the ground that they are contrary to the principles of the independence of the judiciary and the rule of law. While the Court has concluded that the Maltese provisions governing the selection of the judiciary, which were claimed to give too much power to the Prime Minster, are not contrary to EU law due to the involvement of an independent body responsible for assessing candidates and providing opinions, the proceedings involving Poland have not been so amicable.

Tensions between the EU and Poland go back to 2015 when the newly elected right-wing Prawo i Sprawiedliwość (Law and Justice) government began to introduce radical restructurings of the judicial system. A series of violations of the rule of law by Polish legislation (see the decisions in Case C-791/19 *European Commission* v *Republic of Poland* EU:C:2021:596 and Case C-487/19 *Proceedings brought by W.Ī* EU:C:2021:798) have now led to the unprecedented decision by the EU to withhold billions of euros from Poland for recovery after the COVID-19 pandemic and, in a recent decision by the Court, Poland has been ordered to pay the European Commission €1,000,000 daily as a penalty for failing to comply with interim measures intended to uphold the rule of law (see Case C-204/21 *European Commission* v *Republic of Poland* EU:C:2021:878).

At the time of writing, it does not seem that the conflict is likely to end any time soon; the Polish government is pushing back against the decisions of the Court, claiming that it is going beyond the powers conferred on it. It is possible for the Commission to start infringement procedures, or engage mechanisms that permit the suspension of other EU payments when a Member State violates the rule of law, however, the EU is reluctant to take this step for fear of potential unrest it could cause in the Union as a whole.

12.2.2 Challenges to Member State legislation

According to developed case law, Member States are bound by general principles of EU law in a number of circumstances. The first circumstance is when the Member State is applying national provisions of EU legislation, which are based on protection for human rights. For example, in Case 36/75 *Rutili* [1975] ECR 1975 the Court of Justice said that national measures restricting free movement had to be examined as to their compliance with Directive 64/221 setting out the limitations on the right of free movement of workers under Article 45(3) TFEU and also in the light of provisions of the ECHR. (See also Cases 222/84 *Johnston* [1986] ECR 1659 and C-465/00, 138 and 139/01 *Österreichischer Rundfunk* [2003] ECR I-4989 in which the Court recognised that the

Convention rights to an effective remedy and to privacy respectively were reflected in EU legislation and had to be interpreted accordingly by the Member State concerned.)

The second circumstance is when the Member State is acting as an 'agent' of the EU by implementing or enforcing EU measures. Thus, when interpreting and implementing EU law, Member States are under an obligation to act and legislate in a way that respects Convention rights, even if such rights are not explicitly provided for under EU law. For example, in Case 5/88 *Wachauf* [1989] ECR 1263, national authorities were required to ensure 'as far as possible' that human rights are protected. Here, the Court had to consider the obligation of a Member State to provide compensation under an EU Regulation to a farmer who had discontinued milk production. The Court felt that to deprive the farmer of compensation in return for the fruits of his labour would be incompatible with his fundamental rights. Member States should be bound, when implementing EU law, by all of the same general principles and fundamental rights as the Union.

See also Cases C-101/01 *Lindqvist* [2003] ECR I-12971 (paras 84–90) and C-540/03 *European Parliament* v *Council* [2006] ECR I-5769 (paras 15–23) in which the Court ruled on whether the EU legislation in question violated fundamental rights and general principles of EU law by providing Member States discretion in terms of their implementation measures.

The third circumstance is when Member States derogate from EU law on the grounds of, for example, public policy. Even in these cases, the Court has held that it has a duty to ensure that the Member State, when derogating, has adequately respected EU fundamental rights and general principles (see Case C-260/89 *Elliniki Radiophonia Tileorassi AE* v *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, paras 42–45).

On the one hand, such scrutiny by the Court has meant that there has been a stream of cases in which a Member State attempts to rely on a public policy or public interest derogation to expel, or refuse a benefit to, a migrant covered by EU law. In such cases the Member State has been required by the Court to take adequate account of the impact of the proposed action on the right to family life, as protected under Article 8 of the Convention (see, for example, Case C-60/00 *Carpenter* v *Home Secretary* [2002] ECR I-7091, para.42). On the other hand, this scrutiny has also allowed the Court to uphold derogations made on grounds of the protection of human rights. For example, in *Omega* (above), whereby the Court found that the restriction of the marketing of laser games in Germany could be justified on the grounds of the protection of human rights.

Lastly, the Court has confirmed that, when acting outside the scope of EU law, Member States are not bound by EU fundamental rights and principles. In Cases 60 and 61/84 *Cinéthèque [*1985] ECR 2605, the Court of Justice held that it had no power to examine the compatibility with the ECHR of national law which concerns an area that falls within the jurisdiction of the national legislator (see also Case 12/86 *Demirel* [1987] ECR 3719). See also Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629 where the Court found that a purely hypothetical prospect of exercising the right to the free movement of persons does not establish a sufficient connection with EU law to justify the application of Union general principles.

Despite this, as was evident in the case of *Carpenter* (above), what falls inside and what falls outside of EU law is not certain. See also Cases C-144/95 *Maurin* [1996] ECR I-2909 and C-276/01 *Steffensen* [2003] ECR I-3735 which demonstrate the difference in treatment depending on whether the measure concerned falls inside or outside the scope of EU law.

12.3 The Charter of Fundamental Rights

CORE TEXT

- **Steiner & Woods, Chapter 6 'General principles of law'.**

12.3.1 The emergence of the Charter

The original Community Treaties contained no catalogue of basic rights which could constitute a check on the exercise of power by the EU institutions. Recognising this, the Union set up a study group in 1999 with the intention of cataloguing the various fundamental rights spread around the EU Treaties, the case law of the Court of Justice, the ECHR and the Declaration on Fundamental Rights of the European Parliament 1989. As such, the aim was not only to collect together existing rights, but also to codify new rights. The result was the Charter, which sets out rights that must be upheld within the Union, categorising them under the subheadings of Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, Justice and General Provisions of Interpretation and Application.

The Charter was solemnly proclaimed at the Nice European Council on 7 December 2000. At that time, it did not have any binding legal effect. However, the Treaty of Lisbon saw the incorporation of the Charter into primary European law and, since then, it has been binding on EU institutions and national governments. Article 6 TEU states that 'the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 ... which shall have the same legal value as the Treaties'.

The United Kingdom and Poland both considered it necessary to adopt Protocol No.30 providing an 'opt-out' from the Charter for both countries. Article 1 of the Protocol declared that

> the Charter does not extend the ability of the Court of Justice of the European Union, or any Court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

This Protocol carried more political than legal weight, as the national courts of Member States were already bound by rights identified by the Court of Justice, national traditions and the European Court of Human Rights. In 2009 the Czech Republic was added to the Protocol.

Following the Lisbon Treaty, the Charter now has primary legal status within the Union. However, for the rights to be actionable a Union element must still be invoked. Thus, purely internal situations do not fall within the ambit of the Charter, nor do fundamental rights issues which arise in areas over which the EU has no competence (see, for example, Case C-27/11 *Vinkov* ECLI:EU:C:2012:326).

The Court of Justice has ruled on the scope of the Charter. Article 51 states that the Charter is applicable to the institutions of the EU and the Member States when implementing EU Law. The expression 'Member states when implementing EU law' was the object of much disagreement. Its wording reflects the attempts made by Member States to limit the scope of the Charter mainly to the mere implementation of Directives. In Case C-617/10 *Fransson* ECLI:EU:C:2013:105 the Court clarified instead that

> the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations... Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

In conclusion it could be argued that the Charter is now a benchmark for the legality of both EU law and national law when this falls within the (very wide) scope of EU law.

The Court has, however, recently provided some guidance on the scope of application of Article 51 of the Charter. In Case C-206/13 *Cruciano Siragusa* v *Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126 the Court held that a national measure will be considered as implementing EU law when 'a certain degree of connection' is established and where that link with EU law 'is above and beyond the matters covered being closely related or one of those matters having an indirect

impact on the other'. Moreover, the Court reminded that a number of elements must be taken into account to establish whether national legislation 'involves the implementation of Article 51 of the Charter', namely 'the legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.'

See further on the scope of application of the Charter, Case C-609/17 *TSN* ECLI:EU:C:2019:981.

As for the relationship between the Charter and other sources of human rights protection, Article 53 of the Charter makes it clear that nothing in the Charter can be interpreted so as to lower existing protection of rights under EU law, the Member States' constitutions or international law including the ECHR. Case C-399/11 *Melloni* ECLI:EU:C:2013:107 deals with a possible conflict between the fundamental rights guaranteed by the Spanish Constitution and the European Arrest Warrant rules. The European Arrest Warrant is a uniform system of extradition between Member States of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions. In the *Melloni* judgment the question was whether a Member State can make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its Constitution. The Court of Justice in interpreting Article 53 of the Charter ruled that although national authorities and courts remain free to apply national standards of protection of fundamental rights, the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law cannot be compromised. The Court robustly added that casting doubt on the uniformity of the standard of protection of fundamental rights as defined in the European Arrest Warrant decision would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise its efficacy.

An additional development regards the application of the Charter to private parties. Whilst Directives can have vertical but generally not horizontal direct effect, a question as to whether the Charter could apply horizontally remained. Joined cases C-569/16 and C-570/16 *Bauer* EU:C:2018:871 Judgment of 6 November 2018 confirm that the Charter is horizontally applicable in principle and Article 51 (regarding its scope of application) does not preclude such a finding. Therefore, provisions of the Charter are applicable in all situations governed by EU law and Member State laws must, as far as possible, be interpreted in conformity with those rights. Where an interpretation of national law through consistent interpretation is impossible, and the right has a mandatory nature that determines the obligations imposed in a sufficiently clear manner, the right can be invoked in both public and private disputes, and judicial protection must be ensured.

The Charter, with a particular focus on the right to effective judicial protection, has been recently invoked in a series of rulings, including infringement proceedings brought by the Commission with respect to Member State provisions relating to the national judicial system (see Case C 192/18 *European Commission* v *Poland* ECLI:EU:C:2019:924; see further the judgment in Joined Cases C 585/18, C 624/18 and C 625/18 *A.K.* ECLI:EU:C:2019:982).

12.3.2 The application of Charter rights by the Court of Justice

Since the coming into force of the Lisbon Treaty, the number of judgments in which the Court has cited or made reference to the Charter has vastly increased.

One example can be seen in the Court's judgment in C-555/07 *Kücükdeveci* [2010] ECR I-365 with regard to age discrimination. Here, the Court referred specifically to Article 21(1) of the Charter which prohibits discrimination on grounds of (*inter alia*) age.

The Court has also upheld the fundamental right of data protection by invalidating part of an EU measure which required the publication of the names of recipients of

funds from the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development (see Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke* [2010] ECR I-11063). Furthermore, in Case C-70/10 *Scarlet* v *SABAM* [2010] ECR I-11959, the Court declared that obliging an internet service provider to install a filtering system in order to prevent the infringement of intellectual property rights would violate the right of the provider's customers to the protection of their personal data. This was because such a filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses.

In Case C-578/08 *Chakroun* [2010] ECR I-1839, the Court interpreted the provisions of the EU Family Reunification Directive in the light of fundamental rights, in particular the right to respect for family life. In view of this interpretation, the Court found that national legislation which imposes certain requirements on the amount of financial resources available to third-country nationals who wish to obtain a residence permit for their spouse was prohibited under the Directive.

The right to an effective remedy is one of the most quoted rights in the case law of the Court of Justice. In Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849, the Court had to consider whether national legislation refusing legal aid to persons in the absence of a 'public interest' violated the right to an effective remedy. The Court held that the principle in Article 47 of the Charter must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, the costs of legal advice or representation.

The Court has not only considered Member State measures when applying the rights protected in the Charter. In fact, the Court has also ruled on how the EU institutions must take into account fundamental rights in the Charter when acting. For instance, the Court has annulled the notices of several open competitions to become a civil servant of the EU on the basis that they have only been published in three languages, thereby violating the non-discrimination prohibition in Article 21 of the Charter (see Case C-566/10 P *Italian Republic* v *Commission* [2013] 2 CMLR 5).

However, one of the most important recent judgments is C-362/14 *Maximillian Schrems* v *Data Protection Commissioner*. Mr Schrems, an Austrian national, lodged a complaint with the Irish Supervisory Authority (the Data Protection Commissioner) stating that the laws and practices of the United States do not offer adequate protection from surveillance by public authorities of the data transferred to it. The complaint was rejected on the basis that under the 'Safe Harbour Scheme' the United States ensured a sufficient level of protection of all personal data transferred to it. The applicant subsequently brought the case before the High Court of Ireland. In response to a preliminary ruling asking whether the decision of the Commission (the Safe Harbour Decision) had the effect of preventing a national supervisory authority of investigating such a complaint, the ECJ held that the decision of the Commission 'cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities' by the Charter or the Directive. The Court stressed the role of national supervisory bodies of protecting personal data as guaranteed under the Charter. The Court also stressed that it had the sole competence to determine whether or not a Commission decision is valid. The Court then went on to decide whether the Safe Harbour Decision was valid. It held that:

(1) the US Safe Harbour Scheme allowed for interference, by US public authorities, with the fundamental rights of EU nationals, particularly in the absence of any rules limiting such interference, and in the absence of any effective legal protection against such interference.

(2) United States authorities were able to access and process personal data received from EU Member States in a way which went beyond what was proportionate and necessary for the purposes of protecting national security

(3) such legislation which permits unlimited access to electronic communications must be regarded as 'compromising the essence of the fundamental right to respect for private life'.

(4) such legislation which does not provide for any access to effective legal remedies, or access to the information directly relating to the individual, or a means of obtaining rectification or erasure of such data compromises 'the essence of the fundamental right to effective judicial protection' which is an inherent aspect of the rule of law.

The consequence of this judgment is that the Commission's Safe Harbour Decision is invalid.

See further the recent Advocate General Opinion delivered in Case C-311/18 *Schrems* ECLI:EU:C:2019:1145.

C-203/15 *Tele2 Sverige* ECLI:EU:C:2016:970

The Court considered the fundamental rights to private life and data protection in the joined Cases C-203/15 *Tele2 Sverige AB* v *Post-och telestyrelsen* and C-698/15 *Secretary of State for the Home Department* v *Tom Watson and others*. Upholding its decision in C-293/12 and C-594/12 *Digital Rights Ireland*, it held that Member States may not impose a general obligation to retain data on providers of electronic communications services.

The Court confirmed that the national measures in question fall within the scope of EU law. It further stated that EU law precludes national legislation that imposes a general and indiscriminate retention of traffic data and location data, as the retention of such data constitutes a serious interference and therefore only the objective of fighting serious crime is capable of justifying such measures. The Court noted that a Member State may only adopt legislation as a preventive measure, and strictly for the targeted retention of that data and solely for the purpose of fighting serious crime. Additionally, access to retained data must be subject to safeguards provided for in the relevant legislation, including prior independent review.

Joined cases C-804/18 and C-341/19 *IX* v *WABE eV* and *MH Müller Handels GmbH* v *MJ* EU:C:2021:594

IX and MJ were employed at companies that were governed by German law; both wore headscarves to work and were asked to remove them on the grounds that it contravened the policy of political, philosophical and religious neutrality pursued by the company and the aim to create a workplace without 'conspicuous, large-sized signs of any political, philosophical or religious beliefs' respectively. Questions were referred to the ECJ as to whether these were compatible whether these were directly or indirectly discriminative and whether they could be justified.

The CJEU held that it is justified as long as such a policy is pursued in a general and undifferentiated way and is based on the employer's 'genuine need' (not just mere desire) to present a neutral image towards customers and avoid any adverse consequences, subject to the principle of proportionality. When assessing the 'genuine need' of the employer a court will need to reconcile the rights and interests at issue in the particular case having regard to the specific context of their Member State and any more favourable national measures on the protection of freedom of religion.

The Court has recognised various fundamental rights in the Charter, including:

- **Article 1:** The right to human dignity (see Cases C-34/10 *Brüstle* v *Greenpeace* [2011] ECR I-9821, which relate to the patenting of human embryos through patented cloning; and C-179/11 *CIMADE* v *Ministre de l'Interieur* ECLI:EU:C:2012:594, which concerned the obligation on Member States to guarantee minimum conditions for the reception of asylum seekers).
- **Articles 15 and 16:** the freedom to choose an occupation and the freedom to conduct a business (see Case C-544/10 *Deutsches Weintor* v *Land Rheinland-Pfalz*, which discussed the compatibility of an EU regulation on health claims made on foods with these articles of the Charter).
- **Article 18:** The right to asylum (see Case C-175/08 *Hasan* [2010] ECR I-1493).
- **Article 24:** The rights of the child (see Case C-403/09 PPU *Jasna Deticek* v *Maurizio Sgueglia* [2009] ECR I-12193 and Case C-491/10 *Aguirre Zarraga* [2010] ECR I-14247).

- **Article 28:** The right to strike (see Case C-341/05 *Laval* [2007] ECR I-11767).
- **Article 34:** The right to social and housing assistance (see Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233, which concerned a national measure denying long-term resident third country nationals the right to housing benefits).
- **Article 42:** The right to access to documents (see Cases C-506/08 P *Kingdom of Sweden* v *Commission* [2011] ECR I-6237; C-28/08 P *Commission* v *The Bavarian Lager Co Ltd* [2010] ECR I-6055; C-139/07 P *Commission* v *Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885).

12.4 The EU and the European Convention on Human Rights

CORE TEXT

- **Steiner & Woods, Chapter 6 'General principles of law'.**

The ECHR and its interpretation and enforcement mechanism, the ECtHR, are under the auspices of the Council of Europe, and therefore institutionally and constitutionally separate from the European Union.

12.4.1 The application of the ECHR by the Court of Justice

As an international human rights measure, the EU uses the ECHR as a source of inspiration when interpreting fundamental principles in EU law. This was recognised in Case C-4/73 *Nold* v *Commission* [1974] ECR 491.

In Case C 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, the Court held that various rights invoked by the applicant and contained in express provisions of Union secondary legislation were specific manifestations of more general principles enshrined in the ECHR. Further references to specific provisions of the ECHR were made by the Court in Case 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651, where the Court said that the requirement of judicial control reflected a general principle of law common to the Member States as laid down in Articles 6 and 13 of the ECHR. As such, Article 6 of the Equal Treatment Directive 76/207 had to be interpreted 'in the light of the general principle'.

The same goes for sex discrimination (see Cases C-13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143 and C-185/97 *Coote* v *Granada Hospitality* [1998] ECR I-5199) and for data-protection and privacy (see Cases C-465/00, 138 and 139/01 *Rechnungshof* v *Österreichischer Rundfunk* [2003] ECR I-12489). The Court has also, on several occasions, referred to the 'special significance' of the Convention to EU law (for examples of this see Cases C-260/89 *Elliniki Radiophonia Tileorassi AE* v *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925 and C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629).

The EU has, on some occasions, gone further than the Convention when recognising rights in EU law. For example, in Case 155/79 *AM&S Europe Ltd* v *Commission* [1982] ECR 1575, the Court found that the right to legal privilege (i.e. lawyer–client confidentiality) is protected under EU law, despite not necessarily being so protected at the time under the ECHR.

In the field of competition law, the Commission's powers are broad and include the right to authorise searches of premises and to impose severe financial penalties. Affected parties have therefore called upon the Court to limit the exercise of the Commission's powers by reference to fundamental legal principles. In the Joined Cases 46/87 and 227/88 *Hoechst AG* v *Commission* [1989] ECR 2859, the applicant invoked various human rights principles, such as that protected under Article 8 of the ECHR, but argued their application to their business premises. The Court found that there had been no such breach by the Commission. This ruling was criticised for being incompatible with rulings of the ECtHR such as that in Case A 251-B *Niemietz* v *Germany* (1993) 16 EHRR 97, where it was explicitly stated that Article 8 of the ECHR extends to encompass business premises. This ruling was later reflected in the Court of Justice's ruling in Case C-94/00 *Roquette Frères* [2002] ECR I-9011.

A similar approach was taken by the Court in relation to Article 6(1) of the ECHR (see Cases 374/87 *Orkem* [1989] ECR 3283, *Funke* v *France* (1993) 16 EHRR 297 and C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287).

12.4.2 The EU's accession to the ECHR

Discussed since the late 1970s, the accession of the EU to the ECHR became a legal obligation under Article 6(2) of the Treaty of Lisbon. The legal basis for the accession of the EU is provided by Article 59(2) ECHR, as amended by Protocol 14.

Whereas all EU Member States are also parties to the ECHR, the EU itself is currently not. Even though the EU is founded on the respect for fundamental rights, the ECHR and its judicial mechanism do not formally apply to EU acts. Despite this, all EU Member States, as parties to the Convention, have an obligation to respect the ECHR even when they are applying or implementing EU law. This divergence may be rectified by the EU becoming a party to the Convention.

Accession would make the ECtHR the court of last instance regarding matters of human rights in the EU, a fundamental shift from the current constitutional set-up. Case C-84/95 *Bosphorus* v *Minister for Transport* [1996] ECR I-3953 concerned an Irish action to impound a Yugoslav plane under EU Regulation 990/93. The interpretation and application of the Regulation was contested in the light of fundamental rights, including the right to peaceful enjoyment of property and the freedom to pursue a commercial activity. In response to a preliminary reference, the Court of Justice did not consider that the Irish actions had been disproportionate. Subsequently, the lessees of the plane brought an action before the ECtHR (Application No. 45036/98 *Bosphorus* v *Ireland*, Judgment of 30 June 2005), in which the Court found that EU law protection of fundamental rights could be considered 'equivalent' to that of the Convention system.

Following talks on accession, a draft accession agreement was published. In December 2014, Opinion 2/13 assessed the question: 'Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms compatible with the Treaties?' After ruling that the case was admissible and making some preliminary points, such as the *sui generis* nature of the EU (as opposed to its being a state), and affirming the primacy of direct effect and EU law, the Court went on to rule that the draft agreement was incompatible with EU law. It gave several reasons for its decision, among which are the following:

- The draft agreement did not take account of the specific characteristics and the autonomy of EU law.
- It violated Article 344 TFEU which gives the Court of Justice a monopoly on settling inter-state disputes concerning EU law between Member States.
- The co-respondent system envisaged in the draft agreement proved incompatible with EU law. According to this system both the EU and a Member State could be parties to an ECHR case. This was considered problematic because it would give the ECtHR too much scope to interpret EU law and because it would give the ECtHR the power to allocate responsibility for breach of the Convention between the EU and its Member States, which goes against the idea that only the CJEU can rule on EU law.

The Court passed this judgment despite the submissions given by the Commission, the Council, the European Parliament and the majority of its Member States. In its Opinion, however, the Court did provide some amendments that would have to be carried out before the EU could accede to the ECHR while still being in compliance with EU law.

ACTIVITY 12.1

'Some commentators see the Charter of Fundamental rights as an unnecessary complication. Instead it symbolises what the EU and the Court of Justice case law stand for: the affirmation of the principle of equality and protection of individual rights.' Critically discuss.

Activity 12.2

Which Charter rights might apply in the following circumstances?

a. **An individual who has been fired from his job because he is 'too old'.**

b. **An individual who is forced to leave an EU Member State, even when his wife and children are resident there.**

c. **An internet company that is informed by the government that they must hand over the personal details of all its clients.**

d. **An asylum seeker who has been tortured whilst in immigration detention in an EU Member State.**

e. **A child who, when her parents divorce, has no right to say which parent she would like to live with.**

f. **An individual who, despite being subject to persecution in her home country for being a homosexual, has been refused asylum in an EU Member State.**

g. **A single mother who, because she is unmarried, is denied child benefits from the state.**

No feedback provided.

Activity 12.3

Core comprehension – *Google Spain* and the right to be forgotten

Using your Online Library resources, research:

- **Case C-131/12 *Google Spain SL, Google Inc* v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Opinion of Advocate General Jääskinen.**

You can complete this learning activity by reading the following sections: Introduction [1]–[10] and Sections D and E [120]–[137].

Note: In *Google Spain* the CJEU held *inter alia* that:

> … As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name …

Introduction

a. **Identify the competing interests of businesses and private individuals with regards to privacy.**

b. **What is the issue surrounding the right to be forgotten?**

c. **Identify the main EU law provisions relating to the question of the protection of personal data in *Google Spain*.**

d. **Why does today's level of access to internet information present challenges for the interpretation of Directive 95/46/EC, the Data Protection Directive (later repealed)?**

D – Rights of freedom of expression and information, and the right to conduct a business

e. **Identify aspects of the right to freedom of expression.**

E – Can a data subject's 'right to be forgotten' be derived from Article 7 of the Charter?

f. **In *Aleksey Ovchinnikov* identify the circumstances where a restriction may be appropriate to prevent the reproduction of information which is already in the public domain.**

Activity 12.4

Applied comprehension – Lenaerts: The EU Charter Of Fundamental Rights and the derogation situation

Using your Online Library resources, research the following journal article:

- Lenaerts, K. 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375–403.

Questions a–h can be answered by reading the relevant sections as highlighted.

The scope of application of the Charter (pp.376–78)

a. Identify the 'triple function' of the EU Charter of Fundamental Rights.

b. Why is it incorrect to assert that the EU has become 'a human rights organisation'?

c. Identify two different types of obligations that EU law imposes on the Member States.

The derogation situation (pp.383–86)

d. What is meant by the 'derogation situation'?

e. Explain what is meant by 'the narrow reading of the terms'.

f. Which case does Eeckhout highlight to illustrate the narrow approach to the derogation situation?

Using your Online Library resources, outline the rationale for permitted derogations in the following cases. Consider using the 'Find' tool in your case law document to research this task effectively. You can insert a relevant key word, such as 'derogation', 'Charter' or 'restriction' to focus your search.

g. Case C-368/95 *Familiapress* [1997] ECR I-3689.

h. Case C-112/00 *Schmidberger* [2003] ECR I-5659.

i. Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779.

Further reading

- Callewaert, J. 'The European Convention on Human Rights and EU law – a long way to harmony' (2009) 6 *European Human Rights Law Review* 768–83.
- Costello, C. 'The Bosphorus ruling of the ECHR – fundamental rights and blurred boundaries in Europe' (2006) 6(1) *Human Rights Law Review* 87–130.
- European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe 'Handbook on European non-discrimination law' (2011).
- Fontanelli, F. 'General principles of the EU and a glimpse of solidarity in the aftermath of Mangold and Kücükdeveci' (2011) 17(2) *European Public Law* 225–40.
- Jacobs, F.G. 'Human rights in the EU – the role of the Court of Justice' (2001) 26 *ELRev* 336–37.
- Sánchez, S.I. 'The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' (2012) *CMLRev* 1565.

Quick quiz

QUESTION 1

What are the three sources of the EU's protection of human rights?

a. **The Charter, the Geneva Convention, the Declaration of Civil Rights.**

b. **The ECHR, the Charter, General Principles of Member States.**

c. **The ECHR, the Declaration of Human Rights and Citizens, The International Moratorium on Torture.**

d. **None of the above.**

QUESTION 2

Which of the following fictitious scenarios is a circumstance in which the principle of EU law does not apply?

a. **In order to comply with the EU's fundamental right agenda, Croatia passes a law banning the death penalty, but makes an exception for people found guilty of atrocities during the Balkan Wars.**

b. **The EU issues a new directive encouraging equal male/female representation in EU diplomatic service, while Belgium implements legislation allowing positive discrimination.**

c. **Poland was declared in breach of its obligations under Article 34, and pleads a derogation under the guise of public health, but by doing so mildly infringes a right to liberty.**

d. **The United Kingdom decides to invest part of its internal development fund in a private security firm condemned in other countries for torture, and a group of concerned citizens want to prevent the investment.**

QUESTION 3

In which of the following fictitious situations could the Charter be plead?

a. **France introduces a measure discriminating between farmers of its different regions.**

b. **Italy bans women from the military infantry corp.**

c. **Austria implements a directive on equal pay, but exempts the legal profession from the scope.**

d. **Spain decrees that foreign owners of fishing fleets must pay higher rates of taxes.**

QUESTION 4

Which of the following statements is correct?

a. **The jurisprudence of the ECtHR is binding upon the EU.**

b. **When making their decisions, the EU must bear in mind the ECHR.**

c. **The EU is party to the ECHR.**

d. **The ECtHR has directly reviewed EU regulations.**

Answers to these questions can be found on the VLE.

NOTES

Feedback to activities

Contents

Using feedback

Feedback is designed to help you judge how well you have answered the activities in the text. It will show you whether you have understood the question and chosen the correct solutions.

Do not look at the feedback until you have made an attempt at answering the questions. To do so beforehand would be pointless and even counter-productive.

Doing the activities helps you learn. Checking the feedback helps you learn more.

Chapter 1

Activity 1.1

a. It is restricted to '**justice between parties**. This type of justice is said to focus on the relationship between the parties to a contract, **disregarding the social context** in which the relationship is embedded'. (p15, emphasis added)

b. It 'broadens the spectacles of justice so as to consider contractual relationships in its broader socioeconomic context (social justice).' (p.15)

c. Instrumentalisation of private law (see extract at (d)).

d. Example: Private law is used as a tool to achieve the objectives of the European Union, in particular the correction of market inequalities. [22 words]

   Extract: 'For this reason, social private law has been blamed for the instrumentalisation of private law for wider social purposes: the correction of market inequalities or the "materialisation" (de-formalisation) of private law, which takes into account particular material circumstances of contract parties.'

e. 'European private law aims to deliver justice to everyone by ensuring competition, jobs, low prices and greater choice.' (p.15)

f. '…Access justice is a concept of justice, which merges the liberal concern with the equality of opportunity with the concern for well-functioning markets.' (p.16)

g. '…Ideally, all consumers should be "confident consumers" reaping internal market benefits, part of the mobile workforce moving flexibly where market needs are, or learning skills that the market requires.' (p.16)

h. Example: The well-functioning market requires a high participation in the market and a low level of barriers to participation. Access justice ensures that barriers from participating in the opportunities of the market are removed as far as possible. (37 words)

i. The privatisation of 'former public utility sectors, such as telecom, gas, electricity, postal services and public transport'.

   '….a horizontal dimension of the principle of non-discrimination discrimination—present across the sale of goods, provision of services or labour market'

   '….the transformation of individuals so as to become useful internal market participants.' (p.16)

Activity 1.2

a. '…"the right to be left alone"…data protection and other privacy rights. Human rights that arrived with democracy establish a public sphere in which citizens can discuss, publish, convene and protest in order to influence democratic life - these include freedom of assembly, freedom of speech and also the right to vote (democratic human rights).'

b. Social human rights.

   Example: Literacy lessons provided as a public good give individuals better opportunities of social integration and independence and generate a better skilled workforce and a healthier economy. (28 words)

c. '…The Charter abandons artificial divisions between liberal, democratic and social rights. It thus constitutes a modern human rights catalogue: beyond only formally granting rights, it also aims at making rights effective for all.'

d. 2004 and 2007 Eastern Enlargements of the EU.

   2007 – The Global Financial Crisis – when the first ripples of the global crisis were felt. (p.104)

e. Luxembourg – 35 per cent in 2007 and 39 per cent in 2014.

f. Highest percentage: Ireland (8.10 per cent)

   Lowest percentage: France (2.21 per cent)

g. Total (17 + 15.34 + 14.79 + 14.35 + 14.22) = 75.7 / 5 = 15.14

h. '… citizens of Member States with high unemployment move more frequently to Member States with thriving economies than citizens of Member States with thriving economies move to Member States with high unemployment.' (p.106)

Chapter 2

ACTIVITY 2.1

a. An internal market is characterised by free movement of goods. Goods should be able to circulate freely within the area without the imposition of customs duties when crossing borders within the common market or encountering any other obstacles to free movement, whether fiscal, physical or technical.

   In order to allow free movement of goods imported from third countries, it is also necessary to have a Common Customs Tariff (see below) which sets a common customs duty for every good imported from third countries which is imposed regardless of which country in the common market the good enters.

   So, for example, a watch from Russia will pay the same duty whether it enters Italy, France or Germany.

   In a common market there is also free movement of persons (workers and establishment), free movement of services and free movement of capital.

   The principle underlying a common market is that of non-discrimination (see Article 18 TFEU); there should be no discrimination within any country inside the common market against goods, persons or services from any other Member State. (This principle of non-discrimination would not apply to protect goods or persons from third countries.)

   There is also a requirement for a competition policy to prevent companies from dividing up the market.

b. The advantages of an internal market for the consumer are:

   - lower prices
   - greater choice
   - greater diversity
   - technically innovative goods
   - protection from cartels and monopoly power for the participating countries
   - greater productivity.

   These benefits flow from:

   - economies of scale from larger markets
   - increased competition allowing the most efficient and technically innovative companies to prosper.

c. A Common Customs Tariff is the setting of a common customs duty for every good imported into the common market from third countries. The boundary of the common market is the boundary of a single market and goods must pay the same duty wherever (into whichever country) they enter.

d. Without the Common Customs Tariff, there could be no free circulation of goods from third countries, because in the absence of a Common Customs Tariff the imported good would always enter the common market into the country which imposed the lowest duty.

e. The main policies created by the Treaty of Rome were:

- the principle of non-discrimination
- free movement of goods, persons, services and capital
- a Common Customs Tariff
- a Competition Policy
- a Common Agricultural Policy
- a Common Transport Policy
- a Common Fisheries Policy
- abolition of state aids.

The four institutions were:

- the Council of Ministers (later the Council)
- the European Assembly (later the European Parliament)
- the High Authority
- the European Court of Justice.

Activity 2.2

The Treaty of Paris 1951 established the first, and most supranational, Community, the European Coal and Steel Community (ESCS). Member States pooled their resources in coal and steel, the materials needed to manufacture weapons. The principal aim was to ensure that no war could ever be waged again between, in particular, France and Germany. The Treaty set up the Institutional framework which was to be followed by the Treaty of Rome in 1957. Unlike the other treaties, the ECSC was concluded for a limited duration of 50 years and expired in 2002. Its remaining relevant provisions were absorbed into the EC Treaty.

Activity 2.3

The European Economic Community was created by the 1957 Treaty of Rome (the EEC Treaty) and renamed the EC by the Maastricht TEU.

The Maastricht TEU created the European Union (EU) which was the overarching body comprising three pillars. The first pillar included the EC, the ECSC (now expired and absorbed into the EC) and Euratom. The other two pillars were distinct from the EC and were intergovernmental areas of cooperation between the Member States.

All three pillars were governed by the 'Common Provisions' of the TEU.

The pillar structure has now been abolished. The 'Third Pillar' is now included in Title V of the TFEU, named the Area of freedom, security and justice (Articles 67–89 TFEU).

The 'Second Pillar' is now in the TEU, Chapter 2, Title V, Articles 23–46. This part of the TEU is still largely inter-governmental.

Activity 2.4

a. 'Principles or standards of behaviour; one's judgement of what is important in life'

b. '….The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.'

c. 'A fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning.'

d. '…It is based on the principles of democracy and the rule of law.'

e. 'A moral or legal entitlement to have or do something'.

f. '…it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.'

'…Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.'

g. 'The state of being unrestricted and able to move easily'.

h. '…free movement of persons, services, goods and capital, and the freedom of establishment.'

i. 'The right or condition of self-government'

j. '…The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level.'

k. 'An exemption from or relaxation of a rule or law: example "countries assuming a derogation from EC law".'

ACTIVITY 2.5

a. '…a norm of EC law is used as an aid to the interpretation of another rule; the latter is one actually being applied by a court (or other authority) but it is construed in the light of the form. That is to say, it is being interpreted consistently with the hierarchically higher norm of EC law.' (pp.397–98)

b. '…a court simply applies the relevant norm of Community law as such (directly), if necessary, displacing any conflicting rules of its national law.' (p.398)

c. '…the method involving consistent interpretation seeks to solve a clash between conflicting norms regulating the same issue between a high ranking norm constraining the effect of a lower rule by choosing between different possible interpretations. The impact of the rule of EC law on national law is therefore an indirect one.'

d. The Constitution:

'…A conflict between the Constitution and another lower ranking norm is solved by construing the latter consistently with the former'. (p. 398)

e. '…Generally speaking, it is a canon of interpretation that statutes should not be so construed that they would violate international law, whenever another possible interpretation remains.' (p.398)

f. '…the national level of giving effect to EC law within the domestic legal sphere.'

'…the level of secondary Community law which must be construed in conformity with primary EC law.'

'…the level of Community legal order (primary and secondary law) vis-a -vis public international law.'

Chapter 3

ACTIVITY 3.1

No feedback provided.

ACTIVITY 3.2

a. In this case, the Court of Justice made clear that it was grounds for annulment under Article 230 EC (now Art 263 TFEU) for the Council not to wait to receive the opinion of the Parliament before enacting legislation under the consultation procedure.

b. The role of the Parliament in the legislative procedure has been increased because this is seen to be a way to address the democratic deficit caused by the lack of democratic accountability of the Commission and the Council.

c. The Commission is the powerful executive of the EU yet it is appointed by the Member States rather than elected. Increasing the control of the Parliament over it is seen as a way of subjecting it to control by an elected body.

Activity 3.3

a. The Commission is a very unusual body which combines the powers of all three organs of the state. It acts as the executive of the EU, carrying out its policies and, more importantly, supervising how the executives of the Member State give effect to EU policies. It also acts like an executive and legislator in initiating legislation. It acts as a legislator when it legislates in its own right, as it does when given the power to do so under the Treaties. It is also given wide powers to enact delegated legislation. In regard to infringements of the Competition Articles by undertakings, it acts as both investigator and judge, deciding whether undertakings are in breach and setting penalties.

b. The Parliament has the power to force the resignation of the Commission by a motion of censure carried by a two-thirds majority of the votes cast, representing a majority of MEPs, under Article 234 TFEU.

Activity 3.4

a. The Council of the EU represents the interests of the Member States and is a primary legislator for the EU. The Council has the power to request the Commission to draw up legislative proposals in some particular area under Article 241 TFEU. If the Commission does not submit such a proposal, it must inform the Council of the reasons for not doing so.

b. The Presidency rotates among the Member States every six months. The country which occupies the Presidency chairs all meetings of the Council. It has become an increasingly high-profile role, with Member States adopting an agenda for their Presidency.

c. The functions of the High Representative (Article 18 TEU) are: to act as a Vice-President of the Commission and to take part in the work of the European Council; to conduct the Union's Common Foreign and Security Policy and preside over the Foreign Affairs Council. The High Representative ensures consistency of the EU's external action.

   The functions of the President of the European Council are to act as President of the European Council for two and a half years, chairing it and driving forward its work. The President of the European Council should endeavour to facilitate consensus and must report to the European Parliament after each of its meetings (see Article 15 (5) TEU). Because the provision is very general it can be 'filled in' in different ways. The European Council, because of who its members are, is arguably the most important policy making Institution in the EU.

Activity 3.5

a. Example: The *Behrami* complaint was brought by the father of two children about KFOR's decision to deprioritise the task of clearing known unexploded CBUs, which resulted in the death of one of his children and severe injury of a sibling. (39 words)

b. '…Behrami complained to the EtCHR of violation of Article 2 of the Convention concerning the right to life.' (p.12)

c. Example: The *Saramati* complaint was brought by a Kosovar national of Albanian origin who was arrested, detained and released on several occasions by UN peacekeeping forces and ultimately had all convictions squashed. (31 words)

d. '…Saramati complained to the ECHR that his detention by KFOR breached Articles 5 and 13 of the ECHR concerning liberty, security and the right to an effective remedy.'

e. Example: The events happened outside of the territories of the two European States involved (France and Norway) and outside the 'legal space' of the Convention. (28 words)

f. Example: The Court determined the organ of 'ultimate control' for actual operations and held that the acts challenged where attributable to the UN.

g. '…insofar as the EU maintains a functioning system of human rights protection which is at least equivalent to that provided by the ECHR, the Court of Human Rights will presume that the EU measures are compatible with the Convention, unless there is evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights'.

h. '…evidence of a manifest deficiency or dysfunction of control.'

FN 62:

'The Bosphorus approach, described above n. 55, adopts a rebuttable presumption that the international organization in question protects the same shared, basic fundamental rights in an equivalent way, subject to ECtHR review being triggered where there is evidence of a manifest deficiency or dysfunction of control.'

i. '…the commonality in values underpinning the ECHR and the UN Charter'.

'…The ECtHR however drew a sharp distinction between the legal orders of the UN and that of the EU for these purposes. For the Court of Human Rights, the commonality in values underpinning the ECHR and the UN Charter – in terms of protection for human rights – provided one of the reasons for deference on the part of the ECtHR to the actions and decisions of the UN and its organs.'

'…the distinctive mission of the UN and its unique powers to pursue (the commonality of values)'.

'…While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace.., the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force'.

Activity 3.6

a. '…It must be identified for the sake of normative clarity, so as to test the soundness of the policy and hence the existence and scope of the legal rule.'

b. '…The existence of such exceptions can betoken uncertainty about the policy that underlies the basic rule, and/or its normative weight, which is then manifest in a willingness to allow the rule to be circumvented through exceptions.'

c. '…we must inquire whether qualifications or exceptions to the legal rule are consonant with its policy objective, since, if they are not, then the overall law will be incoherent.'

d. '…there has to be some convincing normative justification for the policy and consequential legal rule applicable to situation A to be different from that applicable to situation B.'

e. '…according to Article [249] of the EEC Treaty, the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed"' (pp.2–3)

'…a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person' (p.3)

f. Example: It introduced an element of uncertainty into the rule expressed in the textual approach by extending the scope of reliance on Article 119 to include contracts between individuals. (28 words)

Relevant extract:

'Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals' (p.3)

g. '…Given, however, that the Community courts created direct effect from an admixture of principled, teleological and functional reasoning, and given also their willingness to recognise horizontal as well as vertical direct effect of Treaty articles, regulations and decisions, it is surely necessary to consider why Directives are treated differently in this regard. We should cease to pretend that the answer is determined by a textual argument.' (pp.3–4)

h. '…the rule is premised on, inter alia: legal certainty; the need to distinguish regulations and Directives.'

'…the fact that Directives are ill-suited to imposition of obligations on individuals; injustice to the private party'

'…It might, for example, be argued that the motivation was "political" in response to opposition from national courts to the expansion of direct effect. We cannot know whether this featured in the Court's thinking, but insofar as it did one cannot but wonder whether if national courts could have foreseen subsequent legal developments they might have revised any such opposition.' (Footnote 10)

i. '…These were constructed on the basis of the humble pronoun "itself", since later decisions, eager to ensure the effectiveness of Directives, repeatedly emphasised that word from the Marshall judgment, ("a directive may not of itself impose obligations on an individual"), in order to justify the imposition of such obligations where there was something "in addition" to the Directive.' (p.4)

Chapter 4

Activity 4.1

a. The Article 267 TFEU reference procedure ensures the uniformity of European Union law by referring questions of the interpretation and validity of EU law to one central authority, the Court of Justice. This prevents disparate and conflicting interpretations of EU law developing in the case law of different national courts.

b. Many of the most important and influential judgments of EU law have come from references from lower courts (*Costa* v *ENEL*, *van Gend*). The use of Article 267 TFEU by national courts at every level has allowed the effective penetration and absorption of EU law into the national legal systems. If references could only be made from courts of final appeal, parties would be put through the expense of appealing through the national court hierarchy before they could have a point of EU law to determine the case decided by the appropriate body. Many applicants would be unable to afford the time and expense involved. The success of the Court of Justice in recruiting all national courts to be EU courts has significantly improved the dissemination and acceptance of EU law principles.

c. With the huge number of cases coming before the Court of Justice being heard in chambers of three or five, there is already the problem of conflicting judgments. This danger would be increased if the number of judges were increased.

d. The Court of Justice decided that the question of what is a court or tribunal for the purposes of Article 234 EC (now Article 267 TFEU) must be determined by EU law not national law because the question of when a reference should be made concerns the nature of the proceedings.

e. The traditional case law of the EU Courts (the *Plaumann* test) is certainly extremely restrictive. Persons other than those to whom a decision is addressed are individually concerned only if the decision affects them 'by reason of certain

attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'. The decision must distinguish them individually in the same way that it distinguished the original addressee. The Courts appear to be concerned to prevent too many cases under Article 263 TFEU being brought by non-privileged applicants. As you read these cases, you will see that Union law is highly regulatory, setting down, for example, requirements for licences and quotas which must be fulfilled by traders and farmers. These regulations frequently change the legal position of companies and applicants. Often some groups are affected adversely and the Court of Justice appears to wish to discourage large numbers of Article 263 TFEU challenges to such EU secondary legislation. One of the most eloquent criticisms of such a case law can be found in Advocate General Jacobs Opinion in the UPA case. He alleged that the right to effective judicial protection, a principle recognised in EU law, was breached by the case law on individual concern, as were Articles 6 and 13 of the ECHR and Article 47 of the Charter of Fundamental Rights. Article 47 states that everyone 'whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'. The Charter was not binding at the time but has now been made legally binding by the Treaty of Lisbon (Article 6(1) TEU). Advocate General Jacobs contrasted the Court of Justice's restrictive case law on standing with its expansive interpretation of 'acts' and the standing of the European Parliament under Article 230 EC (now Article 263 TFEU). The Lisbon Treaty has rewritten the Treaty Article for judicial review. In regard to a decision addressed to another, the word 'decision' has been replaced by the word 'act' giving it a wider meaning (an act having legal effect, but not necessarily a 'decision' under Article 288 TFEU), but the requirement of direct and individual concern remains, and the test for standing would be the same. Post-Lisbon case law seems to indicate no substantial changes.

Activity 4.2

a. '…the Court of Justice is afforded a strong-form judicial review power to annul the interventions of the legislature with reference to primary law, and a relatively free rein to interpret secondary legislation in creative ways.'

b. '…The Court has been trenchantly criticized on the one hand (see the reactions to, for example, Baumbast) for denying the legislature the capacity to exercise its legislative competence effectively; and on the other (see the reactions to, for example Pringle) for failing to constrain political choices.'

c. '…If one chooses to focus on the fact that the Court has been explicitly authorized to interpret the Treaties and to annul legislation which is contrary to the Treaties, one ends up with a frame of reference which privileges the position of primary law over secondary law, and the position of the judiciary over that of the legislature.'

d. '…the Court's interpretation of the Treaties should not be influenced by the passage of legislation and the vagaries of politics.'

   '…the Court should use the Treaties as its touchstone, and be prepared (within the limits of judicial propriety however defined) to strain the meaning of legislation so that it most closely corresponds with, and indeed furthers, the Court's conception of the dictates of the Treaties.'

   '…primary law may either trump, or take priority over, secondary law…' (p.483)

e. '…it is not only the judiciary, but also the legislature which has a role in defining the meaning of the EU's constitutional text.'

f. 'Within it, there are unresolved tensions between uniformity and diversity, between the economic and the social, and between human rights and fundamental freedoms, whose resolution is seen by many to belong as much in the political, as in the legal, realm.'

g. '…the Court should only exercise its power to review the acts of the Union institutions in extreme circumstances, where for example, the legislature has "manifestly", or "manifestly and gravely", exceeded the limits of its powers.'

'...It should, as far as possible, try to read secondary legislation literally.'

'...It should also be prepared to adjust its own interpretation of Treaty texts in the light of the stance adopted by the legislature.' (p.484)

h. Example: Syrpis highlights two main features to illustrate the point. The first concerns the limits of the competences of the EU legislature and the numerous actors which police its competencies. The second is the variety of ways in which it can intervene and the variety of legal bases for the interventions. (Relevant extract at p.485)

i. 'Where legislation is unclear, and/or poorly drafted, and where the relationship between primary and secondary law is not fully specified, the Court cannot be said to have been afforded a meaningful steer by the legislature, and can do little other than seek to make the best of a bad job.' (p.486)

j. 'The "methodological pluralism and attendant flexibility of the Court's cumulative approach [to interpretation] afford the Court of Justice the freedom to favour almost any conclusion, assuming it can be justified by some argument or other."' (p.486)

k. 'Different configurations of the Court and different Advocates General ... the attitude of (particular) Member State governments, (particular) national courts, (particular) international courts and supervisory bodies, not to mention the likely reaction of the financial markets...' (p.486)

Chapter 5

Activity 5.1

- The reasoning is based on an analysis of the distinctive nature of Community (now Union) law as compared with other international treaties. The EC Treaty set up institutions with powers to adopt laws which impose obligations on individuals. Logically, therefore, it must also confer rights on them.

Activity 5.2

a. Article 267 TFEU allows national courts to refer questions to the Court of Justice concerning the interpretation of primary and secondary EU legislation. Directives are a form of secondary legislation. It follows, the Court said, that the Treaty envisages that national courts will be applying Directives. Article 288 TFEU says that Directives are 'binding as to the result to be achieved'. The Court says this provision would be frustrated if Member States' failure to implement them were to deprive Directives of effect.

   The final, and probably most important, argument is one of policy: Directives will be more effective if individuals can enforce them in national courts.

b. Note that the Directive has always been an important instrument, and is the principal instrument for completing the single market. It was, therefore, very important that the rules contained in Directives were protected and enforced by national courts.

Activity 5.3

No feedback provided.

Activity 5.4

a. 'H3...According to the contested order, the games which took place in Omega's establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence involved were contrary to fundamental values prevailing in public opinion.'

b. 'H8...it should be recalled that fundamental rights formed an integral part of the general principles of law and that the Community legal order strove to ensure

respect for human dignity as a general principle of law. The protection of such objective was therefore compatible with Community law, it being immaterial that, in Germany, the principle of respect for human dignity had a particular status as an independent fundamental right.' [32]–[34]

c. '…the **protection of** and **respect for** the essence or nature of the human being perse'. [AG 75] (emphasis added)

d. '…human dignity forms the underlying basis and starting point for all human rights distinguishable from it; at the same time, it is the focal point of individual human rights in the light of which they are to be understood and interpreted.' [AG76]

e. Human dignity is an 'inherent and inalienable' right. [AG77]

f. '…self-determination' [AG78]

'…personality and identity' [AG79]

'…he is a person (subject) and must not be downgraded to a thing or object' [AG78]

'As an emanation and as specific expressions of human dignity, however, all (particular) human rights ultimately serve to achieve and safeguard human dignity.' [AG81]

g. If human dignity is an independent justiciable rule of law, then individuals can have 'direct recourse' [AG86] to human dignity and do not need any further codification of the concept.

Activity 5.5

a. '…in the event of a potential conflict between a European Community and a domestic norm, a court will first seek to neutralize such a clash by way of "reconciling interpretation"; it is only where this proves unfruitful that the doctrine of direct effect is employed, setting aside the national law provision and directly applying the European one.' (p.399)

b. '…Community law requires that the result envisaged by the directive must be attained in law and in fact.' (p.400)

c. '…all the authorities of the Member States' must interpret their national law in the light of the wording and the purpose of the directive' (p.400).

d. '…in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive' [para.8 *Marleasing* judgment] (p.400)

e. '…the way effect was given to the Directive…boiled down to a 'prohibition' against the Spanish court applying a provision of the Civil code insofar as it would produce a result not envisaged by the Directive.' (p.401)

f. '…The national court was obliged not to apply any grounds of justification and the requirement of fault, as applicable to the dispute under the Dutch tort law system.' (p.401)

g. Example: The extent of liability is broader under European Law than under German law and therefore the employer incurs more liability and is no longer protected by the restrictive recovery of damages under the national regime. (35 words)

h. '…What these cases do illustrate is the level of uncertainty parties are confronted with in coping with conflicts between directives and national provisions and the scope for reconciling them as a matter of interpretation…To an extent this uncertainty is inevitable, in my view, and inherent in the notion that there must be some ambiguity in the national rule for it to be construed consistently with Community law ('…as far as possible…').' (p.402)

Chapter 6

Activity 6.1

a. Customs union refers to the abolition of customs duties only (fiscal barriers) while free movement refers to the abolition of non-fiscal barriers to the free flow of goods as well.

b. The prohibition is triggered if imports are subjected to a condition that domestically produced goods are not expected to satisfy, or if different conditions are applied where the condition applicable to the import is more onerous. MQR definition is contained in the *Dassonville* judgment.

c. Check again *Dassonville* and *Cassis De Dijon*. Which is the discriminatory measure and which the indistinctly applicable one?

Activity 6.2

a. Step 1: product requirement, equally applicable/dual burden.

   Step 2: possible justification under *Cassis* mandatory requirement: environmental protection.

b. Step 1: product requirement, equally applicable/dual burden.

   Step 2: possible justification under *Cassis* of consumer protection. However, this is unlikely to succeed. The court is more likely to say that it is disproportionate to impose this on imported fruit conserve because of the principle of mutual recognition. Labelling as to fruit content would be a less restrictive way of achieving consumer protection.

c. Step 1: a label is a product requirement, equally applicable/dual burden.

   Step 2: possible justification on grounds of consumer protection.

d. Step 1: product requirement, discriminatory.

   Step 2: possible justification under Article 36 TFEU but only if inspections carried out in the exporting state can be shown to be inadequate, which is unlikely.

e. Step 1: selling arrangement, equal burden under *Keck*.

   Step 2: probably legal.

f. Step 1: probably a selling arrangement

   Step 2: probably legal, provided access to the market for imports is not made more difficult thereby than for domestic goods (*Gourmet International*).

Activity 6.3

a. (i) Articles 28 EC and 30 EC

   (ii) Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use.

   Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('the Directive on electronic commerce').

   Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p.19) regulates distance sales. [15]

b. 'The German trade organisation which opposed the activities of DocMorris, The Apothekerverband, the claimant in the main proceedings, is an association whose aim is to protect and promote the economic and social interests of pharmacists. Its members are the Landesapothekerverbände and the Landesapothekervereine (federations and associations of pharmacists at Länder level), which, since they represent more than 19 000 managers of pharmacies, bring together the majority of the 21 600 dispensing pharmacies in Germany.' [34]

c. '…DocMorris, the first defendant in the main proceedings, is a limited company established in Landgraaf (Netherlands). As well as selling medicinal products by mail order, it carries on a 'standard' pharmaceutical business via a traditional dispensary in the Netherlands, to which the public has access. Both that activity and its internet site are covered by a licence issued by the Netherlands authorities and are subject to control by the latter.' [35]

d. '…Since 8 June 2000 DocMorris and Mr Waterval have been offering for sale, at the internet address 0800 DocMorris, prescription and non-prescription medicines for human use, in languages including German, for end consumers in Germany. The defendants in the main action sell only authorised medicines, some of which have been authorised in Germany and others in the Netherlands.'

e. '…Medicinal products may be advertised to the general public which, by virtue of their composition and purpose, are intended and designed for use without the intervention of a medical practitioner for diagnostic purposes or for the prescription or monitoring of treatment, with the advice of the pharmacist, if necessary.' [13]

f. '…The ABO also requires pharmacists to examine the medicinal products with which they are supplied before selling them (Paragraph 12 of the ABO), to stock the full range of preparations needed by their customers, or to be in a position to procure those preparations within a few hours (Paragraph 15), to hand the medicines to the customer himself or arrange for dispensing staff with specialised knowledge to do so (Paragraph 17(1)), to advise and consult with the customer and to ascertain, where necessary, whether the prescription contains errors (Paragraph 17(2)), in cases of doubt to contact the doctor who issued the prescription (Paragraph 17(5)) and to postpone supplying the medicines where there is a reasonable suspicion of intentional misuse (Paragraph 17(8)).' [29]

g. '…Any advertising of medicinal products which require authorisation and which are not authorised or deemed to be authorised under the law on pharmaceutical products is illegal.' [31]

   '…Any advertising the aim of which is to sell by mail order medicinal products which may be supplied only by pharmacies is illegal.' [32]

   '…Any advertising the aim of which is to sell (i) medicinal products by way of teleshopping or (ii) particular medicinal products by way of individual importation …is also illegal.'

h. '…It submits that the provisions of the AMG and the HWG do not permit the defendants in the main proceeding to carry on a business of that kind, and that the prohibition imposed by those two laws cannot be challenged on the basis of Articles 28 EC and 30 EC.' [41]

i. 'The defendants in the main proceedings contend that their business is permitted even under national law and that, in any event, a prohibition on the sale of medicinal products by mail order is incompatible with Community law.' [42]

j. '…is Article 30 EC to be interpreted as meaning that a national prohibition designed to protect the health and life of humans is justified if, before prescription medicines are sent out, a doctor's original prescription must have been produced to the pharmacy sending out the medicines? In such a situation, what requirements should be placed on that pharmacy as regards control of orders, packaging and receipt?' [43]

ACTIVITY 6.4

a. '…105. It is common ground that the Court's case-law has recognised the protection of health not only in the context of Article 30 EC, but also as a mandatory requirement under Article 28 EC.'

b. '…it must be pointed out that before examining any justification under Article 30 EC it must be assessed whether the national measure is applicable without discrimination, since if that is the case justification can be found in Article 28 EC, i.e.

in the *Cassis de Dijon* case-law adopted on that provision. Reliance on Article 30 EC is therefore no longer necessary…' [104]

c. '…The proportionality test must not be based on specific individual cases, but be general. The principle of proportionality is infringed even if the infringement is merely a typical characteristic. To this end it is necessary to examine the appropriateness, the necessity and the reasonableness of the national measure.' [108]

d. '…The measures laid down… are appropriate in principle to serve that objective. This is not affected by the fact that different rules allowing internet sales could serve the objective of health protection.' [110]

e. 'Member States are not required to opt for the lowest degree of protection' [at 112].

'…the fact that such a prohibition is not regarded as necessary by all Member States and does not exist in all the Member States militates against the necessity of the contested rules.' [113]

f. '…in order to test whether the contested provisions of the AMG are consistent with Community law, they must be examined in the light of the proportionality principle in the narrow sense, or reasonableness.'

g. '…whether the health and life of humans can be protected as effectively by measures that are less restrictive of intra-Community trade.'

Activity 6.5

a. '…All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions' (p.1427)

b. '…they include the following: import licenses, import inspections, marketing authorizations, prohibitions on sale, the unwarranted reservation to certain goods of generic names, or indications of origin, labeling requirements, discrimination in the award of public contracts, and certain price controls; the list is almost endless.' (pp.1428–29)

c. The Court rejected this argument in favour of the consideration of both actual and potential effects of legislation. (18 words)

Extract:

'Article [34 TFEU] applies ... not only to the actual effects but also to the potential effects of legislation. It cannot be considered inapplicable simply because at the present time there are no actual cases with a connection to another Member State.' (p.1430)

d. Legal certainty.

'…Whether such a measure has any impact on imports at all is dependent on a variety of imponderables: the same shops might open at other locations, which might even attract more custom; and, even if the shops had been authorized in the city center, they might simply have drained business away from competitors without increasing the overall quantity of imports sold.' (pp.1430–31)

e. '…One of the arguments advanced by Denmark was that the decree fell outside article 34 as being de minimis, since it covered only 0.3 percent of Danish territory.'

'…the slight effect of the Decision, in volume terms, cannot, in itself, prevent the application of Article [34 TFEU] of the Treaty.' (p.1431)

f. '…a measure may constitute an actual and direct restriction on a very small proportion of imports, as is clearly illustrated by *Bluhme*. The rule of remoteness, in contrast, relates to the intensity of the impediment to imports.' (p.1432)

g. '…The plaintiffs, who sought to import this drink from France into Germany, contested the validity of a provision of German law requiring spirits to have a minimum alcohol content. Cassis de Dijon, which in France had a content of

between fifteen percent and twenty percent, fell into the category of products required to have twenty-five percent alcohol under the German provision.'

h. Broad approach.

'…The Court, however, found that the measure fell within article 34. It accepted that the measure did "not have the purpose of regulating trade patterns" and its effect was "not to favour national production as against the production of other Member States, but to encourage cinematographic production as such." Yet it found that the measure still fell foul of article 34.' (p.1435)

i. 'In view of the increasing tendency of traders to invoke Article [34 TFEU] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to reexamine and clarify its case-law on this matter.' (p.1437)

j. '…the category of measures relating to selling arrangements referred to in paragraph 16 of the ruling in Keck covered the following: restrictions on when goods may be sold; restrictions on where or by whom goods may be sold; price controls; and advertising restrictions.'

k. '…The case concerned so-called "bake-off" products, that is, bread which is first half-baked, then frozen and transported to the point of sale (typically a supermarket), where it is thawed and the baking is completed.'

'…The Court held that such a measure clearly aimed to "specify the production conditions for bakery products, including 'bake-off' products" and did not "take the specific nature of these products into account and [entailed] extra costs, thereby making the marketing of those products more difficult." Thus, it could not be regarded as a measure relating to a selling arrangement.' (p.1441)

ACTIVITY 6.6

a. '…the Court has never been able or willing to settle on a unique free movement test, relying instead on highly open-textured concepts such as 'obstacle to free movement', 'barrier to trade', 'restriction to market access', 'discrimination on grounds of nationality' or 'non-discriminatory restriction'.' (p.366)

b. '…many scholars to advocate a specific version of the free movement test, based for instance on a strict approach to discrimination, or on a distinction between product requirements and market circumstances.'

c. '…Nowadays, European law scholars frequently rely on similar analyses, associating specific versions of the free movement test to different institutional arrangements and visions of the European Union.' (p.366)

d. '…The first conception seeks to ensure that the competition among private businesses is not distorted by national regulations, which is expressed by the paradigm of regulatory neutrality. The second vision of economic integration seeks to ensure the proper functioning of the competition among Member States, and is embodied by the paradigm of regulatory competition.' (p.366)

e. '…Regulatory neutrality aims at neutralising internal frontiers by suppressing the impact of national regulatory idiosyncrasies on trade flows competing within the internal market.' (p.370)

'…the ultimate strategic goal of the regulatory neutrality paradigm is the creation of a so-called 'level playing field', an idealised situation in which all economic agents competing within the European Union would be subject to identical regulatory conditions throughout the internal market'. (p.370)

f. '…the regulatory competition paradigm is concerned with a process of competition among Member States, more precisely among national laws. In essence, it postulates the existence—and proper functioning—of a "law market" on which States compete to attract private interests, a process that would ultimately lead to optimal laws.' (p.372)

g. '…In particular, the landmark *Cassis de Dijon* ruling (1979) marked the judicial advent of the mutual recognition principle, whose purpose was to reduce the relative cost of cross-border trade by precluding multiple regulation, in conformity with the regulatory neutrality paradigm.' (p.376)

h. Example: People will generally base their decision to exercise the right of free movement, on the advantages which they perceive in the host state; thus Member States may attempt to encourage or discourage free movement through their regulatory regimes.

Relevant extract:

'…[B]y facilitating the mobility of persons and resources… the free movement provisions also facilitate regulatory and tax arbitrage. This is because legal mobility is a basic pre-condition for arbitrage. Thus, if persons and resources can move at low cost between jurisdictions and provided that mobile actors are informed about differences in regulatory regimes, differences between regulatory regimes can a priori also be exploited.' (p.376)

Chapter 7

Activity 7.1

a. The Court has included both providers and recipients of services within the scope of Article 56. It has also clarified that the notion of remuneration needs to be interpreted broadly (see the patients' case law). Finally, it clearly established that indistinctly applicable measures are covered (*Sager-Alpine investments* cases).

b. No feedback.

c. No feedback.

Activity 7.2

a. & b. The distinction was clearly spelled out by the Court in cases such as *Gebhard*. It clearly aimed at preventing the circumvention of the scope of free movement of establishment (non-discrimination only) by using the more flexible provisions on services. However, you could also discuss the progressive 'merging' of the two freedoms both in the case law and in the Services Directive.

Activity 7.3

a. 'The necessity of combating drugs, inter alia by punishing the illegal trafficking in those drugs and by preventing the consumption of narcotic drugs and drug addiction, has been acknowledged by a number of measures and instruments of the European Union.' [3]

b. Examples: [3]–[10].

Council Framework Decision 2004/757/JHA of 25 October 2004.

The Convention implementing the Schengen Agreement, of 14 June 1985.

Council Resolution of November 29, 1996 on measures to address the drug tourism problem within the European Union (1996).

Joint Action of December 17.

United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, concluded in Vienna on 20 December 1988.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [1990] OJ L326/56.

c. '…"soft" drugs, which although deemed to be "risky" do not give rise to the same concerns.' [13]

'…the sale of cannabis, in strictly limited quantities and in controlled conditions, is tolerated, priority thus being given to the punishment of other offences which are considered to be more dangerous.' [14]

'…in the establishment of coffee shops. In such establishments, which are classified as catering establishments, cannabis is sold and consumed in the same way as food and non-alcoholic beverages. The sale of alcoholic beverages is, however, prohibited.' [15]

'…the marketing of cannabis in coffee shops may be tolerated are defined, at national level, by the directives of the Openbaar Ministerie (the Public Prosecutor's Office). Those criteria, commonly known as "the AHOJ-G criteria"' [17]

d. '…The municipality of Maastricht adopted a policy on cannabis by defining, inter alia, certain strict conditions in which a limited number of coffee shops are tolerated. At the material time in the main proceedings, that number was set at 14'. [18]

'…the proprietor of an establishment as referred to in art.2.3.1.1 (1) (a) (3) of that regulation is forbidden to admit persons other than residents to the establishment or to permit them to remain in or at the establishment.' [20]

e. '…As narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, a coffee shop proprietor cannot rely on the freedoms of movement or the principle of non-discrimination, insofar as concerns the marketing of cannabis, to object to municipal rules such as those at issue in the main proceedings.' [42]

'…such an approach cannot put illegal drugs dealing on the same footing as economic channels which are strictly controlled by the competent authorities in the medical and scientific field. The latter trade is actually legalised whereas illegal dealings, albeit tolerated, remain prohibited…' [43]

f. (i) '…As regards more specifically the possibility of granting non-residents access to coffee shops whilst refusing to sell cannabis to them, it must be pointed out that it is not easy to control and monitor with accuracy that that product is not served to or consumed by non-residents. Furthermore, there is a danger that such an approach would encourage the illegal trade in or the resale of cannabis by residents to non-residents inside coffee shops.' [81]

(ii) '…it must be stated that rules such as those at issue in the main proceedings are suitable for attaining the objective of combating drug tourism and the accompanying public nuisance and do not go beyond what is necessary in order to attain it.' [83]

g. '…That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance.' [84]

ACTIVITY 7.4

a. '…A service-provider may be subject to different or even contradictory regulations. A regulation imposed by the home State (where the service-provider is established) may conflict with a regulation of the host State (the foreign jurisdiction in which activities are undertaken). This is often referred to as "double regulation" or "dual burden".' (p.3)

b. '…In the field of services, the mutual-recognition obligation requires that the host State may not prohibit, impede or make less attractive an export from a provider already established in another Member State in which he lawfully supplies a service similar to the one he intends to export.' (p.3)

c. '…discrimination against a person providing services on the ground of his nationality'.

'…any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'

d. '…firstly, the provider must be already established in another Member State, and secondly, the provider must lawfully provide in the home State a service similar to the one he intends to supply in the host State.'

e. The host State can rebut the presumption by proving that the measure is justified. Restrictions on the free movement of services are exceptionally justified by the EC Treaty (Article 46 para 1, Article 55) on grounds of public policy, public security or public health. Other exceptions have been admitted by the ECJ (the 'general good exceptions').

f. 'The proportionality principle entails three tests: the suitability test, the necessity test and the proportionality *stricto sensu* test.'

g. When services providers meet the regulatory requirements of their home state to provide certain services, it should be able to enter service provision in host states in the knowledge that the home state authorisation is acceptable in the host states.

   Extract:

   '…To guarantee the free movement of services the provider must be able to remain subject to a single set of national rules, even though he operates in several jurisdictions.' (p.4)

h. '…As regards the positive obligation, the host State must open itself up to foreign legal rules and acts. It must recognize such rules and acts as being capable of producing effects within the host legal system, or being capable of constituting the precondition for the production of the effects that, in the host State, follow from its own rules and acts.'

i. '…For the negative obligation, the host State must exercise self-restraint: it may not restrict the activities of a foreign provider by imposing legal requirements or administrative controls. The host State may derogate from such prohibition only on an exceptional basis under certain conditions.'

Activity 7.5

a. (i) Trade Unions – The Finnish Seamen's Union (FSU), International Transport Workers' Federation (ITF), Svenska Byggnadsarbetareförbundet.

   (ii) Social rights related to the workplace - 'established terms and conditions of employment', 'workers' rights to strike under national labour law', 'collective agreement', 'industrial action, including boycotts'.

b. Example: This is essentially a 'race to the bottom' or 'social dumping' argument where companies legitimately seek to obtain business advantages through maximising operational conditions such as lower workforce costs or the most 'employer friendly' terms and conditions. (37 words)

c. '…Article 28 refers to the entitlement of "workers and employers, or their respective organisations… in cases of conflicts of interest, to take collective action to defend their interests, including strike action"…'

d. '…Article 3(1) of the Directive identifies a nucleus of mandatory rules (this could be termed a "floor") which host states must apply to posted workers.'

e. '…in accordance with national law which respects Community law (Article 1(6))'.

f. The Council of Europe's European Social Charter 1961, International Labour Organisation (ILO) Convention 87, the CCFSRW, and the EUCFR.

g. '…[I]n principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions fixed at a certain level, falls within the objective of protecting workers.'

h. Where the disputed level of wages under collective agreements exceeded the national minimum wage level, the benchmark in Article 3 1. (c), and the national minimum wage level is paid, the lower level of pay meets the de minimis requirement and therefore it is the 'ceiling threshold' considered by the Court. (51 words)

Extract:

'…it is the case that national measures and collective action intended to secure terms and conditions beyond the floor established in the Directive are viewed with suspicion by the Court.'

Chapter 8

ACTIVITY 8.1

a., b. & c. Focus on the wording of the Treaty that speaks of 'restrictions' instead of the usual non-discrimination clause. Then analyse some of the judgments of the ECJ on indistinctly applicable measures such as the golden shares *acqui*. Note that free movement of capital is the only freedom that applies to third countries (with certain limits).

ACTIVITY 8.2

No feedback provided.

ACTIVITY 8.3

a., b. & c. Try to make the connection with Activity 8.2 as well. How can a Member State retain some forms of control on these economic activities? How can the system be proportionate?

ACTIVITY 8.4

a. Regulation 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

   Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

   Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area.

   Directive 2011/85 on requirements for budgetary frameworks of the Member States.

   Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

   Regulation 1174/2011 on enforcement measures to correct macroeconomic imbalances in the euro area [2011] OJ L306/8. (at FN3)

b. '…The euro crisis, precipitated initially by the situation in Greece, was not, however, quelled by such measures, and the bond markets continued to charge ever-increasing rates of interest to service Greek, Italian and Spanish debt.' (p.2)

   '…The majority of Member States nonetheless wished to press forward with the reforms, the result being the TSCG.'

c. '…Article 1 TSCG provides that the contracting parties agree, as Member States of the European Union, to strengthen the pillar of economic and monetary union by adopting rules to foster budgetary discipline through a fiscal compact, to strengthen the co-ordination of their economic policies and to improve the governance of the euro area.' (p.3)

d. '…Article 2(1) provides that the TSCG is to be applied and interpreted in conformity with the EU Treaties, in particular art.4(3) of the Treaty of the European Union (TEU), and with EU law, including procedural law when adoption of secondary legislation is required.8 Article 2(2) further stipulates that the TSCG applies insofar as it is compatible with the EU Treaties and EU law, and that the TSCG shall not encroach on the competence of the Union to act in the area of the economic union.' (p.3)

e. '…Article 3(1) TSCG contains the "balanced budget" rule and is the heart of the new Treaty. The budgets of the contracting parties must be balanced or in surplus. This is deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5 per cent of gross domestic product at market prices.' (p.3)

f. '…It provides that the rules in art.3(1) TSCG shall take effect in national law of the contracting parties…'

'…The national correction mechanism is to be based on common principles proposed by the Commission, concerning the nature, size and time-frame of the corrective action to be undertaken, and in the case of exceptional circumstances, the role and independence of the national institutions responsible for monitoring compliance with the rules in art.3(1)'.

'…The correction mechanism must fully respect the prerogatives of national parliaments. Article 8 TSCG provides for judicial enforcement of art.3(2) through recourse to the ECJ via art.273 TFEU.' (p.3)

g. '…Article 4 TSCG stipulates that when the ratio of debt to gross domestic product exceeds the 60 per cent reference value in art.1 of Protocol 12 of the Lisbon Treaty, the contracting party must reduce it at an average rate of one-twentieth per year as a benchmark, as provided for in art.2 of Regulation 1467/97 as amended'.

h. '…The existence of an excessive deficit due to breach of the debt criterion is decided by the procedure in art.126 TFEU.' (p.3)

Chapter 9

Activity 9.1

Discuss whether the first tobacco judgment was a true defeat for the EU institutions or whether instead the Court was only concerned that the harmonisation measure was disproportionate. Relate the first judgment to the second tobacco case where instead the Court, presented with a more 'accurate' Directive, backed up the EU institutions.

Activity 9.2

a. '…competence in this context is about everything deriving from EU law that affects what happens in the UK.' [1.8]

b. '…The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by Member States as set out in the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.' [1.9]

c. Supporting, Shared, Exclusion [1.10].

Example:

'Supporting' competence is the only competence type in which the EU cannot prevent Member States from taking action on their own.

d. '…Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action.'

e. '…Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.'

f. Example: There is a need for a single strategic framework and cooperation from all Member States as the delivery of health policies impacts on all Europe's citizens. Inter-relationships include the mutual recognition of healthcare professional qualifications and reciprocal healthcare arrangements. (40 words) (see 1.14–1.17)

g. A. The Tobacco Products Directive 2001/37/EC

(i) the products themselves - their manufacture, presentation and sales

(ii) maximum levels of tar, nicotine and carbon monoxide yields of cigarettes, and industry reporting requirements.

(iii) Health warnings [6.2]

B. The Tobacco Advertising Directive 2003/33/EC

(i) an EU wide ban on cross-border tobacco advertising and sponsorship in the media other than television.

(ii) The ban covers print media, radio, internet and sponsorship of events involving several Member States, such as the Olympic games and Formula One races.

C. The Audio Services Visual Media Directive 2010/13/EU on the coordination of laws and regulations concerning the provision of audio visual media activities.

(i) prohibits advertising promoting cigarettes and other tobacco products, including indirect forms of advertising, on all forms of audiovisual commercial communication.

'...The Tobacco Advertising and Promotions Act 2002; The Tobacco Advertising and Promotion 2002 (Amendment) Regulations 2006 (S.I. 2006/2369); and the Tobacco Products (Manufacture, Presentation and Sale (Safety) Regulations 2002 (S.I. 2002/3041) as amended.' [6.4]

ACTIVITY 9.3

a. The establishment and functioning of the internal market

...which have as their object the establishment and functioning of the internal market.... (Art. 114)

Article 26 (ex Article 14 TEC)

(1) The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

b. '...the EU may intervene to cure diversity between national laws only where that diversity is shown to be harmful to the achievement of the EU's internal market. This is why Directive 98/34 on tobacco advertising, which did not cross that threshold, was annulled. Though the Tobacco Advertising judgment was in principle not novel, it was the first instance of annulment of this type of EU legislation on these grounds.' (p.830)

c. The 'principle of conferral'.

Article 5(2) TEU states that: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein' and adds (superfluously) that 'Competences not conferred upon the Union in the Treaties remain with the Member States.' (p.830)

d. '...any national measure may be harmonized provided that leads to an improvement in the functioning of the internal market envisaged by Article 26 TFEU, and nothing is placed off the EU's limits, excepting only that Article 114(2) TFEU excludes harmonization of fiscal provisions, those relating to free movement of persons, and those relating to the rights and interests of employed persons.' (p.831, emphasis added)

e. '...where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market...'

'…Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws.' (p.831)

f. '…The anxiety is that the Court has failed to address the problem and has instead concocted a set of phrases which merely serve as a "drafting guide" which readily enables the legislative institutions to comply with the principle of conferral.' (p.833)

g. Public health.

'…Directive 2001/37 deals principally with labelling (in particular health warnings) and tar yields rather than advertising.' (p.834)

h. '…Differences in rules concerning carbon monoxide are likely to constitute barriers to trade and to impede the smooth operation of the internal market.' (p.835)

i. 'That Directive demonstrates that unsafe products may the subject of a harmonized ban in order to improve the functioning of the market for safe products.' (p.836)

Chapter 10

Activity 10.1

No feedback provided.

Activity 10.2

No feedback provided.

Activity 10.3

No feedback provided.

Activity 10.4

a. Vertical restraint because Washco and the distributors are at different levels in the chain of production/distribution. This will deter retailers from obtaining supplies of Washco machines from distributors in other Member States, even if they could thereby obtain them more cheaply. It restricts price competition between the distributors of Washco machines in different Member States ('intra-brand' competition). It amounts to an indirect export ban, compartmentalising the market along national lines.

b. Another example of a vertical restraint designed to deter export of cars from one Member State to another, to compartmentalise the market, and to prevent price-competition between distributors in different Member States.

Activity 10.5

Explain the two aspects of relevant market: product and geographic. The Commission and the Court's method of determining product market can be seen in *United Brands* – demand-side substitutability, and *Continental Can* – supply-side substitutability. Both tests were used in *Michelin*. Geographic market: *United Brands*. Discuss the Commission's Notice on Determining the Relevant Market – explain the SSNIP test and the empirical approach to geographic markets.

The second part requires a discussion of dominance. Start by defining this concept (*United Brands*). That case laid down a 'multi-factoral' test including the competitive situation on the market, barriers to entry (likelihood of 'potential competition') and the characteristics of the company – its ability to act independently of competitive pressure. Explain what factors were taken into account in that case, then give examples from other cases (e.g. *Hoffmann-La Roche*).

Activity 10.6

No feedback provided.

ACTIVITY 10.7

No feedback provided.

ACTIVITY 10.8

a. '…it constitutes a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.' [AG33]

b. '…concerted practices which are considered anti-competitive only by reason of their effects and those which must already be regarded as anti-competitive by reason of their object'.

c. '…The per se prohibition of such practices recognised as having harmful consequences for society creates legal certainty and allows all market participants to adapt their conduct accordingly. Moreover, it sensibly conserves resources of competition authorities and the justice system.' [AG43]

d. 'Instead, for the prohibition of art. 81(1) EC to be triggered it is sufficient that a concerted practice has the potential—on the basis of existing experience—to produce a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, that is, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the Common Market.' [AG46]

e. 'Ultimately, therefore, the prohibition on "infringements of competition by object" resulting from art. 81(1) EC is comparable to the risk offences (Gefährdungsdelikte) known in criminal law …. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.' [AG47]

f. '…It is irrelevant in that connection whether only one undertaking unilaterally informs its competitors of its intended market behaviour or whether all participating undertakings inform each other of their respective deliberations and intentions. Simply when one undertaking alone breaks cover and reveals to its competitors confidential information concerning its future commercial policy, that reduces for all participants uncertainty as to the future operation of the market and introduces the risk of a diminution in competition and of collusive behaviour between them.' [AG54]

g. '…art. 81 EC forms part of a system designed to protect competition within the internal market from distortions (art.3(1)(g) EC). Accordingly, art.81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.'

   'To narrow the prohibition of art. 81(1) EC simply to behaviour having a direct influence on consumer prices would deprive that provision, which is fundamental for the internal market, of much of its practical effect.' [AG58–60]

h. '…in relation to the exact timing, extent and details of the modifications adopted by each undertaking considerable uncertainties may remain. An exchange of information which is capable of removing those very uncertainties between participants pursues an anti-competitive object.' [AG67]

i. 'Article 81 EC does not preclude economic operators from shaping their conduct according to the reality of the relevant market and in so doing from reacting intelligently to changes in the economic and legal framework and to any changes in the market conduct of other undertakings. However, art.81 EC prohibits the implementation of such modifications under elimination of the rules of free competition, for example, where competitors concert their future market conduct

and in so doing avoid to some extent the pressure of competition and related market risks.' [AG70]

j. Example: The objective of European competition law is to protect free competition which allows competitors to access the market. Competitive prices for products is one example of an indirect benefit for consumers and the general public. (35 words)

Relevant extract:

'If art.81 EC did not apply to such practices, ultimately that would shield competitors from competition and accord priority to the interests of the undertakings concerned at the expense of the public interest in undistorted competition (art.3(1)(g) EC). However, the objective of European competition law must be to protect competition and not competitors, because indirectly that is of benefit also to consumers and the public at large.' [AG71]

Activity 10.9

a. i. '…the AECT examines whether a dominant undertaking's conduct constitutes an exclusionary practice by foreclosing from the relevant market an as-efficient rival.'

'…Its rationale is that the most efficient firm should be the competitive winner. Thus, harmful, anti-competitive exclusion should be distinguished from "exclusion" as a result of undistorted competition on the merits.'

ii. '…These practices should be regarded as abusive only when they are linked to certain anti-competitive effects. The latter are established by demonstrating that an equally efficient competitor is excluded from the market due to the relevant pricing strategy.'

iii. Consumers.

'…The CHT is an effects-balancing test which focuses on the consequences of the conduct on total or consumer welfare. Its salient assumption is that consumer harm can be caused by maintaining or strengthening market power and subsequently by raising prices or restricting output. Under this standard, an exclusionary conduct violates EUCL in case it diminishes competition without fully offsetting these potential adverse effects. Accordingly, an exclusionary conduct should be deemed abusive as long as it does not fully benefit consumers. Hence, the CHT makes illegal any conduct by which a dominant undertaking strengthens its market position causing net harm to consumers.' (p.10)

iv. '…The ToI asks whether the behaviour in question is irrational "but for" its capability of eliminating or lessening competition". Additionally, when evidence of economic effects is dubious, the element of intent clarifies whether the conduct has an anti-competitive purpose or is aligned with competition on its merits.' (pp.10–11)

v. '…The profit sacrifice test appraises a dominant firm's behaviour as abusive if it sacrifices profits or incurs losses to an extent that would not make economic sense but for eliminating or excluding its rivals from the relevant market.' (pp.10–11)

vi. '…This test was adopted by the Court in *AKZO* where it was held that pricing above AVC but below ATC is to be considered abusive "only if prices at that level are determined as part of a plan for eliminating a competitor".' (p.11)

vii. '…the ToI may assist in reducing false convictions when objective data have proved inadequate for the finding of an infringement and an additional element is necessary to affirm anti-competitiveness.'

'…intent as a supplementary element of an anti-competitive practice guards against the risk of false convictions and over-deterrence.' (p.11)

Chapter 11

ACTIVITY 11.1

a. To prevent Member States placing unilateral restrictions on those who can benefit from the free movement rights under Article 45 TFEU (ex Article 39 EC): see *Levin* case, paras 12–14.

b. *Levin* test: is the activity effective and genuine, not marginal and ancillary. Also *Lawrie Blum* test: does the person perform services for, or under the direction of, another in return for remuneration?

c. *Antonissen*: right to reside is limited to a reasonable period in which to find work and *Lebon*: right to equal access to employment but not to the same social and tax advantages as nationals under Article 7(2) of Regulation 1612/68. Now covered by Articles 14(4)(b) and 24(2) of Directive 2004/38.

d. Try to find the relevant Article in Directive 2004/38.

ACTIVITY 11.2

a. & b. The question refers to the development of the case law on citizenship rights. You should analyse the first tentative steps taken by the Court (*Martinez Sala*) and the turning point cases such as *Grzelczyk, Baumbast* and *Chen* where the Court declared EU citizenship as the fundamental status of individuals. It also held that citizenship rights are enforceable regardless of the exercise of an economic activity.

ACTIVITY 11.3

a. Catherine held the nationality of one Member State (Ireland) while living in another (UK). This was enough to give the case a Community dimension.

b. The only provision which could confer an independent right to reside on a baby was Directive 90/364 on the General Right of Residence (the baby was clearly not a worker, service-provider, self-employed person, student or retired person). The relevant limitations and restrictions were, therefore, those contained in that Directive (medical insurance and sufficient resources requirements). (These are now laid down in Article 7(1)(b) of Directive 2004/38.)

c. To deny her mother a right to reside would effectively defeat the baby's own right, as her mother was her primary carer. The Court, therefore, decided that the mother's right was implicit in the child's right.

ACTIVITY 11.4

No feedback provided.

ACTIVITY 11.5

Discuss the very generous approach of the Court in *Carpenter* (decision based on free movement of services) and *Zambrano* (based on citizenship provision) and their emphasis on fundamental rights. Compare with the restrictive readings in *McCarthy* and *Dereci* that have been considered by some commentators as a sort of overruling of *Zambrano*.

ACTIVITY 11.6

a. '…(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary'. [10]

'…"special non-contributory cash benefits" means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the

persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned; …

Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.' [11]

b. '…the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.' [16]

c. '…proof of sufficient sickness insurance cover and sufficient means of subsistence'. [32]

d. '…on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union)'. [33]

Activity 11.7

a. Example: the rights associated with the freedom of movement generally require citizens to move to another Member State. Therefore Member State citizens who move within the territory of the EU fundamentally enjoy the same rights as other EU citizens who live in the state.

b. (i) home state

(ii) host state.

c. Example: Nationality is determined by the conditions laid down by the individual Member States.

d. Example: Residency is determined by legal entitlement to stay in a country. Nationals have automatic rights to reside in their national state. EU citizens have a right to reside in EU Member States.

Activity 11.8

a. The principle of equal treatment and non-discrimination.

'…since the introduction of European citizenship by the Maastricht Treaty, non-economic migration between Member States also triggers the application of the Treaty prohibition of discrimination on grounds of nationality in the host State (now Art. 18TFEU).' (p.365)

b. '…However, the Court did not grant economically inactive migrants unconditional access to the welfare benefits of the host State. Depending on the case, the applicant should "not become an unreasonable burden on the public finances", should "have **a genuine link** with the employment market of the State concerned", or would "need to demonstrate a certain **degree of integration** into the society of the host State".' (p.365)

c. '…it remained quite unclear on the basis of which elements and according to which procedure the national court should make such an assessment. The role of the prohibition of discrimination on grounds of nationality in EU law was not clarified either.' (p.367)

d. '…the narrow interpretation of the limitations [means that] the ECJ would allow to be applied to the equal treatment principle, in which the proportionality test can only be put aside in very specific situations, such as the circumstance in which a person moves to another Member State solely in order to obtain social assistance there. Indeed, the proportionality test is inherent in the implementation of Article 18 TFEU, which may only be put aside in self-evident situations.' (p.382)

e. The non-discrimination issue:

'…The first is whether it would still be possible to invoke the Treaty provisions directly, more specifically the general prohibition of discrimination on grounds of nationality in Article 18 TFEU, to claim social benefits from the host State.' (p.383)

The 'sufficient resources' issue:

'…Second, *Dano* does not clarify what role could still be played by the provision of Article 8(4) of Directive 2004/38 to which the Court, strikingly, does not refer at all.' (p.383)

The 'expulsion' issue:

'…Third, it also remains unclear what the consequences of *Dano* would be for the host Member State's ability to expel Union citizens who do not possess sufficient resources.' (p.383)

f. '…This kind of situation would manifestly result in the creation of poverty and social exclusion on the territory of the host State and would be in contradiction with the Union's objectives to combat social exclusion, objectives enshrined in provisions such as Article 3(3) TEU, Articles 9 and 151(1) TFEU as well as Article 34(3) of the EU Charter of Fundamental Rights. Articles 1 (Human dignity) and 24 (Children's rights) 77 of the EU Charter could also play a role in the discussion.' (p.384)

g. Example: It makes it easier to expel economically inactive citizens.

'…the wording of the judgment, including its dictum, could be used to justify a broader interpretation thereof and allow the Member States to deny all social benefits as soon as the economically inactive Union citizen whose residence period is shorter than five years, and who does not have sufficient resources of his/her own. The unreasonability of the burden would not even need to be demonstrated. Yet, such a broad interpretation would be contrary to the objectives of the EU on the free movement for persons, including those who are or who become economically inactive.' (p.388)

Activity 11.9

a. '…The silence of European citizenship in purely internal situations—the ones where no right of movement has been exercised— has stood unchallenged for several years, albeit criticized as it potentially translates into reverse discrimination.' (p.434)

b. '…The rights of European citizenship apply only within the scope ratione materiae of European Union law. This means in practice that a national of a Member State cannot invoke his rights as a European citizen if not in the context of the exercise of EU law-based rights.'

c. '…The contours of the substance of European citizenship have not been clearly defined… the relation between the rights of citizenship and fundamental rights remains fuzzy.'

'…it is not clear whether and how the focus on the substance may affect the boundaries of European citizenship.' (p.434)

d. '…It held that denying a right of residence to the parent caretaker of two minor European citizens would have the effect of interfering with their enjoyment of the substance of the rights of European citizenship. In all likelihood, the two children would be forced to leave Belgium, and probably even the European Union, and would be thus deprived of the substance of their EU citizenship rights even before having benefited from it.' (p.435)

e. (i) '…the relevant Austrian national EU citizen had never exercised a free movement right and was not dependent on the TCN family member' (p.436)

(ii) '…the fact that the refusal of a residence permit impacts on an EU citizen's desire, for convenience or other reasons, to keep his family together in an EU Member State does not amount to interference with the genuine enjoyment of the substance of the rights of EU citizenship'. (p.436)

f. '…As the Court pointed out, these situations are in principle outside the scope of EU law, but intrinsically connected to an EU citizen's free movement rights, so that they require EU law intervention in order to preserve the effectiveness of EU citizenship.' (p.437)

g. '…In performing their determination, national courts are called to take into account, inter alia, whether there is a relation of legal, financial, or emotional dependency between the TCN for whom the residence permit is sought and the EU citizen child.' (p.438)

h. The shift from free movement rights to individual rights.

'…European citizenship, according to this perspective, is eventually freed from its dependence on free movement rights, and gains strength as an autonomous source of individual rights.' (p.438)

'…This evolution also opens up the possibility of fundamental rights-oriented readings of supranational citizenship and the rights it brings about.' (p.438)

'…Breaking the implied pact between free movement and citizenship, the CJEU frees up the hidden energy of the notion of supranational citizenship.' (p.438)

Chapter 12

Activity 12.1

This activity deals with the Charter of Fundamental rights relevance: you should discuss its legal status – how the Court is using it both as benchmark for the legality of EU action and for Member State action. You should analyse how the ECJ developed a human rights *acquis* by relying on the idea of general principles of EU law. Cases such as *Nold, Wachauf* or *ERT* could be mentioned. You should then assess whether the Charter is adding anything 'extra' both in terms of what kind of rights can be protected (see solidarity) and in terms of intensity of review (cases such as *Test Achats*).

Activity 12.2

No feedback provided.

Activity 12.3

a. '…a balance has to be struck between various fundamental rights, such as freedom of expression, freedom of information and freedom to conduct a business, on one hand, and protection of personal data and the privacy of individuals, on the other.'

b. '…whether data subjects can request that some or all search results concerning them are no longer accessible through search engine.' [6]

c. Directive 95/46/EC, the Data Protection Directive.

Article 8 of the Charter of Fundamental Rights of the European Union.

'Since the adoption of the Directive, a provision on protection of personal data has been included in Article 16 TFEU and in Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter').'

d. 'The present preliminary reference is affected by the fact that when the Commission proposal for the Directive was made in 1990, the internet in the present sense of the World Wide Web, did not exist, and nor were there any search engines. At the time the Directive was adopted in 1995 the internet had barely begun and the first rudimentary search engines started to appear, but nobody could foresee how profoundly it would revolutionise the world. Nowadays almost anyone with a smartphone or a computer could be considered to be engaged in activities on the internet to which the Directive could potentially apply.' [10]

e. '…This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. [120]

f. '…for example to prevent further airing of the details of an individual's private life which do not come within the scope of any political or public debate on a matter of general importance.' [127]

ACTIVITY 12.4

a. '…the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter.'

'…the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside.'

'…it continues to operate as a source of authority for the 'discovery' of general principles of EU law.' (p.376)

b. '…the second paragraph of Article 6(1) TEU stresses that "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties"'.

'…Article 51(2) of the Charter… requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU.'

'…Art. 51(2) of the Charter reads as follows: "[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".' [FN10]

c. '…(1) EU obligations that require a member state to take action … and (2) EU obligations that must be complied with when a member state derogates from EU law'. (p.378)

d. '…the Charter should not apply when examining the validity of national measures derogating from EU requirements.'

e. '…an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy.'

f. '…In addition, he rightly notes that the notion of 'public policy' is difficult to apprehend without considering fundamental rights. By way of example he observes that had the ECJ decided in *Grogan* that the freedom to provide services was applicable to the Irish ban on the distribution of specific information about clinics in another member state where abortions were performed, it would have been very difficult for the ECJ to decide whether such a measure complied with EU law without considering Ireland's argument based on the right to life.' (p.384)

g. 'Held: (c) Justification of national rules as overriding public interest requirements had to be considered in light of the general principles of law, including protection of fundamental rights, and a prohibition on selling publications offering the chance to win a prize could detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms did, however, permit derogations for the purpose of maintaining press diversity if prescribed by law and necessary in a democratic society.' [24]–[26]

h. '…it nevertheless follows from the express wording of para.2 of Arts 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

…unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of

those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.' [79]–[80]

i. '...H10 (a) Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which formed an integral part of the general principles of Community law, the exercise of that right might nonetheless be subject to certain restrictions. As was reaffirmed by Art.28 of the Charter of Fundamental Rights of the European Union, those rights were to be protected in accordance with Community law and national law and practices.' [44]

'...H11 (b) The protection of fundamental rights was a legitimate interest which, in principle, justified a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods or freedom to provide services. The Court had held that the exercise of the fundamental rights at issue, namely, freedom of expression and freedom of assembly and respect for human dignity, respectively, did not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.' [45]–[46]

'...44. Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Art.28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from [5] of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is contra bonos mores or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods.' [44]–[45]

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