SQE

EU CONCENTRATE

New to this edition

- Fully up to date following the UK leaving the EU on 31 January 2020
- Coverage of the Withdrawal Agreement 2020 and the Trade and Cooperation Agreement 2020
- New case law coverage including *Wightman, Faccini Dori v Recreb Srl,Pfeiffer and others v Deutsches Rotes Kreuz, Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel, Coman,* and *Secretary of State for the Home Department v NA*

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Origins, institutions, and sources of law

The assessment

Some courses may cover the origins and institutions of the EU and the sources of EU law as introductory topics and exclude these matters from direct assessment. Others may assess areas that typically give rise to academic debate, for instance the balance of power between the EU institutions and democracy within the institutions. You are unlikely to be asked for purely descriptive historical accounts but may encounter questions about the development of the original economic and political aims of the EU or the evolving 'two-speed Europe' in which some Member States wish to press ahead with further European integration. In this context, given the outcome of the UK's referendum on EU membership in June 2016 and the UK subsequently leaving the EU on 31 January 2020, it is important to keep up to date with developments. Problem questions in this area may be unlikely, but be guided by the approach taken on your course.

Key facts

- **The European Economic Community (EEC) was created by the European Community Treaty (the EEC Treaty or Treaty of Rome), signed by the six original Member States in 1957.**
- **The EEC Treaty set up the common market, now known as the internal market, in which goods, persons, services, and capital move freely between Member States.**
- **The Treaty on European Union 1992 created the European Union (EU), incorporating the EEC, together with two new policy areas, Cooperation on Justice and Home Affairs and Common Foreign and Security Policy. The EEC was renamed the 'European Community' (EC) and the EEC Treaty the 'EC Treaty'.**
- **Over the years, further Treaties agreed by the Member States have amended the two founding Treaties, effecting changes to the institutions and law-making procedures of the EC and EU and adding new policy areas.**
- **From six original states, the EU expanded to a membership of 28 (now 27 post-Brexit) and further enlargement is planned.**
- **The principal EU institutions are the European Parliament, the European Council, the Council, the**

European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.

- **The Treaty of Lisbon amended the two founding Treaties and replaced all references to the ‘European Community’ with ‘European Union’. Together, the two amended Treaties (the Treaty on the Functioning of the European Union (TFEU) (formerly called the EC Treaty) and the Treaty on European Union (TEU)) constitute the Treaties on which the EU is now based.**

Origins

The European Community

The EEC

The EEC was created by the Treaty of Rome (EEC Treaty), signed by France, Germany, Italy, Belgium, the Netherlands and Luxembourg in 1957. In the preamble to the Treaty, the founding states expressed the desire to 'lay the foundations of an ever closer union among the peoples of Europe' and, through a pooling of resources, 'to preserve and strengthen peace and liberty'.

Impetus for European integration

The events leading up to the founding of the EEC can be traced back through the first half of the twentieth century, during which Europe had suffered the devastating effects of two major wars. There was a strong desire for lasting peace and, as Europe finally emerged from war, greater European political and economic cooperation were seen as the means to achieve this. After the Second World War (1939–1945), the vision of European integration moved towards reality. The political landscape had changed dramatically as the Soviet Union pursued an expansionist policy, gaining control over the Eastern

European states, including the former East Germany. Amidst mutual fear and suspicion, the communist East and the capitalist West entered the period known as the Cold War. As long as Western Europe remained divided, it was vulnerable to the effects of Soviet power and expansionism.

The founding states were driven by high ideals, political motivation, and economic objectives. The cost and physical devastation of warfare had left Western national economies weak. As part of a defence strategy against the Soviet threat, the USA had bolstered these economies with massive financial aid, particularly to the former West Germany, through the Marshall Plan. Then, in 1957, the EEC Treaty established a common market to promote across the Member States a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and an accelerated raising of the standard of living.

First steps: ECSC Treaty, 1951

The first stages of formal European economic integration predate the EEC Treaty, going back to the adoption of the European Coal and Steel Community Treaty 1951 (the ECSC Treaty or Treaty of Paris). The original blueprint for the ECSC Treaty was set out in the Schuman Plan of 1950. This envisaged linking the French and German coal and steel industries, under the control of a High Authority operating at a **supranational** level, in other words above and independently of the two governments. It was considered that supranational control over coal and steel production would remove national capability for

armament production and reduce the likelihood of war.

The ECSC Treaty, signed in Paris by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg, created a common market in coal and steel, regulated by four institutions, including a High Authority with decision-making powers. The ECSC Treaty expired in 2002, when its functions were incorporated within the EC Treaty.

Next steps: EEC and Euratom Treaties, 1957

The EEC Treaty extended economic integration beyond coal and steel, creating a **customs union** incorporating the free movement of goods between Member States and a **common customs tariff** to be applied to goods entering the EEC. The core framework was a common market, now known as the 'internal market', entailing gradual removal of barriers to trade, free movement rights for workers and the self-employed, and prohibition of anti-competitive practices. Common policies in agriculture and transport were introduced.

Alongside the EEC Treaty, the founding states also signed the **European Atomic Energy Community Treaty (the Euratom Treaty)**, which regulated nuclear power. The EEC and **Euratom Treaties** were signed in Rome in 1957. Given its legal and economic significance, the EEC Treaty is frequently referred to as the 'Treaty of Rome'.

The EEC Treaty set up the institutions of the EEC: the Assembly (now the European Parliament), Council, Commission, and the European Court of Justice. This framework remains in place today, although the

respective institutions' functions and powers, to be considered below, have evolved over the years.

The European Union

The **Treaty on European Union (TEU)**, signed at Maastricht in 1992, created the European Union (EU), a new entity incorporating the existing Communities, and amended the existing Treaties.

Revision tip

Questions requiring pure description of EC and EU origins may be unlikely, but familiarisation with the history will help you contextualise EU law.

Enlargement

EEC membership remained unchanged, at six states, until the UK, Denmark, and the Republic of Ireland joined in 1973. Then followed the accessions of Greece (1981) and Spain and Portugal (1986). With the reunification of Germany, East Germany was assimilated in 1990. In 1995, Austria, Finland, and Sweden joined what had by then become the EU, followed by Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia in 2004. The Union was enlarged yet further to a membership of 27, when Romania and Bulgaria joined in 2007 and further still in 2013 when Croatia joined. Currently, Albania, Turkey, the Republic of North Macedonia, Montenegro, and Serbia are candidate countries. Bosnia and Herzegovina and Kosovo are known as potential candidates as they are deemed to have a clear prospect of joining the EU in the future but have not yet been granted candidate country status.

Revision tip

It is important to be aware of the identity of the 27 Member States when applying EU law. For example, all Member State nationals hold Union citizenship, a status conferring free movement rights (see Chapter 6).

Development

The amending Treaties

Later Treaties amended the founding Treaties. With regard to the EEC Treaty, the most significant amending Treaties were the **Single European Act 1986** and the **TEU 1992**. The **Treaty of Amsterdam 1997** and the **Treaty of Nice 2001** amended both the **EC Treaty** and the **TEU**. Various Accession Treaties, adopted as new members joined the EU, made the necessary amendments to the **EC Treaty** concerning, for instance, increased membership of the EU institutions.

Single European Act 1986

The principal aim of the Single European Act 1986 (SEA) was to complete the internal market by removing remaining barriers to trade by the deadline of 31 December 1992. The SEA introduced a new 'cooperation' procedure, which enhanced the European Parliament's role in law-making, and extended EEC competencies to economic and social cohesion, research and technological development, and environmental protection.

Treaty on European Union 1992

Creation of the EU

Following protracted ratification processes in some Member States, the **TEU** came into effect on 1 November 1993. The **TEU** was much more than an amending Treaty. As well as introducing changes to the EC Treaty, it created the EU.

The EU was set up as a three-pillar structure, comprising the three Communities (the first pillar), a Common Foreign and Security Policy (the second pillar), and Cooperation on Justice and Home Affairs (the third pillar). The three Communities, along with their governing Treaties, remained intact within the larger edifice of the EU.

This structure (see Figure 1.1) was devised to allow Member States to cooperate within new policy areas, Common Foreign and Security Policy and Justice and Home Affairs, outside the mechanisms of the Community Treaties. Although the second and third pillars shared the Community institutions, decision-making within these pillars was based on national autonomy, resting largely with the Council, representing the Member States. Here, the other Community institutions had a limited role in decision-making. Except in certain narrow circumstances, the European Court of Justice had no jurisdiction in matters within the second and third pillars.

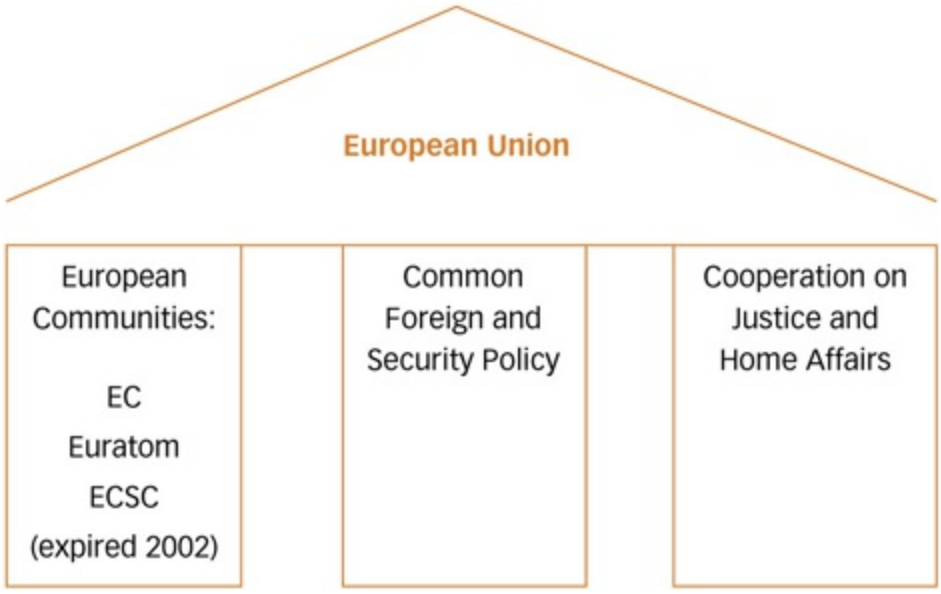


FIGURE 1.1 The three pillars of the EU

Looking for extra marks?

Decision-making under the second and third pillars of the **TEU** is described as **intergovernmental**, since it entailed agreement between the Member States acting as independent sovereign states. By contrast, decision-making within the Community framework had significant 'supranational' elements, for here the institutions, acting partly or entirely independently of the Member States, had a key role.

Amendments to the (renamed) EC Treaty

The **TEU** renamed the EEC Treaty the 'EC Treaty', reflecting the fact that the activities of the EEC (renamed the 'EC') now went beyond its

original economic goals.

The European Parliament's powers were enhanced, particularly through the introduction of the **co-decision procedure** allowing Parliament to veto (block) proposed legislation in certain areas. Qualified majority voting (considered later) was extended. The timetable for economic and monetary union, including a common currency, was set out. The new status of citizenship of the Union was created.

Protocols attached to the **TEU**, of which they form an integral part, included the protocols granting the UK a social policy opt-out and the UK and Denmark economic and monetary union opt-outs.

Looking for extra marks?

The **TEU** established a complex and fragmented constitutional structure, creating a Europe of 'variable geometry'. The three pillars were incorporated within the overarching new entity, the EU. The Community institutions were shared within this framework, but whilst the supranational elements of decision-making were contained entirely in the first pillar, the second and third pillar processes were intergovernmental. Complexity and fragmentation were further manifested in the opt-out protocols, giving rise to the description 'two-speed' Europe.

Treaty of Amsterdam 1997

It was intended that the Treaty of Amsterdam (which entered into force on 1 May 1999) would begin a process of restructuring the EU institutions in preparation for enlargement to 25 Member States. In fact, this was not achieved. Restructuring was put on hold, to be taken up later by the Treaty of Nice. However, this Treaty did achieve the reform of the EC legislative process, considered later.

The Treaty of Amsterdam moved provisions across the three-pillar structure of the EU. A new Title was inserted into the EC Treaty, headed 'Visas, Asylum and Immigration' and the relevant elements of the third pillar were moved here. The remaining Title in the third pillar was renamed 'Police and Judicial Co-operation in Criminal Matters'. The strictly intergovernmental character of the third pillar was being broken down, notably as the European Court of Justice and the European Parliament acquired enhanced roles under this pillar.

This transfer of provisions, together with the extension of supranational elements into previously intergovernmental areas of Union activity, seemed to herald a more integrated EU legal order. However, other provisions introducing 'closer cooperation' (later reformulated and renamed 'enhanced cooperation' by the Treaty of Nice) indicated movement the other way, towards further fragmentation. 'Closer cooperation' allowed Member States, using the institutions and mechanisms of the EC and EU, to cooperate more closely in areas falling within the general scope of the Treaties but which were not yet covered by EC legislation. This meant that some Member States could choose to cooperate, as a small group, in specific areas. In addition, further opt-outs were incorporated. Whilst following a change of government the UK's social policy opt-out was

no longer necessary and was repealed, the UK, Ireland, and Denmark secured opt-outs on border controls.

The Amsterdam Treaty renumbered all the articles of the EC Treaty and the **TEU**. It should be noted that all pre-Amsterdam texts, including pre-dating case law, use the pre-Amsterdam numbering.

Treaty of Nice 2001

The focus now on enlargement and the business left uncompleted by the Treaty of Amsterdam, the Treaty of Nice was signed in 2001. After rejection and then acceptance in Irish referenda in 2001 and 2002 respectively, this Treaty eventually entered into force on 1 February 2003. The Treaty of Nice addressed important institutional issues in preparation for the accession of ten new Member States in 2004 relating, for instance, to qualified majority voting, the co-decision procedure, and the composition of the institutions. This chapter returns to these matters presently. 'Closer cooperation' was renamed 'enhanced cooperation', the latter requiring, significantly, the participation of a minimum of only eight Member States, rather than 'a majority', as previously under the Treaty of Amsterdam.

Failed Constitutional Treaty

In a 'Declaration on the Future of the Union', the Nice summit called for a deeper and wider debate on the future of the EU. That call was echoed at the 2001 Laeken summit, which resolved to convene a

'Convention on the Future of Europe' to draft a Constitutional Treaty. Following considerable debate and amendment, the 'Treaty establishing a Constitution for Europe' was eventually signed in Rome in October 2004. This Treaty would have replaced the founding Treaties, setting out the institutional and substantive provisions of the EU in a single document. In 2007, the Constitutional Treaty was abandoned in the face of widespread criticism and opposition, including rejection in the 2005 French and Dutch public referenda.

Treaty of Lisbon 2007

Following abandonment of the Constitutional Treaty, a new amending Treaty, the Treaty of Lisbon (the 'Reform Treaty') was signed in December 2007. After a protracted ratification process, including rejection and then acceptance in Irish referenda of June 2008 and October 2009 respectively, the Treaty of Lisbon entered into force on 1 December 2009. Unlike the failed Constitutional Treaty, the Treaty of Lisbon did not replace but amended the EC Treaty and the **TEU**, though it incorporates many of the provisions of the abandoned Constitutional Treaty.

The Treaty of Lisbon renamed the EC Treaty the **'Treaty on the Functioning of the European Union' (TFEU)** and replaced all references to the 'Community' with 'Union'. The amended **TEU** and the **TFEU**, with their various protocols, now together constitute the Treaties on which the Union is founded and are the primary source of EU law. Their provisions, together with secondary legislation (regulations, directives, decisions), international agreements entered

into by the EU, and the case law of the Court of Justice of the European Union make up the body of law known as **European Union Law**.

Institutional changes

The Lisbon Treaty introduced institutional changes, such as the elevation of the European Council to a full Union institution, the creation of new positions of President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy, and the limitation of the European Parliament's maximum membership to 750. These and other changes are addressed later.

Streamlining law-making

EU law-making was streamlined through adjustments to **qualified majority voting (QMV)**, to be introduced from 2014, preventing a very small number of the larger Member States from vetoing (blocking) proposed legislation. QMV became the standard system and was extended to further policy areas including immigration, asylum, and judicial cooperation in civil matters. Unanimity is still required in areas such as tax, foreign policy, defence, and social security.

The European Council acquired new, and controversial, powers. By unanimous vote, it can propose amendments to certain parts of the EU Treaties, with adoption following ratification by Member States. Previously, such changes could only be effected by an amending Treaty. More controversially still, the Lisbon Treaty permits the

European Council, again acting unanimously, to amend the Treaties so as to allow QMV to operate in certain areas previously requiring unanimity.

Legislative procedures

The **ordinary legislative procedure** set out in **Article 294 TFEU** (formerly the co-decision procedure) involving the participation of the European Commission, the Council, and the European Parliament, became the standard legislative procedure and was extended to new areas, including the free movement of **third country nationals**, economic and monetary union, and the common agricultural policy. The other legislative procedures ('**special legislative procedures**'), requiring decisions by the Council, and in some cases involving only consultation with Parliament, continue to apply, for instance to areas of foreign and security policy and tax (see **Article 289(2) TFEU**).

Role of national parliaments

National parliaments can scrutinise and submit opinions on proposed EU legislation, allowing them to ensure that **subsidiarity** is applied. Subsidiarity requires that decisions be taken as closely as possible to the citizen and that action at EU level, rather than at national, regional, or local level, is justified. If one-third of national parliaments requested it, a proposal would have to be reviewed. If a majority opposed a proposal, with the backing of the Council or the Parliament, it would have to be abandoned.

Areas of competence

The EU has **competence** (power) to adopt policies and legislation only in the areas specified in the Treaties. As specified by the Lisbon Treaty, the EU retains exclusive competence (decisions must be made at EU, not national, level) in certain areas, for instance the customs union and the competition rules. The EU and national governments retain joint competence in other areas, for instance agriculture and consumer protection, with new joint competencies, such as aspects of the environment and public health. National governments retain some areas of exclusive competence (with the EU having competence to coordinate activity), for instance industry, culture, and tourism.

Citizens' initiative

This allows for at least one million citizens from different Member States to directly request the Commission to initiate proposals within an area of EU competence.

Looking for extra marks?

It could be argued, with justification, that the Treaty of Lisbon has enhanced democracy and transparency in the EU. The extension of co-decision and its renaming as the 'ordinary legislative procedure' represents both a significant conceptual development and a very tangible increase in the Parliament's role in law-making. The opportunity for national parliaments to submit opinions on legislative proposals has given them a new, formal

role in the legislative process. Through the citizens' initiative, Union citizens can request the Commission to initiate proposals. The listing of areas of competence clarifies the respective powers of the EU and the Member States.

External relations

With the Lisbon Treaty, the EU acquired legal personality, allowing it to conclude international agreements and join international organisations. A High Representative of the Union for Foreign Affairs and Security Policy coordinates external policy, assisted by a European External Action Service. The appointee is Vice-President of the Commission and chairs the Foreign Affairs Council.

The work of the EU in the area of external relations includes the negotiation of trade agreements, and cooperation on energy, health, and climate and environmental issues, often in the context of international organisations, for example the United Nations.

Common Foreign and Security Policy

The intergovernmental character of decision-making on Common Foreign and Security Policy remained unchanged, with all action requiring the Council's unanimous approval. However, Member States or the High Representative, not the European Commission, proposes initiatives. Subject to specific national defence policies, for instance on neutrality, Member States now have an obligation to assist should

another Member State become the victim of armed aggression. A new 'solidarity clause' requires EU/Member State joint action should a Member State become the target of a terrorist attack or suffer a natural or man-made disaster.

Area of Freedom, Security and Justice

All of the remaining **TEU** third-pillar provisions on Justice and Home Affairs were moved to the **TFEU** into a section entitled 'Area of Freedom, Security and Justice'. Here, most new legislation is adopted by the 'ordinary legislative procedure', with QMV in the Council. The Court of Justice gradually acquired jurisdiction over all matters in this area.

Justice and Home Affairs matters were extended to include common policies on asylum, immigration, and external border control, cooperation between police and judicial authorities in cross-border criminal matters, and judicial cooperation in cross-border civil matters.

Looking for extra marks?

By moving the remaining elements of Justice and Home Affairs from the **TEU** to the **TFEU**, the Treaty of Lisbon dismantled what remained of the EU's three-pillar structure. More significantly still, the changes shifted much decision-making in this area from an intergovernmental basis to a European, supranational basis. Denmark, Ireland, and the UK regarded this as an unacceptable

transfer of national sovereignty and negotiated opt-outs.

Human and fundamental rights

The Lisbon Treaty provides for the EU's accession to the **European Convention on Human Rights** and also binds the Court of Justice to interpreting EU law in accordance with it. The **TEU** was amended to recognise the EU **Charter of Fundamental Rights** (to be discussed below), giving it the same legal value as the Treaties, but with opt-outs for Poland and formerly, the UK.

Renumbering

The Lisbon Treaty renumbered the provisions of the **TEU** and the EC Treaty (now the **TFEU**). This book uses the new numbering, with reference to the old numbering only when necessary for clarity or where the context requires.

Brexit

In June 2016, the Conservative government led by Prime Minister David Cameron held a referendum on UK membership of the EU. The 'Leave' campaign was successful in achieving 51.9 per cent (17,410,742 votes) of valid votes cast whilst the 'Remain' campaign secured 48.1 per cent (16,141,241 votes). Commonly known as **Brexit** by combining the words 'Britain' and 'exit', this decision to leave the Union has enormous ramifications for both the UK and the EU. There is still

uncertainty over the future relationship between them.

The mechanism for withdrawal

Article 50 TEU provides the legal mechanism by which a Member State may withdraw from the Union. This provision provides that a Member State may leave the EU by simply giving notice to the European Council (recently referred to as 'triggering **Article 50**'). Such notice was given by Prime Minister Theresa May on 28 March 2017 following the decision in ***Miller (R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant))*** where the UK Supreme Court ruled that approval of the UK Parliament was required although the approval of the devolved parliaments was not. According to **Article 50(3)** the Treaties would no longer apply to the UK from the date of entry into force of a withdrawal agreement or failing that, two years after notification. There was, however, scope to extend this period if the European Council, in agreement with the UK, unanimously decided to do so.

Article 50 operates on a two-stage basis: the first stage concerns the arrangements for withdrawal whilst the second concerns the arrangements for the future relationship between the EU and the withdrawing state. On 15 December 2017, EU leaders agreed to move to the second phase of negotiations in accordance with the provisions in **Article 218 TFEU**.

The Brexit process was extended several times, but as the newly elected Prime Minister, Boris Johnson reaffirmed his commitment to

complete the process by 31 January 2020.

After 23.00 GMT on 31 January 2020, the UK formally left the EU with a transition period running until 1 January 2021 to enable the UK and the EU to negotiate additional arrangements. During this transitional period, the existing rules on trade, travel, and business for the UK and EU continued to apply with an unchanged trading relationship as part of both the customs union and the single market. New rules took effect from 1 January 2021.

The Withdrawal Agreement was negotiated between the EU and the UK under **Article 50 TEU**, whilst the UK's future trading relationship with the EU was negotiated under a separate agreement; the Trade and Cooperation Agreement (TCA). The Withdrawal Agreement is part of the EU legal order and the Court of Justice has a significant ongoing role in relation to its interpretation and implementation. In contrast, the TCA is a stand-alone international agreement, with no role allocated to the Court of Justice.

The Withdrawal Agreement provides for the key issues of EU citizens' rights already living and working in the UK, financial contribution by the UK and the Northern Ireland Protocol (intended to avoid a hard border on the island of Ireland). It also covers a range of other matters such as intellectual property rights and ongoing judicial cooperation on civil and commercial matters. The Withdrawal Agreement also makes provision for institutional arrangements specific to the Agreement, including the establishment of a Joint Committee responsible for the implementation and application of the Agreement, and provisions on disputes relating to the Agreement itself.

The TCA is usually discussed in relation to trade in goods and services and we will come back to this in Chapter 5. However, the TCA also covers a broad range of additional areas in the EU's interest, such as competition, tax transparency, air and road transport, energy and sustainability, fisheries, data protection, and social security coordination.

Continuing relevance of studying EU law following Brexit

It is perhaps unsurprising that given the outcome of the referendum and the UK subsequently leaving the EU, some law students have queried the need to study EU law or, indeed, the relevance of doing so. It is argued that at this time it is more important than ever to understand EU law and how the EU's structure, institutional machinery, and trading relationship relate to those set out as alternatives. There is a view that the referendum campaigns were fought with inconsistencies and untruths on both sides of the debate. Only by understanding EU law can you challenge such arguments and recognise the political and legal issues that the outcome of the referendum raises.

Whilst it is planned for the UK to 'amend, repeal, and improve' legislation as necessary, this will take a significant period of time and an understanding of the development of that law and its application and meaning is crucial. Indeed, whatever future relationship the UK has with Europe, trade with the EU will inevitably remain hugely important to the UK as its largest trading partner.

As such, the demand for those with a thorough understanding of EU law is greater than ever and it is arguably a fascinating time to be a student of EU law.

Institutions

According to **Article 13 TEU**, the official EU institutions are: the European Council; the Council; the European Commission; the European Parliament; the Court of Justice of the European Union; the European Central Bank; and the Court of Auditors. Other bodies include: the Committee of the Regions; the Economic and Social Committee; and the Committee of Permanent Representatives.

European Council (Articles 15 TEU; 235–236 TFEU)

The European Council, which has a broad non-legislative role, consulting on topical political issues and defining general policy direction for the EU, comprises the heads of state or government of the Member States. Given its composition, it has had a growing and significant influence in a variety of high-profile areas and has been referred to as the 'supreme political authority'. Its meetings are known as 'European summits'.

The Treaty of Lisbon created the new role of President of the European Council. Elected by the European Council by qualified majority for two-and-a-half years, the President, who is not allowed to hold national office whilst holding the Presidency, ensures the preparation

and continuity of the European Council's work, in cooperation with the President of the Commission, and reports to the European Parliament. European Council meetings are held four times a year. The President of the Commission is a full member of the European Council (**Article 15 TEU**).

The new role of High Representative of the Union for Foreign Affairs and Security Policy was also created. The post-holder, elected by the European Council by qualified majority, conducts the EU's Common Foreign and Security Policy (**Article 18 TEU**).

Council (Articles 16 TEU; 237–243 TFEU)

Presidency

The Presidency of the Council is held by each Member State, in rotation, for six months. Before taking office, a Member State sets the programme for its Presidency.

Composition

The Council comprises of ministers of the Member States, its membership changing according to the matter under discussion. So, for instance, if agricultural matters are under consideration, the Council consists of national Ministers of Agriculture. The General Affairs Council ensures consistency in the work of the different

Council configurations. Each configuration is chaired by the relevant minister of the Member State holding the Presidency, except for the Foreign Affairs Council which, under Treaty of Lisbon amendments, is chaired by the High Representative of the Union for Foreign Affairs and Security Policy. Council members represent national interests. In contrast, as noted later, members of the Commission are required to act independently of national governments.

Powers

The Council has final power of decision on the adoption of secondary legislation, exercised jointly with the European Parliament where the ordinary legislative procedure applies. The Council can generally act only on a Commission proposal but can require the Commission to frame draft legislation in any specific area. The Council can delegate power to the Commission to enact regulations. Its work is prepared by the Committee of Permanent Representatives (COREPER), which considers legislative proposals drafted by the Commission and helps set the agenda for Council meetings. The Council Secretariat provides administrative support.

Voting

Voting in the Council is by unanimity, simple majority, or qualified majority, depending on the Treaty requirement for the particular matter. When unanimity is required, it can be difficult to press ahead with legislation, as any one state has power of veto (to block the legislation). For that reason, the amending Treaties have continued to

extend majority voting to more areas of EU activity.

The Treaty of Lisbon retained unanimous voting for certain areas, such as common foreign, security and defence policy, taxation, and social security. Simple majority voting is rarely used, but Treaty amendments have gradually extended the use of QMV. QMV is required for the adoption of legislation in many areas, including most internal market measures and other areas such as the environment, agriculture, competition, consumer protection, asylum, immigration, and judicial cooperation in civil and criminal matters.

QMV operated as a system of weighted votes. Under Lisbon Treaty amendments, a qualified majority (known also as a 'double majority' under a system of double majority voting (DMV)) is reached when at least 55 per cent of Member States agree to a proposal (currently 15 out of 27 Member States) and these states represent at least 65 per cent of the EU population (72 per cent where the proposal does not emanate from the Commission or the High Representative). A blocking minority must include at least four Member States, failing which a qualified majority will be deemed attained.

I realise that this is going beyond the permitted amendments, but I sent this amendment through before the deadline and this hasn't been implemented.

Looking for extra marks?

Currently under QMV the distribution of votes is based loosely on Member States' population size. Over the years the definition of

qualified majority and the allocation of votes have been hotly disputed, the smaller states fearing domination by the larger states and the latter often claiming that the smaller states were over-represented.

QMV creates a particular dynamic in Council decision-making. Ministers representing different national interests across different policy areas frequently seek to 'trade' their agreement in one area in return for support from other Member States in other areas.

European Commission (Articles 17 TEU; 244–250 TFEU)

Commissioners must be completely independent, neither seeking nor taking instructions from their governments, and Member States must not seek to influence them.

Appointment and removal

Commissioners are nominated by the President-elect of the Commission and the European Council followed by approval, as a body, by the European Parliament. They are appointed for a renewable five-year term. Parliament can remove the entire Commission by vote of censure but has no power to remove individual Commissioners. The Court of Justice may, on application by the Council or Commission, compulsorily retire a Commissioner for failure to perform his/her

duties or for serious misconduct. Additionally, the President of the Commission can require a Commissioner to resign. The President is nominated by the European Council and elected by Parliament.

Composition

There is one Commissioner for each of the Member States. Following Lisbon Treaty amendments, the number of Commissioners would equal the number of Member States until 2014, and then comprise two-thirds the number of Member States, unless the European Council were to decide otherwise (**Article 17 TFEU**). In negotiations following the Irish rejection of the Lisbon Treaty in 2008, the European Council stated that it would take the necessary decision to maintain the current composition of one Commissioner per Member State.

Commissioners' portfolios are allocated by the President and cover policy areas such as trade, competition, environment, and fisheries. The Commission is supported by a staff of around 25,000, based largely in Brussels, and organised into administrative departments known as Directorates-General, for instance, the Directorate-General for Competition, each headed by a Director-General.

Role

The Commission acts as 'guardian' of EU law, bringing actions against Member States or individuals in breach. It formulates policy, proposes legislation, partakes in discussions on the framing of legislation by the

Council and Parliament, and performs an executive role, implementing the Council's policy decisions, under delegated powers. The Commission also manages the EU's budget. The Treaty of Lisbon made no significant changes to the Commission's functions.

European Parliament (Articles 14 TEU; 223–234 TFEU)

Membership and functioning

The European Parliament has its seat in Strasbourg and a secretariat in Luxembourg, with certain sessions and committee meetings taking place in Brussels. Members of the European Parliament (MEPs) are directly elected in the Member States. The **TEU** fixed the maximum number of MEPs at 750 plus the President, and following the May 2019 elections, 751 MEPs were appointed.

The European Council, with the Parliament's consent, will determine the number of MEPs and the seats allocated to Member States, on the basis of population size and 'degressive proportionality' (MEPs representing the larger Member States by population will represent more people than the smaller states), none having more than 96 or less than six MEPs (**Article 14 TEU**).

Following the departure of the UK from the EU, from 1 February 2020, the European Parliament has 705 seats, with 27 of the pre-Brexit UK's 73 seats having been redistributed to other countries, whilst the remaining 46 are to be kept in reserve for potential future

enlargements.

Powers

Originally, Parliament's participation in the legislative process was purely advisory and consultative. With the amending Treaties, Parliament's powers increased. Notably, where the ordinary legislative procedure applies as is now the case in many policy areas, Parliament's approval must be obtained before legislation can be adopted.

Parliament exerts control over the executive through its right to approve the Commission and to dismiss the entire Commission. It also has powers of scrutiny, including the ability to question Commissioners orally or in writing, and the power to reject the annual budget. The Treaty of Lisbon increased Parliament's powers still further by the extension of co-decision (now ordinary legislative procedure) to more policy areas.

Revision tip

Think about the composition and powers of the Council, Commission, and Parliament and the extent to which it can be argued that a democratic deficit exists.

Court of Justice of the European Union

(Articles 19 TEU; 251–257 TFEU)

The Court of Justice, the General Court (formerly known as the Court of First Instance), and the specialised courts (formerly the judicial panels) are now collectively referred to as the Court of Justice of the European Union (**Article 19 TEU**).

Court of Justice

The Court of Justice's task is to ensure that, in the interpretation and application of the Treaties, the law is observed. It has jurisdiction to give **preliminary rulings** on the interpretation of EU law under **Article 267 TFEU** and to review the legality of acts of the institutions under **Article 263 TFEU**. The Court of Justice is not bound by its own decisions, but nevertheless seeks to maintain consistency in its judgments.

The Court consists of one judge from each Member State and 11 Advocates-General (A-Gs), chosen 'by common accord' of Member State governments from persons whose independence is beyond doubt and who possess the qualifications required for the highest judicial office in their respective jurisdictions. Appointments, which are scrutinised by a panel established under the Lisbon Treaty, including former judges of the Court of Justice and judges of national supreme courts, are for six years and are staggered to provide partial replacement every three years. A-Gs assist the Court by giving reasoned opinions. Although these do not bind the Court and are not

always followed, they carry considerable weight. Where no new points of law are raised, the Court's Statute permits it to reach a determination without an A-G's submission.

The Court sits in plenary session for cases of exceptional importance; as a Grand Chamber of 13 judges when a Member State or institution that is a party to the proceedings so requests; and, in the majority of cases, in chambers of three or five judges.

Looking for extra marks?

The Court of Justice has played a key role in the development of EU law, using its jurisdiction creatively in ground-breaking decisions, for instance in establishing the principles of direct effect and state liability, upholding the fundamental principles of the free market and furthering the rights of individuals.

General Court

The Court of First Instance (now known as the General Court) was set up under the Single European Act 1986 to reduce the Court of Justice's workload. Since then, its jurisdiction has been extended to include most **direct actions** (annulment actions, actions for failure to act, damages actions), the power to give preliminary rulings, and to hear appeals from the judicial panels. The General Court comprises at least one judge from each Member State and sits as a full court or in smaller

chambers. One judge may act as an A-G in complex cases.

Specialised courts

Judicial panels, now known as specialised courts, were established by the Treaty of Nice. They may be set up by the European Parliament and Council to hear certain classes of action at first instance and will be attached to the General Court. Appeal lies to the General Court and, if there is a serious risk to the consistency of EU law, the Court of Justice may exceptionally review the General Court's decision. The only specialised court to have been set up so far was the Civil Service Tribunal which dealt with cases involving the EU institutions and employees between 2005 and 2016. In 2016, this court was dissolved and its responsibilities were transferred back to the General Court.

Court of Auditors

This body performs budgetary functions, auditing expenditure, and producing an annual report for the European Parliament.

Economic and Social Committee and Committee of the Regions

These are advisory bodies that must be consulted on proposed legislation concerning matters within their respective remits.

Sources of law

Acquis communautaire

This term is applied to the entire body of EU law, including all the forms of law described in this section.

Treaties

Following the entry into force of the Treaty of Lisbon, the **TEU** and the **TFEU** together constitute the Treaties on which the Union is founded and are the primary source of EU law.

Various protocols and declarations are annexed to the Treaties. Protocols are integral to the Treaties and are therefore binding. By contrast, declarations are not binding but may inform or assist the interpretation of EU law.

Secondary legislation

The EU institutions enact secondary legislation, **regulations**, **directives**, and **decisions**, under powers conferred by the Treaty. These acts of the institutions supplement Treaty provisions, many of

which are framed as broad policies or principles. Following Lisbon Treaty amendments, a distinction is made between 'legislative acts' (adopted under legislative procedures) and 'non-legislative acts' (adopted by the Commission under delegated powers) (**Articles 289–290 TFEU**).

Regulations

Regulations are detailed forms of secondary legislation. A regulation is defined in **Article 288 TFEU** as having 'general application … binding in its entirety and directly applicable in all Member States'. This means that regulations apply to all governments, institutions, and individuals without the need for any national implementing legislation.

Directives

Article 288 TFEU describes a directive as 'binding as to the result to be achieved, upon each Member State to which it is addressed but leaving to the national authorities the choice of form and methods'. This means that Member States are required to implement directives, which are set out in general terms, through the adoption of detailed measures, normally legislation. Directives specify the deadline by which implementation must be completed.

Decisions

These are addressed to Member States or to specified individuals, for

instance Commission decisions addressed to businesses regarding breaches of competition law.

Recommendations and opinions

Unlike regulations, directives, and decisions, recommendations and opinions are not legally binding.

Case law

The Court of Justice's decisions are binding on Member States, including national courts. As will be noted throughout this book, many of the Court's decisions concern the interpretation of the Treaties and secondary legislation. In formulating its judgments, the Court draws upon general principles such as human or fundamental rights, equality, **proportionality**, and **legal certainty**. Examples of how the Court applies these general principles will be given when discussing the substantive law in later Chapters.

General principles of law

Human and fundamental rights

Whilst neither of the founding Treaties of the European Communities made reference to the protection of human and fundamental rights, the Court of Justice in ***Stauder v City of Ulm, Sozialamt*** **(Case**

29/69) recognised such rights as part of the general principles of EU law based upon common constitutional traditions. As case law developed in this area, in December 2000 the European Parliament drafted the **Charter of Fundamental Rights of the European Union**, although the Charter was persuasive rather than legally binding. It was adopted at Strasbourg in 2007 and given legal effect by the Member States under the Lisbon Treaty, holding the same value as the Treaties (**Article 6(1) TEU**). However, under **Protocol No 30**, Poland enjoys (as did the UK whilst still a Member State) 'opt-outs' ensuring that the Charter does not create additional rights above those already provided for in national law.

In addition, **Article 6(3) TEU** recognises that the fundamental rights as guaranteed by the **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)** shall constitute general principles of Union law with **Article 6(2)** providing that the EU shall accede to the **ECHR**. However, the Court of Justice (controversially) ruled in December 2014 (Opinion 2/13, 18 December 2014) that the Draft Accession Agreement of the European Union to the **European Convention on Human Rights** did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction. At the time of writing, a new accession agreement is yet to be agreed but negotiations were relaunched in 2021 and are progressing.

Equality

The principle of equality or non-discrimination permeates EU law and

is set out, for instance, in Treaty provisions relating to equal pay for men and women in employment and non-discrimination on grounds of nationality.

Proportionality

This general principle requires that actions taken or measures adopted, whether by Member States or the EU institutions, go no further than is necessary to achieve their objective.

Legal certainty, non-retroactivity, and legitimate expectation

The concept of legal certainty incorporates the requirement that the distinction between what is lawful and unlawful should be reasonably clear. Within this general principle, **non-retroactivity** dictates that the law should not impose penalties retroactively; the principle of **legitimate expectation** requires that law or action must not breach the legitimate expectations of those who are affected by it.

International agreements entered into by the EU

The EU is legally entitled to enter into international agreements on all the policy areas it has competence, insofar as it necessary to achieve results set out in EU policies. Examples include trade agreements and

association agreements with third countries. These also form part of the *acquis communautaire*.

Law-making process

Legal base

Secondary legislation is adopted by the EU institutions under Treaty powers. The **legal base** of a particular legislative measure is the Treaty article conferring the power to legislate in the relevant policy area. The Treaty article forming the legal base also sets out the procedure and the voting requirements in the Council: unanimity, simple majority, or qualified majority, for the adoption of the legislation.

Legislative procedures

Ordinary legislative procedure (Articles 289, 294 TFEU)

As mentioned above, the ordinary legislative procedure was first introduced as the co-decision procedure by the **TEU** and entails two readings of proposed legislation. At first reading, Parliament delivers its opinion to the Council, with any suggested amendments. If these are approved, the measure may be adopted. If not, at second reading, Parliament considers the Council's common position, including any

proposed Council amendments which must have been adopted unanimously. If Parliament rejects the common position, the measure is not adopted. If it proposes further amendments, these are referred to the Council and Commission, which deliver their opinion. If the Council approves all the amendments, the measure can be adopted. If not, a meeting of the Conciliation Committee, comprising MEPs and Council members or their representatives, is convened. If a joint text is approved, this can be adopted. Otherwise, the measure is not adopted.

The vast majority of secondary legislation is now adopted by the ordinary legislative procedure.

Special legislative procedure (Article 289(2) TFEU)

The special legislative procedure applies in respect of specified areas provided for by the Treaties, thus, the adoption of a regulation, directive, or decision by the Parliament with the participation of the Council (consent) or by the Council with the *participation of the Parliament* (consultation). The meaning can only really be ascertained by looking at the provision in question.

Revision tip

Ensure that you can trace the development of the European Parliament's increasing influence in the legislative process.

EXAM QUESTION

Essay question

The EU has been criticised as ‘undemocratic’. Critically evaluate the accuracy of this assessment by reference to the composition of the EU institutions and their respective powers in relation to law-making within the EU.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

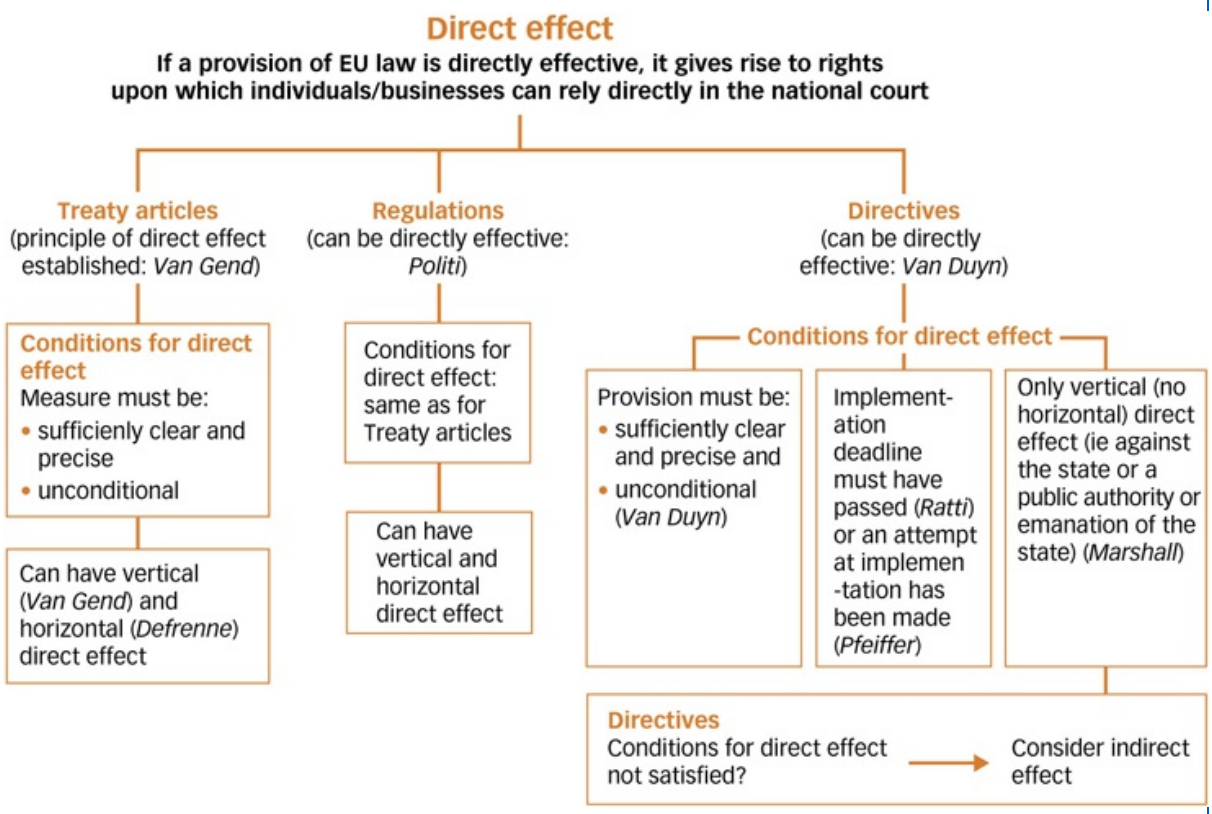
2

EU law in national courts

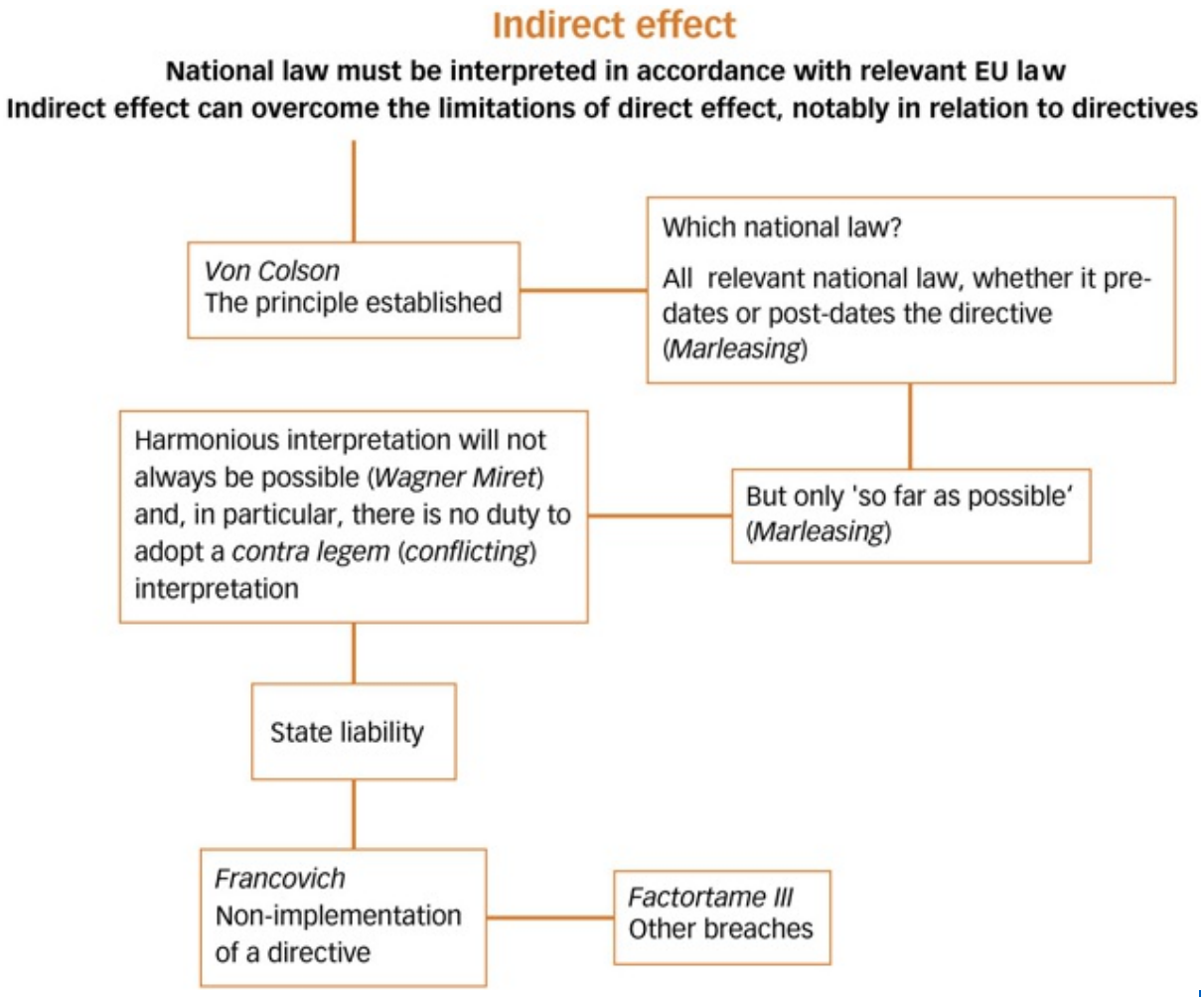
The assessment

As EU law provides rights and imposes obligations on Member States and individuals and businesses, the EU legal system incorporates various methods to promote compliance. Supremacy, direct effect, indirect effect, and state liability are key concepts within the EU legal order. It would be surprising to encounter an EU law assessment that did not include at least one question in this area. Problem questions typically concern individuals or businesses who are seeking to rely on EU law in a national court because it gives them better rights than any national provision. Questions may also require application of the principle of state liability, concerning damages claims by individuals against a Member State for non-implementation of a directive or other breaches of EU law. Due to the particular difficulties surrounding the direct effect of directives, these are likely to figure prominently in assessment questions, as indeed they do in the case law of both the Court of Justice and national courts. Essay questions may ask you to analyse the development of the doctrines of supremacy, direct effect, indirect effect and state liability together with the significance of the Court of Justice's activism in this area.

Overview: direct and indirect effect



Overview: direct and indirect effect



Key facts

- **Since EU law forms part of the national legal system of each Member State, rights and obligations arising under such provisions are most commonly enforced in national courts.**
- **The doctrine of supremacy prescribes that EU law takes precedence over conflicting provisions of national law.**

- **If a provision of EU law is directly effective, it gives rise to rights upon which individuals and businesses can rely directly in the relevant national court.**
- **Treaty articles and regulations are capable of direct effect both vertically (against the state and emanations of the state) and horizontally (against individuals and non-public bodies) and are directly effective if their terms are sufficiently clear, precise, and unconditional.**
- **Directives are capable of direct effect, but only vertically. To be directly effective their terms must be sufficiently clear, precise, and unconditional and the implementation deadline must have passed.**
- **If an EU measure is not directly effective, a claimant may be able to rely on it through the application of indirect effect, which requires national courts to interpret national law in accordance with relevant EU law.**
- **State liability gives rise to a right to damages where an individual has suffered loss because a Member State has failed to implement a directive or has committed other breaches of EU law.**

‘EU law’

Treaty provisions, secondary legislation (regulations, directives, decisions), international agreements made by the EU and the case law of the Court of Justice make up the body of law known as ‘EU law’.

Revision tip

Remember: with the entry into force of the Lisbon Treaty, EU law originates in the **TEU** and the **TFEU**. See Chapter 1 for a timeline of the Treaties.

Sovereignty and the supremacy of EU law

Sovereignty

Originally, it was thought that the founding Treaties, like other international treaties, were binding on Member States with respect to international obligations, but allowed them to exercise **national sovereignty** internally, determining the domestic legal effects of their international obligations.

Early in the European Community's development, the Court of Justice overturned this view. In ***Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62)** the Court declared that 'The Community constitutes a new legal order in international law, for whose benefit the states have limited their sovereign rights, albeit within limited fields'. In ***Costa v ENEL* (Case 6/64)** the Court reiterated this statement: 'By contrast with ordinary international Treaties, the EEC Treaty has created its own legal system which became an integral part of the legal systems of the Member States'. By creating the Community, Member States had limited their sovereign rights and, within the areas covered by the Treaties, transferred powers to the Community. A consequence of the sovereignty of the Community (now EU) legal order is the **supremacy** of EU law.

Doctrine of supremacy

Until recently, there was no express Treaty reference to supremacy. The Court of Justice has developed this doctrine, holding repeatedly that supremacy is implied in the Treaties. **Article 4(3) TEU** requires Member States to take all measures to ensure fulfilment of any Treaty obligations and to abstain from measures that could jeopardise Treaty objectives. Declaration 17 attached to the Lisbon Treaty now confirms this doctrine but expresses it to be subject to conditions laid down in case law. Supremacy requires that EU law takes precedence over conflicting provisions of national law.

Costa v ENEL (Case 6/64) [1964] ECR 585

Facts: The Court of Justice considered whether national legislation post-dating the relevant Treaty and conflicting with it should take precedence.

Held: The Court affirmed that, by establishing the Community, Member States accepted a permanent limitation on their sovereign rights, creating a body of law binding their nationals and themselves. The integration of [EU] law into national law makes it impossible for subsequent national law to take precedence over [EU] law.

The Court went further in ***Internationale Handelsgesellschaft GmbH* (Case 11/70)**, holding that [EU] law takes precedence over all

forms of national law, including national constitutional law. As a consequence, national courts must set aside national provisions that conflict with [EU] law.

Amministrazione delle Finanze dello Stato v Simmenthal (Case 106/77) [1978] ECR 629

Facts: An Italian magistrates' court asked whether it should disapply national legislation which the Court of Justice had already found to violate [EU] law. At that time, only the Italian Constitutional Court could declare national provisions invalid.

Held: The Court of Justice held that national courts must apply [EU] law in its entirety. Any conflicting national law must be set aside, whether prior or subsequent to the [EU] rule.

National procedural rules must not interfere with an EU law right, even where that right has not been definitively established.

R v Secretary of State for Transport, ex parte Factortame Ltd (II) (Case 213/89) [1990] ECR I-2433

Facts: A claim by Spanish fishermen that the UK **Merchant Shipping Act 1988** breached [EU] law was the subject of a reference to the Court of Justice (***Factortame I***). In ***Factortame II*** the applicants sought an interim injunction in the English court setting aside the relevant provisions, pending the outcome of

Factortame I. Under the UK doctrine of **parliamentary sovereignty**, the English court had no power to suspend an Act of Parliament.

Held: The Court of Justice stated that the full effectiveness of [EU] law would be impaired if a national rule could prevent the grant of interim relief in relation to [EU] rights. The national court must set aside that rule.

Incorporation of EU law

The national incorporation of EU law depends broadly on whether a Member State embraces a monist or dualist view of the relationship between international and national law. In **monist systems**, such as the French system, EU law becomes binding from ratification, with no need for incorporating measures. In **dualist systems**, international law is not binding internally until it is incorporated by domestic statute. In the UK's dualist system EU law was incorporated by the **European Communities Act (ECA) 1972**. **Section 2(1)** provided:

> All such rights, powers, liabilities, obligations and restrictions … created or arising by or under the Treaties … are without further enactment to be given legal effect …

National recognition of supremacy

Supremacy would be meaningless without acceptance by national courts. In general, the supremacy of EU law is now recognised across

the Member States. In the UK, the relevant provision was **s 2(4) of the ECA 1972**:

> … any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions of this section …

The supremacy debate in the UK centred around two different views of **s 2(4)**. Were the courts simply required to construe national law, so far as possible, to be consistent with EU law, or to give priority to EU law in cases of conflict? Lord Bridge's view in ***Factortame II*** represented the pre-Brexit position in the UK:

> Under the terms of the 1972 Act it has always been clear that it is the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of [EU] law …

Through the doctrines of direct effect, indirect effect, and state liability, the Court of Justice has created a framework of principles through which supremacy is accorded to EU law within the current Member States.

Implications of the UK's departure from the EU ('Brexit')

The UK's relationship with the EU has changed fundamentally. As part of the arrangements for the cessation of the UK's membership of the EU set out in the Withdrawal Agreement, the **European Union (Withdrawal) Act 2018** (the **2018 Act**) repealed the **European Communities Act 1972**, removing the basis for EU law having effect in the UK, but preserving most EU law as 'retained EU law' (**sections**

2–7). It should be noted that **section 5(1)** provides that the principle of the supremacy of EU law does not apply to any enactment made on or after exit day.

Section 6 of the **2018 Act** (and **the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020** (the **2020 Regulations**)) set out rules for the UK courts to follow when dealing with retained EU law. The lower courts of the UK, that is any courts inferior to the Court of Appeal must follow the pre-Brexit case law of the Court of Justice until one of the higher courts departs from such decisions or until UK legislation amends that retained EU law. Conversely, higher courts of the UK are always free to depart from retained EU law, whilst following the test that the Supreme Court adopts when deciding whether to depart from its own case law.

The future trading relationship between the EU and the UK is to be governed by another treaty in the form of the Trade and Cooperation Agreement (already referred to in Chapter 1).

Further implications of 'Brexit' will be discussed below and in subsequent Chapters where relevant.

Direct effect

Distinguishing ‘direct applicability’ and ‘direct effect’

Directly applicable provisions of EU law are part of national law and automatically binding, without further enactment. Regulations are directly applicable and of general application (**Article 288 TFEU**). They are automatically incorporated into the national legal order. Similarly, Treaty provisions are directly applicable. By contrast, directives are not directly applicable, since they require implementation into national law (**Article 288 TFEU**).

If a provision of EU law has **direct effect**, individuals (natural persons and businesses) can enforce it in a national court.

Revision tip

Always explain the meaning of ‘direct effect’ rather than just referring to this term. You could use the definition mentioned above.

Directly applicable EU law is not necessarily directly effective, but

provisions that are not directly applicable (e.g. provisions of directives) are capable of direct effect. Whilst any provision of EU law is capable of direct effect, this is not automatic. Direct effect is subject to the conditions laid down by the Court of Justice.

The principle of direct effect is not contained in the Treaties but has been developed by the Court of Justice. Treaty articles, regulations, decisions, and directives are capable of direct effect.

Looking for extra marks?

Ensure that you develop an understanding of the significance of direct effect for individuals and businesses. Direct effect is especially important where a Member State has failed to meet its obligation to implement an EU measure or where the implementation is partial or defective. This relates, in particular, to directives.

Treaty articles

Creation of the principle of direct effect

I n ***Van Gend,*** the Court of Justice created the principle of direct effect and held that Treaty articles are capable of direct effect.

Van Gend en Loos v Administratie der Belastingen

(Case 26/62) [1963] ECR 1

Facts: Van Gend brought proceedings in the Dutch court seeking refund of a customs duty charged on its import of chemicals from Germany into the Netherlands, claiming that the duty infringed an EC Treaty provision (now **Article 30 TFEU**) concerning the free movement of goods. The national court asked the Court of Justice whether Member States' nationals may, on the basis of a Treaty article, enforce rights before the national court. It was argued that claims concerning Member States' infringements of [EU] law could be brought only in enforcement proceedings by the Commission or other Member States, in the Court of Justice.

Held: The Court disagreed, holding that the Treaty is not only an agreement creating obligations between Member States. EU law imposes obligations upon individuals and confers on them legal rights. [**Article 30**] was capable of creating 'direct effects in the legal relations between the Member States and their citizens'. Direct effect not only provided a mechanism for the enforcement of individuals' [EU] rights but also an additional means of supervision of Member States' compliance with [EU] obligations.

Held: The Court declared that [**Article 30 TFEU**] contained a clear and unconditional prohibition whose implementation required no legislative intervention by Member States. The fact that Member States were the subject of this negative obligation did not mean that individuals could not benefit from it. It followed from the spirit, general scheme, and wording of the Treaty that [**Article 30**] was directly effective, creating individual rights which

national courts must protect.

Looking for extra marks?

Consider why the doctrines of direct effect and supremacy are of great importance. Together, they require national courts to apply EU law for the benefit of individuals and businesses (provided the necessary conditions are met), in priority over any conflicting provisions of national law. National courts must disapply national measures that conflict with directly effective provisions of EU law.

Conditions for direct effect

In ***Van Gend***, the Court of Justice then moved on to consider the direct effect of the specific Treaty article in question.

This statement of the defining characteristics of directly effective Treaty articles was applied by the Court of Justice in numerous subsequent decisions. These provided an early formulation of the conditions to be satisfied: the measure must be sufficiently clear and precise and unconditional and its implementation must not be dependent upon any implementing measure. In its developing case law, the Court of Justice applied the conditions increasingly loosely, relaxing and eventually disregarding the third condition. In ***Defrenne***, for instance, it was argued that the former Article 119 EC (now **Article 157 TFEU**) could not be directly effective because it

could not be fully implemented without [EU] and national measures defining its scope.

Defrenne v Sabena (Case 43/75) [1976] ECR 455

Facts: Defrenne, who had worked as an air hostess for the Belgian airline Sabena, sought to rely on [**Article 157**] in an equal pay claim against her former employer. This provision requires Member States to uphold the principle of equal pay for equal work for men and women.

Held: The Court of Justice recognised that the complete implementation of this aim, in relation to both direct and indirect discrimination, may involve the adoption of national or [EU] measures providing elaboration of the criteria to be applied. Nonetheless, the provision was held capable of judicial enforcement in cases of direct discrimination.

Accordingly, to be directly effective, a Treaty article must be sufficiently clear, precise, and unconditional.

Vertical and horizontal direct effect of Treaty provisions

In ***Van Gend,*** the Court of Justice held that Treaty provisions can be invoked by individuals against the state, in other words they can have **vertical direct effect**. However, could Treaty articles be invoked

horizontally, by an individual against another individual?

This question, unresolved in ***Van Gend***, was addressed in ***Defrenne***. The Court of Justice's finding was unequivocal: '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 contracts between individuals'. The principle that Treaty provisions are capable of **horizontal direct effect** (as well as vertical direct effect) was established.

Since ***Van Gend*** and ***Defrenne*** numerous Treaty articles have been held to be vertically and horizontally directly effective, including provisions establishing the fundamental principles of the EU internal market. These are explored later: **Articles 34, 35 TFEU** (free movement of goods); **Articles 45, 49, 56 TFEU** (free movement of workers and rights of establishment and to provide services); **Articles 101, 102 TFEU** (competition law).

Revision tip

Always explain the meaning of 'vertical' and 'horizontal' direct effect instead of just stating these terms. Refer to ***Van Gend*** and ***Defrenne*** and other relevant case law.

Regulations

Article 288 TFEU sets out the defining characteristics of **EU regulations**: 'A regulation shall have general application. It shall be binding in its entirety and directly applicable.' As already indicated, 'direct applicability' denotes the automatic incorporation of a measure into the national system, without the need for further enactment. Additionally, regulations are capable of vertical and horizontal direct effect, subject to the same conditions as are applied to Treaty articles (***Politi v Italian Ministry of Finance* (Case 43/71)**).

Directives

Direct effect

Unlike Treaty articles and regulations, **directives** are not directly applicable, but require **implementation** by Member States. This means that they must be incorporated into national law by the deadline set out in the directive itself. Originally, it was believed that directives could not be directly effective, since 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' (**Article 288 TFEU**).

Looking for extra marks?

Article 288 TFEU appears to suggest that directives are not intended to operate as law within national legal systems, since that is the role envisaged for the relevant national implementing

measures. Directives are addressed to Member States and seem not to affect individuals directly. They were widely seen as giving Member States broad discretion in implementation, being binding only as to the result to be achieved and insufficiently precise to fulfil the ***Van Gend*** criteria. Despite these factors, the Court of Justice has confirmed that directives can have direct effect.

The Court of Justice hinted in ***Grad v Finanzamt Traunstein* (Case 9/70)** and confirmed in ***Van Duyn*** that directives can have direct effect.

Van Duyn v Home Office (Case 41/74) [1974] ECR 1337

Facts: Van Duyn, a Dutch national, challenged the UK immigration authorities' decision to refuse her entry on public policy grounds. She wished to come to the UK to work for the Church of Scientology, which the UK regarded as socially harmful. Under Directive 64/221 (now incorporated into **Directive 2004/38** to be discussed in Chapter 6) any restriction of free movement on public policy grounds must be based exclusively on the individual's personal conduct. Van Duyn argued that her membership of the Church of Scientology did not constitute 'personal conduct' and, since the UK had not implemented Directive 64/221, she sought to rely on this directive in the English court.

Held: The Court of Justice stated that Van Duyn could rely on the

Directive before the national court, thus establishing the principle that directives are capable of direct effect.

Van Duyn established that, to be directly effective, directives must be sufficiently clear, precise, and unconditional. Later, in ***Pubblico Ministero v Ratti* (Case 148/78)**, one further condition was applied. A Member State's obligation to implement becomes absolute only when the time limit for implementation (as specified in the relevant directive) has expired. A directive cannot be directly effective until its implementation deadline has passed or an attempt to implement has been made by the Member State. The latter point was implicit from the Court's judgment in ***Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases 397/01 and 403/01)**.

Looking for extra marks?

It would be unfair to permit a directive to be invoked against a Member State until its obligation to implement had become absolute. However, it would equally be unfair to allow a Member State to rely on its failure to implement a directive or defective implementation to escape obligations arising under it.

Vertical and horizontal direct effect

The Court of Justice in ***Van Duyn***, concerning a claim against the UK

authorities, confirmed that directives can have vertical direct effect, but the question remained as to their potential horizontal direct effect. Can an individual/business rely on a directive against another individual/business? ***Marshall*** provided the answer.

Marshall v Southampton & South West Hampshire Area Health Authority (Case 152/84) [1986] ECR 723

Facts: Marshall sought to rely on the Equal Treatment Directive 76/207 to challenge, as discriminatory, her employer's compulsory retirement policy. Although her claim was vertical, since the health authority was held to be part of the state (though it acted here in the capacity of an employer), the Court of Justice considered the issue of horizontal direct effect of directives.

Held: Directives can only be invoked vertically, against the state or a public authority.

The Court of Justice has been firm in reiterating this finding in later cases, notably in ***Faccini Dori v Recreb Srl* (Case C-91/92)** discussed further below.

Revision tip

When considering the direct effect of directives, explain and discuss the conditions, citing the authorities. In problem questions, apply the conditions to the facts.

Looking for extra marks?

The Court's refusal to permit directives to be invoked horizontally is frequently criticised as anomalous and unfair. In an employment context, for instance, individuals employed by the state or a public body can invoke rights under a directive against their employer, whilst those working for private employers cannot. The reason for this seemingly harsh stance is discussed below.

The Court's justification for this position is placed within the context of the EU legal order. This requires rights under directives to be enshrined in national implementing measures, upon which claimants can rely in national courts. Moreover, only Member States, not individuals, should be held accountable for a state's failure to implement directives.

Werner Mangold v Rüdiger Helm **(Case C-144/04)** is seen to complicate things in this regard. In this case, the Court appeared to provide for the horizontal direct effect of a directive (**2000/78**) even before the expiration of the transposition period. However, closer consideration of the circumstances reveals that the horizontal direct effect allowed was based upon the underlying fundamental principles of EU law (non-discrimination). Whilst questions remain, it is clear from ***Mangold*** and subsequent case law (***Seda Kücükdeveci v Swedex GmbH & Co KG*** **(Case C-555/07)**) that the basic position

that directives are incapable of horizontal direct effect remains.

The Court of Justice has mitigated its harsh effects by creating the doctrines of indirect effect and state liability. The Court has also defined the scope of 'vertical' claims broadly, through a generous interpretation of 'public body' (more recently referred to as an 'emanation of the state').

Broad interpretation of 'public body' or 'emanation of the state'

Whilst in many cases 'the state' is easy to identify, the meaning of 'public body' or 'emanation of the state' is less clear. The point is crucial for claimants, since a finding that a claim is horizontal prevents direct reliance on a directive. ***Foster*** addressed the scope of 'public body'.

Foster v British Gas (Case C-188/89) [1990] ECR I-3133

Facts: Foster sought to rely on the Equal Treatment Directive 76/207 to challenge her employer's different compulsory retirement ages for men and women.

Held: Considering the nature of the defendant, British Gas, the Court of Justice held that entities against which a directive can be invoked include 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the state

> and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals'.

Foster provides a three-limbed test for 'public body', or 'emanation of the state': (1) a body made responsible by the state for providing a public service; (2) under state control; (3) with special powers for that purpose, beyond those normally applicable between individuals. The test refers to those bodies that are 'included' within the scope of 'public body', so appears not to be intended as a legal definition, though bodies that satisfy all three elements clearly qualify. Other entities could well qualify as public bodies too. Indeed, in ***NUT and Others v The Governing Body of St Mary's Church of England (Aided) Junior School and Others*** **[1997]**, Schiemann LJ rightly drew attention to the often-misunderstood point that it was clear 'from the wording of the Court's judgment in ***Foster*** … that the formula there used was not intended to be an exclusive formula'.

In ***Foster***, the Court of Justice referred to previous decisions indicating that directives can be invoked against tax authorities (***Becker v Hauptzollamt Münster-Innenstadt*** **(Case 8/81)**), local or regional authorities (***Fratelli Costanzo v Comune di Milano*** **(Case 103/88)**), authorities responsible for public order and safety (***Johnston v RUC*** **(Case 222/84)**), and public health authorities (***Marshall***).

A more recent case, ***Farrell***, explored whether the three requirements in ***Foster*** were cumulative or alternatives with the Court of Justice

concluding the latter and that a directive may be capable of having direct effect even when the body concerned does not satisfy all three of the ***Foster*** requirements. This undoubtedly makes it easier for an applicant to prove that a body is an emanation of the state.

Farrell v Whitty and others (Case C-413/15)

Facts: This case was concerned with liability under a motor insurance directive. Farrell was the victim of a road traffic accident but could not rely on Irish law which had been implemented in response to the directive as this contained an exclusion. Farrell sought compensation from the Motor Insurers Bureau of Ireland (MIBI) and the Court of Justice was required to address whether this body was an emanation of the state.

Held: The Court of Justice confirmed that the ***Foster*** conditions are not cumulative, therefore an emanation of the state:

> … can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers.

Revision tip

When considering the direct effect of directives consider the wide

scope of ‘public body’ or ‘emanation of the state’ and ensure you refer to the recent case of ***Farrell***.

‘Incidental’ effect of directives

In limited circumstances, the Court of Justice has afforded ‘incidental’ effect to directives, notably in actions between private parties where one party has relied on a directive to challenge successfully the applicability of national legislation (and render this void), resulting in an incidental adverse impact on the other party. Most are based on Directive 83/189 (replaced by **Directive 98/34**) concerning the notification of national technical standards to the Commission (for instance ***CIA Security International SA v Signalson SA* (Case C-194/94)** and ***Unilever Italia SpA v Central Food SpA* (Case C-443/98)**). Whilst the Court has implicitly allowed horizontal direct effect in these cases, it has stressed that there is no departure from the basic position that directives are incapable of horizontal direct effect (***Unilever***).

Indirect effect

The principle established

By maintaining resolutely that directives are not capable of horizontal direct effect, the Court of Justice has created apparently arbitrary distinctions, for instance in the employment context. This was brought into sharp focus by two cases decided shortly before ***Marshall***, ***Von Colson*** and ***Harz v Deutsche Tradax GmbH*** **(Case 79/83)**. In both cases, the female claimants, whose job applications had been rejected, sought to invoke Article 6 of the Equal Treatment Directive 76/207. In ***Von Colson***, the claim was vertical, against the German prison service. In ***Harz*** the claim was horizontal, against Deutsche Tradax, a private company. The Court of Justice created a novel solution in ***Von Colson***.

Von Colson and Kamman v Land Nordrhein-Westfalen (Case 14/83) [1984] ECR 1891

Facts: A German court had found that sex discrimination had occurred but that national law limited compensation to the reimbursement of travel expenses. Article 6 of Directive 76/207 required Member States to introduce measures allowing individuals to pursue sex discrimination claims by judicial

process.

Held: The Court of Justice asserted that the measures must be 'sufficiently effective to achieve the objective of the directive' and that the national provision would not satisfy this requirement. However, Article 6 was not sufficiently precise to be directly effective. Nonetheless, Member States must, under (former) Article 5 EC (now **Article 4 TEU**) take all appropriate measures to fulfil their [EU] obligations. The national court (as part of the state) must interpret the national law in the light of the wording and purpose of the Directive.

This is the principle of **indirect effect**: national law must be interpreted in accordance with relevant EU law. It should be noted that, consistent with the approach taken in ***Pubblico Ministero v Ratti* (Case 148/78)** with regards to the direct effect of directives, in order to rely on a Directive indirectly, the transposition deadline must have passed (***Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* (Case C-212/04)**) or an attempt at implementation has been made (albeit defectively) (***Pfeiffer***).

Revision tip

Always explain the meaning of 'indirect effect' rather than just referring to this term. You could use the definition mentioned above.

Looking for extra marks?

Indirect effect is a vitally important principle for individuals and businesses who cannot rely directly on EU law either because the relevant provision is not sufficiently clear, precise, and unconditional or, more commonly in practice, because their claim is horizontal and concerns rights contained in a directive.

Which national law?

The national legislation in ***Von Colson*** and ***Harz*** had been adopted to implement Directive 76/207. Neither judgment determined whether indirect effect must be applied to national law that is not intended to perform this function, including national provisions pre-dating a directive. ***Marleasing*** addressed these issues.

Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-4135

Facts: Certain provisions of Spanish company law conflicted with the Company Law Directive 68/151, which Spain had not implemented. The parties were private companies and so, on the basis of ***Marshall***, the Directive did not have direct effect.

Held: As in ***Von Colson***, the Court of Justice referred to the Member States' duty under the Treaty to ensure the fulfilment of

[EU] obligations. National courts must, as far as possible, interpret national law, whether adopted before or after a directive, in the light of the wording and purpose of the directive.

Marleasing confirmed that indirect effect has wider scope than ***Von Colson*** had made apparent. It applies to both pre- and post-dating national legislation and, by implication, also to national legislation not intended to implement EU law. On the other hand, the judgment envisages limits to the duty of consistent interpretation, since national courts must interpret national law in accordance with EU law only 'so far as possible'. ***Wagner Miret*** and ***Faccini Dori*** recognised the limits.

Wagner Miret v Fondo de Garantira Salaria (Case C-334/92) [1993] ECR I-6911

Facts: Spanish provisions provided for a compensation scheme for workers made redundant on their employers' insolvency. Miret, a member of senior management staff, brought an action seeking compensation following the insolvency of his employer. However, the action was dismissed as the Spanish scheme did not extend to senior management staff.

Held: The Spanish provisions could not be interpreted in line with Directive 80/97 to allow senior management staff entitlement to the scheme's benefits under national law.

Faccini Dori v Recreb Srl (Case C-91/92)

Facts: The Italian claimant entered into a contract to buy a language tuition course whilst she was at a railway station. She changed her mind and tried to cancel, but the supplier insisted on payment. An EU Directive required that there be a 'cooling off' period for consumer transactions entered into away from business premises during which the consumer might cancel but this had not been implemented into Italian law.

Held: The Court of Justice reiterated that Member States' courts are under a duty to try and interpret national law so as to give effect to a directive. If it was not possible to do so without completely distorting the wording of the national legislation, such as in this case, then the appropriate remedy was for the affected individual to seek damages for breach of EU law (see below).

In particular, indirect effect does not extend to **contra legem interpretations**. A national court has no duty to interpret national provisions against their clear meaning (***Pupino* (Case C-105/03)**). The result of this is that indirect effect will not always enable the rights contained within a directive to be enforced. In ***Google Inc v Vidal-Hall and others* [2015] EWCA Civ 311** the Court of Appeal of England and Wales noted that the principle is therefore relatively clear and easily stated. However, the Court further stated that an EU law-compatible interpretation of national law may be possible even if part of the national law had to be disapplied or struck down, provided that this was not inconsistent with its key principles. In spite of Brexit, this

judgment may be taken into account by other national courts.

Despite the limitations noted above, it is important to note the strength of the national courts' duty to attempt to adopt an interpretation of national law which is compatible with EU law. This was emphasised by the Court of Justice in ***Pfeiffer*** and is particularly true if the national law was introduced to implement a directive as was emphasised in ***Kolpinghuis*** **(Case 80/86)**.

Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Cases C-397-403/01)

Facts: In a preliminary reference from German courts, the Court of Justice was asked whether Directive 93/104 on working time was unconditional and sufficiently precise to be relied upon by individuals in national courts when the Directive had not been properly transposed into national law. The claimants were workers for the German Red Cross (not an emanation of the state) and therefore they could not rely on the direct effect of the Directive to ensure their working hours did not exceed the maximum of 48 hours per week. However, the Court went on to explore the application of indirect effect.

Held: The Court of Justice was quite specific and emphatic as to the extent of the interpretative duty stating that:

> the principle of interpretation in conformity with [EU] law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that [any] Directive … is fully effective [to cases which fall within the scope of the Directive and deriving from

facts postdating expiry of the period for the implementation of the Directive].

Revision tip

In problem questions first identify whether there is national legislation and a directive covering similar rights and obligations. Secondly, consider whether the national provisions can be interpreted in line with the directive and justify why this may be the case with reference to the case law authorities referred to above.

Looking for extra marks?

It is frequently suggested that, by creating indirect effect, the Court of Justice gave directives horizontal direct effect ‘by the back door’. This argument certainly has some merit. However, ***Marleasing*** established that indirect effect has limitations, since the duty of consistent interpretation is not absolute. A national court is obliged to interpret national law in line with EU law only ‘so far as possible’. As the Court of Justice has recognised *in cases such as* ***Wagner Miret*** *and Faccini Dori*, other remedies may exist to fill this gap.

State liability

Creation of the principle

Clearly, the limitations of direct effect and indirect effect, especially in relation to directives, can have a significant impact on the ability of individuals and businesses to benefit from EU law rights in national courts. The Court of Justice confronted these shortcomings in ***Francovich***, developing a third principle, **state liability**. This provides a right to damages where a Member State has breached EU law, causing loss to the claimant. The claimant will apply for this remedy in the relevant national court. It is important to note that this principle is not confined to cases involving directives.

Francovich: the principle established

Francovich established the principle of state liability. Here the applicants, who had been made redundant when their employer became insolvent, could not rely directly or indirectly on a directive which they asserted afforded them rights.

> *Francovich and Bonifaci v Republic of Italy* (Cases C-6 & 9/90) [1991] ECR I-5357

Facts: Directive 80/987 required Member States to ensure that schemes were in place to guarantee funds covering unpaid wages when employees were made redundant on their employers' insolvency. Italy had failed to implement the Directive, so no scheme had been set up. The applicants, who were owed wages in these circumstances, sought to rely on Directive 80/987 to claim compensation from the Italian state.

Held: The Court of Justice held that the relevant provisions were insufficiently clear to be directly effective. However, the full effectiveness of [EU] law would be impaired if individuals could not obtain redress when their rights were infringed by a state's breach of [EU] law. Moreover, under Article 5 EC (now **Article 4 TEU**) Member States must take all appropriate measures to fulfil their [EU] law obligations. Consequently, they must make good any loss or damage caused to individuals through their breaches of [EU] law.

The Court of Justice declared that the requisite conditions depend upon the nature of the breach of [EU] law. Where a Member State fails to implement a directive, there is a right to damages provided three conditions are satisfied:

- the result prescribed by the directive entails the grant of rights to individuals;
- it must be possible to identify the content of those rights from the directive; and
- there must be a causal link between the Member State's failure and the loss suffered by the claimant.

Accordingly, the Court of Justice established the principle of state liability. Italy, in failing to implement Directive 80/897, had not fulfilled its Treaty obligations. Francovich, who had suffered loss as a result, could bring proceedings directly against the state.

Damages for non-implementation of a directive: the conditions

The right to damages is, however, subject to conditions.

> Revision tip
>
> Remember the three ***Francovich*** conditions so that you can set them out and (for problem questions involving a complete failure to implement a directive) apply them.

Francovich left a number of questions unresolved. It was unclear whether damages would be available where a state's breach arose not from non-implementation of a directive but from incorrect or incomplete implementation, or indeed from any other kind of infringement of EU law. The Court of Justice provided clarification in the joined cases of ***Brasserie du Pêcheur*** and ***Factortame III***.

Brasserie du Pêcheur and Factortame III: other

kinds of breach

Whereas ***Francovich*** involved non-implementation of a directive, ***Brasserie du Pêcheur*** and ***Factortame III*** concerned the adoption and retention, by Germany and the UK respectively, of national legislation that infringed the Treaty.

Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd and Others (Joined Cases C-46 & 48/93) [1996] ECR I-1029

Facts: Brasserie du Pêcheur, a French brewery, had been prevented from exporting its beer to Germany because German 'beer purity' legislation imposed strict content and labelling requirements. ***Factortame III*** concerned the Merchant Shipping Act 1988, which prevented the applicants, Spanish fishermen, from fishing in UK territorial waters. The Court of Justice had already found that the legislation breached Treaty provisions on the free movement of goods (the 'beer purity' laws) and the right of establishment (the 1988 Act). The claimants sought damages for their losses.

Held: The Court of Justice held that the right of individuals to rely on directly effective Treaty provisions before national courts is only a minimum guarantee, in itself insufficient to ensure the complete implementation of the Treaty. The Court pointed out that, in the absence of direct effect, ***Francovich*** provides a right to damages where a Member State has failed to implement a

directive. The Court reasoned that individuals should also be able to obtain redress in the event of a state's direct infringement of [an EU] provision. It would be irrelevant which organ of the state was responsible for the breach: the legislature, judiciary, or executive.

Reiterating its ***Francovich*** statement, the Court declared that the conditions under which a Member State's liability gives rise to a right to damages depend on the nature of the breach. Where [EU] law allowed Member States a wide discretion, as in the present case, a right to damages would arise, provided three conditions were satisfied:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach and the damage sustained.

The 'decisive test' for a 'sufficiently serious breach' is whether the Member State has 'manifestly and gravely disregarded the limits on its discretion'. In its assessment, the national court may take a number of factors into account. These are the 'clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [EU] 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 taken by [an EU] institution may have contributed towards the omission, and the adoption or

retention of national measures or practices contrary to [EU] law'.

Damages for other breaches of EU law: the conditions

The Court then specified the conditions under which a right to damages would arise.

When ***Factortame III*** returned to the House of Lords, that court, applying the conditions, decided that the adoption and retention of the Merchant Shipping Act was a sufficiently serious breach by the UK, since it was an infringement of clear and unambiguous [EU] provisions.

Subsequently in ***Dillenkofer v Germany*** **(Cases C-178–179 & 188–190/94)** the Court of Justice held that non-implementation of a directive amounted, in itself, to a sufficiently serious breach.

Revision tip

Remember the ***Factortame III*** conditions and the factors indicating a 'sufficiently serious breach'. These are particularly relevant for cases not involving a failure to implement a directive.

Expansion of state liability

British Telecommunications established that liability can arise as a result of incorrect implementation of a directive. Here, however, the breach was not sufficiently serious and there was no right to damages.

R v HM Treasury, ex parte British Telecommunications (Case C-392/93) [1996] ECR I-1631

Facts: The UK had implemented Directive 90/531, but incorrectly. BT, which claimed it had suffered loss as a result, sought damages from the UK.

Held: The Court of Justice found that there was no right to damages. The UK's error was excusable because the provisions of the directive were unclear.

As indicated in ***Factortame III***, liability can arise from acts of the national executive and judicial decisions, as well as from acts of the legislature. ***Hedley Lomas*** concerned an administrative act.

R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd (Case C-5/94) [1996] ECR I-2553

Facts: The Ministry had refused licences for the export of live animals to Spain for slaughter, claiming that Spanish slaughterhouses did not comply with [EU] law.

Held: The Court of Justice held that the Ministry acted, without

justification, in breach of Treaty provisions on the free movement of goods. This infringement constituted a sufficiently serious breach by the UK and there was a right to damages.

Köbler extended state liability to a decision of a court of last instance.

Köbler v Austria (Case C-224/01) [2003] ECR I-1039

Facts: Köbler, an Austrian university professor, had been refused a length-of-service pay increment because he had not completed the requisite 15 years' service in Austrian universities. He claimed that the refusal infringed [EU] free movement provisions (see Chapter 6). The national court had found the refusal to be justified. Köbler argued that this court had wrongly interpreted [EU] law and brought a damages action against Austria.

Held: The Court of Justice, finding that the national court's interpretation of [EU] law was incorrect, held that an erroneous interpretation of [EU] law by a court of last instance can give rise to state liability, though in this case the breach was not sufficiently serious as the Austrian Supreme Court had mistakenly applied a previous ruling of the Court of Justice on similar facts.

Köbler established liability in cases of 'intentional fault and serious misconduct' by a court of last instance. More recently in ***Traghetti del Mediterraneo SpA v Italy*** **(Case C-173/03)**, the Court of

Justice appeared to extend liability somewhat further by declaring that it could not rule out liability for damage caused by ‘manifest errors’ of interpretation of [EU] law by a court of last instance.

Looking for extra marks?

In ***Bergaderm*** **(Case C-352/98P)** the Court of Justice aligned the principles relating to state liability and liability of EU institutions, reiterating its declarations in ***Factortame III***. ***Bergaderm***, which concerned a claim under what is now **Article 340 TFEU**, is considered in Chapter 4.

Procedure and remedies in national courts

National procedural autonomy

Although direct effect, indirect effect, and state liability are extremely significant for the protection of EU law rights in national courts, the full effectiveness of these remedies depends upon national procedural rules which, in principle, fall outside the Court of Justice's jurisdiction. The Court has accepted the principle of national procedural autonomy in designating the courts having jurisdiction and in determining procedural rules. Member States are obliged to ensure that a remedy is potentially available in national courts for breaches of EU law (**see Article 19(1) TEU** and **Article 47 of the Charter of Fundamental Rights of the European Union**). See Chapter 1 for a discussion of the Charter.

The Court of Justice in ***Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel*** **(Case 158/80)** stated that despite the availability of direct enforcement by individuals of their EU law rights in national courts, 'it was not intended to create new remedies in the national courts to ensure the observance of [EU] law'. An exception to this general rule has been the creation of state liability in appropriate cases (as discussed above).

At the same time, it has imposed limits on this autonomy, insisting that the principles of effectiveness and equivalence be applied in national proceedings concerning EU law.

Effectiveness and equivalence

‘Effectiveness’ dictates that national procedural rules must not render the exercise of EU law rights impossible or excessively difficult. ‘Equivalence’ requires national procedural rules and remedies in EU law actions to be no less favourable than those applying to similar domestic law actions. Unsurprisingly, the application of these principles has frequently proved difficult. Initially, the Court of Justice adopted an interventionist approach, holding that particular national rules did not comply. More recently, it has taken a more cautious, case-by-case approach, acknowledging that national courts alone have in-depth knowledge of national procedural rules.

Application of the principles

The ‘effectiveness’ and ‘equivalence’ tests have been applied, in particular, to limitation periods and the level of damages awards. The Court of Justice has held that national time limits for bringing actions are ‘reasonable’ and compatible with EU law only if they do not make it excessively difficult or impossible for individuals to rely on EU rights.

Emmott v Minister for Social Welfare (Case C-208/90) [1991] ECR I-4269

Facts: The claim, based upon Ireland's failure to correctly implement **Directive 79/7** on equal treatment in social security, was brought outside the national three-month time limit.

Held: The Court of Justice held that a defaulting Member State may not rely on an individual's delay in bringing proceedings to protect rights conferred by a directive. In addition, the time limit could not begin to run until the directive had been properly implemented.

Following ***Emmott***, the Court of Justice has looked for evidence that the particular circumstances of the case will lead to an unjust result. For instance, in ***Levez v Jennings* (Case C-326/96)** the Court did not criticise the national two-year limitation applied in sex discrimination cases. However, it held that it would be incompatible with the principle of effectiveness to permit an employer to rely on the rule in the particular circumstances of that case. Unfortunately, this case-by-case approach is not conducive to legal certainty.

Factortame III makes clear that the principle of effectiveness must also be applied to damages awards. The reparation must be 'commensurate with the loss or damage sustained so as to ensure the effective protection of [individuals'] rights'. Applying this principle in ***Marshall***, the Court of Justice had held that the statutory ceiling for damages under the Sex Discrimination Act 1975 prevented full and effective compensation for Mrs Marshall's loss and was incompatible

with [EU] law.

Implications of Brexit

Schedule 1, paragraph 4 to the European Union (Withdrawal) Act 2018 provides that there is no right in domestic law on or after exit day to damages in accordance with the rule in ***Francovich***. As such, unless proceedings have begun in a court or tribunal in the UK before exit day but have not been finally decided (**Schedule 8, paragraph 39(3)**), or, unless proceedings are begun within the period of two years beginning with exit day where the proceedings relate to something occurring before exit day, a cause of action under ***Francovich*** or ***Factortame*** will not exist.

In addition, directives that have been incorrectly implemented as at exit day, will be incapable of direct effect.

KEY CASES

CASE	FACTS	PRINCIPLE
***Amministrazione delle Finanze dello Stato v Simmenthal* (Case 106/77) [1978] ECR 629**	Should a national court disapply national provisions that violate [EU] law?	Any conflicting national law must be set aside, whether prior or subsequent to the EU rule.
***Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd and Others* (Cases C-46 & 48/93) [1996] ECR I-1029**	Damages claim: other kinds of breach of [EU] law by Member States.	Right to damages, provided the conditions are satisfied.
***Costa v ENEL* (Case 6/64) [1964] ECR 585**	Challenge to Italian legislation.	EU law takes precedence over post-dated national legislation that conflicts with it.
***Defrenne v Sabena* (Case 43/75) [1976] ECR 455**	Defrenne sought to invoke a Treaty article (now **Article 157 TFEU**) in an equal pay claim.	Treaty articles are also capable of horizontal direct effect. Conditions for direct effect loosened: a Treaty article must be sufficiently clear, precise, and unconditional.
***Farrell v Whitty and others* (Case C-413/15) [2017] EUECJ**	Case concerning with liability under a motor insurance directive and the potential for it to have direct effect.	Clarified definition of 'public body'/'emanation of state', ***Foster*** test was not intended to provide cumulative conditions nor be exhaustive
***Foster v British Gas* (Case C-188/89) [1990] ECR I-3133**	Foster sought to rely on Directive 76/207 in a sex discrimination claim.	'Public body' includes a body made responsible by the state for providing a public service, under state control, and with special powers for that purpose, beyond those normally applicable between

		individuals.
***Francovich and Bonifaci v Republic of Italy* (Cases C-6 & 9/90) [1991] ECR I-5357**	Damages claim against Italy: non-implementation of a directive.	Right to damages, provided the conditions are satisfied.
***Internationale Handelsgesellschaft GmbH* (Case 11/70) [1970] ECR 1125**	[EU] levies claimed to be contrary to the German constitution.	EU law takes precedence over all national law, including national constitutional law.
***Köbler v Austria* (Case C-224/01) [2003] ECR I-1039**	Damages claim: national court's interpretation of [EU] law.	An erroneous interpretation of EU law by a court of last instance can give rise to state liability.
***Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135**	Horizontal claim concerning the Company Law Directive 68/151.	If no direct effect: national courts must, as far as possible, interpret national law, whether adopted before or after a directive, in the light of the wording and purpose of the directive.
***Marshall v Southampton & South West Hampshire Area Health Authority* (Case 152/84) [1986] ECR 723**	Marshall sought to rely on Directive 76/207 in a sex discrimination claim.	Directives can only be invoked vertically, against the state or a public body.
***Pubblico Ministerio v Ratti* (Case 148/78) [1979] ECR 1269**	Claim concerning two directives relating to product labelling.	A directive cannot be directly effective until its implementation deadline has passed (unless the Member State has already attempted to implement the directive)
***Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases 397/01 and 403/01) [2004] EUECJ**	Claim relating to reliance on a directive which had been incorrectly implemented into national law	National courts have a strong duty to attempt to apply indirect effect and adopt an interpretation of national law which is compatible with EU law.
R v HM Treasury, ex	The UK had	State liability can arise in respect

parte British Telecommunications **(Case C-392/93) [1996] ECR I-1631**	implemented a directive incorrectly.	of incorrect implementation of a directive.
R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd **(Case C-5/94) [1996] ECR I-2553**	Refusal of licences for export of live animals to Spain.	State liability can arise in respect of administrative acts.
R v Secretary of State for Transport, ex parte Factortame Ltd (II) **(Case 213/89) [1990] ECR I-2433**	Application for an interim injunction.	The effectiveness of EU law would be impaired if a national rule could prevent the grant of interim relief in relation to EU law rights. The rule must be set aside.
Van Duyn v Home Office **(Case 41/74) [1974] 1337**	Van Duyn challenged the UK's decision to refuse her entry, seeking to rely on Directive 64/221.	Directives are capable of direct effect. ***Van Gend*** conditions applied: the provision must be clear, precise, and unconditional.
Van Gend en Loos v Administratie der Belastingen **(Case 26/62) [1963] ECR 1**	Challenge to an increased customs duty as a breach of an EC Treaty provision concerning the free movement of goods (now **Article 30 TFEU**).	Principle of direct effect established. A Treaty article is directly effective if clear, precise, and unconditional and its implementation requires no legislative intervention by Member States. Treaty articles are capable of vertical direct effect.
Van Gend en Loos v Administratie der Belastingen **(Case 26/62) [1963] ECR 1**	(See above)	'The Community constitutes a new legal order in international law, for whose benefits the states have limited their sovereign rights, albeit within limited fields.'
Von Colson and Kamman v Land Nordrhein-Westfalen **(Case 14/83) [1984] ECR 1891**	Von Colson sought to rely on Article 6 of Directive 76/207.	The provision was not sufficiently clear and precise to have direct effect. The German court must interpret the relevant national provision in line with Article 6. Principle of indirect effect created.

EXAM QUESTIONS

Problem question

Fred is a laboratory technician employed by the Department of Foreign Affairs and Trade in Ireland. He has encountered problems at work and is considering bringing proceedings against his employer.

(Fictitious) Directive 2003/555 ('the Directive') provides that all overtime worked by laboratory technicians must be paid at no less than three times the normal hourly rate. The Directive also provides that laboratory technicians must receive health and safety training. An annex to the Directive sets out the details of the required training, which must include sessions covering all new handling techniques relating to toxic substances. The deadline for implementation of the Directive was 31 December 2015.

The (fictitious) Laboratory Technicians Act 2000 ('the Act') provides that all overtime worked by laboratory technicians must be paid at no less than twice the normal hourly rate. The Act also provides that all laboratory technicians must receive health and safety training but does not specify the content of the training.

Fred occasionally works overtime and, under his contract of employment, receives twice his normal hourly rate of pay. He is dissatisfied with this but when he complained, his employer pointed out that this overtime rate complies with the Act.

Last month, Fred came into contact with a toxic substance at

work and, as a result, suffered respiratory problems. Whilst Fred has received health and safety training, he has not received training in recently developed handling techniques for toxic substances. He believes that, had he received such training, he would not have been exposed to the associated health risk.

(a) Advise Fred as to whether he has any cause of action against his employer under EU law.

(b) How would your answer differ (if at all) if Fred was employed not by the Department of Foreign Affairs and Trade but by Fyso PLC.

[For the purposes of this question, you are NOT required to consider any possible action for damages against the Irish government.]

Essay question

Trace the development of the principles of direct effect, indirect effect, and state liability by the Court of Justice, evaluating their significance for individual and business claimants.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

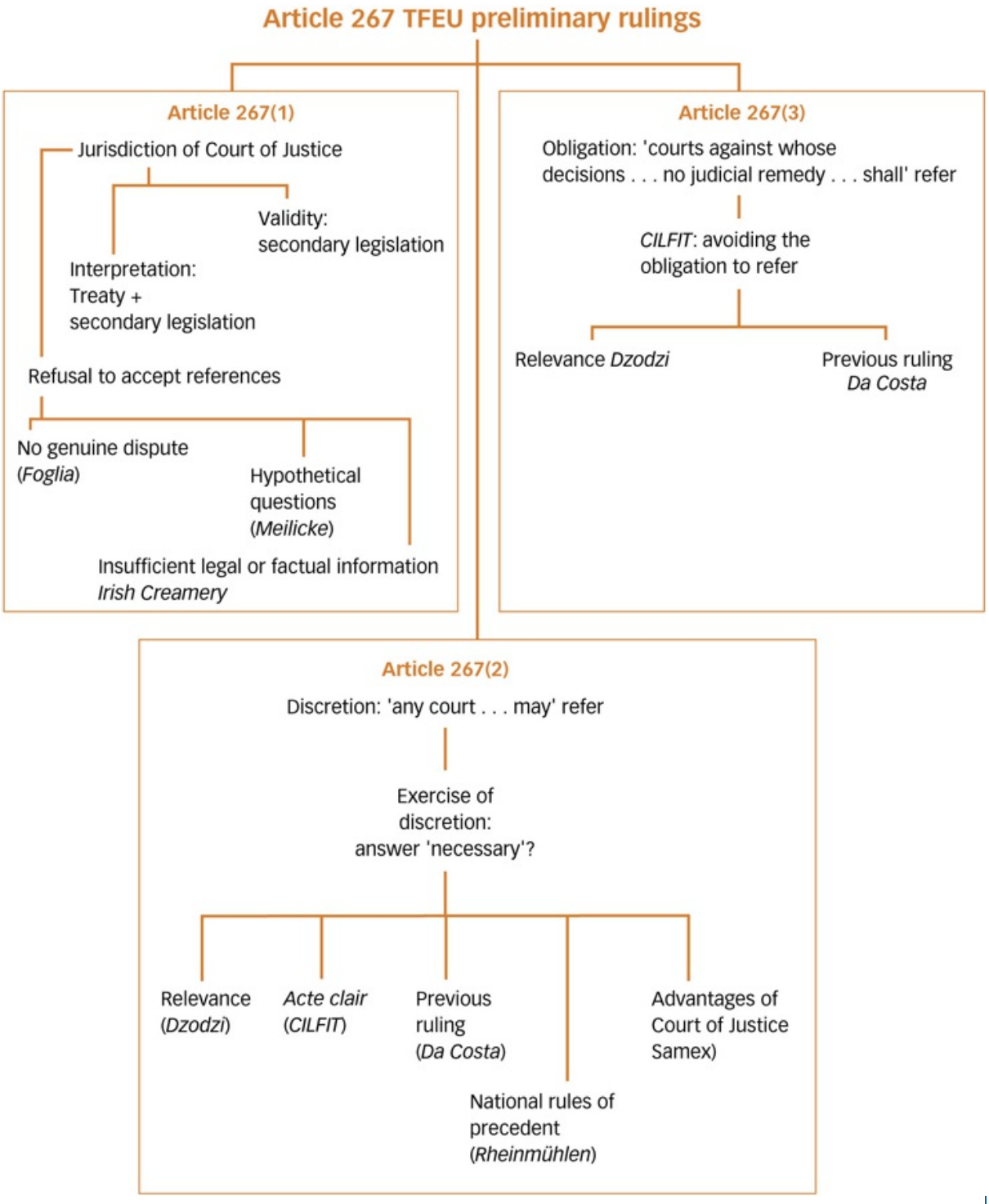
3
Preliminary rulings

Article 267 TFEU

The assessment

You can expect essay or problem questions in this area. Common essay topics include: the purpose of Article 267 TFEU and the separation of functions between national courts and the Court of Justice; the coherence and effectiveness of the scheme of discretionary and mandatory references within the EU legal order; abuse of the procedure; and the Court of Justice's rejection of references. Problem scenarios typically focus on disputes progressing through national courts and the application of Article 267 at the various levels of the national system.

Chapter overview


Article 267 TFEU preliminary rulings
Article 267(1)
Jurisdiction of Court of Justice
Validity: secondary legislation
Interpretation: Treaty + secondary legislation
Refusal to accept references
No genuine dispute (Foglia)
Hypothetical questions (Meilicke)
Insufficient legal or factual information Irish Creamery
Article 267(3)
Obligation: 'courts against whose decisions . . . no judicial remedy . . . shall' refer
CILFIT: avoiding the obligation to refer
Relevance Dzodzi
Previous ruling Da Costa
Article 267(2)
Discretion: 'any court . . . may' refer
Exercise of discretion: answer 'necessary'?
Relevance (Dzodzi)
Acte clair (CILFIT)
Previous ruling (Da Costa)
National rules of precedent (Rheinmühlen)
Advantages of Court of Justice Samex)

Key facts

Article 267 TFEU gives the Court of Justice jurisdiction to deliver preliminary rulings on the validity and interpretation of EU law.

- **The primary purpose of Article 267 is to ensure that EU law has the same meaning and effect in all the Member States.**
- **Where it considers a decision on a question of EU law is necessary to enable it to give judgment, any court may refer that question to the Court of Justice (the discretion to refer).**
- **Where a question of EU law is raised before a national court of last resort, that court must refer it to the Court of Justice (the obligation to refer).**
- **However, in *CILFIT* the Court of Justice set out circumstances in which a national court of last resort is not obliged to refer.**
- **On occasions, the Court of Justice has declined to accept a reference, on the grounds that the question referred was irrelevant or hypothetical or that there was no genuine dispute between the parties.**

Article 267 TFEU

Article 267 provides:

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 will act with the minimum of delay.

Outline of the procedure and timing of the reference

When a national court is exercising its duty to apply EU law, it may be uncertain as to its meaning. Questions concerning the validity of EU secondary legislation may also be raised in national proceedings. In such situations a national court may, and in certain circumstances must, refer the matter to the Court of Justice. The **preliminary reference** comprises a question or questions about EU law, together with an indication of the factual and legal context of the case. The Court delivers its judgment on the correct interpretation or on validity and refers this back to the national court, which must decide the case before it on the basis of the Court's response. It is important to note that the parties to an action have no right to a reference. **Article 267** does not set out an appeals procedure. Rather, it provides a mechanism enabling national courts to obtain authoritative rulings on the interpretation or validity of EU law.

The Court of Justice has recognised that it is for the national court to determine the timing of the reference. Nevertheless, the Court has emphasised that it can provide a useful response only if the facts and relevant legal issues have been established (***Irish Creamery Milk Suppliers Association v Ireland* (Cases 36 & 71/80)**). Indeed, as will be noted later, the Court has sometimes refused to accept references when it has been provided with insufficient information.

Looking for extra marks?

Whilst the core rationale for the preliminary reference procedure is the uniform and consistent interpretation of EU law, **Article 267** has even broader significance. The role it has played in the development of EU law is extremely important. **Article 267** embodies the mechanism through which the Court of Justice has developed major legal principles such as **direct effect** and **indirect effect**. For instance, it was on an **Article 267** reference from the Dutch court (in ***Van Gend* (Case 26/62)**) that the Court established the principle of direct effect. Many of the cases referred to in this book began in national courts and were decided in the context of preliminary rulings. Currently, around half the cases heard by the Court of Justice reach it by this means. Although it does not provide an appeals procedure, **Article 267** is also important for individuals. Through the national court, it provides them with a means of access to the Court of Justice (albeit indirectly).

Binding effect of preliminary rulings

For some time there was uncertainty as to whether preliminary rulings bind only the parties to the dispute giving rise to the reference, or whether they should be applied in subsequent cases. ***International Chemical Corporation v Amministrazione Finanze*** **(Case 66/80)** established that all national courts and tribunals are bound by rulings on validity. Further, in ***Kühne & Heitz v Productschap voor Pluimvee en Eieren*** **(Case C-453/00)**, concerning the decision of a Dutch administrative body, the Court of Justice confirmed that its rulings on interpretation bind all national courts and administrative authorities across the EU.

However, the binding effect of a preliminary ruling does not preclude national courts from seeking further guidance from the Court of Justice on interpretation or validity. The Court retains the right to depart from its previous rulings and may do so, for instance when a different conclusion is warranted by dissimilar facts.

The Court’s jurisdiction under Article 267

The Court of Justice has jurisdiction to rule on the interpretation or validity of EU law (save in certain areas expressly excluded by the Treaties, such as the Common Foreign and Security Policy). It has no jurisdiction to rule on the application of EU law, on the interpretation of national law, or on the compatibility of national law with EU law. Where such questions are raised, the Court is likely to reformulate them in terms that raise general points of EU law. Nonetheless, in practice the distinction between interpretation and application may not be easily drawn. Indeed, the Court does sometimes express an opinion as to the application of its ruling.

R v HM Treasury, ex parte British Telecommunications (Case C-392/93) [1996] ECR I-1631

Facts: The UK had implemented Directive 90/531, but incorrectly. BT, which claimed it had suffered loss as a result, sought damages from the UK government.

Held: Liability to damages could arise in a case of incorrect implementation of a directive, provided the three ***Factortame III*** conditions were met: the directive was intended to confer rights

on individuals, the breach was sufficiently serious, and there was a direct causal link between the breach by the Member State and the loss suffered by the applicant. Seemingly assuming that the first and third conditions were met, the Court went on to declare that the Directive was unclear. It was capable of more than one reasonable interpretation and the Commission had never challenged the UK's interpretation. Consequently, the UK's error was excusable and the breach was not sufficiently serious.

Such 'interference' by the Court of Justice in the application of EU law may cause difficulties. In ***Reed***, the English High Court considered that the Court had exceeded its jurisdiction in this respect.

Arsenal Football Club v Reed (Case C-206/01) [2002] ECR I-10273

Facts: Arsenal had tried to prevent Reed from selling football souvenirs carrying the Arsenal name and logos. The reference to the Court of Justice concerned the interpretation of the **Trade Mark Directive (89/104)**.

Held: The Court found that there was an infringement of the Directive and, rather than expressing its judgment in general terms, referred directly to the parties and the particular circumstances of the case.

The High Court took the view that the Court of Justice had made findings of fact that conflicted with the facts which it had already

established. Accordingly, it refused to accept the Court's conclusion that there was an infringement by Reed and gave judgment for him, declaring that it had no power to surrender to the Court of Justice a jurisdiction it did not have. Subsequently, the Court of Appeal overruled the High Court's decision, holding that the difference between the conclusions of the Court of Justice and the trial judge arose not from any inconsistency in findings of fact, but rather from a variance in legal reasoning.

Revision tip

Ensure that you are clear on the rationale for the procedure set out in **Article 267** and the separation of functions between the Court of Justice and national courts.

‘Court or tribunal’

Article 267 refers to a ‘court or tribunal of a Member State’. The meaning of these terms is a matter of EU law (***Politi v Italy* (Case 43/71)**). ***Broeckmeulen*** provided some indication of the scope of ‘court or tribunal’.

Broeckmeulen v Huisarts Registratie Commissie (Case 246/80) [1981] ECR 2311

Facts: Broeckmeulen was refused registration as a medical general practitioner in the Netherlands, despite holding a Belgian medical qualification. He sought to rely on [EU] rules on the free movement of professionals before the Appeals Committee of the Dutch medical professional body. On a preliminary reference from that committee, the first question for the Court of Justice was whether the committee was a ‘court or tribunal’.

Held: In the absence of a right of appeal to the ordinary courts, the Appeals Committee was a ‘court or tribunal’ since it operated with the consent and cooperation of the public authorities and delivered final decisions following an adversarial procedure.

Dorsch Consult Ingenieurgesellschaft v

Bundesbaugesellschaft Berlin **(Case C-54/96)** provided further guidance on the scope of 'court or tribunal'. Various factors are taken into account, such as whether the body is established by law and is permanent, whether its procedure is *inter partes*, whether it applies rules of law and is independent, and whether its jurisdiction is compulsory. Over the years, the Court has accepted references from a wide range of bodies, including administrative tribunals, professional disciplinary bodies, tax adjudicators, and insurance officers.

Refusal to accept references

In accordance with the primary purpose of **Article 267**, to ensure that EU law has the same meaning and effect in all Member States, the Court of Justice has generally encouraged national courts to refer. Initially, the Court adopted an open approach, taking the view that it was for the national court alone to assess whether a decision on a question of EU law was necessary to enable it to give judgment. The Court later moved on from this position, indicating that its receptiveness to references is not without limits and that it will exert control over admissibility. From time to time, the Court has declined to accept references, most notably where they amounted to an abuse or misuse of the procedure. It has refused jurisdiction where there is no genuine dispute between the parties, where the questions referred are irrelevant or hypothetical, or where the national court has failed to provide sufficient legal or factual information.

No genuine dispute

Foglia v Novello (No 1) (Case 104/79) [1980] ECR 745 and *Foglia v Novello (No 2)* (Case 244/80) [1981] ECR 3045

Facts: Foglia had agreed to sell Italian liqueur wine to Novello in

France. Under the contract Novello would reimburse any taxes incurred by Foglia, unless they infringed [EU] law. Foglia's separate contract with Danzas, the carrier, stipulated that Foglia would not be liable for any charges that violated [EU] law. French taxes were levied and paid by Foglia, who sought to recover the relevant amount from Novello in the Italian court, claiming that the French taxes breached [EU] law. A reference was made to the Court of Justice.

Held: The Court did not have jurisdiction. There was no genuine dispute and the parties had engineered the situation to challenge the French tax in the Italian court (***Foglia (No 1)***).

Dissatisfied with this outcome, the Italian court made a further reference. The Court again refused jurisdiction, stating that it did not deliver advisory opinions on general or hypothetical questions (***Foglia (No 2)***).

Looking for extra marks?

In referring for the second time, the Italian judge was clearly troubled that the Court's initial response departed from its previously open approach to receiving references. ***Foglia (No 2)*** confirmed that the Court intended to assert control over the admissibility of references. It declared that, whilst having regard to the national court's assessment of the need for a reference, it would check its jurisdiction by making its own assessment.

It was suggested that the Court's refusal of the ***Foglia*** reference was motivated partly by its recognition of national sensitivities about challenges to domestic legislation in the courts of other Member States. Later cases indicate that the Court will be prepared to accept references in such circumstances (see, for instance, ***Eau de Cologne v Provide* (Case C-130/88)**). However, the Court has reiterated its statement in ***Foglia*** that it will apply 'special vigilance' to ensure that the information provided by the national court establishes the need for a reference. That need was not established, for instance, in ***Bacardi-Martini SAS v Newcastle United Football Club* (Case C-318/00)**. Here, the Court declined to accept a reference from the English High Court concerning French legislation on alcohol advertising and [EU] rules on the free movement of services.

Hypothetical or irrelevant questions

Despite the Court's declared intentions in ***Foglia (No 2)***, it was some years before it adopted a similar stance again. One notable case in which it did so is ***Meilicke***.

Meilicke v ADV/ORGA AG (Case C-83/91) [1992] ECR I-4871

Facts: A German academic, who had advocated views about the Second Banking Directive, challenged the legitimacy of non-cash contributions of capital developed by the German courts, claiming that it was incompatible with the Directive. There was no

evidence that the issue of non-cash contributions was relevant to the case.

Held: Citing ***Foglia (No 2)***, the Court had no jurisdiction to give advisory opinions on hypothetical questions and therefore declined to give a ruling.

However, in the landmark Brexit-related case of ***Wightman*** the Court accepted the views of the referring court and was prepared to give a ruling based on the fact that the case involved 'a genuine and live issue, of considerable practical importance.'

Wightman and Others v Secretary of State for Exiting the European Union (Case C-621/18)

Facts: This case related to the interpretation and revocability of **Article 50 TEU** and the UK government argued that the reference should be rejected because the question of revocability was 'hypothetical'. It added that there was 'no concrete dispute, since the question referred addresses events that have not occurred and may not occur' and that 'the question (of revocability) actually concerns the legal implications of a situation that does not currently exist.'

Held: The Court rejected these arguments and considered the reference to be admissible and ruled that **Article 50** was revocable and that a Member State could decide 'to reverse its decision to withdraw and, accordingly, to remain a Member of the

European Union.’

Insufficient legal or factual information

A number of cases decided since ***Foglia*** demonstrate that the Court of Justice will be prepared to respond to a reference only if the facts and the legal issues are made clear in the order for reference. For example, in ***Telemarsicabruzzo SpA v Circostel*** **(Cases C-320–322/90)**, the Court refused jurisdiction because the national court had supplied insufficient information on the facts and the relevant national provisions, whilst in ***Criminal Proceedings against Grau Gromis and Others*** **(Case C-167/94)**, the Court noted that such information was necessary in order to be able to provide an interpretation that would be helpful for the national court.

Revision tip

Be familiar with the cases demonstrating the limits to the Court’s receptiveness to references from national courts.

Jurisdiction of the national courts to refer

Article 267 draws a distinction between the obligation to refer (**Article 267 paragraph 3**) and the discretion to refer (**Article 267 paragraph 2**).

Obligation to refer

Article 267 paragraph 3 provides that where a question of interpretation or validity is raised 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'.

Courts 'against whose decisions there is no judicial remedy under national law'

Put simply, these are courts of last resort or final appeal. **Article 267 paragraph 3** clearly applied, for instance, to the UK Supreme Court. However, the precise scope of 'courts … against whose decision there is no judicial remedy under national law' is a matter of debate. There are two different views as to the kinds of bodies that **Article 267**

paragraph 3 covers. According to the 'concrete theory', the obligation to refer applies to courts whose decisions are not subject to appeal in the particular case in which the question of EU law arises. The 'abstract theory' embodies the notion that 'courts … against whose decisions there is no judicial remedy under national law' comprise exclusively those courts which occupy the highest position in the national system and whose decisions are therefore never subject to appeal. ***Costa*** suggested that the Court of Justice inclines to the former view, the 'concrete theory'.

Costa v ENEL (Case 6/64) [1964] ECR 585

Facts: The case before the Italian magistrates' court concerned a claim for such a small sum of money that there was no right of appeal to a higher national court.

Held: The Court of Justice declared that 'national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice'.

Particular problems have arisen in the UK concerning the position of the Court of Appeal, since an appeal from that court can only be brought with leave of the Court of Appeal or the Supreme Court. If leave is refused, does the Court of Appeal become a court 'against whose decisions there is no judicial remedy under national law'? This question was raised in the English court in ***Chiron Corporation***.

Chiron Corporation v Murex Diagnostics [1995] All ER (EC) 88

Held: The Court of Appeal considered that it was not a court of last resort where it had refused leave to appeal. It took the view that the possibility of an application to the House of Lords (now the Supreme Court) for leave to appeal constituted a 'judicial remedy'. Before refusing leave to appeal, the House of Lords should consider whether the case raised an issue of [EU] law. If it did, that court could either refer the question immediately or grant leave to appeal, with a view to referring the question in the course of the appeal proceedings.

Although the Court of Appeal concluded that it was not a court of last resort, it reasoned that if it transpired that a ruling on [EU] law was necessary, and provided the House of Lords adopted one of the proposed alternative courses of action, a reference would ultimately be made. The Court of Appeal in *R v Pharmaceutical Society of Great Britain* [1987] 3 CMLR 951 also confirmed this reasoning and held 'A court or tribunal below the House of Lords can only fall [within Article 267 paragraph 3] where there is no possibility of any further appeal from it'. Subsequently, ***Lyckeskog* (Case C-99/00) [2002] ECR I-4839** endorsed this approach.

CILFIT: avoiding the obligation to refer

The central purpose of **Article 267** is to prevent the creation, in any Member State, of a body of national case law that is out of line with EU law. It would therefore be reasonable to conclude that the obligation on courts of last resort to refer questions of EU law to the Court of Justice should be absolute and unqualified. Indeed, the wording of **Article 267 paragraph 3** appears to be unequivocal, courts of last resort 'shall bring the matter before the Court of Justice'. However, in ***CILFIT***, the Court of Justice acknowledged that there are exceptions to this obligation. The starting point for the national court must be whether a decision on the question of EU law is necessary to enable it to give judgment.

CILFIT Srl v Ministero della Sanita (Case 283/81) [1982] ECR 3415

Facts: The Italian Supreme Court referred to the Court of Justice a question concerning its obligation to refer in the context of a challenge to an Italian levy on imported wool under **Regulation 827/68**. The Ministry of Health argued that the interpretation of the Regulation was so obvious as to rule out any doubt as to its meaning and that this obviated the need for a reference. The claimant importers maintained that since a question of [EU] law had arisen, the Supreme Court could not, as a court of last resort, escape its obligation to refer.

Held: Affirming the relationship between [**Article 267 paragraphs 2 and 3**] the Court declared that a national court of last resort has the same discretion as any other national court to

ascertain whether a decision on a question of [EU] law is necessary to enable it to give judgment. Accordingly, a national court of last resort has no obligation to refer where a question of [EU] law is not relevant. In addition, a national court of last resort is not obliged to refer if the Court of Justice has previously ruled on the point or where the correct interpretation of [EU] law is so obvious as to leave no scope for reasonable doubt as to its meaning. Nevertheless, in all these circumstances, national courts of last resort are free to bring the matter before the Court of Justice if they consider this to be appropriate.

Development of precedent

In setting out the 'previous ruling' exception in ***CILFIT***, the Court of Justice was reiterating its earlier conclusion in ***Da Costa***.

Da Costa en Schaake NV v Nederlandse Belastingadministratie (Cases 28–30/62) [1963] ECR 31

Facts: A chemical importer challenged Dutch import duties in the Dutch court. The facts and issues of interpretation were materially identical to those raised previously in ***Van Gend***.

The Court began by pointing out that [**Article 267 paragraph 3**] 'unreservedly' requires national courts of last resort to refer every question of interpretation raised before them. However, despite that requirement, the Court concluded that 'the authority

of an interpretation … already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'

Nonetheless, the Court emphasised that [**Article 267**] allows any national court to refer questions of interpretation again.

Held: In response to the question raised, the Court restated its judgment in ***Van Gend***. Declaring that the questions of interpretation were identical and that no new factors had been presented, the Court referred the national court directly to the ***Van Gend*** judgment.

Thus, ***Da Costa*** established that a previous ruling removes the obligation to refer where the facts and questions of interpretation are identical. The Court went further in ***CILFIT***, holding that the same principle applies 'where previous decisions … have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even if the questions at issue are not strictly identical'.

Looking for extra marks?

Da Costa and ***CILFIT*** indicate the development of a system of precedent. The Court of Justice permits, indeed encourages, national courts to rely on its previous rulings, not only when the

facts and questions of interpretation are identical but also when the nature of the proceedings is different and the questions are not identical.

As referred to above, preliminary rulings on validity and interpretation are binding, not only on the parties to the dispute but also in subsequent cases.

Nevertheless, the binding effect of a preliminary ruling does not preclude national courts from seeking further guidance from the Court of Justice. The Court retains the right to depart from its previous rulings and may do so, for instance, when a different conclusion is warranted by different facts.

The development of precedent, together with the binding effect of preliminary rulings, has brought a subtle change to the relationship between the Court of Justice and national courts. Whereas that relationship was originally perceived as horizontal, its roots firmly grounded in cooperation, it is increasingly becoming vertical in nature, with the Court of Justice occupying a position of superiority to national courts.

Doctrine of acte clair

The term **acte clair**, which translated literally means 'clear act', is applied to a provision of EU law whose interpretation is clear or, as articulated in ***CILFIT***, is 'so obvious as to leave no scope for reasonable doubt as to its meaning'. According to ***CILFIT***, when the meaning is clear, there is no need to refer. Whilst this exception appears to allow national courts ample opportunity to avoid making

references, ***CILFIT*** narrowed its scope to a considerable degree. The national court must be convinced that the matter is equally obvious to the courts of the other Member States and the Court of Justice. ***CILFIT*** emphasised that [EU] law is drafted in several languages, uses terminology that is peculiar to it, and must be placed in its context; legal concepts do not necessarily have the same meaning in [EU] law and the law of the various Member States.

It would be surprising to encounter many national courts with sufficient linguistic ability to be able adequately to bear all these matters in mind. The ***CILFIT*** criteria are difficult to satisfy and, in practice, national courts have tended to interpret *acte clair* more loosely.

It is now apparent, however, that too broad an approach to the application of *acte clair* carries risks, for instance where a national court of last resort avoided a reference in reliance on *acte clair* and one party was deprived of EU law rights as a result. In ***Köbler v Austria*** **(Case C-224/01)** the Court of Justice held that state liability in damages would arise if it was manifestly apparent that a national court had failed to meet its obligations under [**Article 267 paragraph 3**], for instance by misapplying the *acte clair* doctrine. More recently in ***Traghetti del Mediterraneo SpA v Italy*** **(Case C-173/03)** the Court declared that it could not rule out liability for damage caused by 'manifest errors' of interpretation of [EU] law by a court of last instance.

As noted by the Court of Human Rights in ***Dhahbi v Italy*** **(App No 17120/09)** the refusal of a court of last instance to make a reference

to the Court of Justice without providing reasons for such refusal will breach the right to a fair trial under **Article 6 of the European Convention on Human Rights**.

> Revision tip
>
> Make sure you are familiar with the circumstances in which a national court of last resort can legitimately decline to refer and that you can cite relevant authorities.

Discretion to refer

Article 267 paragraph 2 sets out the power, or discretion, of every national court to refer questions of interpretation or validity of EU law. It provides that 'any 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'. Importantly, however, the power to refer does not deprive a lower national court of the right to decline to make a reference and reach its own conclusions on the meaning of EU law. That is so even if, in the terms of **Article 267 paragraph 2**, a decision on the question is 'necessary' to enable it to give judgment. **Article 267** is designed to ensure that any 'necessary' questions of EU law will ultimately be referred at the final appeal stage in the relevant jurisdiction.

References on validity

National courts have no power to declare EU law invalid (***Foto-Frost v Hauptzollamt Lübeck-Ost* (Case 314/85)**). Consequently, if a national court's decision turns on the issue of the validity of an EU measure, it must make a reference. Here, a national court may grant interim relief by temporarily suspending a national measure which is being challenged on the grounds of the validity of the EU measure on which it is based (***Zuckerfabrik Süderdithmarschen v Hauptzollamt Itzehoe* (Case C-143/88)**).

Guidance on the exercise of the discretion

The Court of Justice has provided guidance on the exercise of the **Article 267 paragraph 2** discretion in cases relating to the interpretation of EU law.

Whilst guidance from the Court of Justice clearly carries more authority than any statements of national courts, neither can fetter the **Article 267 paragraph 2** discretion. Lower courts remain free to refuse to make a reference but it is important to consider how this discretion is to be exercised.

Relevance

***Dzodzi v Belgium* (Cases C-297/88 & 197/89)**, concerning an interpretation of [EU] law which bore directly on the interpretation of Belgian national law, established that it is for the national court to determine the relevance of the questions referred. As noted earlier, the Court of Justice has rejected references seeking an interpretation

bearing no relation to the main action, though such cases are rare. Following ***Wightman***, the national courts can enjoy a presumption that the reference, and the questions asked, are relevant to the dispute.

Acte clair

Having established relevance, the next consideration for the national court is likely to be whether the provision of EU law is clear. If it is, a reference will not be necessary. In this respect, the ***CILFIT*** criteria for *acte clair* provide useful guidance. As already noted in relation to the obligation to refer, because these criteria demand a significant level of language expertise on the part of the national court, as well as an overview of EU law, in reality they are not easily satisfied. Additionally, as Bingham J (as he then was) pointed out in the English High Court in ***Commissioners of Customs and Excise v Samex* [1983]**, the Court of Justice has distinct advantages that are not necessarily enjoyed by a national court. It has the ability to make comparisons between [EU] texts in different language versions, has a panoramic view of the [EU] and its institutions, and possesses detailed knowledge of [EU] legislation. Later, Sir Thomas Bingham MR (as he later became) in ***R v Stock Exchange, ex parte Else (1982) Ltd* [1993]** again referred to the advantages of the Court of Justice in interpreting [EU] law, declaring that 'if the national court has any real doubt, it should ordinarily refer'.

The ruling in ***CILFIT*** was followed in the English case ***R v International Stock Exchange of the UK and the Republic of Ireland Ltd ex parte Else (1982) Ltd* [1993] 2 CMLR 677**. The

Court of Appeal held:

> [T]he appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself … ***If the national court has any real doubt, it should ordinarily refer***.

In ***R v Secretary of State for the Environment ex parte RSPB* [1995] JPL 842; [1997] Env LR 431, 438**, the House of Lords held that if judges hearing a single case could not agree on how to interpret a rule of EU law, it could not plausibly be regarded as '*acte clair*'.

Of course, if judges from a single Member State are unable to agree on the interpretation of a particular measure, it is not possible for them to conclude that the law is *acte clair*. A recent example is found in ***MB v Secretary of State for Work and Pensions* [2016]** concerning an equal treatment directive on state benefits. As the court was divided on the question of whether the directive applied to a domestic requirement for a transgender person to be unmarried in order to receive a state pension, the Supreme Court held that a reference to the Court of Justice was needed to resolve the dispute.

A previous ruling does not preclude a reference

A previous ruling by the Court of Justice on a similar question does not preclude a reference (***Da Costa***). As noted earlier, in ***Da Costa*** the question referred was substantially the same as that referred in ***Van Gend***. Nonetheless, the Court affirmed that [**Article 267 paragraph 2**] allows a national court, if it considers it desirable, to 'refer questions of interpretation to the Court again'. Thus a reference was not ruled out, although in responding to the question in ***Da***

Costa, the Court simply repeated its judgment in ***Van Gend***.

In the recent case of ***Viesgo Infraestructuras Energéticos*** **(Case C-683/19)** the Spanish Constitutional Court suggested a more stringent test and overruled a previous Supreme Court decision as this court had failed to make a reference to the Court of Justice in reliance on two previous Court of Justice's rulings addressing the underlying legal issue.

The Spanish Constitutional Court considered that the facts of the previous rulings of the Court of Justice were not analogous and involved a different directive and thus the matter could not be clarified using the ***CILFIT*** principle.

National rules of precedent

National rules of precedent have no impact on the discretion to refer (***Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*** **(Case 146/73)**). This means that the ruling of a higher national court on an interpretation of EU law does not prevent a lower court in the national system from requesting a ruling on the same provisions from the Court of Justice.

Revision tip

Be familiar with and prepared to apply the guidance relating to the exercise of the discretion to refer including the benefits of making a reference to the Court of Justice as set out in ***Samex***.

Reform

The Court of Justice's workload has risen significantly over the years and currently references for preliminary rulings can take around 20 months. Modifications to the Court's Rules of Procedure have helped to alleviate the difficulties: for instance, the provision for expedited hearings in urgent cases and the power to give preliminary rulings by reasoned order where an identical question has been dealt with previously. Other means of reducing the Court's case load have been canvassed and discussed, notably in the paper 'The Future of the Judicial System of the European Union' (1999, produced by members of the Court of Justice and the Court of First Instance) and the Due Report (2000). These include restricting the power to make references to courts of last resort, removing the obligation to refer save for questions that are 'sufficiently important', and the creation of decentralised regional courts. The Treaty of Nice gave the Court of First Instance the power to give preliminary rulings, as specified by the **Statute of the Court of Justice**, though currently the Statute does not confer **Article 267** jurisdiction on the General Court (formerly the Court of First Instance).

Implications of Brexit

Whilst earlier English cases demonstrated a reluctance of the UK courts to make references (see Lord Denning in ***Bulmer Ltd and another v Bollinger SA and Others*** **[1974]**), later cases demonstrated a recognition of the advantages of the Court of Justice in interpreting [EU] law and a greater number of references were made by courts below the final appeal court in that case.

The preliminary referencing system under **Article 267 TFEU** will have limited relevance for UK courts following the end of the transition period. However, UK courts will retain a power to make references to the Court regarding the meaning of any aspects of part 2 of the Withdrawal Agreement for eight years beyond the end of the transition period. Consequently, questions concerning the rights of EU citizens to reside in the UK post-Brexit can continue to be referred until at the least the end of 2028. An example would be if the UK courts are considering whether EU citizens with pre-settled status under the EU Settlement Scheme (to be discussed in Chapter 6) are entitled to state benefits.

KEY CASES

CASE	FACTS	PRINCIPLE
CILFIT Srl v Ministero della Sanità **(Case 283/81) [1982] ECR 3415**	Claim before Italian magistrates: no right of appeal as the sum of money concerned was so small.	'[N]ational courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice.'
Da Costa en Schaake NV v Nederlandse Belastingadministratie **(Cases 28–30/62) [1963] ECR 31**	Challenge to an Italian levy on imported wool.	No obligation to refer if the question is not relevant; there is a previous ruling by the Court of Justice; or the correct interpretation of EU law is *acte clair*.
Costa v ENEL **(Case 6/64) [1964] ECR 585**	Interpretation of [EU] law bore directly on the interpretation of Belgian law.	It is for the national court to determine the relevance of the questions referred.
Dzodzi v Belgium **(Cases C-297/88 & 197/89) [1990] ECR I-3763**	The facts and questions of interpretation were materially identical to those raised previously in ***Van Gend***.	A previous ruling by the Court of Justice does not preclude a reference.
Foglia v Novello (No 1) **(Case 104/79) [1980] ECR 745 and** ***Foglia v Novello (No 2)*** **(Case 244/80) [1981] ECR 3045**	Challenge in the Italian court to French taxes levied on imported liqueur wine.	No genuine dispute: reference refused.
Köbler v Austria **(Case C-224/01) [2003] ECR I-10239**	Köbler claimed that failure to refer deprived him of his [EU] law rights.	State liability in damages would arise if the national court of last resort had failed in its obligations, for instance by misapplying *acte clair*.

***Lyckeskog* (Case C-99/00) [2002] ECR I-4839**	The decision of the Court of Appeal for Western Sweden was subject to appeal to the Swedish Supreme Court, but only with leave from the latter court.	The need for leave to appeal did not preclude a judicial remedy. If a question of EU law arose, the Supreme Court would be obliged to refer, either when considering admissibility or at a later stage.
***Meilicke v ADV/ORGA AG* (Case C-83/91) [1992] ECR I-4871**	Reference concerning the Second Banking Directive.	Questions were hypothetical: reference refused.
***R v Pharmaceutical Society of Great Britain* [1987] 3 CMLR 951**	Status of national courts with regard to appeals from their judgments.	A court or tribunal below the highest court in a Member State can only fall within Article 267 paragraph 3 where there is no possibility of any further appeal from it.
***Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 146/73) [1974] ECR 139**	A German lower court sought a reference despite a ruling by a higher national court involving questions of [EU] law.	National rules of precedent have no impact on the discretion to refer: the ruling of a higher national court on an interpretation of EU law does not preclude a reference from a lower court.
***Telemarsicabruzzo SpA v Circostel* (Cases C-320–322/90) [1993] ECR I-393**	No information provided on the facts and legal background.	National court had supplied insufficient information: reference refused.
Viesgo Infraestructuras Energéticos (Case C-683/19)	Consideration of significance of previous rulings of the Court of Justice when not directly analogous to current case.	Spanish Constitutional Court applied more stringent test as to whether national courts can rely on previous rulings of the Court of Justice.
***Wightman and Others v Secretary of State for Exiting the European Union* (Case C-261/18)**	Consideration of whether Article 50 TEU notice to leave the European Union is revocable.	Court of Justice accepted reference as it was necessary for the effective resolution of the dispute; not regarded as a hypothetical issue

EXAM QUESTIONS

Problem question

Maxisports SA, a French manufacturer of fitness equipment, agreed to supply rowing machines to Ben, an Irish retailer. Under the contract, Ben reserved the right to reject the goods if they failed to comply with any relevant provisions of EU law. (Fictitious) Council Regulation 27/89 ('the Regulation') requires fitness equipment to be fitted with safety notices in a 'permanent form'.

The machines arrived at Ben's store in Dublin. They carried safety notices attached to the machines with plastic tabs. Ben refused to take delivery, claiming that the machines did not comply with the Regulation because the notices were not in a 'permanent form'. Ben brought proceedings in the Irish High Court for return of the purchase price. Maxisports rejected this claim on the grounds that the rowing machines complied with the Regulation.

In the Irish High Court it was established that the rowing machines had a working life of up to six years and that the safety notices were sufficiently secure to remain intact for between three and four years. The court was referred to an earlier Irish Supreme Court's decision in which the words 'permanent form' in the Regulation had been interpreted to include any method of attachment that could reasonably be expected to endure throughout the period of the manufacturer's guarantee. Their Lordships had reasoned that equipment became obsolete once a

guarantee had expired, because repairs were so expensive. Counsel for Maxisports argued that, since Maxisports' machines were guaranteed for three years, the safety notices were in a 'permanent form' and that therefore the machines complied with the Regulation. The Irish High Court took the view that it was bound by the Supreme Court's interpretation and declined to make a reference to the Court of Justice. It gave judgment for Maxisports.

On appeal, the Irish Court of Appeal disagreed with the Supreme Court's interpretation of 'permanent form' stating that these words clearly meant that the notices must be attached to fitness equipment in such a way as to remain intact throughout its working life. Nonetheless, taking the view that it was bound by the Supreme Court's interpretation, the court refused to make a reference to the Court of Justice, gave judgment for Maxisports, and refused leave to appeal to the Irish Supreme Court.

Consider the application of **Article 267 TFEU** to this situation.

Essay question

Article 267 TFEU embodies a method of cooperation between national courts and the Court of Justice which ensures that EU law has the same meaning in all the Member States.

How far do you consider this to be an accurate evaluation of the **Article 267** preliminary reference procedure?

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

4

Direct actions in the Court of Justice of the European Union

Articles 258–260, 263, 265, 277, and 340 TFEU

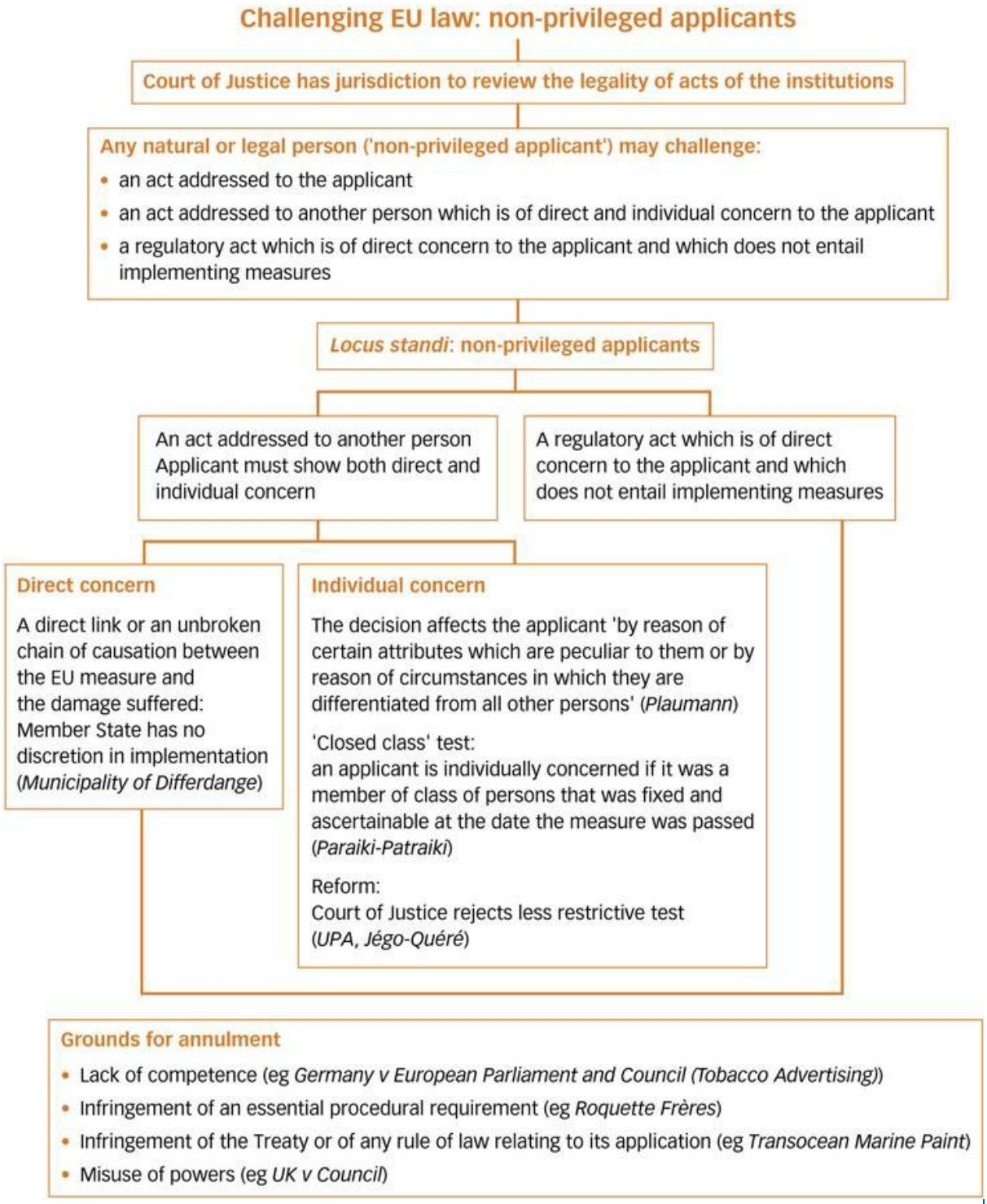
The assessment

The coverage of direct actions varies greatly from course to course and the wide variety of potential questions reflects this. You may be tested on your knowledge of procedure and your ability to evaluate this, for instance in relation to enforcement actions under Article 258 TFEU. You may be asked to analyse developing case law, for instance concerning the difficulties for individuals in establishing standing under Articles 263 and 265 TFEU or the right to damages against the EU under Article 340 TFEU. In compiling problem questions, examiners may draw inspiration from the facts of cases, so be familiar with these.

Key facts

- **As well as actions brought indirectly to the Court of Justice through preliminary references from national courts under Article 267, the TFEU also provides for actions that are brought directly before the Court.**
- **Under Articles 258 and 259 TFEU, respectively, the European Commission and Member States may bring enforcement proceedings against a Member State in breach of Treaty obligations. Article 260 TFEU requires compliance with the Court's judgment.**
- **Article 263 TFEU concerns judicial review of EU acts. The outcome of a successful action is annulment.**
- **Article 265 TFEU provides for actions against the EU institutions for failure to act.**
- **Article 277 TFEU may be invoked in the course of other proceedings, for instance in an action under Article 263, to challenge the underlying regulation on which a contested act is based.**
- **Under Article 340 TFEU individuals who have suffered loss as a result of EU action can recover damages.**

Overview: Article 263 TFEU


Challenging EU law: non-privileged applicants
Court of Justice has jurisdiction to review the legality of acts of the institutions
Any natural or legal person ('non-privileged applicant') may challenge:
• an act addressed to the applicant
• an act addressed to another person which is of direct and individual concern to the applicant
• a regulatory act which is of direct concern to the applicant and which does not entail implementing measures
Locus standi: non-privileged applicants
An act addressed to another person
Applicant must show both direct and individual concern
A regulatory act which is of direct concern to the applicant and which does not entail implementing measures
Direct concern
A direct link or an unbroken chain of causation between the EU measure and the damage suffered:
Member State has no discretion in implementation
(Municipality of Differdange)
Individual concern
The decision affects the applicant 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons' (Plaumann)
'Closed class' test:
an applicant is individually concerned if it was a member of class of persons that was fixed and ascertainable at the date the measure was passed
(Paraiki-Patraiki)
Reform:
Court of Justice rejects less restrictive test
(UPA, Jégo-Quéré)
Grounds for annulment
• Lack of competence (eg Germany v European Parliament and Council (Tobacco Advertising))
• Infringement of an essential procedural requirement (eg Roquette Frères)
• Infringement of the Treaty or of any rule of law relating to its application (eg Transocean Marine Paint)
• Misuse of powers (eg UK v Council)

Enforcement actions against Member States (Articles 258–260 TFEU)

Member States have a duty, under **Article 4 TEU**, to fulfil their EU obligations. **Articles 258–260 TFEU** provide enforcement mechanisms comprising of proceedings against Member States in breach of EU law, brought by the European Commission (**Article 258**) or another Member State (**Article 259**) directly in the Court of Justice. **Article 260** complements these provisions by requiring Member States to comply with the Court's judgment.

Originally, **Article 258** was intended to be the principal mechanism for enforcement of EU law. However, since the development of the doctrines of **direct effect**, **indirect effect**, and **state liability** (discussed in Chapter 2), providing for the enforcement of EU law in the national court by individuals, direct actions in the Court of Justice form only part of the system of 'dual enforcement' of EU law.

Enforcement actions by the Commission (Article 258 TFEU)

What constitutes a breach?

Whilst the Treaty provides no definition, the Court of Justice has held that breaches include not only acts but also failures to act. Commonly, infringements comprise failure to implement directives or a failure to implement them correctly, or breaches of the Treaty.

Commission v Belgium (Case 1/86) [1987] ECR 2797

Held: In proceedings brought by the Commission under [**Article 258 TFEU**], the Court of Justice found that Belgium had not met its Treaty obligations by failing to implement, by the deadline, a directive concerning water pollution.

Spanish Strawberries concerned a failure to act to ensure the free movement of goods (discussed in Chapter 5).

Commission v France (Spanish Strawberries) (Case C-265/95) [1997] ECR I-6959

Facts: For over a decade, the French authorities had failed to prevent violent protests by French farmers directed against agricultural products being imported from other Member States.

Held: In [**Article 258**] proceedings, the Court of Justice held that, in failing to take adequate preventative action, France had breached its obligations under what is now **Article 4 TEU**.

Identifying breaches

The Commission discovers suspected breaches through its own investigations, complaints from private parties, or reports from Member States. Individual citizens or companies affected by a breach cannot compel the Commission to take action.

Star Fruit Company v Commission (Case 247/87) [1989] ECR 291

Facts: Star Fruit had complained to the Commission about breaches of [EU] law by France relating to the organisation of the French banana market and now brought proceedings against the Commission under what is now **Article 265 TFEU** (considered later) for failure to act.

Held: The Court of Justice held that the Commission has a discretion, not a duty, to commence proceedings. Individuals cannot require the Commission to take action.

Looking for extra marks?

The Commission's wide discretion in this regard may be criticised as diluting the effectiveness of EU law enforcement.

The Commission is not obliged to keep the complainant informed of the progress of any action that it may be taking, though in a 2016 Communication (C(2016)8600), it undertook to keep complainants more closely informed.

Member States as defendants

Although national governments are the defendants in **Article 258** proceedings, an action may be brought in respect of the failure of any state agency, whether executive, legislative, or judicial.

Commission v Belgium (Case 77/69) [1970] ECR 237

Facts: Belgium maintained that it was not responsible for its Parliament's failure, through lack of time, to amend national tax legislation, which violated [EU] law.

Held: The Court of Justice held that Member States are responsible 'whatever the agency of the State whose action or

inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.

Procedure

Administrative stage

Article 258 provides that 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations'. The administrative phase incorporates the required elements: the Member State concerned must be given the opportunity to submit its observations; if the Commission is not satisfied, it delivers a reasoned opinion.

The Commission's practice is first to raise the matter informally with the Member State. If not satisfied with the response, it commences the formal procedure.

Formal proceedings begin with the 'letter of notice' to the Member State setting out the Commission's reasons for suspecting an infringement. The Member State must be given a reasonable period of time to respond. Typically, there follow discussions between the Commission and the Member State, with a view to negotiating a settlement. If this proves impossible, the Commission moves to the next phase, the reasoned opinion.

The **reasoned opinion** sets out precisely the grounds of complaint and specifies a time limit within which the Member State is required to take action to end the infringement. In determining whether the deadline is reasonable, the Court of Justice takes account of all the circumstances.

Commission v France (Case C-1/00) [2001] ECR I-9989

Facts: France had continued to ban beef imports from the UK, despite the relaxation of the export restrictions imposed on the UK by the EU during the BSE ('mad cow disease') crisis. The Commission took action under [**Article 258**]. France complained that it had been given insufficient time to respond to the Commission's opinion.

Held: The Court of Justice held that a very short period would be justified where, as here, the Member State is already fully aware of the Commission's views.

Measures taken by the Commission during the administrative stage, including the letter of notice and reasoned opinion, have no binding force. They cannot be challenged under **Article 263 TFEU** (considered later).

Judicial stage

Once the time limit for a response to the reasoned opinion has passed,

if the matter is not settled the Commission may commence proceedings in the Court of Justice. Here, the Commission cannot rely on matters not raised in the reasoned opinion. Interested Member States, but not individuals, may intervene in the proceedings.

Revision tip

Questions may require consideration of the enforcement procedure described above; be familiar with this.

Interim measures

It can take many months to reach a resolution, during which there may be continuing harm to affected individuals. **Articles 278** and **279 TFEU**, respectively, provide for suspension orders and orders for interim measures.

Commission v UK (Case C-246/89R) [1989] ECR 3125

Held: The Court of Justice ordered the suspension of provisions of the UK Merchant Shipping Act 1988, which the Commission claimed infringed [EU] law, pending judgment in the main **Article 258** enforcement proceedings.

Effect of a judgment (Article 260 TFEU)

Article 260 requires Member States to comply with the Court of Justice's judgment. If the Commission considers that the state has not complied it may bring the case before the Court, after giving that state the opportunity to submit its observations. The **Treaty on European Union** amended Article 228 EC (now **Article 260 TFEU**) to allow the Commission to recommend an appropriate lump sum or penalty payment. The Court of Justice is not bound to follow this recommendation. It can set any level of penalty it wishes, with no upper limit, including a dual financial penalty, incorporating both a penalty payment levied in respect of each day (or other time period) of delay in complying with the judgment and a lump sum penalty (***Commission v France*** **(Case C-304/02)**). Where, at the date of the judgment, a Member State has complied with its obligations, the imposition of a penalty payment will not be necessary, though the Court of Justice may order a lump sum payment where the breach was serious and has persisted for a considerable period of time (***Commission v France*** **(Case C-121/07)**).

Article 260 paragraph 3 TFEU, introduced by the Treaty of Lisbon, provides that when the Commission brings a case before the Court pursuant to **Article 258** on the grounds that a Member State has failed to fulfil its obligation to notify measures transposing a directive, it may specify the amount of lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment not exceeding the specified amount, taking effect on a date specified by the Court.

Enforcement actions brought by Member States (Article 259 TFEU)

A Member State may bring an action against another Member State which it considers has failed to fulfil EU obligations. First, the complaint must be brought before the Commission which, before any Court action is taken, asks for submissions from both states, delivers a reasoned opinion, and seeks a settlement. Sometimes, the Commission takes over the action, as it did in ***Commission v France*** **(Case 1/00)**. **Article 259** actions are rare, as Member States generally prefer, for political reasons, to ask the Commission to act under **Article 258**.

Action for annulment: Article 263 TFEU

Whereas **Articles 258** and **259** concern proceedings against Member States for alleged breaches of EU law, **Article 263** provides for judicial review of acts adopted by the EU institutions, through direct actions in the Court of Justice. Actions brought by individuals are heard, at first instance, in the General Court. Applicants may challenge acts of the institutions on grounds of 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'. If the challenge is successful, the act is annulled.

Annulment actions may be brought by Member States, the EU institutions (against other EU institutions), and individuals. Member States, the European Parliament, the Council, and the Commission have automatic right of access to the Court in such cases. In contrast, individuals' right of access, their 'standing' or locus standi to bring **Article 263** proceedings, is limited. These limitations have given rise to widespread criticism and to calls for reform of this area of EU law.

Revision tip

Locus standi (standing) is the most contentious element of

Article 263. Questions frequently focus on this aspect.

Acts that may be challenged

Article 263 allows the Court of Justice to review the legality of acts of the EU institutions, other than recommendations or opinions, which are 'intended to produce legal effects vis-à-vis third parties'. The Treaty of Lisbon extended the category of reviewable acts in **Article 263** to include the acts of 'bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'. Whilst reviewable acts clearly include legally binding acts, namely regulations, directives, and decisions, other kinds of act may also be susceptible to judicial review. For instance, the Court of Justice held that a Council resolution concerning the European Road Transport Agreement could be challenged (***Commission v Council (ERTA)* (Case 22/70)**).

In ***IBM v Commission* (Case 60/81)** the Court defined a reviewable act as 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position'.

Unfortunately, whether a particular act results in such a change is not always easily determined. The Court's conclusions have sometimes been controversial, as may be illustrated by ***IBM*** and ***SFEI***. In ***IBM***, the Court refused to allow IBM to challenge a letter from the Commission setting out its intention to institute competition

proceedings and the basis of its case. By contrast, a letter from the Commission stating that it intended to close its file on a complaint alleging breaches of competition law was held to be susceptible to judicial review (***SFEI v Commission* (Case C-39/93P)**).

Time limit

Actions must be brought within two months of publication of the measure or its notification to the applicant or, in the absence of either, the date on which it came to the applicant's knowledge.

Why seek judicial review?

Judicial review provides applicants with the means to challenge EU acts which they believe have impacted on them adversely. For instance, in ***Commission v Council (ERTA)*** the Commission challenged the Council's power to participate in negotiation and conclusion of the European Road Transport Agreement, claiming that it, and not the Council, held the necessary powers. Typically, individuals seek to challenge EU acts which affect their business interests. The fishing company Jégo-Quéré, for instance, sought to challenge a regulation on the preservation of hake stocks which prohibited the use of small-meshed fishing nets (***Commission v Jégo-Quéré* (Case C-263/02P)**). Other challenges have concerned the withdrawal of subsidies or import licences or the imposition of import quotas.

Revision tip

Consider the cases carefully, thinking about the kinds of situations in which individuals have sought to challenge EU acts.

Standing: who may bring Article 263 proceedings?

Standing or *locus standi*, meaning the right to bring a legal challenge before the Court, depends upon the prospective applicant's status. There are three classes of applicants: privileged, semi-privileged, and non-privileged.

Privileged and semi-privileged applicants

Privileged applicants, comprising Member States, the Council, Commission, and Parliament, do not need to establish any particular interest in the legality of EU acts. They have an unlimited, right to bring **Article 263** proceedings. Semi-privileged applicants, comprising of the Court of Auditors, the European Central Bank, and the Committee of the Regions, have standing under **Article 263** 'for the purpose of protecting their prerogatives', in other words when their interests are affected.

Non-privileged applicants

These comprise all other applicants, be they natural persons (including individuals in business), or legal persons (companies). Challenges by non-privileged applicants begin in the General Court, with a right of appeal to the Court of Justice. Unlike privileged and semi-privileged applicants, non-privileged applicants' right of access to the Court is severely limited.

Revision tip

Non-privileged applicants figure prominently in questions. Make sure you are confident about the principles applying to them.

Standing: non-privileged applicants

The Lisbon Treaty amended the Treaty provisions relating to the standing of non-privileged applicants.

Article 263 TFEU provides that:

> Any natural or legal person may … 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 other words, a non-privileged applicant may challenge:

- an act addressed to the applicant;
- an act addressed to another person which is of direct and individual concern to the applicant;

- a regulatory act which is of direct concern to the applicant, and which does not entail implementing measures.

'An act addressed to that person'

With respect to acts addressed directly to the applicant, such as Commission decisions on competition law breaches addressed directly to companies, admissibility is not problematic. Such measures may be challenged without restriction, provided they are brought within the two-month time limit. Whilst the similar provision in Article 230 EC referred to a 'decision' addressed to the applicant, the position under **Article 263 TFEU** remains substantially unchanged, since acts addressed to individuals typically take the form of decisions.

'An act addressed to another person'

'An act addressed to another person' clearly includes a decision addressed to another person (typically to a Member State or Member States). To challenge such a measure, the applicant must establish both direct and individual concern.

In contrast, the position regarding regulations is less clear. Previously, under Article 230 EC, in order to establish standing to challenge a regulation (in addition to the requirements for direct and individual concern), an applicant had to show that the measure was 'a decision in the form of a regulation'. Although the Court of Justice addressed this provision in a number of cases, the precise scope of the 'decision in disguise' requirement remained uncertain. With the Lisbon Treaty

amendments, this provision has been abandoned in its entirety. However, fresh uncertainty has been introduced by the new provision in **Article 263 TFEU** concerning 'regulatory acts'.

'A regulatory act which is of direct concern to the applicant, and which does not entail implementing measures'

Article 263 affords standing to a non-privileged applicant in respect of 'a regulatory act which is of direct concern to the applicant, and which does not entail implementing measures'. Unfortunately, the Treaties do not define 'regulatory act', though the **TFEU** makes a distinction between 'legislative acts' (adopted by the Council and the European Parliament under legislative procedures) and 'non-legislative acts' (adopted by the Commission under delegated powers) (**Articles 289–290 TFEU**). If defined broadly, 'regulatory act' could include both legislative regulations and non-legislative regulations. Conversely, if defined narrowly, 'regulatory act' could well be confined to non-legislative regulations.

A broad definition of 'regulatory act' would result in a more liberal approach to standing for non-privileged applicants, since only direct concern would need to be established in relation to both legislative and non-legislative regulations, provided the regulation in question did not entail implementing measures. On the other hand, if the narrow definition were to be adopted, legislative regulations would fall within the scope of 'acts addressed to another person' and applicants would need to establish both direct and individual concern.

Recent case law has brought much needed clarity to this area. In ***Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*** **(Case C-583/11P)**, the Court confirmed the interpretation of 'regulatory acts' provided earlier by the General Court and Advocate-General Kokott. In so doing, the Court clarified that the requirements for legislative acts (direct and individual concern) were not to be altered. 'Regulatory acts' therefore can be interpreted as all acts of general application except legislative acts.

The meaning of 'implementing measures' has similarly been interpreted restrictively, seemingly ensuring that the fourth paragraph of **Article 263** fails to relax the rules on standing. In ***T & L Sugars v Commission*** **(Case C-456/13)**, the applicants sought to challenge measures which adversely affected them on the basis that the granting of certificates by Member States pursuant to the application of criteria in the relevant Regulation did not amount to 'implementing measures'. The applicants argued that only where a Member State is afforded discretion as to the implementation of an act would it 'entail implementing measures' within the Article. However, the Court of Justice rejected this interpretation holding that the decisions of national authorities with regards to granting or denying certificates in full or in part therefore constituted implementing measures within the meaning of **Article 263(4) TFEU**.

Direct concern

To establish direct concern the applicant must show a direct link or

unbroken chain of causation between the act and the damage sustained. A link is not established if the measure leaves a Member State discretion in its implementation, for here the applicant is affected not by the act itself but by its implementation.

Municipality of Differdange v Commission (Case 222/83) [1984] ECR 2889

Facts: A Commission decision addressed to Luxembourg authorised it to grant aid to steel producers, provided they reduced production capacity. The applicant sought annulment of the decision, claiming that reduced production would result in the loss of local tax revenue.

Held: The Court of Justice held that the decision left the national authorities and producers discretion in implementation, particularly regarding the choice of factories for closure. It was the exercise of that discretion that affected the applicant, which was therefore not directly concerned by the Commission decision.

Identification of direct concern can entail fine distinctions.

Piraiki-Patraiki v Commission (Case 11/82) [1985] ECR 207

Facts: The applicant companies sought to challenge a

Commission decision authorising France to impose quotas on cotton yarn imports from Greece. The French authorities had discretion since they could choose whether or not to use the authorisation.

Held: The possibility that the authorities would not impose quotas was 'purely theoretical', since France already restricted Greek yarn imports and had requested permission to impose even stricter quotas. The applicants were therefore directly concerned by the decision.

With respect to 'regulatory acts', the distinction (if any) between direct concern and 'entailing implementing measures' remains to be determined.

Individual concern

This requirement is applied very restrictively and has proved a significant hurdle for applicants. The ***Plaumann*** formula is the classic test.

Plaumann v Commission (Case 25/62) [1963] ECR 95

Facts: Plaumann, a clementine importer, sought to challenge a Commission decision addressed to Germany refusing it authorisation to reduce customs duties on clementines imported into the [EU].

Held: The Court of Justice declared that 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. Plaumann was affected because of a commercial activity that in future could be taken up by any other person. The company could not claim to be singled out by the decision and so was not individually concerned.

Looking for extra marks?

The ***Plaumann*** test has been criticised as commercially unrealistic and, in practice, virtually impossible to satisfy. Whilst theoretically anyone in the EU can set up business in a particular sector, for instance as a clementine importer, this may not be possible where, as is often the case, the sector is dominated by a small number of operators. Against that commercial reality, it can be argued that anyone might, in theory, enter the market or, more generally, that the distinguishing characteristics claimed by the applicant may in the future be acquired by any other person. Consequently, it is difficult to establish individual concern.

Despite the difficulties, non-privileged applicants are sometimes able

to establish individual concern. They have done so, in particular, when they were a member of a class of persons that was fixed and ascertainable (a ‘closed class’) at the date the measure was passed and, consequently, the measure had only retrospective impact on a specific group of persons.

Piraiki-Patraiki v Commission (Case 11/82) [1985] ECR 207

Facts: It will be recalled that the applicants sought annulment of a Commission decision authorising France to impose quotas on cotton yarn imports from Greece.

Held: Considering individual concern, the Court of Justice declared that the mere fact that the applicants exported the product to France was not sufficient to distinguish them from any other current or future exporter. However, they were distinguished by the fact that, before the adoption of the decision, they had entered into contracts for sale of the products. They were held to be individually concerned.

Because the applicants had entered into contracts before the decision was adopted, they were part of a closed class of applicants, a class that was fixed and ascertainable at the date the measure was passed.

Looking for extra marks?

The Court of Justice has held unwaveringly to the restrictive interpretation of ‘individual concern’, doubtless fearful of opening the floodgates to challenges to EU law and of hindering the institutions’ ability to adopt legislation in the general interest. In defence of this stance, the Court referred to the other possible routes open to applicants, in particular indirect challenge through **Article 267** and damages claims against the EU under **Article 340**. The continuing criticism of the Court’s restrictive approach, denying access to judicial review to large numbers of non-privileged applicants, culminated in pressure for reform in ***UPA*** and ***Jégo-Quéré***. Both cases concerned challenges to regulations.

Union de Pequeños Agricultores v Council (UPA) (Case 50/00P) [2002] ECR I-6677

Facts: UPA’s challenge to a regulation withdrawing aid for olive oil producers had been held inadmissible by the Court of First Instance (CFI) (now the General Court). UPA had failed to establish individual concern. The CFI rejected UPA’s argument that the current test for individual concern denied individuals effective legal protection, declaring that UPA could have brought proceedings in the national court and sought an **Article 267** reference on the legality of the regulation.

On appeal to the Court of Justice, Advocate-General Jacobs articulated the difficulties of the **Article 267** route. In particular, there may be no national implementing measure on which

national action could be based, a national court has no power to annul EU law, an applicant cannot insist on a reference, and the preliminary reference procedure entails delay and cost. He proposed a new test for individual concern: 'the measure has, or is liable to have, a substantial adverse effect on [the applicant's] interests'.

Held: The Court of Justice rejected these arguments and reaffirmed the existing case law on individual concern.

Before the judgment in ***UPA***, and in the light of Advocate-General Jacobs's opinion in that case, in ***Jégo-Quéré v Commission* (Case T-177/01)**, the CFI called for review of the test for individual concern. It proposed that an individual should be regarded as individually concerned by a regulation if it 'affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'. The Court of Justice subsequently upheld the Commission's appeal against the CFI's decision in ***Jégo-Quéré***, again reaffirming the ***Plaumann*** test for individual concern (***Commission v Jégo-Quéré* (Case C-263/02P)**).

Revision tip

Be familiar with the key points on standing for non-privileged applicants: direct concern, individual concern, and the provision on 'regulatory acts'.

Grounds for annulment

The grounds for annulment, which may well overlap in individual cases, are set out in **Article 263(2)**.

Lack of competence

Here, the institution adopting the measure does not have the necessary power. For instance, in ***Germany v European Parliament and Council (Tobacco Advertising)* (Case C-376/98)** a directive banning tobacco advertising, identified as a public health measure, was annulled because it was adopted under a Treaty article concerning the internal market. Lack of competence is similar to *ultra vires* in English law.

Infringement of an essential procedural requirement

This arose, for instance, in ***Roquette Frères v Council* (Case 138/79)**, concerning a failure to consult Parliament before the adoption of a measure, as required by the Treaty.

Infringement of the Treaty or of any rule of law relating to its application

This broad ground covers any infringement of EU law, including the general principles of non-discrimination, proportionality, and

fundamental human rights. ***Transocean Marine Paint v Commission* (Case 17/74)** provides an example of annulment on the basis of a breach of the principle of natural justice.

Misuse of powers

This entails the adoption of a measure for a purpose other than that intended by the Treaty provision constituting its **legal base**. In ***UK v Council* (Case C-84/94)**, for instance, the UK argued, unsuccessfully, that the Working Time Directive (93/104) was wrongly based on Article 118a EC (now **Article 153 TFEU**) concerning health and safety at work.

Effect of annulment

If the grounds are established, the measure is declared void and the institution concerned must take measures to comply with the judgment.

Action for failure to act: Article 265 TFEU

Article 265 allows privileged and non-privileged applicants to challenge inaction by the EU institutions, the European Central Bank, and the bodies, offices, or agencies of the EU, where they have a duty to act. That duty must be sufficiently well defined.

European Parliament v Council (Case 13/83) [1985] ECR 1513

Facts: Parliament challenged the Council's failure to implement a common transport policy, as required by Article 74 E**C** (now **Article 90 TFEU**), and to ensure freedom to provide transport services, as required by various other Treaty provisions.

Held: Parliament succeeded on the second allegation, as the relevant obligation was clear, but not on the first, as the obligation was not sufficiently precise.

Originally, strict *locus standi* requirements were imposed on non-privileged applicants.

Bethell v Commission (Case 246/81) [1982] ECR 2277

Facts: Lord Bethell sought to challenge the Commission's failure to act on breaches of the competition rules by airlines.

Held: Declaring the action to be inadmissible, the Court of Justice held that to bring a challenge under what is now **Article 265**, the applicant must show that it would be an addressee of the potential act.

Subsequently, the standing requirements have been relaxed.

T Port v Bundesanstalt für Landeswirtschaft und Ernährung (Case C-68/95) [1996] ECR I-6065

Held: The Court of Justice applied *locus standi* requirements analogous to those under what is now **Article 263 TFEU**, holding that the applicant must show that it would be directly and individually concerned by the potential act.

An action will be admissible only if the institution concerned has first been called upon to act and has failed to define its position within two months. Following a declaration of failure to act, the institution must take the necessary measures to comply with the Court's judgment (**Article 266**).

Relationship between Articles 263 and 265

Articles 263 and **265** complement each other by covering, respectively, illegal action and illegal inaction. They have been described by the Court of Justice as prescribing 'one and the same method of recourse' (***Chevally v Commission*** **(Case 15/70)**). They can be pleaded in the alternative but both cannot be applied to the same factual situation.

Eridania v Commission (Cases 10 & 18/68) [1969] ECR 459

Held: The Commission's refusal to revoke certain decisions on the grant of aid to sugar producers amounted to an act, not a failure to act. Accordingly, only [**Article 263**] could be applied. [**Article 265**] should not be used to bypass the limitations of [**Article 263**], notably the two-month time limit for bringing proceedings. The annulment action was held inadmissible for lack of direct and individual concern.

Plea of illegality: Article 277 TFEU

Under **Article 277** 'any party', including privileged and non-privileged applicants, may challenge an 'act of general application' indirectly, even where the two-month time limit laid down by **Article 263** has elapsed. **Article 277** does not provide an independent cause of action but may be invoked during other proceedings. For instance, in an action for annulment of a decision under **Article 263**, the applicant may seek to challenge the underlying regulation on which that decision is based. The grounds for review are identical to the **Article 263** grounds. The outcome of a successful challenge is a declaration of inapplicability.

Overview: Article 340 TFEU

EU liability in damages

Non-contractual liability: 'The Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties' (Article 340 TFEU)

General principles common to the laws of the Member States. Applicant must establish:

- wrongful act
- actual damage
- causation (*Lütticke*)

Wrongful act

Schöppenstedt

(General legislative measures involving choices of economic policy)
The applicant must show:

- **a sufficiently serious breach** (*HNL*)
  (institution has 'manifestly and gravely disregarded the limits on its discretion' with regard to the effect of the measure (*HNL*); or Court of Justice may require the conduct to be 'verging on the arbitrary' (*Amylum*))
- **a superior rule of law for the protection of individuals**
  (eg general principles of law, such as non-discrimination (*HNL*))

Bergaderm

Infringement of a rule of law intended to confer rights on individuals

Test for a sufficiently serious breach: the degree of discretion accorded to the institution, not the arbitrariness of the act or the seriousness of the damage caused

Damage

Must be quantifiable and exceed the loss arising from the normal economic risks inherent in business (eg *HNL*)

Causation

The damage must be a sufficiently direct consequence of the institution's breach (*Dumortier*)

Recovery of damages: Article 340

Article 340 provides a mechanism for recovery of damages by individuals who have suffered loss as a result of EU action:

> In the case of non-contractual liability, the Union shall, in accordance with the principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

This is an independent form of action, so an applicant need not first secure annulment under **Article 263**.

In cases of damage caused by EU officials, the Court of Justice will apply the test in ***Sayag v Leduc* (Case 9/69)**: the EU 'is only liable for acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to [it]'. Where, more commonly, the claim concerns an act of an EU institution, three elements must be established: a wrongful or illegal act, damage, and causation (***Lütticke v Commission* (Case 4/69)**).

Wrongful act: the original approach in *Schöppenstedt*

Under the so-called ***Schöppenstedt*** formula, a distinction was

drawn between legislative and administrative acts (***Schöppenstedt Aktien-Zuckerfabrik v Council* (Case 5/71)**). With regard to administrative breaches, liability could be established on the basis of illegality alone.

Administrative breaches

Adams provides an example.

Adams v Commission (Case 145/83) [1985] ECR 3539

Facts: Adams had alerted the Commission to alleged competition law breaches by his employer, the Swiss pharmaceutical company Hoffmann-La Roche. The Commission disclosed documents to the company from which the latter identified Adams as the informant. Subsequently Adams was convicted of economic espionage in Switzerland.

Held: In [**Article 340**] proceedings brought by Adams, the Court of Justice found that the Commission's negligence in disclosing the documents to La Roche and its failure to warn Adams, who had moved to Italy, that he would be prosecuted if he returned to Switzerland, gave rise to liability in damages.

General legislative measures involving choices of economic policy

In ***Schöppenstedt*** the Court applied a more rigorous test to general legislative measures involving choices of economic policy. For these measures, liability arose only where there was a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual'.

A sufficiently flagrant violation of a superior rule of law

Applying ***Schöppenstedt*** subsequently, the Court of Justice included within the scope of 'superior rule of law' Treaty articles and general principles of law, such as equality, proportionality, legal certainty, and legitimate expectation. According to ***Schöppenstedt***, not only must the applicant establish a breach, but that breach must be a sufficiently flagrant violation of a superior rule of law for the protection of individuals. Where the institution concerned acted with a wide discretion, the applicant must show that the institution manifestly and gravely disregarded the limits on its powers. In ***HNL***, the Court's assessment was based upon the effect of the measure.

Bayerische HNL Vermehrungsbetriebe GmbH v Council and Commission (Cases 83 & 94/76, 4, 15 & 40/77) [1978] ECR 1209

Facts: In order to reduce surplus stocks of skimmed milk powder, a regulation was passed requiring its purchase for use in poultry feed. Previously, the Court of Justice had held the regulation void, as discriminatory and disproportionate. Here, the applicant claimed an adverse effect on its business because the

measure increased the cost of feed.

Held: The Court found that the regulation affected wide categories of traders, reducing its effect on individual businesses. Further, the regulation had only limited impact on the price of feed, by comparison with the impact of world market price variations. Consequently, the breach was not manifest and grave.

In other cases, the Court focused on the nature of the breach. In ***Amylum*** it applied an even more rigorous test, requiring the institution's conduct to be 'verging on the arbitrary'.

Amylum NV v Council and Commission (Isoglucose) (Cases 116 & 124/77) [1979] ECR 3497

Facts: A small group of isoglucose producers sought damages in respect of a regulation imposing production levies, which had previously been held invalid for discrimination because no levies were imposed on sugar, a competing product.

Held: Despite the serious impact of the measure, including the liquidation of one of the companies, the action failed. The Court of Justice held that the institution's conduct could not be regarded as 'verging on the arbitrary'.

Looking for extra marks?

In applying these restrictive tests, the Court of Justice sought to ensure that the risk of successful damages claims by individuals did not hinder the legislative function. The strictness of the tests meant that such actions rarely succeeded.

Bergaderm: a different approach

The development of state liability caused the Court of Justice to reconsider its approach to EU liability. In ***Bergaderm*** it aligned the principles relating to state and EU liability, reiterating its previous declarations in ***Brasserie du Pêcheur and Factortame III*** **(Cases C-46 & 48/93)(see**Chapter 2).

Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission (Case C-352/98P) [2000] ECR I-5291

Facts: This was an appeal against a Court of First Instance decision rejecting Bergaderm's damages claim in respect of loss suffered as a result of a directive restricting the permissible ingredients of cosmetics, on health grounds.

Held: The Court of Justice affirmed that the same conditions apply to state liability and EU liability. Liability arises where the rule infringed confers rights on individuals, the breach is

sufficiently serious, and there is a direct causal link between the breach and the damage. A sufficiently serious breach is established when there is a manifest and grave disregard of discretion by the EU. Where that discretion is considerably reduced or there is no discretion, a mere infringement may be sufficient. The general or individual nature of a measure is not decisive in identifying the limits of the institution's discretion.

This represents a significant departure from ***Schöppenstedt***. The rule infringed need no longer be a 'superior rule of law', but merely intended to confer rights on individuals. The decisive test for a sufficiently serious breach is the degree of discretion accorded to the institution, rather than the arbitrariness of the act or the seriousness of the damage. It is likely that the additional factors set out in ***Brasserie du Pêcheur*** will be applied, namely the clarity of the rule, whether the error of law was excusable or inexcusable, and whether the breach was intentional or voluntary. Finally, a distinction is no longer drawn between administrative and legislative acts.

Revision tip

Be ready to discuss the developing test for a 'wrongful act' under **Article 340** and the closer alignment of Member State and EU liability.

Damage

The applicant must prove the loss, which must be quantifiable and exceed the loss arising from the normal economic risks inherent in business. In ***HNL***, for instance, the loss did not satisfy this requirement. Damage to person or property and economic loss are recoverable, but the Court will not compensate speculative loss. Steps must be taken to mitigate the loss. Damages will be reduced if the applicant has in some way contributed to its loss.

Causation

To establish the necessary causal link, the applicant must show that the damage is a sufficiently direct consequence of the institution's breach. Compensation is not available for every harmful consequence, however remote.

Dumortier Frères v Council (Cases 64 & 113/76, 167 & 239/78, 27, 28 & 45/79) [1979] ECR 3091

Facts: The producers of maize grits brought an action under **Article 340(2)** claiming compensation in relation to an unlawful withdrawal of production subsidies.

Held: The Court of Justice rejected claims based on reduced sales, financial problems, and factory closures. Even if the Council's actions had exacerbated the applicants' difficulties,

those difficulties were not a sufficiently direct consequence of the unlawful conduct to give rise to liability.

Concurrent liability

Frequently, EU legislation requires implementation by national authorities. Where loss results wholly or partly from implementation, the question arises as to whether the applicant should bring proceedings against the national authorities in the national court, against the relevant EU institution in the Court of Justice, or both. Only national courts have jurisdiction to award damages against national authorities and, conversely, claims in respect of damage caused by EU institutions must be brought in the EU General Court. The Court of Justice has held that any national cause of action must be exhausted before proceedings are brought before the Court of Justice, provided the national action can result in compensation (***Krohn v Commission* (Case 175/84)**).

Time limit

Article 340 proceedings must be brought within five years of the materialization of the damage (**Statute of the Court, Article 46**).

Implications of Brexit

Any cases which were pending on 31 December 2020 (the end of the transition period) (including appeals) fall within the jurisdiction of the Court of Justice until complete whilst if the European Commission wishes to bring infringement proceedings against the UK for action or inaction before the end of the transition period, it must do so within four years (Withdrawal Agreement (Article 87), October 2019).

KEY CASES

CASE	FACTS	PRINCIPLE
Article 258 cases		
***Commission v Belgium* (Case 1/86) [1987] ECR 2797**	Failure to implement a directive.	Breaches include acts and failures to act.
***Commission v France* (Case 232/78) [1979] ECR 2729**	France argued in its defence that another Member State had failed to fulfil a similar obligation and that the Commission had not brought proceedings.	Defence based on **reciprocity** rejected.
***Commission v France* (Case 167/73) [1974] ECR 359**	Discriminatory French provisions on employment in the merchant fleet were not enforced in practice.	Actual or administrative compliance is no defence.
***Commission v Italy (Re Transport Statistics)* (Case 101/84) [1985] ECR 2629**	Failure to implement a directive due to the bombing of a data-processing centre.	This could amount to ***force majeure*** and provide a defence to non-implementation but a delay of four years was inexcusable.
***Commission v United Kingdom (Tachographs)* (Case 128/78) [1979] ECR 419**	Failure to implement a directive on fitting tachographs to lorries due to cost and political difficulties.	Defence based on economic and political difficulties rejected.
***Star Fruit Company v Commission* (Case 247/87) [1989] ECR**	Star Fruit complained to the Commission about	The Commission has a discretion, not a duty, to commence proceedings.

291	breaches of [EU] law by France.	
Article 263 cases		
Commission v Jégo-Quéré **(Case C-263/02P) [2004] ECR I-3425**	The applicant sought to challenge a regulation concerning fishing-net mesh sizes.	The Court of Justice reaffirmed the ***Plaumann*** test for individual concern.
IBM v Commission **(Case 60/81) [1981] ECR 2639**	IBM sought to challenge a letter from the Commission setting out its intention to institute competition proceedings.	'Reviewable act': 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position'.
Jégo-Quéré v Commission **(Case T-177/01) [2002] ECR II-2365**	The applicant sought to challenge a regulation concerning fishing-net mesh sizes.	The Court of First Instance proposed that an individual should be considered individually concerned by a regulation if it 'affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'.
Municipality of Differdange v Commission **(Case 222/83) [1984] ECR 2889**	A Commission decision addressed to Luxembourg authorised it to grant aid to steel producers, provided they reduced production capacity.	The decision left the national authorities, and the companies, discretion in implementation in the choice of factories to be closed. The exercise of that discretion affected the applicant, which was not therefore directly concerned.
Plaumann v Commission **(Case 25/62) [1963] ECR 95**	Plaumann, a clementine importer, sought to challenge a Commission decision addressed to Germany, refusing it authorisation to reduce customs duties on clementines.	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'.

***Piraiki-Patraiki v Commission* (Case 11/82) [1985] ECR 207**	The applicants sought to annul a Commission decision authorising France to impose quotas on cotton yarn imports from Greece.	The possibility that France would not use its discretion was 'purely theoretical'; it had already restricted Greek yarn imports and requested permission to impose even stricter quotas. The applicants were therefore directly concerned by the decision.
***Union de Pequeños Agricultores v Council* (UPA) (Case 50/00P) [2002] ECR I-6677**	UPA's challenge to a regulation withdrawing aid for olive oil producers had been held inadmissible by the Court of First Instance. UPA had failed to establish individual concern.	On appeal to the Court of Justice, the A-G proposed a new test for individual concern: 'the measure has, or is liable to have, a substantial adverse effect on his interests'. The Court of Justice rejected this test, reaffirming the existing case law.
Article 340 cases		
***Amylum NV v Council and Commission (Isoglucose)* (Cases 116 & 124/77) [1979] ECR 3497**	The applicants sought damages in respect of a regulation imposing production levies.	The institution's conduct must be 'verging on the arbitrary'.
***Bayerische HNL Vermehrungsbetriebe GmbH v Council and Commission* (Cases 83 & 94/76, 4, 15 & 40/77) [1978] ECR 1209**	The applicant claimed damages in respect of a regulation requiring the purchase of skimmed milk powder for use in poultry feed.	Where the institution concerned acted with a wide discretion, the applicant must show that the institution manifestly and gravely disregarded the limits on its powers.
***Dumortier Frères v Council* (Cases 64 & 113/76, 167 & 239/78, 27, 28 & 45/79) [1979] ECR 3091**	Damages claim concerning withdrawal of production subsidies.	The damage caused must be a sufficiently direct consequence of the institution's breach.
***Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* (Case C-352/98P)**	Appeal against a Court of First Instance decision rejecting Bergaderm's	The same conditions apply to state liability and EU liability. The right to reparation arises where the rule infringed confers rights on individuals, the breach is

[2000] ECR I-5291	damages claim relating to a directive on cosmetics ingredients.	sufficiently serious, and there is a direct causal link between the breach and the damage.
***Lütticke v Commission* (Case 4/69) [1971] 325**	Action concerning the Commission's refusal to bring enforcement proceedings against Germany.	The applicant must establish a wrongful or illegal act, damage, and causation.
***Schöppenstedt Aktien-Zuckerfabrik v Council* (Case 5/71) [1971] 975**	Action concerning a regulation on sugar prices.	The breach must be a sufficiently flagrant violation (sufficiently serious breach (***HNL***)) of a superior rule of law for the protection of individuals.

EXAM QUESTIONS

Problem question

In 2018 the European Commission adopted (fictitious) Regulation 364/2018, which requires Member States to issue wine import licences each month to importers from outside the EU who submit licence applications during the previous month. On 1 February 2020 the European Commission issued a (fictitious) decision addressed to France allowing it to restrict licences for Argentinian wine imports for February 2020 so as to limit the amount that could be imported into France by an applicant to 10,000 litres during that month.

Argenco SA ('Argenco') imports Argentinian wine into the EU. In January 2020 it applied to import 15,000 litres of wine into France in February. A licence was granted on 2 February but was limited to 10,000 litres. The French authorities claimed to be acting pursuant to the Commission decision of 1 February.

Argenco now seeks your advice on instituting annulment proceedings in the General Court in respect of the Commission decision. Advise Argenco as to whether such an action would be admissible.

How, if at all, would your answer differ if in December 2019 the French authorities had informed Argenco that they had sought permission from the Commission to restrict import licences for Argentinian wine to 10,000 litres for the month of February 2020?

Essay question

In the case of non-contractual liability, **Article 340 TFEU** requires the EU to make good any damage caused by its institutions. Unfortunately, this provision has been interpreted so restrictively that individual applicants face almost insurmountable difficulties in establishing EU liability.

In the light of this statement, critically discuss the interpretation and application of **Article 340** by the Court of Justice.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

5

Free movement of goods

The assessment

Free movement of goods is a key area of EU law and a popular assessment topic. Problem questions frequently concern national legislation that hinders trade between Member States. You may be asked, for instance, to advise a trader who is being prevented from importing goods from one Member State to another, by rules of the state of importation imposing requirements that are difficult or expensive to satisfy. Essay questions may ask you to discuss the nature of free movement rules, the scope and development of derogation and the approach of the Court of Justice in support of free trade, through liberal interpretation of the Treaty prohibitions and restrictive interpretation of the derogation provisions.

Key facts

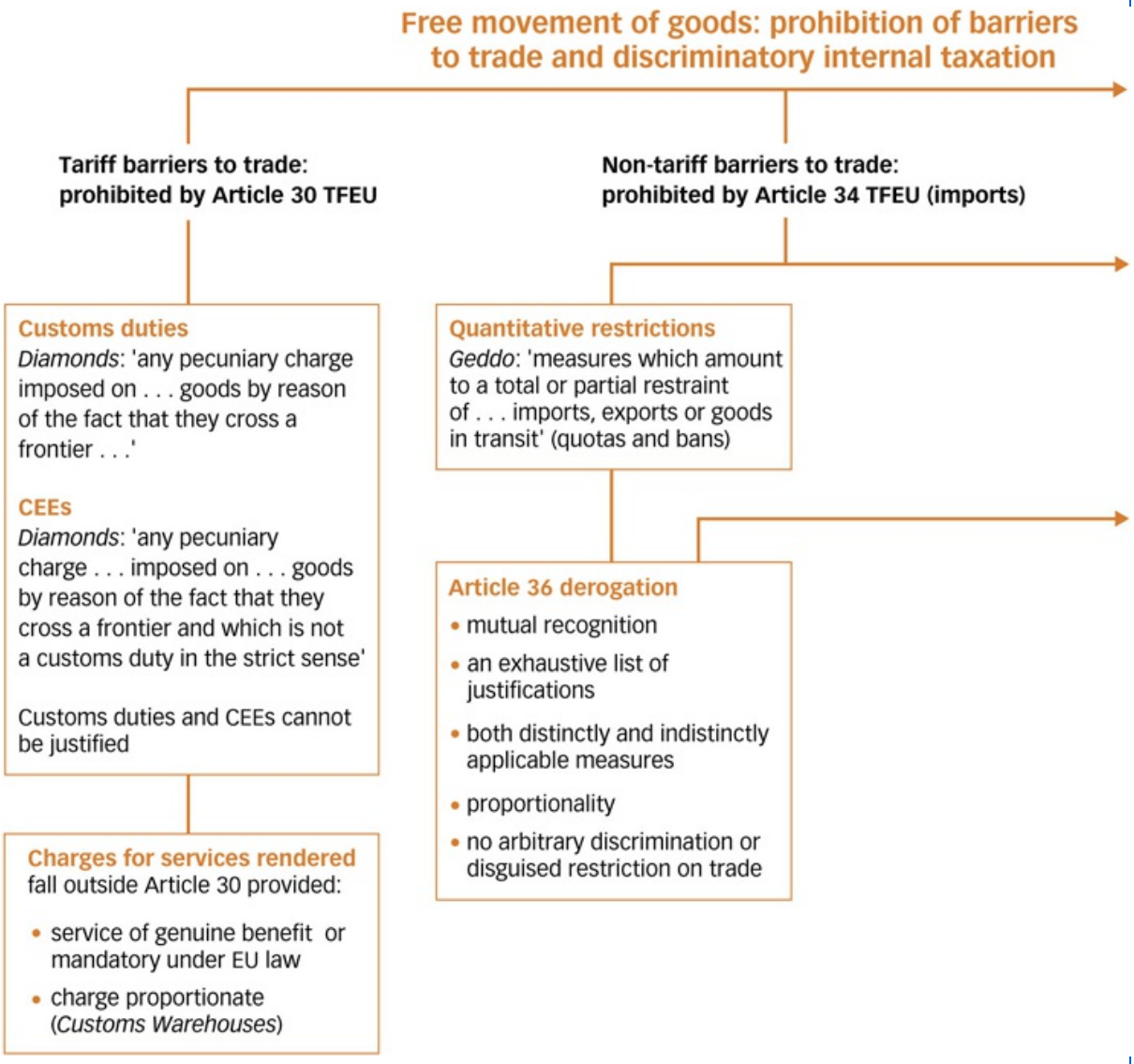
- **Free movement of goods is one of the four 'freedoms' of the internal market.**
- **Obstacles to free movement comprise of tariff**

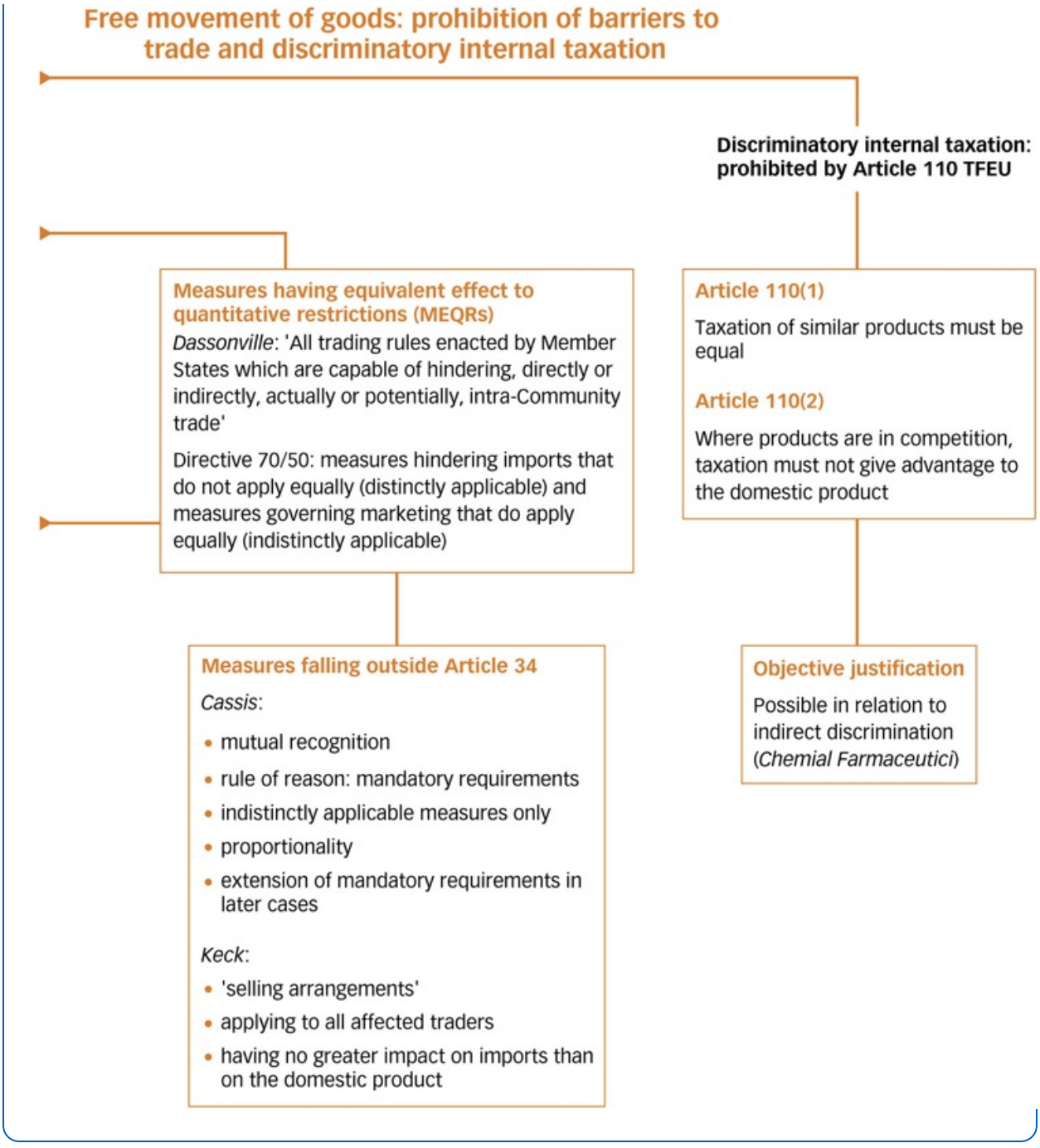
barriers to trade (customs duties and charges having equivalent effect), non-tariff barriers to trade (quantitative restrictions and measures having equivalent effect) and discriminatory national taxation.

- **Where Member States set up such obstacles, they may do so to protect domestic products from competition from imports.**
- **The TFEU prohibits all kinds of restrictions on trade between Member States. Article 30 prohibits customs duties and charges having equivalent effect; Article 34 prohibits quantitative restrictions and all measures having equivalent effect; and Article 110 prohibits discriminatory national taxation.**
- **A limited category of charges may fall outside the scope of Article 30.**
- **Indirectly discriminatory national taxation may be justified on objective grounds.**
- **Article 36 allows derogation from the presumption of free trade, setting out the grounds on which Member States may justify non-tariff restrictions.**
- **In *Cassis de Dijon*, the Court of Justice held that measures satisfying certain 'mandatory requirements', which would otherwise be classified as measures having equivalent effect, do not breach Article 34, provided they are proportionate to their**

objective. In *Keck*, the Court declared that certain 'selling arrangements' will fall outside the scope of Article 34.

Chapter overview




Free movement of goods: prohibition of barriers to trade and discriminatory internal taxation
Discriminatory internal taxation: prohibited by Article 110 TFEU
Measures having equivalent effect to quantitative restrictions (MEQRs)
Dassonville: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'
Directive 70/50: measures hindering imports that do not apply equally (distinctly applicable) and measures governing marketing that do apply equally (indistinctly applicable)
Article 110(1)
Taxation of similar products must be equal
Article 110(2)
Where products are in competition, taxation must not give advantage to the domestic product
Measures falling outside Article 34
Cassis:
mutual recognition
rule of reason: mandatory requirements
indistinctly applicable measures only
proportionality
extension of mandatory requirements in later cases
Keck:
'selling arrangements'
applying to all affected traders
having no greater impact on imports than on the domestic product
Objective justification
Possible in relation to indirect discrimination (Chemial Farmaceutici)

Introduction

The establishment of an **internal market**, in which goods, persons, services, and capital move freely without restriction, is fundamental to the goal of economic integration within the EU. Before turning to the EU rules supporting free trade in the internal market, it is useful to briefly consider the relationship between the EU internal market and the customs union.

Customs union

The EU **customs union** is based upon provisions concerning the movement of goods both into and within the EU. It has an external aspect, incorporating the **common customs tariff** (a common level of duty charged by all Member States on goods imported from third countries) and an internal aspect (a **free trade area** where customs duties and other trade restrictions between Member States are prohibited). The internal aspect of the customs union is an element of the EU internal market.

Internal market

Article 26 TFEU defines the internal market as 'an area without

internal frontiers in which the free movement of goods, persons, services and capital is ensured'. This definition identifies the **four freedoms** and highlights the free movement of goods as a core EU principle.

Restrictions on the free movement of goods

To achieve free movement of goods within the internal market, the **TFEU** prohibits import and export restrictions between Member States. Such restrictions, commonly referred to as 'barriers to trade', may be imposed by Member States for **protectionist motives**, to protect domestic products from competition from imports. Barriers to trade can be tariff or non-tariff and both are prohibited (subject to any derogation).

Tariff barriers to trade

Tariff barriers to trade are import (or export) restrictions involving payments of money. They comprise customs duties and charges having equivalent effect to customs duties (CEEs) and are prohibited by **Article 30 TFEU**. The **TFEU** also prohibits national taxation that discriminates between imported and domestic products.

Customs duties and CEEs

A **customs duty** has two defining elements, referred to in numerous cases, such as ***Diamonds*** **(*Sociaal Fonds voor de Diamantarbeiders) v Chougol Diamond Co* (Cases 2 & 3/69)**). First, it is a pecuniary charge (payment of money) and, secondly, it is imposed on goods by reason of the fact that they cross a frontier. The Court of Justice defined '**CEE**' in ***Diamonds*** as 'any pecuniary charge … imposed on … goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense'. The charge need not be protectionist to constitute a breach.

Customs duties can never be justified and are a clear infringement of **Article 30**. However, a charge having equivalent effect may fall outside **Article 30** altogether, for example if the CEE is charged for services rendered to the importer.

Revision tip

Because they are easily identified, customs duties are now unlikely to occur in practice. Consequently, they rarely feature in assessment questions, but be prepared to deal with CEEs.

Charges for services rendered

Member States have argued that charges imposed on imports (or exports) fall outside **Article 30** because they are levied for services rendered, such as health inspection services (see for instance ***Commission v Germany (Health Inspection Service)* (Case 314/82)**). It should be noted, however, that the argument is difficult to sustain and will be closely scrutinised by the European Commission and the Court of Justice.

Commission v Italy (Statistical Levy) (Case 24/68) [1969] ECR 193

Facts: Italy relied on the 'charges for services rendered' argument in relation to a charge it imposed on imports and exports, used to fund a statistical service for importers and exporters.

Held: The Court of Justice rejected this claim, holding that any benefit was so general and difficult to assess that the charge

could not constitute a charge for services rendered. It was a breach of [**Article 30**].

For the charge to escape **Article 30**, not only must the service be of direct benefit to the importer (or exporter) but the charge must be **proportionate** to the value of the service.

Commission v Belgium (Customs Warehouses) (Case 132/82) [1983] ECR 1649

Facts: Belgium levied charges for storage of imported goods at public warehouses irrespective of whether the importer was depositing the goods to await customs clearance or simply presenting the goods for customs clearance.

Held: The Court of Justice held that a charge is a CEE unless it is the 'consideration for a service actually rendered'. In addition, the charge must not exceed the value of the service.

Fees for health inspections required by EU law fall outside **Article 30**, provided they are proportionate, mandatory under EU law (and not merely permissive) and promote the free movement of goods (***Commission v Germany (Animal Inspection Fees)* (Case 18/87)**).

The structure of **Article 30 TFEU** is illustrated in Figure 5.1.

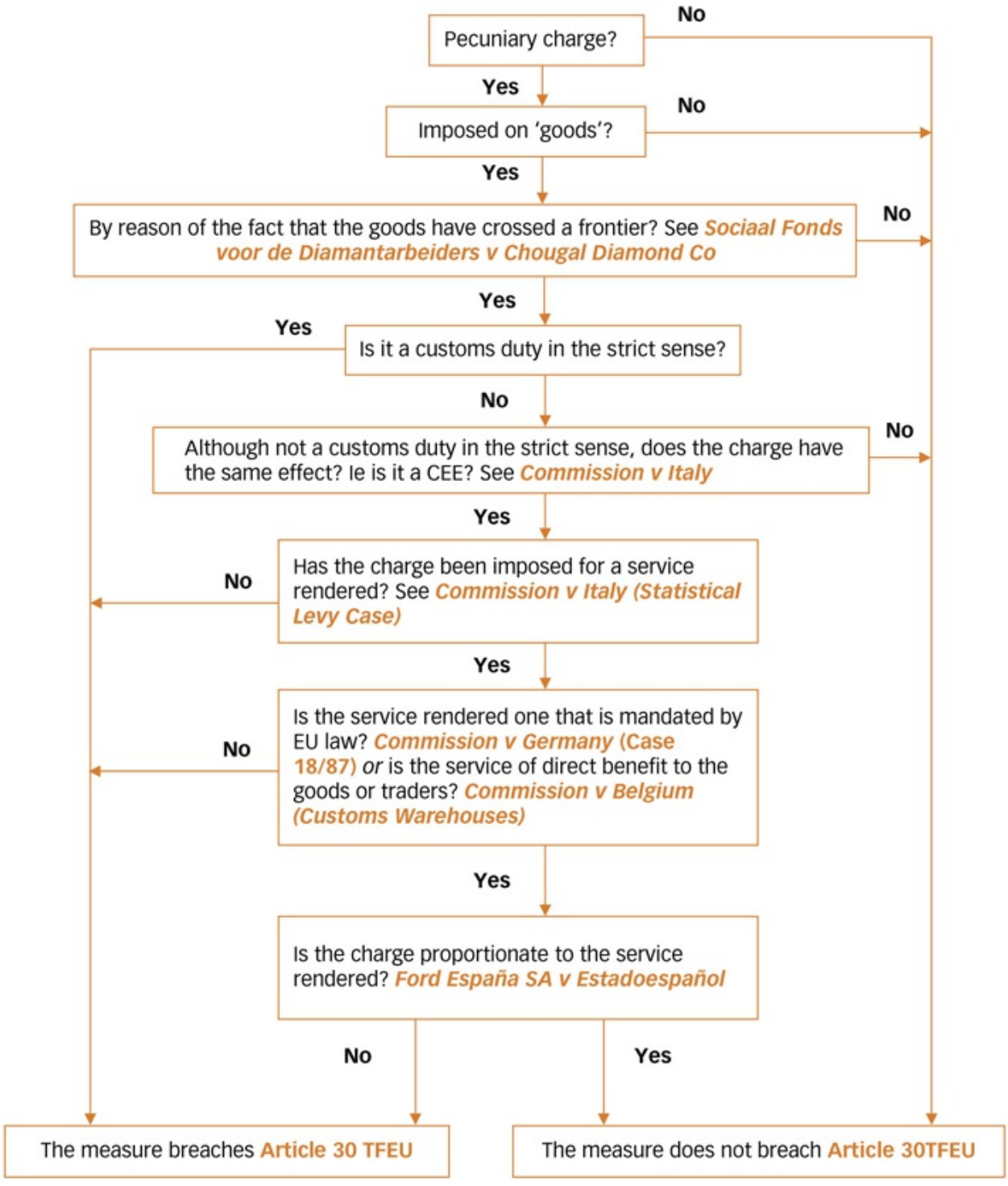


FIGURE 5.1 Article 30 TFEU

Prohibition of discriminatory taxation: Article 110 TFEU

Article 110 relates to national taxation systems operating internally within Member States. ***Denkavit v France* (Case 132/78)** defined internal taxation as 'a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike'. Internal taxation must be distinguished from customs duties and CEEs. A charge is a tax if it is part of an internal system of taxation, as indicated by ***Denkavit***. Customs duties and CEEs are charges levied on goods by reason of importation. **Articles 110** and **30** are complementary yet mutually exclusive (***Deutschmann v Germany* (Case 10/65)**), so a charge on goods cannot be both a tax and a customs duty/CEE. The distinction is important because if classed as a customs duty or CEE it is unlawful under **Article 30 TFEU**. If classed as a tax, it is permissible provided it is not discriminatory between imported and domestically produced goods as provided for in **Article 110 TFEU.**

Article 110(1) prohibits taxes on imported products exceeding those applied to similar domestic products. **Article 110(2)** prohibits taxes on imported products giving indirect protection to domestic products. The Court of Justice has interpreted this to mean that where imported and domestic products are in competition, national taxation must not give advantage to domestic products. It should be noted that if **Article**

110(1) is breached, the Member State must equalise taxation. If **Article 110(2)** is breached, the Member State only has to remove the competitive effect of the tax regulation. Before turning to these provisions in more detail, the concepts of **direct** and **indirect discrimination** are considered, since both kinds of discrimination can infringe **Article 110**.

Direct and indirect discrimination

Measures that openly tax imported and domestic goods at different rates are directly discriminatory. Direct discrimination is now rarely encountered. However, it has occasionally occurred, for example in ***Lütticke (Alfons) GmbH v Hauptzollamt Saarlouis*** **(Case 57/65)** concerning a German tax on imported, but not domestically produced, powdered milk.

Indirectly discriminatory taxation is more difficult to identify. This is taxation that appears not to discriminate between imported and domestically produced goods but nevertheless has a discriminatory effect.

Humblot v Directeur des Services Fiscaux (Case 112/84) [1985] ECR 1367

Facts: A French system of annual vehicle taxation subjected cars with a low power rating to a lower tax than higher power-rated cars.

Held: As France did not produce higher power-rated cars, the effect was to place imported cars at a competitive disadvantage, amounting to indirect discrimination and a breach of [**Article 110**].

Methods of tax collection and the basis of assessment

Discrimination may arise from the way in which tax is collected or the basis of assessment.

Commission v Ireland (Excise Payments) (Case 55/79) [1980] ECR 481

Facts: Ireland allowed domestic producers of spirits, beer, and wine deferment of tax payments until the products were marketed, whilst importers had to pay on importation.

Held: The tax rate was equal but the system of collection was discriminatory and breached [**Article 110**].

Outokumpu Oy (Case C-213/96) [1998] ECR I-1777

Facts: Finnish tax on domestically produced electricity varied according to the method of production, whereas imported

electricity was taxed at a flat rate that was higher than the lowest rate charged on the domestic product.

Held: The Court of Justice held that there is a breach of [**Article 110**] where a different method of calculation leads, if only in certain cases, to a higher tax on the imported product.

Objective justification

Directly discriminatory taxation can never be justified and always breaches **Article 110**. By contrast, indirectly discriminatory taxation may be **objectively justified**.

Chemial Farmaceutici SpA v DAF SpA (Case 140/79) [1981] ECR 1

Facts: Italy imposed a higher tax on synthetic alcohol than on alcohol produced by fermentation, even though the products had identical uses. Italy produced very little synthetic alcohol. It argued that the system was based on a 'legitimate choice of economic policy' aimed to encourage production by fermentation rather than from ethylene, which, it maintained, should be reserved for more important economic uses.

Held: Although, on the facts, the Court of Justice found no discriminatory effect on the imported product, it accepted that legitimate policy objectives would justify differential taxation.

‘Similar’ products

Since **Article 110(1)** prohibits the differential taxation of ‘similar’ products, the ‘similarity’ of the imported and domestic products is clearly important. In a number of cases concerning alcoholic drinks, the Court of Justice has interpreted ‘similar’ broadly, to mean similar characteristics and comparable use, for instance in considering the similarity of Scotch whisky and liqueur fruit wine (***John Walker v Ministeriet for Skatter*** **(Case 243/84)**) and non-fruit spirits and fruit spirits (***Commission v France (French Taxation of Spirits)*** **(Case 168/78)**).

‘Indirect protection to other products’

Under **Article 110(2)**, where imported and domestic goods are not ‘similar’, but simply in competition with each other, national taxation must not give an advantage to the domestic product.

Commission v United Kingdom (Excise Duties on Wine) (Case 170/78) [1980] ECR 417, [1983] ECR 2265

Facts: The UK taxed wine at a higher rate than beer. Clearly wine and beer are not similar products within the meaning of **Article 110(1)** and therefore the Court of Justice considered

whether the products were in competition.

Held: Comparing beer with the cheaper varieties of wine, the Court of Justice found that there was a degree of substitution between them and that the two products were in competition. Since the taxation system favoured the domestic product, it breached [**Article 110(2)**].

The structure of **Article 110 TFEU** is illustrated in Figure 5.2.

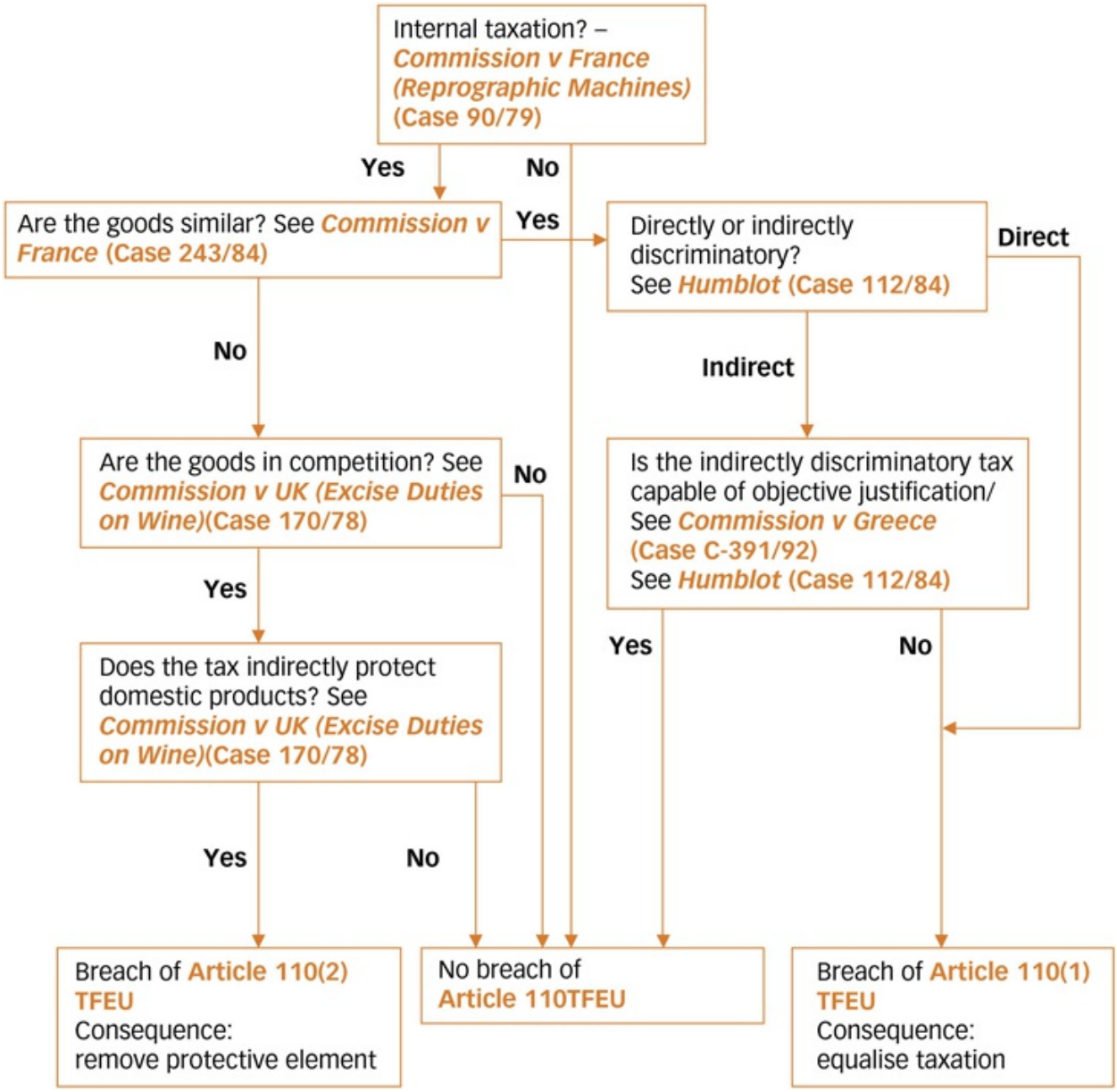


FIGURE 5.2 Article 110 TFEU

Harmonisation of taxation

Harmonisation of taxation within the EU could solve the problems arising from discriminatory taxation. However, whilst progress has

been made on the approximation of VAT, excise duty and corporation tax, Member States remain resistant to further transfer of control to the EU in this area.

Non-tariff barriers to trade

These are barriers to trade that do not involve direct payments of money, comprising of quantitative restrictions and all measures having equivalent effect. Both are prohibited by **Article 34 TFEU** (relating to imports) and **Article 35 TFEU** (relating to exports). Most of the case law on **non-tariff barriers** concerns imports and so **Article 34** is the focus of this section.

> Revision tip
>
> Be able to distinguish 'tariff barriers' from 'non-tariff barriers' to trade. This will help you to correctly categorise restrictions presented in a problem question.

Quantitative restrictions

Like customs duties, **quantitative restrictions** are generally easily recognised. They were defined in ***Geddo v Ente Nazionale Risi* (Case 2/73)** as 'measures which amount to a total or partial restraint of … imports, exports or goods in transit', in other words import (or export) quotas and bans. A **quota** is a 'partial restraint' as it places a limit on the quantity of particular goods that can be imported. A **ban**

is a ‘total restraint’ as it blocks the import of particular goods altogether.

Measures having equivalent effect to quantitative restrictions (MEQRs)

Measures having equivalent effect to quantitative restrictions (MEQRs) are more difficult to identify than quantitative restrictions. They take many different forms, including health and safety requirements, packaging requirements, and requirements relating to the composition or marketing of goods. ‘MEQR’ was defined in ***Dassonville***, in what has become known as the ‘***Dassonville*** formula’. Directive 70/50 (now no longer formally applicable, but still referred to) provides guidance on the scope of an ‘MEQR’.

Revision tip

Problem questions almost invariably feature at least one MEQR. Learn to recognise this category of restriction by considering the relevant case law.

Definition of ‘MEQR’: Dassonville

Procureur du Roi v Dassonville (Case 8/74) [1974] ECR

837

Facts: Traders who had imported Scotch whisky from France into Belgium were prosecuted in Belgium for infringement of national legislation requiring imported goods bearing a designation of origin to be accompanied by a certificate of origin issued by the state of origin. In their defence, the traders claimed that the requirement was an MEQR.

Held: The Court of Justice defined 'MEQRs' as: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. Applying this definition, the Court held that the Belgian requirement was an MEQR and a breach of [**Article 34**].

This definition is wide in scope, covering measures that are capable of hindering interstate trade actually and directly and also potentially and indirectly. Nonetheless, in ***Dassonville,*** the Court accepted that 'reasonable' restraints may not be caught by **Article 34**, signalling an approach which, as will be seen later, it developed further in the ***Cassis*** 'rule of reason'.

Scope of MEQR: Directive 70/50

Directive 70/50 was a transitional measure, now expired, but it still gives useful guidance on the scope of MEQRs. Firstly, it refers to measures that do not apply equally to domestic and imported products (Article 2), commonly called '**distinctly applicable measures**'

because they make an overt distinction between domestic and imported products. Secondly, the Directive refers to measures that do apply equally to domestic and imported products (Article 3), commonly called '**indistinctly applicable measures**' because they make no distinction between domestic and imported products.

The Directive provides examples within each category, for instance distinctly applicable measures that restrict the advertising of imported products or lay down less favourable prices for imported products, and indistinctly applicable measures that deal with the 'shape, size, weight, composition, presentation, identification, or putting up' of products.

Revision tip

Problem questions: be confident about the ***Dassonville*** formula and its application. In addition, be prepared to distinguish between distinctly and indistinctly applicable MEQRs.

Distinctly applicable MEQRs: examples from the cases

Typically, distinctly applicable measures treat imported and domestic products unequally by applying only to the imported product, placing it at a competitive disadvantage as against the domestic product.

Rewe-Zentralfinanz v Landwirtschaftskammer Bonn (San Jose Scale) (Case 4/75) [1975] ECR 843

Facts: A preliminary reference concerned German phytosanitary inspections of imported (but not domestic) plant products to prevent the spread of a pest known as San Jose Scale and whether such inspections amounted to an MEQR.

Held: The inspections did amount to an MEQR and, as they only applied to imported products, they were distinctly applicable.

Procureur du Roi v Dassonville (Case 8/74) [1974] ECR 837

Held: The Belgian rule requiring certificates of origin applied only to imports. The measure was a distinctly applicable MEQR.

Sometimes, distinctly applicable measures treat imported and domestic products unequally by applying only to the domestic product, giving it a competitive advantage over the imported product.

Commission v Ireland ('Buy Irish' Campaign) (Case 249/81) [1982] ECR 4005

Facts: An Irish government campaign was established to help promote Irish products, including widespread advertising of domestic (but not imported) products and use of the 'Guaranteed Irish' symbol.

Held: The campaign amounted to an MEQR.

Commission v Germany (Case C-325/00) [2002] ECR I-9977

Facts: A ‘quality label’ was awarded by a German public body to German products of a certain quality which indicated their German origin.

Held: As the measure was likely to encourage consumers to buy these, rather than imported products, it was an MEQR, even though its use was optional.

All these cases concerned national provisions constituting a hindrance or disincentive to the importer, because they imposed conditions which were difficult or costly to satisfy and/or because they provided an advantage to the domestic product.

Indistinctly applicable MEQRs: examples from the cases

Indistinctly applicable measures apply equally to imported and domestic products.

Whilst indistinctly applicable MEQRs appear not to be discriminatory, their effect is to place imported products at a disadvantage, creating a disincentive to importation and a hindrance to interstate trade.

Commission v United Kingdom (Origin Marking of Goods) (Case 207/83) [1985] ECR 1202

Facts: A UK measure required that certain goods for example domestic electrical appliances for retail sale in the UK be marked with their country of origin.

Held: The measure was an MEQR because, although it applied equally to imports and domestic products, it enabled consumers to distinguish between domestic and imported products, allowing them to assert any prejudices they may have against foreign products.

Walter Rau Lebensmittelwerke v de Smedt PvbA (Case 261/81) [1982] ECR 3961

Facts: Belgium required all margarine for retail sale to be cube-shaped.

Held: Although there was no distinction between imports and the domestic product, the effect was to increase the costs of non-Belgian producers, who would need to adapt their packaging to comply with a requirement that was not imposed by their own national legislation. The measure was an MEQR.

Revision tip

In order to apply ***Cassis de Dijon*** and **Article 36** (see later) appropriately, it is vital that you can correctly distinguish between distinctly and indistinctly applicable MEQRs.

Obligation to ensure the free movement of goods

Not only must Member States refrain from imposing measures that restrict the free movement of goods, they must also take steps to ensure the free movement of goods.

Commission v France (Case C-265/95) [1997] ECR I-6959

Facts: The French authorities had failed to prevent violent protests by French farmers against agricultural products being imported from other Member States, such as interception of lorries, violence against lorry drivers and damage to goods displayed in French shops.

Held: The Court of Justice held that France was in breach of what is now **Article 4 TEU**, which requires Member States to take all appropriate measures to fulfil Treaty obligations.

Schmidberger v Austria (Case C-112/00) [2003] ECR I-5659

Facts: Austria allowed a demonstration by environmental protesters, which caused a 30-hour motorway closure and impeded the free movement of goods.

Held: Austria's decision to allow the demonstration was a breach of **Article 34**, though the decision was justified on the grounds of the rights to freedom of expression and assembly.

Derogations available for non-tariff barriers

There are a number of potential ways for a Member State to seek to justify rules, which have the effect of restricting the free movement of goods.

Some restrictions introduced by Member States exist for valid reasons, which have nothing to do with trade policy, and this situation is provided for in **Article 36 TFEU**. Rather than claiming a derogation under **Article 36**, Member States have also sought to argue that **Article 34** is inapplicable to some trading rules. The Court of Justice accepted this argument in principle in the ***Cassis de Dijon*** case. This has become known as the 'rule of reason' and this will be discussed below.

Article 36 TFEU: derogation

Article 36 sets out the grounds on which Member States may justify restrictions on interstate trade, allowing **derogation** from the general presumption of free trade. Because of the fundamental importance of free movement to the internal market, the Court of Justice interprets these grounds very restrictively. It is notable that there is some overlap between the **Article 36** grounds and the ***Cassis de Dijon*** list of

mandatory requirements to be discussed below (eg public health).

Article 36

Article 36 provides:

> **Articles 34** and **35** shall not preclude prohibitions or restrictions on imports, exports and goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

An exhaustive list

In contrast with the ***Cassis*** list of mandatory requirements, which has been extended by the Court of Justice, the **Article 36** list of justifications is exhaustive, as was made clear in ***Commission v Ireland***.

Commission v Ireland (Restrictions on Importation of Souvenirs) (Case 113/80) [1981] ECR 1625

Facts: A distinctly applicable Irish measure required imported souvenirs depicting Irish motifs to be marked 'foreign' or with their country of origin.

Held: The Court of Justice refused to apply the ***Cassis de Dijon*** rule of reason to the distinctly applicable measure. The Court

also refused to accept a justification based on consumer protection, since this justification is not listed in [**Article 36**].

Distinctly and indistinctly applicable measures

Article 36 is broader than ***than the rule of reason*** in that the justifications can apply to both distinctly and indistinctly applicable measures and also quantitative restrictions.

Proportionality

Article 36 requires measures to be 'justified' on one of the specified grounds. They must be no more than is necessary to achieve the desired aim; in other words, they must be proportionate to their objective.

No arbitrary discrimination or disguised restriction on trade

For derogation to apply, a measure must not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'. This precludes protectionist measures.

Commission v United Kingdom (Imports of Poultry Meat) (Case 40/82) [1982] ECR 2793

Facts: A UK licence requirement, introduced purportedly to prevent the spread of Newcastle disease, effectively imposed a ban on turkey meat imports.

Held: The Court found that, in reality, the measure was designed to protect domestic producers, just as the Christmas season was beginning. The measure amounted to arbitrary discrimination and a disguised restriction on trade.

Mutual recognition

Mutual recognition is the fundamental principle underlying free movement of goods, articulated in ***Cassis de Dijon*** (to be discussed below): provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. The principle of mutual recognition also applies when considering derogation under **Article 36**. Unless restrictions are justified and proportionate, there is no reason why goods that have been lawfully produced and marketed in one Member State should not be introduced into another.

Article 36 grounds

Public morality

This ground was considered in two cases concerning restrictions on imports of pornography.

R v Henn and Darby (Case 34/79) [1979] ECR 3795

Facts: English customs legislation prohibited imports of pornographic films and magazines, despite there being no absolute ban on trade in similar material in the UK.

Held: Declaring that it was for Member States to determine the requirements of public morality nationally, the Court of Justice accepted the UK's argument that the legislation was justified on public morality grounds.

Conegate Ltd v Customs and Excise Commissioners (Case 121/85) [1986] ECR 1007

Facts: The UK customs authorities had seized a consignment of inflatable dolls and other erotic articles imported from Germany.

Held: The Court took a stricter view than in ***Henn and Darby***. Although there were restrictions on similar domestic goods, these did not prohibit manufacture and sale. The UK could not rely on the public morality ground, though it would not be precluded from applying the same restrictions to the imported goods once they

had entered the UK.

Public policy

Potentially wide in scope, 'public policy' has been interpreted narrowly by the Court of Justice. This ground cannot be used as a general justification embracing more specific defences, such as consumer protection, but must be given its own independent meaning (***Commission v Italy (Re Ban on Pork Imports)* (Case 7/61)**). The public policy ground has rarely been invoked. ***R v Thompson*** provides one example.

R v Thompson (Case 7/78) [1978] ECR 2247

Facts: Three UK nationals had been found guilty of being knowingly concerned in a fraudulent evasion of the UK's prohibition of the import of gold coins into the UK and the export of certain silver alloy coins from the UK.

Held: The Court of Justice held that a prohibition on import and export of collectors' coins was justified on public policy grounds, recognising a state's need to protect its right to mint coinage and to protect coinage from destruction.

Public security

This ground was successfully invoked in ***Campus Oil.***

> *Campus Oil Ltd v Minister for Industry and Energy* (Case 72/83) [1983] ECR 2727
>
> **Facts:** Irish legislation required importers to purchase a percentage of their requirements from a state-owned oil refinery.
>
> **Held:** The Court of Justice found that the measure was justified on public security grounds, since it ensured the maintenance of Irish refining capacity for products that were fundamental to the provision of essential services. An interruption of supplies could seriously threaten public security.

Protection of health and life of humans, animals, or plants

Two contrasting decisions, referred to earlier in this Chapter, clarify the scope of this ground. German inspections of imported (but not domestically produced) apples were held to be justified on health grounds, as the imported fruit presented a risk not present in domestic apples. There must be a genuine health risk (***San Jose Scale***). However, the Court of Justice rejected health justifications for UK restrictions on poultry meat imports. The measures were not part of a seriously considered health policy and constituted a disguised restriction on trade (***Imports of Poultry Meat***). The health risk was also assessed in ***DocMorris*** (to be discussed below in relation to

the ***Keck*** judgment).

One difficult area is the use of additives in foodstuffs, since there may be scientific uncertainty as to the extent of any risk.

Officier van Justitie v Sandoz BV (Case 174/82) [1983] ECR 2445

Facts: The Netherlands prohibited the sale of muesli bars with added vitamins, maintaining that the vitamins were harmful to health. The bars were freely available in Germany and Belgium. The vitamins themselves presented no health risk, and were in fact necessary to human health, but their over-consumption across a range of foodstuffs would constitute a risk.

Held: As scientific research had been unable to determine the critical amount or the precise effects, the Court of Justice declared that it was for Member States to decide the appropriate degree of public health protection, whilst observing the principle of proportionality. Member States must authorise marketing when the addition of vitamins to foodstuffs meets a technical or nutritional need.

In ***Beer Purity***, a German ban on additives was held to be to be disproportionate.

Commission v Germany (Beer Purity Laws) (Case

178/84) [1987] ECR 1227

Facts: In addition to the rule on beer ingredients, noted earlier, German legislation also banned the use of all additives in beer. Seeking to rely on the [**Article 36**] public health derogation, the German government argued that because the German population drank large quantities of beer, the use of additives presented a greater public health risk in Germany than elsewhere in the [EU].

Held: Noting that Germany permitted additives in virtually all other drinks, the Court of Justice decided that high beer consumption did not justify banning all additives in this particular product.

Protection of national treasures possessing artistic, historic, or archaeological value

The scope of this justification remains uncertain. In ***Commission v Italy (Export Tax on Art Treasures, No 1)* (Case 7/68)** the Court indicated that quantitative restrictions (but not charges) would be justified where the object of those restrictions was to prevent art treasures from being exported from a Member State.

Protection of industrial and commercial property

EU law protects the ownership of industrial and commercial property rights, such as patents, copyright, trade marks, and design rights.

However, any improper use of these rights, constituting an obstacle to trade, will be condemned by the Court of Justice.

No harmonising rules

Article 36 applies only in the absence of EU rules governing the interest concerned. If there is harmonising legislation in a particular area, Member States may not impose additional requirements, unless the legislation expressly permits it.

Cassis de Dijon: Justification of indistinctly applicable MEQRs

The notion that 'reasonable' restraints were capable of justification, introduced in ***Dassonville***, was developed in ***Cassis de Dijon***.

Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Case 120/78) [1979] ECR 649 (*Cassis de Dijon*)

Facts: The applicant was refused permission to import Cassis de Dijon (blackcurrant liqueur) into Germany from France because the product did not comply with a German requirement that, to be marketed lawfully in Germany, fruit liqueurs must have a minimum alcohol content of 25 per cent. The alcohol content of the French Cassis was between 15 and 20 per cent. The applicant challenged the legislation, claiming that it was an

MEQR.

Germany argued that the measure was justified on grounds of public health and the fairness of commercial transactions, asserting that low-alcohol spirits create a tolerance to alcohol and cause alcoholism and that the high rate of national tax on high-alcohol drinks gave low-alcohol drinks a competitive advantage. The Court of Justice applied two principles that have become known as the 'principle of mutual recognition' and the ***Cassis*** 'rule of reason'.

Principle of mutual recognition

As mentioned earlier, **mutual recognition** is the fundamental principle underlying free movement of goods, articulated in ***Cassis de Dijon***: provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. The principle operates as a rebuttable presumption. ***Prantl*** provides an example of the principle.

Criminal Proceedings against Karl Prantl (Case 16/83) [1984] ECR 1299

Facts: German legislation restricted the use of bulbous 'Bocksbeutel' bottles to wine produced in certain German

regions, where the bottles were traditional. These bottles were also traditional in parts of Italy. Prantl was prosecuted for importing into Germany Italian wine in 'Bocksbeutel' bottles.

Held: Applying the principle of mutual recognition, the Court of Justice held that national legislation may not prevent wine imports by reserving the use of a particular shape of bottle to its own national product, where similar shaped bottles were also used traditionally in the state of origin.

The *Cassis* rule of reason

According to the principle of mutual recognition, free trade between Member States is based upon the assumption that goods lawfully produced and marketed in one Member State are acceptable in another. However, this assumption will be set aside if the ***Cassis*** '**rule of reason**' applies. If so, certain measures which would otherwise be classified as MEQRs under ***Dassonville***, may fall outside the prohibition in **Article 34**.

Cassis de Dijon continued

Held: Unsurprisingly, the Court was unimpressed by Germany's arguments relating to alcohol tolerance and the competitive advantage afforded to low-alcohol drinks by German taxation. However, the Court held that certain kinds of restriction would be

permissible on particular grounds, the ‘mandatory requirements’:

> … obstacles to movement within the [EU] resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

This is known as the ***Cassis*** ‘rule of reason’.

The rule of reason provides that restrictions on trade resulting from national provisions on product marketing, which differ from those applying in other Member States, are permissible if they are necessary to satisfy one of the **mandatory requirements**. The mandatory requirements are the justifications that allow restrictions of this kind to escape the scope of **Article 34**.

No harmonising rules

The ***Cassis*** rule of reason applies only in the absence of EU rules governing the interest concerned. If there is EU **harmonising legislation** in a particular area, Member States may not impose additional requirements, unless that legislation expressly permits it.

Only indistinctly applicable measures

The ***Cassis*** rule of reason applies only to indistinctly applicable measures. Distinctly applicable measures cannot be justified by the

rule of reason (but see above discussion of **Article 36**). This limitation was not contained in the ***Cassis*** judgment itself but has been applied by the Court of Justice subsequently, for example in ***Commission v Ireland***.

Commission v Ireland (Restrictions on Importation of Souvenirs) (Case 113/80) [1981] ECR 1625

Facts: An Irish measure requiring imported souvenirs depicting Irish motifs (such as shamrocks) to be marked 'foreign' or with their country of origin was argued to have been adopted.

Held: The Court of Justice refused to apply the rule of reason to a distinctly applicable Irish measure, adopted allegedly in the interests of consumers and fair trading.

Extension of the mandatory requirements

The rule of reason enunciated in the ***Cassis*** judgment incorporates four mandatory requirements: the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer. This list is not exhaustive and, in later cases, the Court of Justice has added further mandatory requirements, including environmental protection (***Danish Bottles***), legitimate interests of economic and social policy (***Oebel***), and national and regional socio-cultural characteristics (***Torfaen Borough Council***).

Commission v Denmark (Danish Bottles) (Case 302/86) [1988] ECR 4607

Facts: Danish legislation for the protection of the environment limited the use of beer and soft drinks containers that had not been approved by the National Agency for the Protection of the Environment and required all containers to be reusable and subject to a deposit-and-return system.

Held: The Court of Justice held that the protection of the environment, as 'one of the [EU's] essential objectives', may justify restrictions on the free movement of goods.

Oebel (Case 155/80) [1981] ECR 1993

Facts: German legislation prohibited night working in bakeries and night deliveries of bakery products which, it was claimed, restricted deliveries into neighbouring Member States in time for breakfast.

Held: The measure was compatible with **Article 34** because 'trade within the [EU] remained possible at all times'. Whilst it was not necessary for the German government to justify the legislation, the Court recognised that legitimate interests of economic and social policy, designed to improve working conditions, could constitute a mandatory requirement.

Torfaen Borough Council v B&Q plc (Case 145/88) [1989] ECR 3851

Facts: With limited exceptions, the Shops Act 1950 prohibited Sunday trading in the UK. B&Q argued that this provision was an MEQR because its consequence was to reduce sales and hence the volume of imports from other Member States.

Held: The Court of Justice found that the Sunday trading rules were justified because they were in accord with national or regional socio-cultural characteristics.

Looking for extra marks?

It is important to note that restrictions of the type in ***Oebel*** and ***Torfaen Borough Council*** may not now fall within the scope of **Article 34** as they will be classified as 'selling arrangements' (see discussion of the ***Keck*** judgment below).

Proportionality

By permitting only 'necessary' restrictions, the rule of reason includes a **proportionality** requirement. Restrictions must go no further than is necessary to achieve their objective, namely any of the mandatory requirements. Proportionality has frequently proved a difficult hurdle for Member States to overcome, as demonstrated by ***Cassis***, ***Walter***

Rau, and ***Beer Purity***.

Cassis de Dijon continued

Facts: Germany's justifications for its legislation on the alcohol content of fruit liqueurs, the protection of public health, and the fairness of commercial transactions, fell within the 'mandatory requirements'. However, the Court also had to consider whether the provision was proportionate.

Held: The provision was not necessary to satisfy those requirements. The same objectives could have been achieved by means that were less of a hindrance to trade, such as a requirement to label the products with their alcohol content.

Walter Rau continued

Facts: Belgium maintained that national legislation requiring margarine to be retailed in cube shapes was necessary to protect the consumer from the risk of confusing butter and margarine.

Held: The Court held that whilst, in principle, legislation designed to prevent consumer confusion is justified, legislation prescribing a particular form of packaging goes further than is necessary to achieve that objective. Consumer protection could be achieved by measures which were less of a hindrance to interstate trade, such as a labelling requirement.

Commission v Germany (Beer Purity Laws) (Case 178/84) [1987] ECR 1227

Facts: Germany sought to justify a rule requiring all drinks marketed as ‘Bier’ to contain only specified ingredients on grounds of consumer protection, claiming that German consumers associated ‘Bier’ with products containing only these ingredients.

Held: The Court of Justice declared that consumer protection could be achieved by measures that were less of a hindrance to imports, namely a requirement for beer to be labelled with an indication of its ingredients.

Scotch Whisky Association and Others v Lord Advocate (Case C-333/14)

Facts: The **Alcohol (Minimum Pricing) (Scotland) Act 2012** was introduced in Scotland to enable the Scottish government to set a minimum price per unit of alcohol by secondary legislation. The relevant legislation clearly amounted to an obstacle to the free movement of goods as an indistinctly applicable MEQR falling within **Article 34 TFEU**, but the Scottish government sought to justify the measure on the basis of public health.

Held: The Court of Justice accepted the argument for justification on the basis that it both targeted ‘harmful and hazardous’ drinkers, while also reducing general alcohol consumption in the

wider population ‘albeit only secondarily’. However, the Court questioned the proportionality of the measure and whether the objective could be achieved in a way that proved less of a hindrance to trade, for example by means of taxation.

In November 2017, after consideration of new evidence and argument, the UK Supreme Court in ***Scotch Whisky Association v Lord Advocate*** **[2017]** concluded that the measure was proportionate to its objective.

> A critical issue is, as the Lord Ordinary indicated, whether taxation would achieve the same objectives as minimum pricing … [T]he main point stands, that taxation would impose an unintended and unacceptable burden on sectors of the drinking population, whose drinking habits and health do not represent a significant problem in societal terms in the same way as the drinking habits and health of in particular the deprived, whose use and abuse of cheap alcohol the Scottish Parliament and Government wish to target. In contrast, minimum alcohol pricing will much better target the really problematic drinking to which the Government’s objectives were always directed and the nature of which has become even more clearly identified by the material more recently available [63].

Revision tip

Understand the meaning of proportionality and be familiar with its application in the cases. Typical problem questions will require you to apply this general principle.

Keck and Mithouard: selling arrangements

Dual burden and equal burden rules

A number of cases following ***Cassis*** exposed a distinction between two categories of indistinctly applicable measures. First, there are rules relating to goods themselves, referred to as '**dual burden**' rules. These impose additional requirements to those that may be applied in the state of origin, creating an extra burden for producers. The 'cube-shaped margarine' requirement in ***Walter Rau*** is an example. Secondly, there are rules that concern the marketing of goods, described as '**equal burden**' because they impose an equal burden on domestic and imported products. They have an impact on the overall volume of sales, and therefore on imports, but they have no greater impact on imported products than on domestic products. ***Keck*** articulated this distinction.

The *Keck* judgment

Keck and Mithouard (Cases C-267 & 268/91) [1993] ECR I-6097

Facts: Keck and Mithouard were prosecuted for reselling goods at a loss, breaching French competition law. Relying on [**Article 34**] as a defence, they argued that the French legislation breached the free movement of goods principles.

Held: The Court of Justice acknowledged that the legislation restricted the overall volume of sales and hence the volume of sales of products from other Member States. However, the Court held, national measures prohibiting certain 'selling arrangements' do not fall within the ***Dassonville*** formula 'provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. Such provisions do not impede market access for imported products any more than for domestic products and fall outside [**Article 34**].

Looking for extra marks?

In ***Keck***, the Court of Justice indicated that its judgment was aimed at traders who put forward [**Article 34**] to challenge national rules restricting their commercial freedom. Challenges of this kind had been made in the UK 'Sunday trading' cases, for instance in ***B&Q***, referred to earlier.

Application of *Keck*

Keck applies only to rules concerning 'selling arrangements' and not to rules relating to the goods themselves, such as packaging, content, and labelling. In practice, this distinction may prove difficult to make, though later decisions have provided guidance on the scope of 'selling arrangement'. This term includes restrictions on shop opening hours (***Tankstation 't Heukske vof and JBE Boermans*** **(Cases C-401 & 402/92)**), on the kinds of retail outlets from which certain goods can be sold (***Commission v Greece*** **(Case C-391/92)**), and on product advertising (***Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV Shop i Sverige AB*** **(Cases C-34–36/95)**).

Even where a restriction is characterised as a selling arrangement, ***Keck*** provides that it will only escape **Article 34** if it applies to all affected traders in the national territory and affects in the same manner, in law and in fact, the marketing of domestic products and imported products. Any restriction with a discriminatory effect on imports constitutes an MEQR.

Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH (Case-254/98) [2000] ECR I-151

Facts: Austrian legislation prohibited butchers, bakers, and grocers from selling their goods on rounds from door to door unless they also conducted business from permanent establishments in the district.

Held: Whilst the legislation concerned selling arrangements applying to all traders, the Court of Justice found that traders from other Member States, to have the same access to the Austrian market as local traders, would need to incur the additional cost of setting up permanent establishments. The legislation impeded access to the Austrian market for imports and infringed [**Article 34**].

In ***Leclerc-Siplec*** **(Case C-412/93)**, Advocate-General Jacobs proposed the use of an 'impediment to market access' test to be applied to all measures. The approach was embraced in ***Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*** **(Case 405/98)** in relation to a selling arrangement (advertising restrictions). The position in relation to selling arrangements can therefore be usefully summarised by saying that discriminatory selling arrangements and those that prevent access to a market remain MEQRs. This is also illustrated in the ***DocMorris*** case.

Deutsche Apothekerverband v 0800 DocMorris NV (Case C-322/01) [2003] ECR I-14887

Facts: Germany banned the sale of medicines by mail order and over the internet. The measure related to 'selling arrangements', but fell outside ***Keck*** because it had a greater impact on imports than on domestic products. Thus, the ban infringed [**Article 34**].

Held: The Court of Justice held that the measure could be

justified on health grounds in relation to prescription medicines because consumers needed to receive individual advice and the authenticity of prescriptions must be checked. By contrast, non-prescription medicines did not present a risk, because the ‘virtual pharmacy’ could provide an equal or better level of advice than traditional pharmacies. Here, the prohibition was not justified.

Revision tip

Keck applies to ‘selling arrangements’, but only where they have no greater impact on imports than on domestic products. Remember that both elements of the rule must be satisfied. If they are both satisfied, the measure falls outside ***Dassonville*** and therefore does not breach **Article 34** Where a measure fails to satisfy the ***Keck*** requirements, it remains an MEQR and potential justification should be considered under the ***Cassis*** rule of reason or the **Article 36** derogation.

Looking for extra marks?

The account of ***Cassis*** and **Article 36** presented earlier sets out the established position that the **Article 36** list of justifications cannot be extended in the way that the ***Cassis*** list of mandatory requirements has been extended and that the ***Cassis*** rule of reason can apply only to indistinctly applicable measures. These principles, perfectly encapsulated, for instance, in ***Commission***

v Ireland (Restrictions on Importation of Souvenirs), together with the principles of mutual recognition and proportionality, still hold good. You should discuss and apply them in answers.

At the same time, be aware that the Court of Justice has sometimes blurred the distinction between ***Cassis*** and **Article 36**, particularly regarding national measures for the protection of the environment. This point is illustrated by ***PreussenElektra AG v Schleswag AG* (Case C-379/98)**, concerning German legislation requiring German electricity suppliers to purchase the electricity produced from renewable sources in their area of supply. Here, the Court avoided any discussion of the distinction between [**Article 36**] and ***Cassis***, finding that this distinctly applicable measure was justified on environmental grounds.

As noted above, there is some overlap between the ***Cassis*** mandatory requirements and the **Article 36** justifications, notably the public health ground. Where this ground is invoked to justify an indistinctly applicable measure, the case may be presented under either ***Cassis*** or **Article 36**.

Harmonisation

Harmonisation aims to eliminate disparities between national product standards that hinder interstate trade, by establishing EU-wide standards. Once a measure harmonising an area comprehensively is adopted, Member States have no recourse to derogation in that area. **Article 115 TFEU** provides for the adoption

of harmonising directives for this purpose. Early progress on harmonisation was slow, as the adoption of measures under **Article 115** required unanimity in the Council of Ministers.

In 1985, a new approach focused on a minimum level of EU regulation in relation to technical harmonisation and standards, rather than on comprehensive rules. A Council Resolution of 7 May 1985 states that directives are to be based upon the essential requirements with which products must conform. The detailed technical specifications are not a matter for EU legislation but for competent organisations, such as research and standards institutes.

Harmonisation was progressed further with **Article 114 TFEU**, introduced by the Single European Act 1986, providing for the adoption of measures concerning the establishment and functioning of the internal market, by qualified majority vote. Member States wishing to apply stricter standards than those contained in EU harmonising measures may seek approval from the Commission on the basis of 'major needs' or in relation to the environment or the working environment.

The structure of **Article 34 TFEU** is illustrated in Figure 5.3.

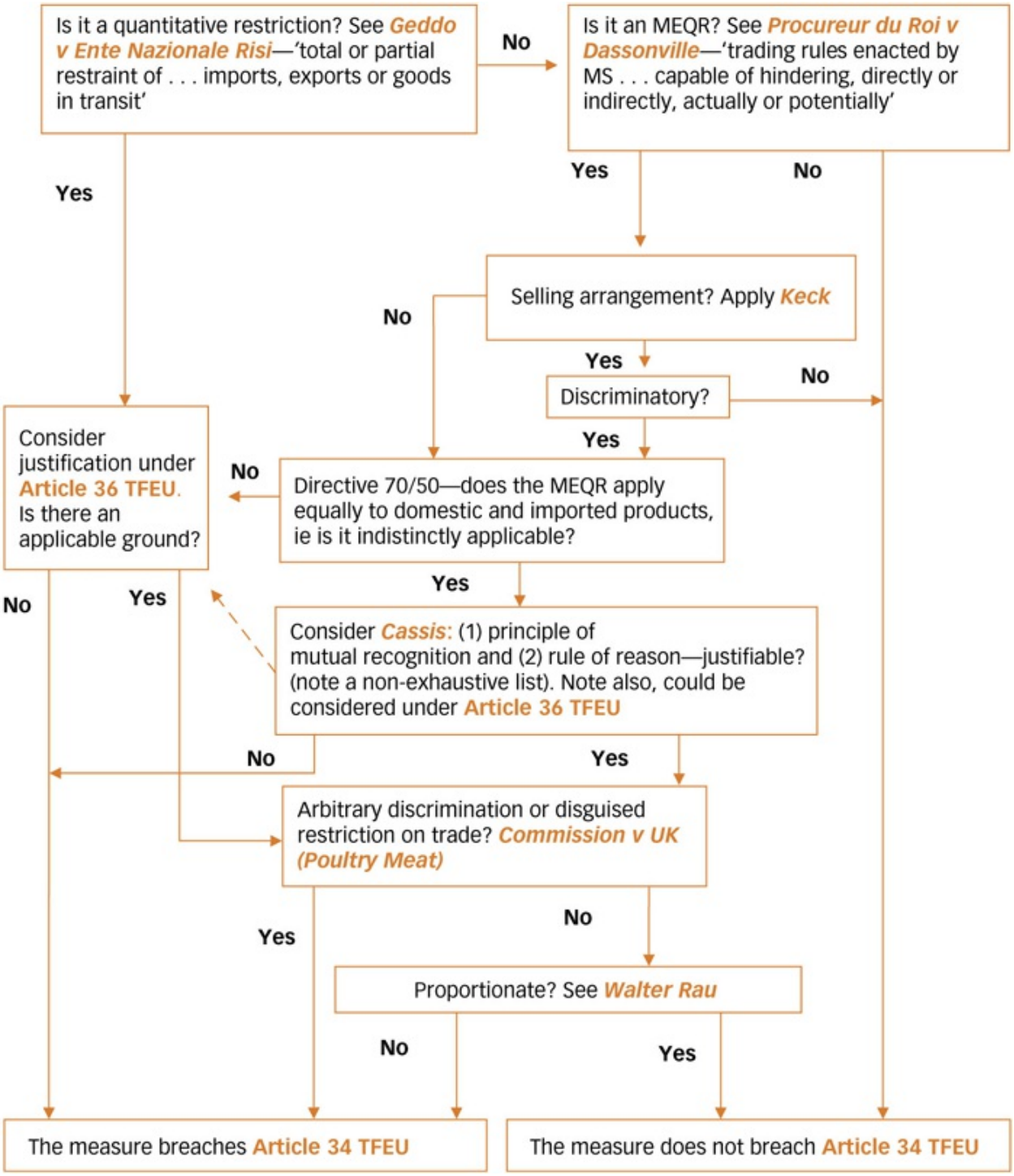


FIGURE 5.3 Article 34 TFEU

Looking for extra marks?

Taking an overview of this area of EU law, two distinct but complementary approaches to achieving the free movement of goods can be identified. The first is deregulatory and negative, entailing the prohibition of national rules that frustrate the internal market objective. The second is based upon positive integration. This approach seeks to eliminate barriers to interstate trade through the application of the principle of mutual recognition and through harmonisation in areas such as technical requirements and health and safety.

Implications of Brexit

Following the outcome of the referendum on UK membership of the EU in 2016 and the departure of the UK from the EU in January 2020, terms such as free trade area, customs union, and the internal market have become ever more part of the common vocabulary but are often misunderstood.

A new agreement, the Trade and Co operation Agreement to regulate the future trading relationship between the EU and the UK, came into force on 31 December 2020. There must be no taxes on goods (tariffs) or limits on the amount that can be traded (quotas) between the UK and the EU with effect from 1 January 2021. However, some new checks will be introduced at borders, such as safety checks and customs declarations. At the time of writing, the fine details of the implementation of the Trade and Co operation Agreement are still being debated.

KEY CASES

CASE	FACTS	PRINCIPLE
***Chemial Farmaceutici SpA v DAF SpA* (Case 140/79) [1981] ECR 1**	Italy taxed synthetic alcohol at a higher rate than alcohol produced by fermentation.	Indirectly discriminatory taxation can be objectively justified.
***Commission v Belgium (Customs Warehouses)* (Case 132/82) [1983] ECR 1649**	Belgium charged importers for storage facilities.	For a charge to escape **Article 30**, the service must be of direct benefit to the importer (or exporter) and the charge must be proportionate to the value of the service.
***Commission v Denmark (Danish Bottles)* (Case 302/86) [1988] ECR 4607**	Danish legislation for the protection of the environment concerning drinks containers.	The ***Cassis*** list of mandatory requirements extended by the Court of Justice to the protection of the environment.
***Commission v Ireland (Restrictions on Importation of Souvenirs)* (Case 113/80) [1981] ECR 1625**	Ireland required imported souvenirs depicting Irish motifs to be marked 'foreign' or with their country of origin.	The ***Cassis*** rule of reason applies only to indistinctly applicable measures. The **Article 36** list of justifications is exhaustive.
***Denkavit v France* (Case**	French	Internal taxation: 'a general system

132/78) [1979] ECR 1923	charge on meat products.	of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike'.
Diamonds (Sociaal Fonds voor de Diamantarbeiders) v Chougol Diamond Co **(Cases 2 & 3/69) [1969] ECR 211**	Belgian charge on imported diamonds.	'CEE': 'any pecuniary charge … imposed on … goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense.' The charge need not be protectionist to constitute a breach.
Geddo v Ente Nazionale Risi **(Case 2/73) [1973] ECR 865**	Italian levy on rice.	Quantitative restrictions: 'measures which amount to a total or partial restraint of … imports, exports or goods in transit'.
Humblot v Directeur des Services Fiscaux **(Case 112/84) [1985] ECR 1367**	French two-tier system of car taxation based on power-rating.	Indirect discrimination: does not openly discriminate on the basis of product origin but its effect is to disadvantage imports.
Keck and Mithouard **(Cases C-267 & 268/91) [1993] ECR I-6097**	French competition rules prohibiting resale of goods at a loss.	National measures prohibiting 'selling arrangements' fall outside ***Dassonville*** 'provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.
Procureur du Roi v Dassonville **(Case 8/74) [1974] ECR 837**	Belgian legislation requiring certificates of origin.	MEQRs: '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 an effect equivalent to quantitative restrictions.'
Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein **(Case**	German requirement: fruit liqueurs	Principle of mutual recognition: provided goods have been lawfully produced and marketed in one

120/78) [1979] ECR 649(*Cassis de Dijon*)	sold in Germany must have a minimum alcohol content of 25 per cent.	Member State, there is no reason why they should not be introduced into another without restriction. Rule of reason: restrictions must be accepted insofar as they are necessary to satisfy ‘mandatory requirements’; the measure must be proportionate.
***Rewe-Zentralfinanz v Landwirtschaftskammer Bonn (San Jose Scale)* (Case 4/75) [1975] ECR 843**	Germany inspected imported (but not domestic) apples.	A distinctly applicable measure: the measure did not apply equally to imports and the domestic product.
***Walter Rau Lebensmittelwerke v de Smedt PvbA* (Case 261/81) [1982] ECR 3961**	Belgium required margarine for retail sale to be cube-shaped.	An indistinctly applicable measure: the measure applied equally to imports and the domestic product.

EXAM QUESTIONS

Problem question

Consider the following fictitious situation:

Freddie is a Spanish manufacturer of metal-grinding machines ('MGMs'), which he has supplied to manufacturers in Spain and France for the past ten years. Freddie now plans to export his machines into Portugal.

Freddie has learned that under Portuguese legislation a licence is required for the import of MGMs. Licence applications are considered by the Portuguese authorities in January and July each year. Freddie has been told that Portugal places an annual limit on the number of MGMs that may be imported and has regulations stipulating that manufacturing machinery, including MGMs, can only be sold through government sales outlets.

Portugal also has health and safety legislation requiring all MGMs to be fitted with an external 'vacuum filtration' unit to collect particles emitted by the grinding process. This legislation has recently been introduced following the publication of a research study conducted in Portuguese heavy industry. The study suggests that, over the past six months, the number of new cases of industrial lung disease has been significantly lower amongst metal-grinding operatives working on Portuguese-manufactured machines (most of which already comply with the new legislation) than amongst operatives working on imported machines (none of which currently complies). Freddie's machines

do not comply with the Portuguese legislation. They are fitted with internal ‘vacuum filtration’ units which, in Freddie’s view, operate much more efficiently than the externally fitted filtration units required by the legislation.

Advise Freddie as to the application, if any, of EU law on the free movement of goods to all aspects of this situation.

Essay question

The free movement of goods is an essential element of the internal market and both EU legislation and the decisions of the Court of Justice support the achievement of this aspect of economic integration. However, the EU internal market is imperfect, so far as goods are concerned. There remain impediments to free movement which are not only embedded in the legislation but also arise from the case law of the Court of Justice.

In the light of this statement, critically discuss the extent to which EU legislation and the case law of the Court of Justice ensure the free movement of goods in the internal market.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

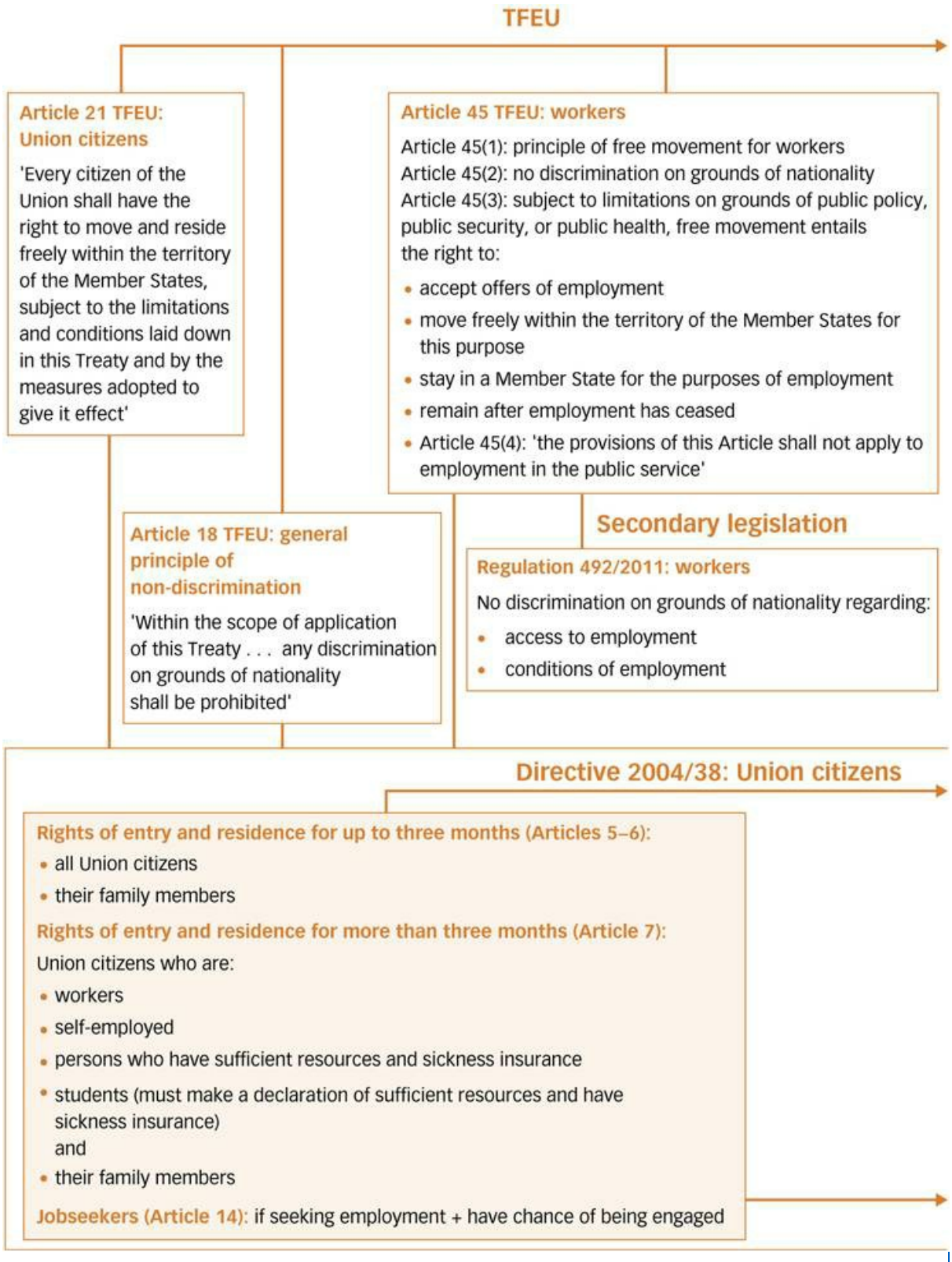
For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

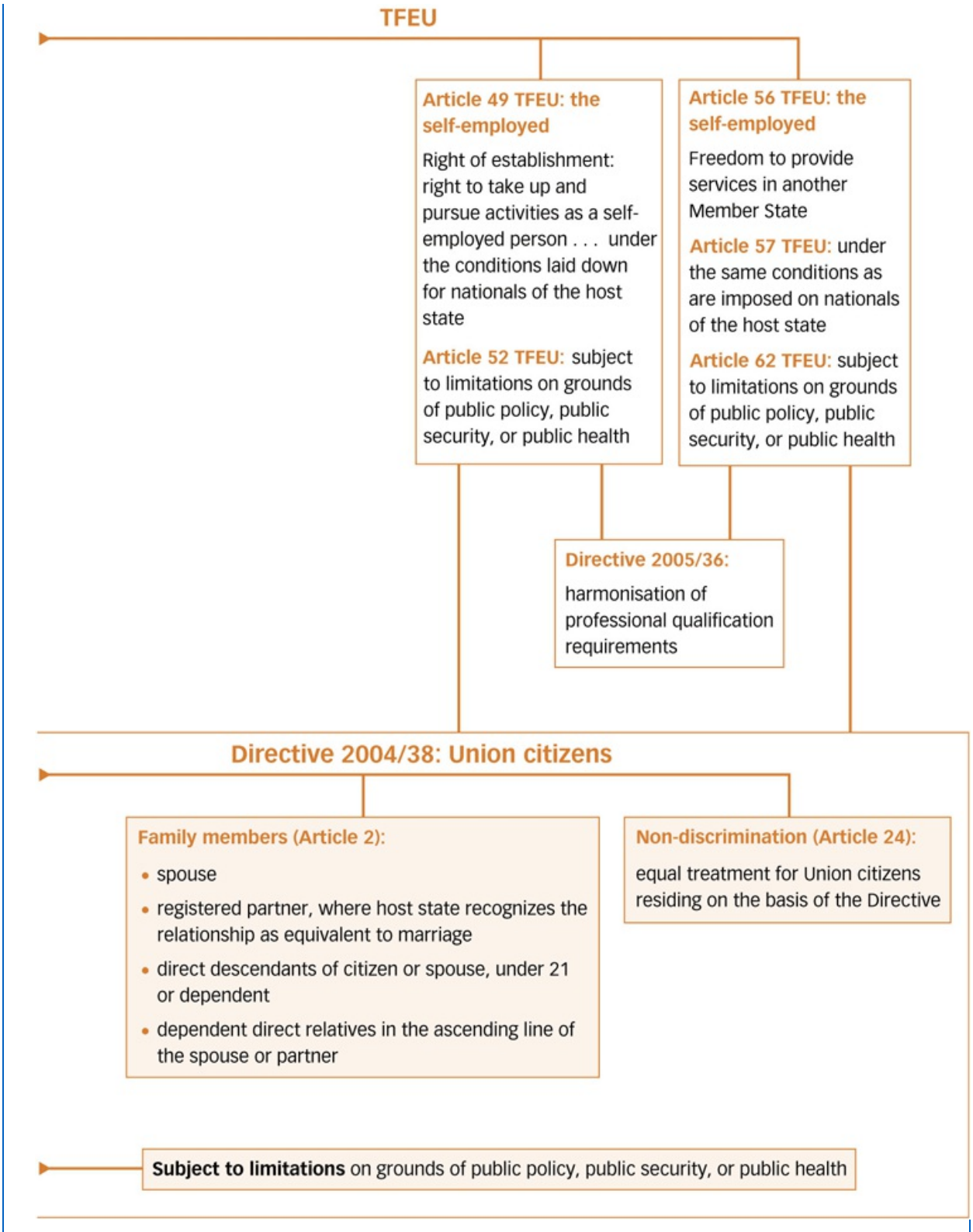
6
Free movement of persons

The assessment

Free movement of persons is a popular assessment topic. A topical issue for essay questions is the development of Union citizenship rights, associated case law, and Directive 2004/38. Other favourites are the rights of the self-employed and the developing alignment of the principles applying to persons exercising the right of establishment and persons providing services in another Member State. Some courses concentrate on free movement of workers, frequently the basis of problem questions. Look out for situations involving Union citizens seeking to exercise worker rights in another Member State and family members wishing to move with them. EU law on the free movement of persons is a combination of Treaty provisions, secondary legislation, and case law.

Overview: legislation


TFEU
Article 21 TFEU: Union citizens
'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'
Article 45 TFEU: workers
Article 45(1): principle of free movement for workers
Article 45(2): no discrimination on grounds of nationality
Article 45(3): subject to limitations on grounds of public policy, public security, or public health, free movement entails the right to:
• accept offers of employment
• move freely within the territory of the Member States for this purpose
• stay in a Member State for the purposes of employment
• remain after employment has ceased
• Article 45(4): 'the provisions of this Article shall not apply to employment in the public service'
Article 18 TFEU: general principle of non-discrimination
'Within the scope of application of this Treaty . . . any discrimination on grounds of nationality shall be prohibited'
Secondary legislation
Regulation 492/2011: workers
No discrimination on grounds of nationality regarding:
• access to employment
• conditions of employment
Directive 2004/38: Union citizens
Rights of entry and residence for up to three months (Articles 5–6):
• all Union citizens
• their family members
Rights of entry and residence for more than three months (Article 7):
Union citizens who are:
• workers
• self-employed
• persons who have sufficient resources and sickness insurance
• students (must make a declaration of sufficient resources and have sickness insurance)
and
• their family members
Jobseekers (Article 14): if seeking employment + have chance of being engaged


TFEU
Article 49 TFEU: the self-employed
Right of establishment: right to take up and pursue activities as a self-employed person . . . under the conditions laid down for nationals of the host state
Article 52 TFEU: subject to limitations on grounds of public policy, public security, or public health
Article 56 TFEU: the self-employed
Freedom to provide services in another Member State
Article 57 TFEU: under the same conditions as are imposed on nationals of the host state
Article 62 TFEU: subject to limitations on grounds of public policy, public security, or public health
Directive 2005/36:
harmonisation of professional qualification requirements
Directive 2004/38: Union citizens
Family members (Article 2):
• spouse
• registered partner, where host state recognizes the relationship as equivalent to marriage
• direct descendants of citizen or spouse, under 21 or dependent
• dependent direct relatives in the ascending line of the spouse or partner
Non-discrimination (Article 24):
equal treatment for Union citizens residing on the basis of the Directive
Subject to limitations on grounds of public policy, public security, or public health

Key facts

- **Free movement of persons is one of the four ‘freedoms’ of the internal market.**
- **Original Treaty provisions granted free movement rights to the economically active: workers, persons exercising the right of establishment, and persons providing services in another Member State.**
- **The EC Treaty also set out the general principle of non-discrimination on grounds of nationality, ‘within the scope of application of the Treaty’.**
- **All of these provisions are now contained in the Treaty on the Functioning of the European Union (TFEU).**
- **Early secondary legislation granted rights to family members, students, retired persons, and persons of independent means. The Citizenship Directive 2004/38 consolidated this legislation as well as clarifying and supplementing the rights of Union Citizens and their family members.**
- **The Treaty on European Union introduced the concept of Union citizenship into the EC Treaty, together with the right of all Union citizens to move freely and reside in another Member State. The TFEU now incorporates these provisions.**
- **The Court of Justice began to use Union citizenship**

as the basis of rights, declaring that 'Union citizenship is destined to be the fundamental status of the nationals of the Member States'.

- **With the adoption of Directive 2004/38, EU law moved further towards breaking the link between rights and economic status.**
- **However, the economically active (workers and the self-employed) and their families, together with students and persons with independent means, still enjoy more extensive rights than are granted to persons simply by virtue of Union citizenship.**
- **Union citizenship rights are subject to 'the limitations and conditions' in the TFEU and secondary legislation. Member States can impose restrictions on grounds of public policy, public security, or public health, though the Court of Justice interprets these grounds restrictively.**

Following the outcome of the referendum on UK membership of the EU in 2016, the departure of the UK from the EU in January 2020 and the end of the so called transition period on 31 December 2020, the rights of EU citizens and their families to reside and work in the UK and the rights of UK nationals and their families to reside and work in the EU will no longer apply and a new immigration regime will be implemented. However, EU citizens who resided in the UK before or during the transition period were able to apply by 31 June 2021 to remain in the UK under the EU Settlement

Scheme.

Free movement rights

Free movement of people is one of the four freedoms upon which the EU was built. The concept is referred to specifically in **Article 3(2) TEU** and **Article 26(2) TFEU** and is fundamental to the functioning of the internal market.

Original Treaty provisions reflected the EU's economic origins, allowing the **economically active**, workers, the self-employed, and persons providing services, to move around the EU to take up employment or business activity and established the principle of non-discrimination on grounds of nationality. The **TFEU** now incorporates these rights in **Articles 45** (workers), **49** (the self-employed), **56** (persons providing services), and **18** (non-discrimination). Later provisions, introduced by the **Treaty on European Union**, created Union citizenship and granted free movement rights to all Union citizens (**Articles 20 and 21 TFEU)**.

These provisions were supplemented by secondary legislation granting free movement rights to family members, students, retired persons, and persons of independent means (respectively Directives 68/360, 90/366, 90/365, 90/364). These directives have been repealed and their provisions consolidated into the **Citizenship Directive 2004/38** along with key principles arising from the Court of Justice's case law.

Limitations

Rights of free movement are not unlimited. **Article 21 TFEU** makes them subject to the 'conditions and limitations laid down in the Treaties and by the measures adopted to give them effect'. Member States can limit free movement and residence rights on grounds of public policy, public security, and public health. These grounds, set out in the **TFEU**, are defined and elaborated in **Directive 2004/38**.

Revision tip

It is essential to get to grips with this legislation. As you work through this Chapter, use the legislation overview chart to help you.

Citizens of the European Union

Article 20 TFEU provides that 'Citizenship of the Union is hereby established' and that every national of a Member State is a Union citizen. **Article 21** grants free movement rights to all Union citizens, subject to 'the limitations and conditions' in the Treaties and secondary legislation. Clarification of the scope of Union citizens' free movement rights is found in case law and in **Directive 2004/38**.

Overview: case law

Union citizens
(Article 21 TFEU)

- *Grzelczyk*: 'Union citizenship is destined to be the fundamental status of the nationals of the Member States'
- Court of Justice based non-discrimination rights on citizenship
- *Baumbast*: the Court of Justice based residency rights on citizenship status, while recognizing that the Article 21 TFEU rights remain 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'

Workers
(Article 45 TFEU, Directive 2004/30, Regulation 492/2011)

Who is a 'worker'? (no Treaty definition):

- *Lawrie-Blum*: '[the] essential feature of an employment relationship . . . is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'
- *Levin,Kempf*: part-time work
- *Steymann*: unpaid work
- *Bettray, Trojani*: is rehabilitation 'work'?

Equal access to employment (Regulation 492/2011):

- *French Merchant Seamen*: a breach of Article 4 (no limits by number or percentage)
- *Groener*: no breach of Article 3 (linguistic knowledge)

Access to public service posts (Article 45(4) TFEU):

- *Commission v Belgium*: 'public service' involves 'the exercise of power conferred by public law' where there is a 'responsibility for safeguarding the general interests of the State'

Equality of treatment in employment (Regulation 492/2011):

- *Cristini*: 'social and tax advantages' need not form part of the contract of employment

Jobseekers
(Directive 2004/38 (Article 14))

- *Royer*: right to enter to seek work
- *Antonissen*: right to remain if making genuine efforts to find work, with a real chance of being employed

Self-employed persons

(Article 49 TFEU—right of establishment, Article 56 TFEU—freedom to provide services, Directive 2004/38—right to enter and remain)

Establishment

Rules of professional conduct:

- *Gebhard*: 'measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty' must be applied in a non-discriminatory manner, justified in the general interest and suitable for and proportionate to their objective

Professional qualifications:

- *Thieffry*: qualifications recognized as equivalent must be accepted

Provision of services

- *Van Binsbergen*: professional requirements are compatible with EU law provided they are equally applicable to host state nationals, objectively justified in the public interest, and proportionate
- *Säger*: Article 56 not only requires the abolition of discrimination but also restrictions that are 'liable to prohibit or otherwise impede' the provision of services. Restrictions are acceptable only where justified by imperative reasons in the public interest, equally applicable to national and non-national providers insofar as the interest is not protected by rules applying in the state of origin, and proportionate

Recipients of services

(Directive 2004/38)

- *Cowan*: recipients of (tourist) services entitled to equal treatment under Article 18 TFEU

Rights attached to Union citizenship: the Court of Justice

Originally, free movement and non-discrimination rights were largely confined to the economically active and their families, though the Court of Justice consistently stressed the importance of free movement as a matter of social justice, as the means for individuals to pursue enhanced life quality through increased mobility. Significantly, after Union citizenship was created, the Court began to use citizenship as the basis for rights, declaring that 'Union citizenship is destined to be the fundamental status of the nationals of the Member States' (***Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*** **(Case C-184/99)**).

Later, the Court based residency rights on citizenship status, while recognising that such rights remain subject to limitations and conditions.

Baumbast v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091

Facts: Baumbast, a German national who had been employed and then self-employed in the UK, challenged the refusal to renew his residence permit on the grounds that he was no longer

economically active in the UK.

Held: The Court of Justice declared that Union citizenship formed the basis for residency rights, albeit subject to the conditions imposed by the relevant secondary legislation granting residency rights to financially independent persons, provided they had sufficient financial means and sickness insurance. Baumbast had sufficient means not to become a financial burden on the UK and, whilst his sickness insurance fell short of what was required, it would be disproportionate to refuse him residency rights. He had a continued right of residence in the UK, arising by direct application of [**Article 21**].

These principles were applied and confirmed in *Chen*.

Zhu and Chen v Secretary of State for the Home Department (Case C-200/02) [2004] ECR 1-9925

Facts: Mrs Chen, a Chinese national entered the UK whilst pregnant and gave birth in Northern Ireland and the child acquired Irish citizenship. The child subsequently lived with her mother in Wales, UK.

Held: the child, as a Union citizen was entitled to rely directly on **Articles 20 and 21 TFEU** to establish her right of residence in the UK. Her mother, as her primary carer, was also entitled to remain in the UK as otherwise the child's citizenship rights would be deprived 'of any useful effect'.

Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) (Case C-34/09) [2011] ECR 1-1117

Facts: The Zambranos were Columbian nationals registered as resident in Belgium. In 2003 and 2005 they had two children who acquired Belgian nationality. The parents sought to take up residence as ascendants of Belgian nationals but this was refused.

Held: Emphasising the fundamental status of EU citizenship, the Court of Justice recalled that **Article 20 TFEU** provided citizenship rights to all nationals of Member States and the Zambrano children enjoyed such status. **Article 20 TFEU** precluded national rules which would deprive the citizen of the substance of those rights. The refusal to grant a right of residence to the parents would have the consequence of depriving the children of the substance of the citizenship rights conferred upon them. Indeed, the refusal to grant a right of residence would lead to the children being forced to leave the Member State in order to reside with their parents.

The subsequent cases of ***McCarthy*** and ***Dereci*** **(Case C-256/11) [2011] ECR 1 -11315**, have confirmed the Court's 'genuine enjoyment' test from ***Zambrano***, but with the acknowledgement that this may not be applicable on the facts.

McCarthy (Case C-434/09) [2011] ECR 1-3375

Facts: McCarthy had dual Irish and British nationality but had only ever lived in the UK. She sought to rely on her EU law residence rights so that her Jamaican husband could enjoy a derived right of residence.

Held: Her claim should be rejected as not being covered by **Article 21 TFEU** (or the relevant secondary legislation) as this was a wholly internal matter since McCarthy had not previously exercised her free movement rights (see below).

Looking for extra marks?

Even before Union citizenship was established, Directives 90/364, 90/365, and 90/366 concerning students, retired persons, and persons with independent means had extended free movement rights to **economically inactive** persons. The economic link was further weakened as the Court of Justice granted rights of non-discrimination and residence on the basis of Union citizenship. **Directive 2004/38** reiterates that Union citizenship is the fundamental status upon which free movement rights are based (**recital 3**).

Revision tip

Be familiar with these cases. You will need to discuss them in an answer concerning the significance of Union citizenship and its development as the basis for free movement rights.

Rights attached to Union citizenship: Directive 2004/38

Directive 2004/38 lays down the conditions governing the exercise of free movement and residence rights by Union citizens and their families in the EU, their rights of permanent residence, and the limitations on grounds of public policy, public security, or public health.

References in this section are to Articles of Directive 2004/38 unless otherwise stated.

All Union citizens and their families

The Directive allows all Union citizens, and their family members irrespective of nationality, to leave their home state and move to and reside in another Member State for up to three months, without conditions or formalities, other than the requirement to hold a valid identity card or passport for Union citizens or a passport for non-EU family members. Non-EU nationals may also be required to hold an entry visa (**Articles 4–6**). For economically inactive Union citizens and their family members, the rights apply provided individuals do not become an unreasonable burden on the host state's social security system. However, expulsion must not be an automatic consequence of

recourse to welfare benefits (**Article 14(3)**). Member States are not obliged to grant social assistance during this three-month period, save to workers, self-employed persons, and their families (**Article 24(2)**).

Elisabeta Dano and Florin Dano v Jobcenter Leipzig (Case C-333/13) EU:C:2014:2358

Facts: Ms Dano and her son, both Romanian nationals, resided in Germany living with Ms Dano's sister who provided for them. Ms Dano claimed unemployment benefits but this was refused. Ms Dano argued that the principle of non-discrimination in **Article 18 TFEU** prohibited Germany's domestic legislation excluding foreign nationals claiming social assistance where they enter the country to obtain such assistance or when the right of residence arises merely as a jobseeker.

Held: Ms Dano did not have sufficient resources and could not claim unemployment benefits on the basis of citizenship. **Directive 2004/38** provides that where the period of residence is in excess of three months but less than five years, as in this case, economically inactive persons must have sufficient resources (**Article 7** below). Furthermore, the Court held that the **Charter of Fundamental Rights** did not have a bearing on the case as when Germany set out in national law the conditions for granting such benefits, it was not implementing EU law. The Court is taking a strict line here on so called 'benefit tourism'.

Workers, the self-employed, and their families

The **TFEU** enshrines the primary free movement rights of economically active Union citizens in **Articles 45** (workers) and **49** (the self-employed). Under **Directive 2004/38** these persons have the right to reside in the host state for more than three months (**Article 7(1)(a)**). That right extends to family members who are Union citizens (**Article 7(1)(d)**) and to those who are not (**Article 7(2)**). The Directive also confirms the right of Union citizens to enter and remain in another Member State to seek work (**Article 14(4)(b)**), a right originally established by the Court of Justice (***Procureur du Roi v Royer*** **(Case 48/75)**). These rights are considered in more detail below.

Persons with independent means, students, and their families

The Directive sets out a right of residence of more than three months for three other groups: persons with independent means (**Article 7(1)(b)**), students (**Article 7(1)(c)**), and their family members (**Article 7(1)(d)**). Persons with independent means and students must have sufficient resources for themselves and their families not to become a burden on the host state's social welfare system and have sickness insurance. Member States must not lay down a fixed amount which they regard as 'sufficient resources' but take account of an individual's

personal situation (**Article 8(4)**). Students must simply make a declaration of sufficient resources (**Article 7(1)(c)**).

The non-discrimination right covers equal access to relevant courses including tuition and other course-related fees (***Gravier v City of Liège* (Case 293/83)**). However, according to **Directive 2004/38**, Member States are not obliged to provide maintenance grants and student loans to persons other than workers, the self-employed, and their families (**Article 24(2)**). This provision draws on the decisions in ***Lair v Universität Hannover* (Case 39/86)** and ***Brown v Secretary for State for Scotland* (Case 197/86)**. Here, the Court of Justice restricted access to a maintenance grant to workers, the self-employed, persons who retain such status, and their families. However, the later ***Bidar*** judgment, handed down before **Directive 2004/38** came into effect, indicates that economically inactive persons may be entitled to student grants and loans provided they are lawfully resident and sufficiently integrated into the host state.

R v London Borough of Ealing & Secretary of State for Education, ex parte Bidar (Case C-209/03) [2005] ECR I-2119

Facts: Bidar, a French national, had come to the UK with his mother (who died soon after their arrival), completed his secondary education (whilst living with his grandmother), and started a course at University College, London. His student loan application was rejected on the ground that he was not settled in the UK.

Held: The Court of Justice held that, in view of developments since ***Lair*** and ***Brown***, notably the creation of Union citizenship, the Treaty right in [**Article 18 TFEU**] granted equality with nationals regarding student grants and loans, though a Member State would be justified in requiring a certain degree of integration into the state's society.

Subsequently, the Court of Justice found that a five-year residency condition imposed by the Dutch authorities was not excessive for the purposes of guaranteeing integration in these circumstances (***Förster v Hoofddirectie van de Informatie Beheer Groep*** **(Cases C-158–157)**).

Family members

Directive 2004/38 grants entry and residence rights to the families of Union citizens exercising free movement rights as workers, self-employed persons, jobseekers, students, or persons with independent means (**Articles 5–7**). Family member rights are sometimes described as 'derivative' because they are not independent rights but derived from the Union citizen's primary rights. Family members who are Union citizens may themselves acquire independent EU rights.

'Family member'

'Family member' means, irrespective of nationality, the Union citizen's

spouse and registered partner; direct descendants under 21 or those who are dependent, and those of the spouse or registered partner; and dependent direct relatives in the ascending line and those of the spouse or registered partner (**Article 2(2)**). According to case law, dependency results from a factual situation in which the Union citizen is actually providing support (***Centre Public d'Aide Sociale de Courcelles v Lebon* (Case 316/85)**). In ***Jia* (Case C-1/05)**, the Court of Justice ruled that the host Member State is required to assess dependency in the light of the financial and social conditions of the person in the country in which they were residing at the time when the application to join the EU citizen was made. Documentary evidence from the authorities of the country of origin will usually be the best form of proof.

Member States must also facilitate entry and residence for other specified individuals, irrespective of nationality: persons who in the state of origin were dependants or members of the Union citizen's household or need his/her personal care for serious health reasons and the partner with whom the Union citizen has a durable relationship (**Article 3(2)**).

'Family member' is defined more narrowly for students (**Article 7(4)**).

Spouses and partners

The legislation predating **Directive 2004/38** made no reference to 'partner', but only to 'spouse'. The Court of Justice stated in ***Netherlands State v Reed* (Case 59/85)** that 'spouse' was

restricted to persons married to each other. Under **Directive 2004/38** 'family member' also includes:

> 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. (**Article 2(2)(b)**)

Many EU countries now recognise same-sex marriages. The recent judgment in ***Coman*** was the Court's first ruling on same-sex marriages for the purposes of EU free movement law.

Coman Case C-673/16

Facts: Mr Coman, a Romanian citizen, had married his husband, a US citizen, in Belgium while residing there. He tried to return to Romania with his husband, but Romania refused residence to the latter, as it does not recognise same-sex marriage.

Held: the term 'spouse' within the meaning of the Directive is gender-neutral and may therefore cover the same-sex spouse of the EU citizen concerned (provided the marriage has taken place within an EU Member State).

Looking for extra marks?

Since Member States retain competence in the legal regulation of non-marital relationships, this provision will inevitably give rise

to differences of treatment across the EU. Note the requirement of Member States to facilitate the entry of partners who fall within **Article 3(2(b)**.

Marriages of convenience

Directive 2004/38 consolidates previous case law on marriages of convenience (***Secretary of State for the Home Department v Akrich*** **(Case C-109/01)**). **Article 35** allows Member States to refuse, terminate, or withdraw rights in cases of abuse or fraud, such as marriages of convenience, provided such action is **proportionate**.

Death or departure of the Union citizen

Should the Union citizen die or leave the host state, the rights of family members holding Union citizenship are unaffected, though before acquiring permanent residency rights they must meet the **Article 7(1)** conditions (be workers, self-employed, students, have independent means, or be family members of a Union citizen holding such status) (**Article 12(1)**).

The position of non-EU family members is more precarious. If the Union citizen dies they can stay, provided they have lived with him/her in the host state for at least a year. Before acquiring a permanent residency right, their right remains subject to them being workers or self-employed; or having sufficient resources for themselves and their families and sickness insurance; or being family

members of a person satisfying one of these requirements (**Article 12(2)**).

Non-EU family members have no right to stay if the Union citizen leaves the host state, unless they can rely on **Article 12(3)**. This provision consolidates previous case law: ***Baumbast v Secretary of State for the Home Department*** **(Case C-413/99)**. It provides that, following the Union citizen's death or departure, his/her children in education in the host state, and the parent who has actual custody, irrespective of nationality, retain residency rights until the children's studies are completed (**Article 12(3)**).

Divorce

Separation has no effect on rights (***Diatta v Land Berlin*** **(Case 267/83)**). Divorce, annulment of marriage, or termination of a registered partnership can have a significant impact. Again, the position of family members who hold Union citizenship is stronger than that of non-EU family members. The rights of the former are unaffected, though before acquiring permanent residency rights, they must meet the **Article 7(1)** conditions (**Article 13(1)**).

Non-EU family members can remain only in limited circumstances: the marriage/partnership has lasted at least three years, with one year in the host state; or the spouse/partner has custody of a Union citizen's children; or there are particularly difficult circumstances, such as being the victim of domestic violence; or where the spouse/partner has access rights to a child in the host state. Before acquiring a permanent residency right, their right to reside remains

subject to them being workers or self-employed; or having sufficient resources for themselves and their families and sickness insurance; or being family members of a person satisfying one of these requirements (**Article 13(2)**).

Note the impact of recent cases on the interpretation of **Article 13**. In ***Singh v Minister for Justice and Equality*** **(Case C-218/14)**, the Court of Justice held that the rights of a non-EU citizen family member would terminate when her EU citizen husband left the host Member State unless divorce proceedings had commenced before he left.

In ***Secretary of State for the Home Department v NA***, the Court of Justice applied ***Singh*** in a case involving domestic violence and it has been noted that this could lead to harsh results.

Secretary of State for the Home Department v NA (Case C-115/15)

Facts: A Pakistani woman had been living with her German husband in the UK but left the family home due to domestic violence. Shortly afterwards, the husband left the UK before divorce proceedings had been commenced.

Held: The wife could not rely on the protection of Article 13 in these circumstances. Fortunately, she could rely on Article 12(3) (discussed above) to establish her continuing right of residence as she was the carer of her school-age children.

Looking for extra marks?

Although family members have rights 'irrespective of nationality', **Directive 2004/38** makes significant distinctions between EU and non-EU family members. Whilst the substance of their respective rights is generally the same, there are notable differences relating, in particular, to the right to remain following divorce or if the Union citizen dies or leaves the host state.

Right to take up employment

Irrespective of nationality, family members may take up employment or self-employment (**Article 23**).

Equal treatment

The right to equal treatment applies without limitation to family members of the economically active. For family members of other Union citizens (persons of independent means and students), their right to equal treatment is limited, as there is no entitlement to social assistance during the first three months of residence and no right to student grants or loans (**Article 24**).

Regulation 492/2011, Article 10 provides that workers' children have a right of access, under the same conditions as nationals of the host state, to the general educational, apprenticeship, and vocational training courses. This includes 'general measures intended to facilitate

educational attendance', including grants (***Casagrande v Landeshauptstadt München* (Case 9/74)**). As already noted, under **Article 12(3)**, children still in education in the host state may remain until their studies are completed and this includes a derivative right of residence for their parent or carer. In the recent case of ***Jobcenter Krefeld v JD* (Case C-181/19)**, the Court clarified the right to equal access to social assistance for both the children and their parent or carers in these circumstances. The derogation from equal treatment in **Article 24(2) Directive 2004/38** will not apply.

Administrative formalities

Member States are entitled to track population movements through administrative formalities and apply proportionate and non-discriminatory sanctions for non-compliance. This would include a requirement to report to the authorities within a reasonable period of time following arrival (***Criminal Proceedings against Lynne Watson and Alessandro Belmann* (Case 118/75)**; ***Messner* (Case C-265/88)**; **Directive 2004/38, Article 5**). For residence periods over three months, Union citizens may be required to register with the authorities (**Article 8**). Non-EU family members must apply for and be issued with a residence card (**Articles 9-11**). Note that such documents only evidence the right of residence and only proportionate and non-discriminatory sanctions may be imposed for non-compliance. Deportation would be a disproportionate sanction in these circumstances (***Procureur du Roi v Royer* (Case 48/75)**).

Right of permanent residence

Union citizens who have resided in the host state legally and continuously for five years and non-EU family members who have resided with them in the host state for at least five years, acquire permanent residency rights. The right is unaffected by temporary absences of up to six months. Once acquired, the right is not subject to economic status and sufficient resources and can be lost only through absences exceeding two years (**Article 16**).

Certain people can enjoy a right of permanent residence before the completion of 5 years' residence for example, workers who reach retirement age whilst living in the host state (**Article 17**).

Family members relying on **Articles 12** or **13** for a right of residence will have to satisfy further conditions before qualifying for permanent residence rights.

Qualifying persons will be entitled to apply for a document certifying permanent residence (**Articles 19–21**).

***Dias* (Case C-352/09)** confirms that only periods of lawful residence are taken into account in assessing the acquisition of the right to permanent residence.

In ***Ogieriakhi* (Case C-244/13)**, the Court of Justice clarified that in the interpretation of Article 16(2), continuous periods of five years must be taken into account even when accumulated before the transposition of **Directive 2004/38**. In addition, separation of spouses during this period would not normally preclude the fulfilment

of this condition.

Limitations

Union citizens' free movement rights are 'subject to the conditions and limitations' in the Treaties and secondary legislation (**Article 21 TFEU**). Member States may limit the rights of economically active EU migrants on grounds of public policy, public security, or public health (**Articles 45(3)**, **52 TFEU**). **Directive 2004/38** defines the scope of the limitations and confirms their applicability to all persons exercising rights of free movement under the Directive, for example family members of EU citizens. The limitations are considered in detail later in this Chapter.

Revision tip

Be prepared to identify who has rights under **Directive 2004/38** and what those detailed rights are. You may also be asked to deal with how those rights may be limited.

EU rights in the state of origin

The Court of Justice has held that EU free movement rights cannot be claimed against a home state unless the individual has already exercised free movement rights (***Morson and Jhanjan v Netherlands*** **(Cases 35 & 36/82)**).

Such rights may be triggered where an individual returns to the home state following a period of economic activity in another Member State (***R v Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department*** **(Case C-370/90)**).

To benefit from rights of re-entry, a spouse must originally have been lawfully resident in the state of re-entry. However, when assessing a claim, the authorities must have regard to the right to respect for human life under **Article 8 of the European Convention on Human Rights** (***Secretary of State for the Home Department v Akrich*** **(Case C-109/01)**). As mentioned above, **Article 35 of Directive 2004/38** allows Member States to refuse, terminate, or withdraw rights in cases of abuse or fraud, including marriages of convenience.

Other situations have provided the necessary EU element, for instance return to the home state after time spent in another Member State as a student (***D'Hoop v Office national de l'emploi*** **(Case C-**

224/98)) and, in a claim by a non-EU national, her husband's exercise of the right to provide services under Article 49 EC (now **Article 56 TFEU**) (***Carpenter v Secretary of State for the Home Department*** **(Case C-60/00)**).

Looking for extra marks?

Note the impact of case law on EU citizenship rights discussed earlier, for example ***Zhu*** *and* ***Chen***, which may mean that family members may exceptionally benefit from derivative rights of residence to ensure the 'genuine enjoyment' of the rights of EU citizens, even if these rights would not ordinarily be available.

Free movement of workers

Overview of the legislation

EU migrant workers have primary free movement rights under the **TFEU** both as Union citizens (**Article 21**) and as workers (**Article 45**).

Article 45 TFEU: rights for workers

Article 45(1) contains the fundamental principle of free movement for workers. Free movement entails the abolition of any discrimination based on nationality between the nationals of the Member States as regards employment, remuneration, and other conditions of employment (**Article 45(2)**). It also entails the right to move freely and stay in another Member State for the purposes of employment and, subject to conditions laid down in secondary legislation, to remain after employment has ceased. The right to enter and remain is subject to limitations on grounds of public policy, public security or public health (**Article 45(3)**).

Secondary legislation

Directive 2004/38 defines the precise scope of workers' rights of

entry and residence, of family members' rights, and also the limits on those rights. **Regulation 492/2011** elaborates on workers' primary right to non-discrimination on grounds of nationality, incorporating provisions concerning equal access to employment and equal treatment in employment.

Who is a 'worker'?

Worker status is of great importance because, if an individual is a worker, he or she has available the whole range of worker rights contained in the primary and secondary legislation. Whilst it is generally straightforward to establish worker status, there are a number of cases in which a claim to worker status has been challenged.

There is no Treaty definition of 'worker'. The Court of Justice has emphasised that the term may not be defined by national laws but has an EU meaning: ***Levin v Staatssecretaris van Justitie* (Case 53/81)**. Clarification was provided in ***Lawrie-Blum v Land Baden-Württemberg* (Case 66/85)**: '[the] essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. Since worker rights relate to one of the fundamental freedoms of the EU, the Court of Justice has interpreted 'worker' broadly.

Part-time work

Levin v Staatssecretaris van Justitie (Case 53/81) [1982] ECR 1035

Facts: Levin, a British national, lived in the Netherlands where she worked part-time. Her income was small but she was supported financially by her husband, a non-EU national. The Dutch authorities refused her a residence permit, claiming that she was not a worker because her wage was lower than the nationally recognised minimum subsistence level.

Held: The Court of Justice held that, provided work is an 'effective and genuine' economic activity and not 'purely marginal and ancillary', a part-time worker is entitled to [EU] free movement rights as a worker. Additionally, a person's motives in seeking employment in another Member State are irrelevant.

Kempf v Staatssecretaris van Justitie (Case 139/85) [1986] ECR 1741

Facts: Kempf, a German national living in the Netherlands, worked 12 hours per week as a music teacher. Like Levin, his earnings were below the minimum subsistence level but, unlike Levin, he relied on state benefits to supplement his income.

Held: The Court of Justice held that persons undertaking genuine and effective part-time employment cannot be excluded from the free movement rights accorded to workers merely because their income falls below the minimum subsistence level

and is supplemented by social assistance.

Unpaid work

Even where no formal wages are paid, an individual may still be a 'worker'.

Steymann v Staatssecretaris van Justitie (Case 196/87) [1988] ECR 6159

Facts: After a short period working as a plumber in the Netherlands, Steymann, a German national, joined the Bhagwan Religious Community. As well as doing plumbing and general household work, he participated in the Community's business activities.

Held: The Court of Justice held that the fact that Steymann received no formal wages but only free accommodation and a minimal amount of money did not rule out his work as effective economic activity.

Can rehabilitation constitute 'work'?

The limits to the scope of 'worker' may be reached when the purpose of the employment is rehabilitation.

Bettray v Staatssecretaris van Justitie (Case 344/87) [1989] ECR 1621

Facts: Bettray, a German national, participated in a programme in the Netherlands aimed at reintegration into the workforce. The work undertaken was paid and supervised.

Held: Since the objective was rehabilitation, the work could not be regarded as 'effective and genuine economic activity' and therefore Bettray was not a worker for the purposes of EU law.

However, a person following a 'social reintegration programme' would be entitled to worker status if the work involved could be regarded as 'effective and genuine' economic activity.

Trojani v Centre public d'Aide Social de Bruxelles (Case C-456/02) [2004] ECR I-7574

Facts: Trojani, a French national, lived in a Salvation Army hostel in Belgium where, in return for board, lodging and pocket money, he worked for around 30 hours per week as part of a 'personal socio-occupational reintegration programme'.

Held: The Court of Justice found that the benefits in kind and money received by Trojani were consideration for work for and under the direction of the hostel. The Court left the national court to decide whether that work was real and genuine, by ascertaining whether the services performed were part of the

'normal labour market'. This could involve consideration of the status and practices of the hostel, the content of the reintegration programme and the nature and detail of the work.

Retaining worker status

Article 7(3) of Directive 2004/38 provides that a Union citizen who is no longer working or self-employed may nevertheless retain worker or self-employed status. Economic status is retained if the individual is temporarily unemployed through illness or accident; or is involuntarily unemployed after working for over a year or on expiry of a fixed-term contract, if registered as a jobseeker; or embarks on vocational training. In the latter circumstance, that training must be related to the previous employment unless the individual is involuntarily unemployed. **Article 7(3)** is an important provision, since it guarantees continued worker rights.

The Court of Justice has expressly asserted that it would determine which former workers still qualified for access to benefits even though such persons were not covered in the Directive. In ***Saint Prix v Secretary of State for Work and Pensions*** **(Case C-507/12)**, the Court ruled that female workers who were former workers at the time they gave birth still had access to benefits (provided they became workers again soon afterwards).

However, in ***Alimanovic*** **(Case C-67/14)**, although the Court does not expressly overturn the ***Saint Prix*** judgment it appears to make it easier for Member States to justify refusal of benefits. The case

concerns a Swedish woman and her daughter who had worked in Germany briefly before losing their jobs. The mother and daughter did not fall within **Article 7(3)** as former workers and so would need to be considered as first- time jobseekers (see below).

Revision tip

Can you discuss this case law confidently, for inclusion in an essay question? Would you be able to apply these cases to the 'characters' in a problem scenario?

Jobseekers

EU nationals are entitled to enter and remain in another Member State to seek work (***Procureur du Roi v Royer*** **(Case 48/75)**). ***R v Immigration Appeal Tribunal, ex parte Antonissen*** **(Case C-292/89)** established that there is no right to remain indefinitely, though an individual would be entitled to remain if making genuine efforts to find work, with a real chance of being employed. **Directive 2004/38** provides protection from expulsion for jobseekers who satisfy these conditions, and their family members (**Article 14(4(b))**). According to **Article 24**, jobseekers are not entitled to social assistance in the host state. The case of ***Collins***, decided before the Directive came into force, seemed to be inconsistent.

Collins v Secretary of State for Work and Pensions (Case C-138/02) [2004] ECR I-2703

Facts: Collins, who had dual Irish and American nationality, had come to the UK to look for work. His application for jobseeker's allowance was refused on the grounds that he was not habitually resident in the UK and was not a 'worker' under [EU] law.

Held: The Court of Justice acknowledged that in earlier decisions it had denied jobseeker's entitlement to financial benefits but referred to its more recent judgments on Union citizens' Treaty right to non-discrimination, under [**Article 18 TFEU**]. The Court held that the equality principle in [**Article 45(2) TFEU**] included a right to a financial benefit 'intended to facilitate access to employment in the labour market of a Member State'.

Nevertheless, a residence requirement attached to a jobseeker's allowance may be justified by proportionate and non-discriminatory objective factors. The required residency period must be no longer than is necessary for the authorities to be satisfied that the individual is genuinely seeking work.

Subsequently, the Court, exercising abroad interpretation of 'social assistance', has reiterated that the principle of equal treatment for Union citizens must include a financial benefit intended to facilitate access to the host state's labour market, though it would be legitimate for a Member State to grant the allowance only after establishing a real link between the jobseeker and the labour market (***Vatsouras &***

another v Arbeitsgemeinschaft Nürnberg 900 **(Cases C-22 & 23/08)**).

Freedom of movement: right to enter and remain

Directive 2004/38 confirms and clarifies workers' free movement rights contained in **Article 45 TFEU**. It sets out the right of workers who are Union citizens to enter and reside in another Member State for more than three months (**Articles 5(1), 7(1)**) and the right of permanent residence after five years (**Article 16**). Family members, irrespective of nationality, accompanying or joining the Union citizen also have the right to enter and remain (**Articles 5(2), 7(1)(d)**, and **7(2)**) and the right to permanent residence after five years (**Article 16**).

Freedom from discrimination

Workers' rights to non-discrimination are enshrined in the **TFEU**. Freedom of movement entails the abolition of discrimination between workers of the Member States as regards employment, remuneration, and other conditions of employment (**Article 45(2)**). **Regulation 492/2011** clarifies the scope of the right, covering two main areas: eligibility for employment and equality of treatment in employment.

Regulation 492/2011, Section 1 (Articles 1–6):

eligibility for employment

Any national of a Member State has the right to take up and pursue employment in another Member State with the same priority and under the same conditions as host state nationals (**Regulation 492/2011, Article 1**). The Regulation prohibits national provisions limiting applications or offers of employment or laying down special recruitment procedures, advertising restrictions, and other impediments (**Article 3**), or limiting by number or percentage the employment of EU migrant workers (**Article 4**). **Article 4** was invoked in ***French Merchant Seamen***.

Commission v France (French Merchant Seamen) (Case 167/73) [1974] ECR 359

Ministerial orders issued under the French Code du Travail Maritime, 1926, imposed a ratio of three French to one non-French crew members on ships of the merchant fleet. By refusing to amend the relevant provision, France was in breach of the Treaty [**Article 45(2) TFEU**] and **Article 4** of what is now **492/2011**.

However, **Regulation 492/2011** permits language requirements, provided these are necessary 'by reason of the nature of the post to be filled' (**Article 3(1)**).

Groener v Minister for Education (Case 379/87) [1989]

ECR 3967

Facts: Irish rules required lecturers in Irish vocational schools to be competent in the Irish language.

Held: Although the teaching post at issue did not entail the use of Irish in the classroom, the Court of Justice held that the requirement would be justified provided it formed part of national policy to promote the use of Irish as the first official language under the Irish Constitution.

However, a requirement to hold a particular language qualification would be unlawful unless it could be justified by factors unrelated to nationality and was proportionate (***Angonese v Cassa di Risparmio di Bolzano SpA* (Case C-281/98)**).

Access to employment in the public service

Member States may restrict or deny access to employment in the public service on grounds of nationality (**Article 45(4) TFEU**). This provision applies only to access to employment. Discriminatory conditions of employment infringe the free movement provisions (***Sotgiu v Deutsche Bundespost* (Case 152/73)**). 'Public service' is an EU concept. Its meaning is not to be determined by Member States (***Sotgiu***, ***Commission v Belgium***).

Commission v Belgium (Public Employees) (Case

149/79) [1980] ECR 3881

Facts: Under Belgian law, certain work for local authorities and on the railways, including jobs such as electrician, joiner, trainee driver, loader, platelayer, and shunter, was reserved to Belgian nationals. Belgium argued that entry to public office was a matter for Member States.

Held: The Court of Justice disagreed, insisting on the uniform interpretation and application of [**Article 45(4)**] throughout the [EU] and defining 'public service' posts as those involving 'the exercise of power conferred by public law' where there was a 'responsibility for safeguarding the general interests of the State'. The posts in question fell outside the scope of [**Article 45(4)**].

Subsequently, various kinds of post have been excluded from **Article 45(4)**, including teachers and trainee teachers (***Lawrie-Blum v Land Baden-Württemberg* (Case 66/85)**) and university foreign language assistants (***Allué and Coonan v Universita degli studi di Venezia* (Case 33/88)**

Article 45(4) applies only where the activities are exercised on a regular basis and do not form only a minor part of the job (***Anker, Ras and Snoek v Germany* (Case C-47/02)**).

Regulation 492/2011, Section 2 (Articles 7–9): employment and equality of treatment

The Regulation extends the non-discrimination principle to conditions of employment, in particular pay, dismissal, and, should the worker become unemployed, reinstatement and re-|employment. Workers are entitled to the same tax and social advantages and access to vocational training as national workers (**Article 7**), as well as to equality regarding membership of trade unions (**Article 8**) and housing, including home ownership (**Article 9**). 'Social and tax advantage' is interpreted broadly.

Cristini v SNCF (Case 32/75) [1975] ECR 1085

Facts: Cristini, an Italian national living in France and the widow of an Italian migrant worker, was refused a fare reduction card for large families, which her husband had previously claimed from French Railways (SNCF), on grounds of nationality. SNCF argued that the card was not a 'social advantage' because that term applied only to advantages attached to worker status.

Held: The Court of Justice disagreed. **Article 7** of Regulation 1612/68 [now **492/2011**] applied to all social and tax advantages, whether or not attached to the contract of employment.

'Social and tax advantage' includes any benefit available by virtue of worker status or residence on national territory, where the benefit facilitates free movement of workers, for instance a disabled adult's allowance (***Inzirillo v Caisse d'Allocations Familiales de l'Arondissement de Lyon* (Case 63/76)**); a discretionary

childbirth loan (***Reina v Landeskreditbank Baden-Württemberg* (Case 65/81)**); and a guaranteed income for old people (***Castelli v ONPTS* (Case 261/83)**).

Direct and indirect discrimination

Discrimination is prohibited, whether direct or indirect. Direct discrimination, consisting of differentiation between nationals and non-nationals, is normally easily identified. Indirect discrimination is less obvious. Measures which appear, on their face, to treat nationals and non-nationals in the same way but in practice have a discriminatory effect are indirectly discriminatory.

Marsman v Rosskamp (Case 44/72) [172] ECR 1243

Facts: German legislation giving employment protection to workers who were injured at work applied to national workers irrespective of state of residence but only to those non-national workers living in Germany.

Held: The Court of Justice found the measure to be directly discriminatory.

Bosman (Case C-415/93)

In this case, the transfer system (under national football association rules) which required a football club wishing to

engage a player, to pay a lump sum to his former club where his contract had come to an end, was held to fall foul of **Article 45 TFEU**.

Workers' families

An EU worker's free movement rights would have limited practical value if family members could not move with the worker. Family members' free movement rights (irrespective of nationality), first granted by Directive 68/360, are now contained in **Directive 2004/38**. These are derived rights, as they are entirely dependent on the worker's rights, though family members who are Union citizens have independent EU rights if they satisfy the necessary conditions.

Revision tip

Workers: make sure you understand the legislative framework: **Article 45 TFEU** (Treaty rights); **Directive 2004/38** (entry and residence); **Regulation 492/2011** (employment, equal treatment, and workers' families).

Overview: limitations

TFEU

Rights subject to limitations of grounds of public policy, public security, or public health

Article 45(3) TFEU: workers
Article 52 TFEU: persons exercising the right of establishment
Article 62 TFEU: persons providing services

Directive 2004/38

Free movement of Union citizens subject to limitations on grounds of public policy, public security, or public health

Public policy and public security: Article 27

'Measures shall comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned'
'Previous criminal convictions shall not in themselves constitute grounds'
'The personal conduct of the individual concerned must represent 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 measures of general prevention shall not be accepted'

- a 'present' threat: *Orfanopoulos & Oliveri*
- personal conduct: *Van Duyn* (association with an organisation), *Calfa* (automatic expulsion)
- proportionality: *Orfanopoulos & Oliveri*
- general preventative measures: *Bonsignore* (deterrent measures)
- previous criminal convictions: *Bouchreau* (a 'present threat to the requirements of public policy', showing 'a propensity to act in the same way in the future')

Public health: Article 29

- diseases with epidemic potential as defined by WHO
- other infectious and contagious diseases if the subject of protection provisions in the host state
- diseases occurring after three months do not constitute grounds for expulsion

Partial restrictions: Article 22

- right of residence covers the whole territory
- partial restrictions acceptable only where they also apply to the host state's nationals
- *Rutili, Olazabal*

Limitations on grounds of public policy, public security, or public health

Overview

As indicated throughout this chapter, free movement rights for Union citizens and family members are subject to various qualifications and limitations. Some of these have already been referred to, such as the provisions permitting Member States to restrict access to public service posts for migrant EU nationals on grounds of nationality. More particularly, **Articles 45(3)**, **52**, and **62 TFEU** allow Member States to restrict rights of entry and residence, respectively, of EU migrant workers, persons exercising the right of establishment, and those providing services, on grounds of public policy, public security, or public health.

The EU institutions and the EU Member States adopted various legislative measures to ensure that there was a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic and will review whether any future restrictions can be justified.

Directive 2004/38

The three grounds of limitation, originally contained in Directive 64/221, are now elaborated in **Directive 2004/38** as well as consolidating the pre-existing case law. The limitations, which relate only to entry and residence, apply to all categories of persons exercising rights under **Directive 2004/38**, including family members, students, and persons of independent means as well as the economically active. In view of the fundamental importance of free movement in the internal market, the Court of Justice interprets the limitations very restrictively.

Directive 2004/38 refers to 'measures' taken by Member States (**Article 27**), defined as 'any action which affects the right of persons … to enter and reside freely in the Member States under the same conditions as nationals of the host state' (***R v Bouchereau*** **(Case 30/77)**).

Public policy and public security

Article 27 of Directive 2004/38 requires that measures taken on grounds of public policy or public security be proportionate and based exclusively on the personal conduct of the individual concerned. Here, no distinction is made between 'public policy' and 'public security', but 'public security' concerns tend to be of a more serious nature and involve more wide-ranging considerations. These grounds may not be invoked for economic reasons.

Originally, whilst insisting on a strict interpretation of 'public policy' or 'public security', the Court of Justice allowed an area of discretion to Member States, permitting them to take account of national needs. Nonetheless, the Court insisted that the scope of such restrictions must be subject to control by the EU institutions (***Van Duyn* (Case 41/74)**; ***Rutili* (Case 36/75)**). Later, in ***Bouchereau* (Case 30/77)** the Court moved to a narrower definition, now incorporated into **Directive 2004/38**: the conduct must represent a 'genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society' (**Article 27**).

A 'present' threat

The personal conduct must represent a 'present' threat to the requirements of public policy or public security. The requirement must, as a general rule, be satisfied at the time of the expulsion, the national court taking account of matters demonstrating a diminution of the threat and occurring after the original decision, especially where a long time has elapsed (***Orfanopoulos and Oliveri* (Cases C-482 & 493/01)**).

Personal conduct

Article 27 provides that measures justified on grounds of public policy or public security be based exclusively on the personal conduct of the individual. ***Van Duyn*** and ***Calfa*** addressed the scope of 'personal conduct'.

Van Duyn v Home Office (Case 41/74) [1974] ECR 1337

Facts: Yvonne van Duyn, a Dutch national, challenged the UK's refusal to allow her entry to work for the Church of Scientology, an organisation considered by the UK to be 'socially harmful'. Van Duyn maintained that the public policy ground did not apply, arguing that her association with the Church did not constitute 'personal conduct'.

Held: The Court of Justice held that present association with an organisation, reflecting participation in its activities and identification with its aims, constitutes personal conduct. In general, past association would not justify restrictions.

Criminal Proceedings against Donatella Calfa (Case C-348/96) [1999] ECR I-11

Facts: Ms Calfa, an Italian national, was convicted of drugs offences whilst on holiday in Crete, sentenced to three months' imprisonment, and, as required by national legislation applying to non-nationals, expelled from Greece for life.

Held: The Court of Justice emphasised that Member States may adopt against nationals of other Member States measures which they cannot apply to their own nationals, particularly on public policy grounds. However, automatic expulsion could not be justified on these grounds since automatic expulsion took no account of the offender's personal conduct.

Similar reasoning was applied in ***Orfanopoulos and Oliveri***, which concerned German legislation requiring automatic expulsion for drugs offences (***Orfanopoulos and Oliveri* (Cases C-482 & 493/01)**). These principles are now incorporated into **Directive 2004/38**. Member States may not issue expulsion orders as a penalty or legal consequence of a custodial penalty, unless they conform to the conditions set out in **Articles 27** (proportionality, personal conduct, etc), **28** (protection against expulsion), and **29** (public health) (**Article 33**).

Proportionality

Restrictive measures must be proportionate to their legitimate aim. Expulsion would be a disproportionate penalty for purely administrative infringements (***R v Pieck* (Case 157/79)**) and possibly also for more serious offences, as ***Orfanopoulos*** suggests.

Orfanopoulos and Oliveri v Land Baden-Württemberg (Cases C-482 & 493/01) [2004] ECR I-5257

Facts: Orfanopoulos, a Greek national, was living in Germany where he had worked intermittently. He was convicted of drugs offences and sentenced to imprisonment, followed by deportation. Oliveri was in a similar situation.

Held: The Court of Justice held that, in assessing the

proportionality of the penalty, the national court must take account of a range of factors, including the nature and seriousness of the offence, the length of residence in the host state, the time that had elapsed since the offences were committed, and the offender's family circumstances. Proper regard must be had to fundamental rights, specifically to the right to family life guaranteed by **Article 8 of the European Convention on Human Rights**.

These principles are now set out in **Directive 2004/38**, which provides guidance on the matters to be considered before an expulsion order is made, including how long the individual has lived in the host state, their age, health, family, and economic situation, social and cultural integration, and links with the state of origin (**Article 28**).

Further protection is afforded to Union citizens, and their family members, with permanent rights of residence. They may be expelled only on 'serious' grounds of public policy or public security. Expulsion decisions taken against those who have resided in the host state for at least ten years or who are minors (unless justified in the best interests of the child) must be justified by 'imperative' grounds of public security. The meaning of 'imperative' is not defined in the Directive but in ***Tsakouridis* (Case C-145/09)**, it was found capable of covering the fight against crime in connection with dealing in narcotics as part of an organised group.

General preventative measures

Directive 2004/38 precludes public policy and public security justifications that are 'isolated from the particulars of the case or that rely on considerations of general prevention' (**Article 27**). ***Bonsignore***, which predates the Directive, clarifies the meaning of 'considerations of general prevention'.

Bonsignore v Oberstadtdirektor of the City of Cologne (Case 67/74) [1975] ECR 297

Facts: The German authorities had ordered the deportation of Bonsignore, an Italian national, following his conviction for unlawful possession of a firearm and causing death by negligence. The national court considered that the only possible justification for deportation would be 'reasons of a general preventive nature', based on 'the deterrent effect' on other non-nationals.

Held: The Court of Justice held that such reasons do not justify restrictive measures.

Previous criminal convictions

Directive 2004/38 provides that previous criminal convictions shall not in themselves constitute grounds for measures taken on public policy or public security grounds (**Article 27**). ***Bouchereau*** provides guidance on previous convictions.

R v Bouchereau (Case 30/77) [1977] ECR 1999

Facts: Bouchereau, a French national working in England, was convicted of drugs offences. The magistrates proposed to recommend his deportation and sought clarification on whether previous convictions could be taken into account.

Held: The Court of Justice held that previous criminal convictions can only be taken into account when 'the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy'. This could only be the case where the individual showed 'a propensity to act in the same way in the future'.

Partial restrictions

Previous provisions allowed Member States to exclude or deport persons exercising EU free movement rights but it was less clear whether partial restrictions were permitted. ***Olazabal*** addressed this issue.

Rutili v Ministre de l'Intérieur (Case 36/75) [1975] ECR 1219

Facts: Rutili, an Italian national resident in France, was a well-known trade union activist. Taking the view that he was 'likely to disturb public policy' the French authorities prohibited him from

living in four particular *départements*.

Held: The Court of Justice held that prohibitions on residence may be imposed only in respect of the whole of the national territory, unless nationals are subject to the same limitations. Otherwise, they amount to inequality of treatment and a breach of the Treaty (now **Article 18 TFEU**).

The approach was different in ***Olazabal***.

Ministre de l'Intérieur v Olazabal (Case C-100/01) [2002] ECR I-10981

Facts: Olazabal, a Spanish national of Basque origin, who had served a prison sentence in France following convictions for terrorism, was prohibited from residing in *départements* bordering Spain.

Held: The Court of Justice declared that where nationals of other Member States are liable to deportation from the host state they are also capable of being subject to less severe measures consisting of partial restrictions, even though the host state cannot apply such measures to its own nationals.

Under **Directive 2004/38** the right of residence covers the whole territory of a Member State. Partial restrictions may be imposed only where the same restrictions apply to the host state's own nationals

(**Article 22**). In the light of its judgment in ***Olazabal***, it will be interesting to see how the Court of Justice interprets this provision in the future.

Public health

The only diseases justifying restrictions on free movement are those with 'epidemic potential' (as defined by the World Health Organization) and other infectious or contagious diseases that are the subject of 'protection provisions' applying to the host state's nationals. Diseases occurring beyond completion of three months' residence do not justify expulsion. During that period, Member States may insist upon a medical examination, free of charge, but not as a matter of routine (**Article 29**).

Procedural rights

Important procedural safeguards supplement Union citizens' substantive rights, including: the right to be notified of decisions and the grounds on which decisions are based; the right of appeal; and the right to remain pending an appeal. Persons excluded on public policy or public security grounds may, after a reasonable period and in any event after three years, apply to have the order lifted on the ground that there has been a material change in the circumstances which justified the exclusion (**Articles 31–33**).

Revision tip

Be confident about use of key cases. Whilst some pre-date **Directive 2004/38**, they are still relevant to the interpretation of the limitation provisions. It is also important to take note of more recent case law in which the Court of Justice has indicated its current approach to the scope of relevant rights (and any limitations).

Implications of Brexit

Although the UK formally left the EU on 31 January 2020 during the 11-month transition period which concluded on 31 December 2020, the UK remained within the EU customs union and internal market, meaning that the free movement of persons provisions considered previously applied in their entirety. The rights of EU citizens and their families to reside and work in the UK and the rights of UK nationals and their families to reside and work in the EU will now no longer apply and a new immigration regime will be implemented.

However, and of great importance to many, under the EU Settlement Scheme (required under the terms of the Withdrawal Agreement), EU citizens who resided in the UK or who moved to the UK during the transition period could apply (by 31 June 2021, subject to permitted extensions) to remain in the UK. If successful they have been (or will be) granted either 'settled' status if they have resided in the UK for a period of five years in line with the 'permanent residency rights' discussed earlier, or pre-settled status for those with less than five years of living in the UK. You should watch out for future case law on the interpretation of such rights.

KEY CASES

CASE	FACTS	PRINCIPLE
***Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091**	A German national living in the UK challenged the refusal to renew his residence permit on the ground that he was no longer economically active in the UK.	Baumbast had sufficient means and adequate sickness insurance. He had a continued right of residence in the UK, arising by direct application of [**Article 21 TFEU**].
***Bettray v Staatssecretaris van Justitie* (Case 344/87) [1989] ECR 1621**	Bettray participated in a drug-rehabilitation programme aimed at reintegrating people into the workforce.	Since the objective was rehabilitation, the work was not an 'effective and genuine economic activity'.
***Bonsignore v Oberstadtdirektor of the City of Cologne* (Case 67/74) [1975] ECR 297**	The German authorities had ordered the deportation of Bonsignore, an Italian national, following his conviction for unlawful possession of a firearm and causing death by negligence.	'Reasons of a general preventive nature', based on 'the deterrent effect' on other non-nationals do not justify restrictive measures.
Commission v Belgium (Public	Belgian law reserved certain	'Public service posts' defined as involving 'the exercise of power conferred by public

***Employees)* (Case 149/79) [1980] ECR 3881**	posts to Belgian nationals.	law' where there is a 'responsibility for safeguarding the general interests of the state.'
***Commission v France (French Merchant Seamen)* (Case 167/73) [1974] ECR 359**	French provisions imposed a ratio of three French to one non-French crew members on ships of the merchant fleet.	France was in breach of the Treaty [**Article 45(2) TFEU**] and **Article 4** of Regulation 1612/68 [now **Regulation 492/2011]**.
***Criminal Proceedings against Donatella Calfa* (Case C-348/96) [1999] ECR I-11**	Calfa, an Italian national, was convicted of drugs offences in Greece, sentenced to three months' imprisonment, and, as required by national legislation applying to non-nationals, expelled for life.	Member States may adopt against nationals of other Member States measures which they cannot apply to their own nationals, on public policy grounds. However, automatic expulsion cannot be justified, since it takes no account of the woffender's personal conduct.
***Cristini v SNCF* (Case 32/75) [1975] ECR 1085**	Cristini, the Italian widow of an Italian migrant worker living in France, was refused a French Railways fare reduction card on grounds of nationality.	Regulation 1612/68 [now **Regulation 492/2011**] applies to all social and tax advantages, whether or not attached to an employment contract.
***Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* (Case C-34/09) [2011] ECR 1-1117**	Non-EU citizen parents of EU citizens parents sought to take up residence as ascendants of Belgian	**Article 20 TFEU** precluded national rules which would deprive the citizen of the substance of those rights.

	nationals was refused.	
***Groener v Minister for Education* (Case 379/87) [1989] ECR 3967**	Irish rules required lecturers in Irish vocational schools to be competent in the Irish language.	The requirement would be justified under Regulation 1612/68 [now **Regulation 492/2011**] provided it formed part of national policy to promote the use of Irish as the first official language under the Irish Constitution.
***Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1986] ECR 2121**	The national court sought clarification of the meaning of 'worker'.	'[The] essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'
***Levin v Staatssecretaris van Justitie* (Case 53/81) [1982] ECR 1035**	Levin, a British national, lived in the Netherlands, where she worked part-time.	Provided work is 'effective and genuine' and not 'purely marginal and ancillary', a part-time worker is entitled to EU free movement rights as a worker. A person's motives in seeking employment in another Member State are irrelevant.
***Ministre de l'Intérieur v Olazabal* (Case C-100/01) [2002] ECR I-10981**	Olazabal, a Spanish national of Basque origin, who had served a prison sentence in France following convictions for terrorism, was prohibited from residing in *départements* bordering Spain.	Where nationals of other Member States are liable to deportation from the host state they are also capable of being subject to less severe measures consisting of partial restrictions, even though the host state cannot apply such measures to its own nationals.
***Orfanopoulos and Oliveri v Land Baden-Württemberg* (Cases C-482 & 493/01) [2004]**	Orfanopoulos, a Greek national, was living in Germany where he had worked intermittently.	In assessing the proportionality of the penalty, the national court must take account of a range of factors, including the nature and seriousness of the offence, the length of residence in the host state, the time that had elapsed since the offences

ECR I-5257	He was convicted of drugs offences and sentenced to a term of imprisonment, followed by deportation.	were committed, and the offender's family circumstances. Proper regard must be had to fundamental rights, specifically to the right to family life guaranteed by **Article 8 of the European Convention on Human Rights**.
***Procureur du Roi v Royer* (Case 48/75) [1975] ECR 497**	Royer, a French national, sought the right to remain in Belgium as a jobseeker.	Jobseeker rights of entry and residence were established.
***R v Bouchereau* (Case 30/77) [1977] ECR 1999**	A French national working in England was convicted of drugs offences. The magistrates proposed to recommend his deportation.	A previous criminal conviction can only be taken into account when 'the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy'. This could only be the case where the individual concerned showed 'a propensity to act in the same way in the future'.
***Rutili v Ministre de l'Intérieur* (Case 36/75) [1975] ECR 1219**	Rutili, an Italian national resident in France, was a well-known trade union activist. The French authorities prohibited him from living in four particular *départements*.	Prohibitions on residence may be imposed only in respect of the whole of the national territory, unless nationals are subject to the same limitations. Otherwise, they amount to inequality of treatment and a breach of [**Article 18 TFEU**].
***Steymann v Staatssecretaris van Justitie* (Case 196/87) [1988] ECR 6159**	Steymann participated in the Bhagwan Community's business activities but did not receive formal wages.	The fact that Steymann received no formal wages but only his 'keep' and pocket money did not rule out his work as an effective economic activity.

***Trojani v Centre public d'aide social de Bruxelles* (Case C-456/02) [2004] ECR I-7574**	Trojani worked for around 30 hours per week as part of a Salvation Army 'personal socio-occupational reintegration programme'.	To decide whether the work was real and genuine, the national court must ascertain whether the services performed were part of the 'normal labour market'.
***Van Duyn v Home Office* (Case 41/74) [1974] ECR 1337**	Van Duyn, a Dutch national who was refused entry to the UK on public policy grounds, maintained that her association with the Church of Scientology did not constitute 'personal conduct'.	Present association with an organization, reflecting a participation in its activities and identification with its aims, constitutes personal conduct. In general, past association would not justify restrictions.

EXAM QUESTIONS

Problem question

Sally, a German national, is 20 years old. Sally had never travelled outside Germany, where all her family and friends live, until last year when she decided to settle permanently in Spain. She has been living in Madrid for the past nine months.

Shortly after her arrival in Madrid, Sally applied for unskilled work in the kitchens of a state-run secondary school. She was invited for interview, but her application was unsuccessful because she failed a Spanish language test set at the interview. Eventually, Sally secured employment as a hotel chambermaid. However, after working in this job for a time, Sally began to feel very unhappy about her low wages and she became involved in criminal activity. She has just been convicted of robbery with violence and the Spanish court is considering ordering her expulsion from Spain on public policy grounds.

Advise Sally as to the application of EU law on the free movement of persons to each aspect of this situation.

Essay question

With reference to relevant legislation and the case law of the European Court of Justice, critically discuss the significance of the status of Union citizenship in relation to free movement rights.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

7

Freedom of establishment and freedom to provide and receive services

The assessment

Freedom of establishment and freedom to provide services are an integral part of the internal market and the four fundamental freedoms. The extent to which they are covered as a distinct area of study differs from course to course with some institutions covering relevant legislation as part of the wider topic of free movement of persons. Where courses do focus on these areas as a discrete topic, essay-type questions often focus on the distinction between establishment and services or the difference in the law relating to natural or legal persons. Problem questions are likely to cover both freedom of establishment and freedom to provide services, requiring you to identify the issues raised and to set out and apply relevant legislation and case law to the circumstances of characters within the question, with a view to advising of the rights contained within this important area of EU law. As with free movement of persons, you will often be expected to consider limitations and exceptions.

Key facts

- **Article 49 TFEU concerns the freedom of establishment and implies the permanent or semi-permanent settlement for economic persons.**
- **Freedom of establishment can be enjoyed by self-employed (natural) persons and by companies (legal persons).**
- **A fundamental right of equal treatment applies prohibiting both direct and indirect discrimination and those measures which hinder or otherwise make the exercise of such right less attractive, unless justified.**
- **Articles 56–57 TFEU concern the freedom to provide services.**
- **Wholly internal situations are not covered by the rules.**
- **Associated services should normally be provided for remuneration.**
- **There is a corresponding right of freedom to receive services.**
- **A fundamental right of equal treatment applies prohibiting both direct and indirect discrimination and those measures which prohibit, impede, or render less advantageous the exercise of such right, unless justified.**

- **Derogations to the freedom of establishment and freedom to provide services can be found on the grounds of public policy, public security, and public health (Articles 52 and 62 TFEU) and in the official authority exception within Articles 51 and 62 TFEU.**

Distinguishing between ‘establishment’ and ‘provision of services’

Freedom of establishment includes the rights of individuals and companies to pursue activities in another Member State, for instance setting up and managing a business or practising a profession, on a permanent basis. Where a person is established in one state and provides services into another, this constitutes the **provision of services**.

Direct effect

***Reyners v Belgium* (Case 2/74)** and ***Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (Case 33/74)** confirmed the direct effect of [**Articles 49** and **56**], respectively. These Treaty rights are not conditional on the adoption of directives defining their scope.

Freedom of establishment

Article 49 TFEU sets out the principle of freedom of establishment. This freedom comprises the right for EU citizens and companies to establish themselves in any Member State for a commercial purpose and, when they are already established in a Member State, to set up secondary establishments in another Member State.

Meaning of ‘establishment’

Establishment implies the permanent or semi-permanent settlement of a person or a company in another Member State for economic reasons. The concept is a broad one, as confirmed by the Court of Justice in ***Gebhard* (Case C-55/94)**, ‘allowing an EU national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the Union, in the sphere of activities of self-employed persons’.

Indeed, it has been decided that:

> an insurance undertaking of another Member State which maintains a permanent residence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking’s own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. (***Commission v Germany* (Case 205/84)**)

However, a presence in a host Member State is required. In ***Stauffer* (Case C-386/04)**, it was held that it was generally necessary to have secured a permanent presence in the host Member State and that where immoveable property, such as a factory was purchased and held, that property should be actively managed.

Beneficiaries

Natural persons

The concept of a self-employed person is not defined in the **TFEU** but, as with the concept of 'worker', it is defined widely.

***Jany* (Case C-268/99)** concerned Czech and Polish women working as prostitutes in the Netherlands. They paid rent and received a monthly income which was declared to the relevant tax authorities. The Court of Justice considered whether a prostitute could be considered to be a self-employed person and, in so doing, concluded that a self-employed person provides a service outside any relationship of subordination concerning the choice of that activity, working conditions, and conditions of remuneration, and does so under their own responsibility in return for remuneration paid to that person directly and in full. In applying these criteria, it is clear that a prostitute could be considered a self-employed person for the purposes of **Article 49 TFEU**.

Legal persons

According to **Article 54 TFEU**, companies or firms means 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'.

This wide definition excludes non-profit-making organisations (such

as charities) meaning that both companies and self-employed persons must pursue economic activities. It should be noted that a company which fails to make a profit but whose activities are intended to so do is nevertheless still pursuing economic activities and therefore still comes within this definition.

The nationality of a company is determined by reference to the Member State in which it has its seat according to its statute. In ***Segers* (Case 79/85)** the Court stated that the fact that a company conducted its business through an agency, branch, or subsidiary solely in another Member State, is immaterial. As confirmed by ***Centros* (Case C-212/97**), when a company is formed in accordance with the law of a Member State and has its registered office, central administration, or principal place of business somewhere in the EU, it is established in the Member State according to which law it is formed even in cases where no business is conducted by the company in that Member State.

Rights

Rights of entry and residence

Directive 2004/38 reaffirms the rights of entry and residence for natural persons. Such rights for legal persons also exist but they are contained in **Article 49 TFEU.**

Prohibition of discrimination

For natural and legal persons exercising the right of establishment, the general non-discrimination provision in **Article 18 TFEU** is supplemented by **Article 49**, which includes the right to pursue activity 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. Clearly, this provision prohibits direct discrimination on grounds of nationality. However, equal treatment can be problematic when applied to rules concerning professional conduct and qualifications, which may hinder or make less attractive the exercise of free movement rights, particularly where individuals who comply with home state requirements find a host state's requirements difficult or impossible to satisfy.

Non-discriminatory restrictions

Rules of professional conduct

Gebhard set out the principles to be applied to rules of professional conduct.

Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) [1995] ECR I-4165

Facts: Gebhard, a lawyer qualified in Germany, faced disciplinary proceedings for practising in Italy under the title avvocato, in contravention of Italian legislation.

Held: The Court of Justice confirmed that an EU national exercising the right of establishment in another Member State must comply with the relevant requirements, such as the use of a professional title. However, 'measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty' must be non-discriminatory, justified in the general interest, and suitable for and proportionate to their objective.

Looking for extra marks?

Gebhard indicates that **Article 49 TFEU** extends beyond inequality of treatment, to include restrictions raising unnecessary obstacles to freedom of establishment. Any

measures hindering or making less attractive the exercise of rights, including those which are equally applicable to host state nationals, must be **objectively justified** and proportionate.

Professional qualifications

Like professional conduct rules, national professional qualification requirements can seriously hinder free movement, for they may not be easily met by non-nationals.

Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris (Case 71/76) [1977] ECR 765

Facts: Thieffry, a Belgian advocate, was refused admission to the Paris Bar because he did not hold the necessary French qualifications.

Held: The Court of Justice held that, since France officially recognised Thieffry's Belgian qualifications as equivalent, this was an unjustified restriction on freedom of establishment.

Where qualifications are not recognised as equivalent, they must be compared with national requirements and, if equivalent, accepted. If not, evidence of the necessary knowledge and experience may be required (***Vlassopoulou v Ministerium für Justiz* (Case 340/89)**).

Mutual recognition of qualifications

Alongside these case law developments, the EU is moving towards **harmonisation** in this area. The harmonisation programme will be considered later in this chapter.

Freedom to provide services

Under **Article 56 TFEU** 'restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended'.

Meaning of 'services'

According to **Article 57 TFEU**, services fall within the scope of the Treaty if 'normally provided for remuneration'. They include industrial, commercial, and professional activities (**Article 57 TFEU**); for instance, legal services (***Van Binsbergen*** **(Case 33/74)**), insurance services (***Safir v Skattemyndigheten i Dalarnas Lan*** **(Case C-118/96)**), and medical services (***Geraets-Smits v Stichting Ziekenfonds and HTM Peerbooms v Stichting CZ Groep Zorgverzekeringen*** **(Case C-157/99)**). Service provision includes the situation where the provider does not physically move from the state of establishment, for example the provision of telephone marketing services in another Member State (***Alpine Investments BV v Minister of Finance*** **(Case C-384/93)**).

In ***Grogan***, abortion services were held to fall within **Article 57** but a

free ‘information service’ about London abortion clinics lacked the necessary economic dimension.

Society for the Protection of Unborn Children Ltd v Grogan (Case C-159/90) [1991] ECR I-4685

Facts: The SPUC challenged the practice of a students’ union in Ireland, where abortion is illegal, to supply information, free of charge, about abortion services provided lawfully by London clinics.

Held: The Court of Justice held that since the information was not distributed on behalf of the economic operators (the clinics), the students’ ‘information service’ fell outside the scope of ‘services’. Accordingly, the prohibition of the students’ activity did not infringe EU law.

In view of the sensitive nature of the abortion issue in Ireland, it is likely that the Court’s reasoning was strongly influenced by policy considerations.

Requirement of a cross-border element

Article 56 TFEU, like the other EU freedoms, does not apply to purely internal situations and, as such, a cross-border element is required. An example of this can be found in ***Jägerskiöld***.

Jägerskiöld (Case C-97/98) [1999] ECR I-7319

Facts: According to Finnish law, a fishing licence which Mr Gustafsson had paid for gave him the right to fish even in private waters. When Mr Gustafsson fished in Mr Jägerskiöld's (private) waters, Mr Jägerskiöld complained, arguing that Finnish law breached EU law on (amongst other things) the free movement of services.

Held: The Court of Justice held that the provisions on the freedom to provide services could apply in theory but they did not apply to activities which were confined in all respects within a single Member State such as those in the case concerned. The proceedings were between two Finnish nationals, both established in Finland, concerning the right of Mr Gustafsson to fish in waters belonging to Mr Jägerskiöld and situated in Finland. Such a situation did not present any link to one of the situations envisaged by EU law in the field of the free provision of services.

The requirement is often easily satisfied with a wide interpretation given by the Court of Justice.

Deliège (Cases C-51/96 & 191/97) [2000] ECR I-2549

Facts: Ms Deliège believed that the Belgian Judo Federation selection officers frustrated her career development contrary to

EU law and her right to provide services. It was argued however, that the selection rules of the Belgian Judo Federation did not involve a cross-border element.

Held: Whilst confirming that the Treaty provisions on the freedom of services did not apply to activities which were confined in all respects within a single Member State, the Court held that the fact that an athlete participates in a competition in a Member State other than that in which she is established would satisfy the requirement in the circumstances of the case.

Remuneration

Article 57 TFEU states that 'Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration'. According to ***Belgium v Humbel*** **(Case 263/86)**, 'the essential characteristic of remuneration ... lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service'. In the case itself, it was clear that courses under a national education system would not satisfy this but if education is provided by an institution which seeks to make a profit and if it is paid for mainly from private funds, it could do so (***Wirth*** **(Case C-109/92)**).

Recipients of services

The **TFEU** makes no reference to recipients of services. The right of Member State nationals to enter and remain in another Member State for the purpose of receiving services, originally contained in Directive 73/148, currently arises from the general provisions on entry and residence in **Directive 2004/38**. It will be recalled that, under the Directive, all Union citizens are entitled to enter and remain in another Member State for up to three months, without conditions, and to stay for more than three months, provided they have the required degree of financial independence.

The Court of Justice has recognised that **Article 56** includes the right to receive, as well as to provide, services. In early decisions, it held that 'recipients of services' included persons travelling to other Member States for medical treatment and for education and business purposes (***Luisi and Carbone v Ministero del Tresoro*** **(Cases 286/82 & 26/83)**). ***Cowan*** concerned a recipient of tourist services.

Cowan v Le Trésor Public (Case 186/87) [1989] ECR 195

Facts: Cowan, a British national who had been violently attacked whilst on a visit to Paris, was refused the compensation to which a French national would have been entitled in those

circumstances. He challenged this decision, relying on the Treaty right in [**Article 18 TFEU]**.

Held: The Court held that tourism was a service and that tourists were entitled to equal treatment under [**Article 18**], including equal access to criminal injuries compensation.

The rights of recipients of services may be restricted, as for workers and others with free movement rights, on grounds of public policy, public security, or public health, considered later in this Chapter.

Rights

Rights of entry and residence

The right to move and reside has been discussed in detail in Chapter 6 and earlier in this Chapter in relation to freedom of establishment. The provisions are contained within **Directive 2004/38**.

It should be noted, however, that whilst establishment means integration into a national economy, the freedom to provide services enables a self-employed person to exercise his/her activity in another Member State (***Gebhard* (Case C-55/94)**). The provider of the services need not, as a matter of principle, reside in the other Member State and such provision of services often involves temporary and/or occasional pursuit of economic activities.

Prohibition of discrimination

Article 57 TFEU prohibits both direct and indirect discrimination. Direct discrimination is usually easy to identify and concerns discrimination on grounds of nationality by the fact that a person is established in a different Member State from the one in which services are being provided (***Gouda* (Case C-288/89)**).

FDC (Case C-17/92) [1993] ECR I-2239

Facts: Spanish law provided that film distributors were granted a licence to dub foreign-language films on condition that they distributed a Spanish film at the same time.

Held: The relevant Spanish law breached **Article 56 TFEU** as it amounted to direct discrimination. The measure meant that producers of national films had a guarantee of distribution which was not afforded equally to producers established in other Member States.

Van Binsbergen (mentioned earlier) provides an example of an indirectly discriminatory measure where a Dutch rule, requiring legal representatives to be resident in the Netherlands, was found to breach EU law because, although it could be objectively justified on the ground of professional rules of conduct connected with the administration of justice, it was disproportionate.

Non-discriminatory restrictions

Like restrictions on the right of establishment, measures that apply equally to national and non-national service providers will nonetheless infringe **Article 56** if they are likely to prohibit or impede the relevant activity, though such measures may be objectively justified.

Säger v Dennemeyer & Co Ltd (Case C-76/90) [1992] ECR I-4221

Facts: Under German legislation, licences for the provision of legal services were available to patent agents but not to persons who, like Dennemeyer (who was based in the UK) offered only patent renewal services.

Held: The Court of Justice held that [**Article 56**] not only requires the abolition of discrimination on grounds of nationality but also restrictions that are 'liable to prohibit or otherwise impede' the provision of services. Such restrictions are compatible with [EU] law only where they are justified by imperative reasons in the public interest, equally applicable to national and non-national providers insofar as the interest is not protected by rules applying in the non-national provider's state of origin, and proportionate.

Similar principles have been applied outside the context of professional rules of conduct and qualifications, for instance in ***Schindler***.

HM Customs and Excise v Schindler (Case C-275/92) [1994] ECR I-1039

Facts: UK Customs and Excise confiscated invitations to participate in a German lottery on the grounds that they contravened national lotteries legislation.

Held: The Court of Justice, finding that lottery activities constitute services, held that although the legislation applied without distinction to national and non-national lotteries, it was likely to 'prohibit or otherwise impede' the provision of lottery services and therefore infringed [**Article 56**]. Such legislation would, however, be justified by 'overriding considerations of public interest' (here, the protection of the consumer, the prevention of crime and fraud, and the restriction of demand for gambling), provided it was proportionate.

Restrictions on freedom to provide services

Article 56 rights are, according to **Article 57**, exercised 'under the same conditions as are imposed by that state on its own nationals'. As with the right of establishment, Member States may impose restrictions on the freedom to provide services provided they are objectively justified. ***Van Binsbergen*** defined the scope of permissible justification.

Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Case 33/74) [1974] ECR 1299

Facts: A Dutch national, qualified as an advocate in the Netherlands, who was advising a client concerning proceedings in a Dutch court, was informed, on moving to Belgium, that he

could no longer represent his client. Under Dutch rules only lawyers established in the Netherlands had rights of audience before certain tribunals.

Held: The Court of Justice held that requirements imposed on persons providing services—particularly rules relating to organisation, qualifications, professional ethics, supervision, and liability—are compatible with EU law provided they are equally applicable to host state nationals, objectively justified in the public interest, and proportionate.

In ***Criminal Proceedings against Webb*** **(Case 279/80)**, in the later 'insurance' cases (***Commission v Germany (Re Insurance Services)*** **(Case 205/84)**, ***Commission v Ireland (Re Co-insurance Services)*** **(Case 206/84)**, ***Commission v France*** **(Case 220/83)**, ***Commission v Denmark (Re Insurance Services)*** **(Case 252/83)**), and in ***Säger v Dennemeyer*** **(Case C-76/90)**, the Court of Justice held that Member States must also take account of any relevant rules applying to the service provider in the state of establishment. Thus, a distinction is made between persons who are permanently established in a host state, who should in principle be bound by rules applying to nationals, and those who operate there on a temporary basis as service providers. In relation to the latter, 'double' regulation will be more difficult to justify.

Looking for extra marks?

In developing the principles relating to equally applicable restrictions, objective justification, and proportionality under **Articles 49** and **56** the Court of Justice has moved towards a **‘rule of reason**’ approach similar to that applied to restrictions on the free movement of goods under ***Cassis de Dijon*** (discussed in Chapter 5). The focus has shifted towards the prohibition and potential for objective justification of rules, whether discriminatory or not, which prohibit or impede interstate trade or freedom of movement.

Harmonisation: rules relating to establishment and services

Mutual recognition of qualifications

To address the problems associated with the recognition of qualifications, an EU programme of harmonisation was started, comprising of the adoption of 12 sectoral directives setting out the requirements for particular trades and professions.

Progress was slow, so a new approach was taken with Directive 89/48, which related to professions other than those already covered by the sectoral directives. The Directive provided for mutual recognition of qualifications, on the basis that an individual who held a higher education diploma on completion of at least three years' professional education and had undertaken the necessary professional training was entitled to pursue that profession in another Member State. Directive 89/48 was supplemented by Directive 92/51, covering diplomas awarded on completion of one-year post-secondary courses, and Directive 99/42, which extended the mutual recognition principle to a range of industrial and professional areas, replacing some of the earlier sectoral directives.

Almost all of the existing harmonising legislation was replaced and consolidated by **Directive 2005/36**. This directive covers 'regulated

professions' and applies to all EU citizens seeking to practise, as employed or self-employed persons, in Member States other than that in which their qualification was obtained. **Directive 2005/36** aims to liberalise the provision of services; it retains the existing systems of mutual recognition and recognition of qualifications covered by the previous sectoral directives and simplifies administrative procedures.

Directive 2006/123: the 'Services Directive'

Directive 2006/123, referred to as the '**Services Directive**', aims to remove barriers to cross-border service provision and to simplify associated procedures. The Directive, which covers both services and establishment, was adopted after a long and drawn-out process during which significant objections were raised. The main opposition centred on the 'country of origin' principle, entailing the regulation of service providers by their state of origin rather than by the state in which services were provided.

The 'country of origin' principle was eventually abandoned and, in its place, the adopted text incorporates the principles on the provision of services established by the Court of Justice. **Article 16 of the Services Directive** provides for free access to, and free exercise of, a service activity within another Member State, subject to the application of non-discriminatory, necessary, and proportionate restrictions. **Article 16** adds to these existing principles a list of acceptable justifications for host state requirements: public policy,

public security, public health, the protection of the environment, and rules on conditions of employment. It could well be that the Court of Justice will treat this list as non-exhaustive, permitting further justifications as it has done, for instance, in relation to the free movement of goods under the ***Cassis de Dijon*** rule of reason.

Directive 2006/123 simplifies administration and procedures. In particular, businesses are able to obtain information and complete administrative formalities through 'points of single contact' in the host state, instead of dealing with different authorities, and are able to do this online. Customers benefit from requirements concerning the quality of services, such as the availability of information on prices and quality. The Directive expressly excludes certain kinds of services from its scope, including some sectors already covered by legislation, such as financial services and transport, as well as other sectors such as social services and health care.

Derogations to the freedom of establishment and the freedom to provide services

The official authority exception

Article 51 TFEU states that 'the provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority'. Whilst **Article 62 TFEU** states that the

‘provisions of **Articles 51 to 54** shall apply to the matters covered by this Chapter’.

The relevant **TFEU** Chapters referred to are Chapter 2 (Right of establishment) and Chapter 3 (Services).

In ***Reyners*** the Court of Justice clarified the scope of the official authority exception.

Reyners v Belgian State (Case 2-74) EU:C:1974:68

Facts: A Dutch national was the holder of a legal qualification giving the right to take up the profession of an ‘avocat’ (lawyer) in Belgium and the question at issue was whether only those activities inherent in this profession which were connected with the exercise of official authority were excepted from the application of the Chapter on the right of establishment, or whether the whole profession was excepted because it comprised activities connected with the exercise of this authority.

Held: The Court of Justice held that the ‘official authority’ exception to freedom of establishment must be restricted to those of the activities referred to which in themselves involve a direct and specific connection with the exercise of official authority and that activities such as consultation, legal assistance, and representation and defence of parties in court would not fit this description.

Consistent with other restrictions on fundamental freedoms within the Treaty, the Court of Justice has construed the official authority exception narrowly (***Commission v Greece* (Case C-306/89)**, ***Commission v Italy* (Case C-272/91)**, ***Commission v Belgium* (Case C-47/08)**).

Public policy, public security, and public health

Article 52 TFEU and **Article 62 TFEU** provide that the provisions relating to rights associated with freedom of establishment and freedom of services are subject to derogations on grounds of public policy, public security, and public health. The regulation of these derogations is found in **Directive 2004/38** for natural persons and within **Directive 2006/123** (the '**Services Directive**') for legal persons.

Omega (Case C-36/02) [2004] ECR I-9609

Facts: German authorities made an order prohibiting simulated killing in the course of a laser game on the basis of the game jeopardising public order, with human dignity being one of the principles safeguarded.

Held: The Court of Justice held that the protection of human dignity constituted a ground of public policy which could justify the restriction on the freedom to provide services. In relation to whether the measure satisfied the requirement of proportionality, the Court held that as the prohibition concerned only commercial

exploitation of the variant of the game which involved playing at killing people, the prohibition did not go beyond that necessary to attain the objective pursued.

Gourmet International (Case C-405/98) [2001] ECR I-1795

Facts: Advertising restrictions were put into place relating to alcoholic beverages above a certain percentage alcohol content.

Held: Such restrictions, even if non-discriminatory, had a particular effect on the cross-border supply of advertising space and thereby constituted a restriction on the freedom to provide services. Such a restriction could be justified, however, by the protection of public health.

Implications of Brexit

The Trade and Cooperation Agreement (discussed in more detail elsewhere) regulating the future relationship between the EU and the UK contains little substance on the services sector, especially in financial services and important issues have been postponed until further negotiations.

KEY CASES

CASE	FACTS	PRINCIPLE
Cowan v Le Trésor Public **(Case 186/87) [1989] ECR 195**	Cowan, a British national who had been violently attacked whilst on a visit to Paris, was refused the compensation to which a French national would have been entitled in these circumstances. He challenged this decision, relying on the Treaty right in [**Article 18**].	The Court held that tourism was a service and that tourists were entitled to equal treatment under [**Article 18**], including equal access to criminal injuries compensation.
Gebhard **(Case C-55/94) [1995] ECR I-4165**	A German national resided in Italy with his wife, an Italian national. He decided to practise in Milan without having registered with the Milan Bar as required and was suspended for failing to register. Was he 'established' for the purposes of EU law?	'Establishment' is given a wide meaning and the applicant was 'established' for the purposes of EU law.
HM Customs and Excise v Schindler **(Case C-275/92) [1994] ECR I-1039**	UK Customs and Excise confiscated invitations to participate in a German lottery on the ground that they contravened national lotteries legislation.	The Court of Justice, finding that lottery activities constitute services, held that although the legislation applied without distinction to national and non-national lotteries, it was likely to 'prohibit or otherwise impede' the provision of lottery services and therefore infringed [**Article 56**].
Jägerskiöld **(Case C-97/98) [1999] ECR I-7319**	According to Finnish law, a fishing licence which Mr Gustafsson had paid for gave him the right to fish even in private waters. When Mr	The Court of Justice held that the provisions on the freedom to provide services could apply in theory but they did not

	Gustafsson fished in Mr Jägerskiöld's (private) waters, Mr Jägerskiöld complained, arguing that Finnish law breached EU law on (amongst other things) the free movement of services.	apply to activities which were confined in all respects within a single Member State such as those in the case concerned.
***Jany* (Case C-268/99) [2001] ECR I-8615**	Whether Czech and Polish prostitutes working in the Netherlands were self-employed persons.	They were self-employed for the purposes of EU law. It is interpreted widely.
***Omega* (Case C-36/02) [2004] ECR I-9609**	German authorities made an order prohibiting simulated killing in the course of a laser game on the basis of the game jeopardizing public order, with human dignity being one of the principles safeguarded.	The Court of Justice held that the protection of human dignity constituted a ground of public policy which could justify the restriction on the freedom to provide services.
***Reyners v Belgian State* (Case 2-74) ECLI:EU:C:1974:68**	Whether only those activities inherent in a Dutch national's profession which were connected with the exercise of official authority were excepted from the application of the Chapter on the right of establishment.	The Court of Justice held that the 'official authority' exception to freedom of establishment must be restricted to those of the activities referred to which in themselves involve a direct and specific connection with the exercise of official authority.
***Säger v Dennemeyer & Co Ltd* (Case C-76/90) [1992] ECR I-4221**	Under German legislation, licences for the provision of legal services were available to patent agents but not to persons who, like Dennemeyer (who was based in the UK), offered only patent renewal services.	The Court of Justice held that [**Article 56**] not only requires the abolition of discrimination on the ground of nationality but also restrictions that are 'liable to prohibit or otherwise impede' the provision of services.
***Society for the Protection of Unborn Children Ltd v Grogan* (Case C-159/90) [1991] ECR I-4685**	The SPUC challenged the practice of a students' union in Ireland, where abortion is illegal, to supply information, free of charge, about abortion services provided lawfully by	The Court of Justice held that since the information was not distributed on behalf of the economic operators (the clinics), the students' 'information

	London clinics.	service' fell outside the scope of 'services'. Accordingly, the prohibition of the students' activity did not infringe EU law.
***Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* (Case 71/76) [1977] ECR 765**	A Belgian advocate was refused admission to the Paris Bar because he did not hold the necessary French qualifications.	The Court of Justice held that since France officially recognized Thieffry's Belgian qualifications as equivalent, this was an unjustified restriction on freedom of establishment.
***Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (Case 33/74) [1974] ECR 1299**	A Dutch national, qualified as an advocate in the Netherlands who was advising a client concerning proceedings in a Dutch court, was informed, on moving to Belgium, that he could no longer represent his client.	The Court of Justice held that requirements imposed on persons providing services are compatible with EU law provided they are equally applicable to host state nationals, objectively justified in the public interest, and proportionate.

EXAM QUESTIONS

Problem question

Gerry owns a specialist butcher shop in Madrid, Spain. It has been successful for a number of years and he has identified premises in Portugal where he can expand his business to. Unfamiliar with Portuguese food standards regulations, he contacts the (fictitious) Portuguese Butchery Association (PBA) which offer free advice on all such matters. However, he is dismayed to receive notification from the PBA that as he is not a Portuguese national, he is not able to obtain the free advice offered.

Advise Gerry on his rights under EU law in relation to all aspects of this scenario.

Essay question

EU provisions on freedom of establishment provide unconditional rights that apply only to individuals.

Critically assess the accuracy of this statement, with reference to relevant cases.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

8

EU competition law

Articles 101 and 102 TFEU

The assessment

EU competition law is a large topic. Some courses may cover only the basic concepts of Articles 101 and 102 TFEU, whilst others may incorporate more detail. Essay-type questions on Article 101 may ask you to consider the aims of competition law and policy and the extent to which Article 101, and its application by the European Commission and the Court of Justice, have achieved these aims. Vertical restraints are commonly encountered in practice and may feature in essay questions as there is scope for businesses to fall within exemptions or exceptions. Problem questions may consist of scenarios concerning arrangements between competing or non-competing businesses.

Essay-style questions on Article 102 may require discussion of all or some of its key elements. For instance, a question may ask you to critically discuss the concept of 'dominance' or of 'abuse', requiring analysis of the Court of Justice's interpretation and application of the terms. Problem-style questions are likely to concern scenarios in

which an allegedly dominant company has abused its position in the market, resulting in harm to another company or to consumers. Some courses may expect you to deal with questions covering Articles 101 and 102 together although this is unusual.

Key facts

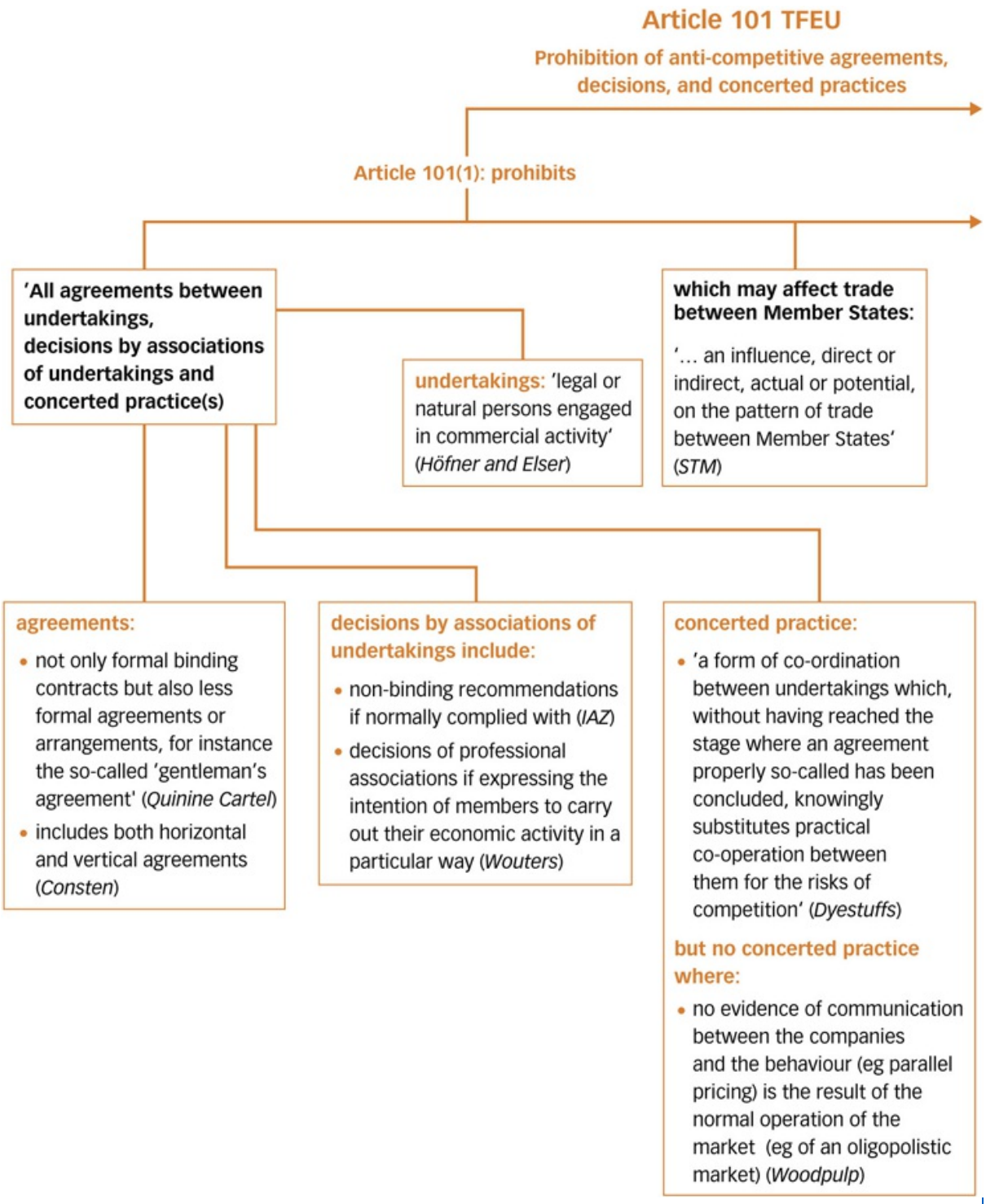
- **Articles 101 and 102 TFEU prohibit anti-competitive business practices that threaten the internal market, harm consumers and small and medium-sized enterprises, and reduce business efficiency.**
- **Article 101(1) prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.**
- **Under Article 101(2) prohibited agreements are automatically void, though offending restrictions may be severed.**
- **Article 101(3) allows for individual exceptions from Article 101(1). To fall within the legal exception, an agreement must have beneficial effects, the restrictions must be proportionate, and there must be no substantial elimination of competition.**

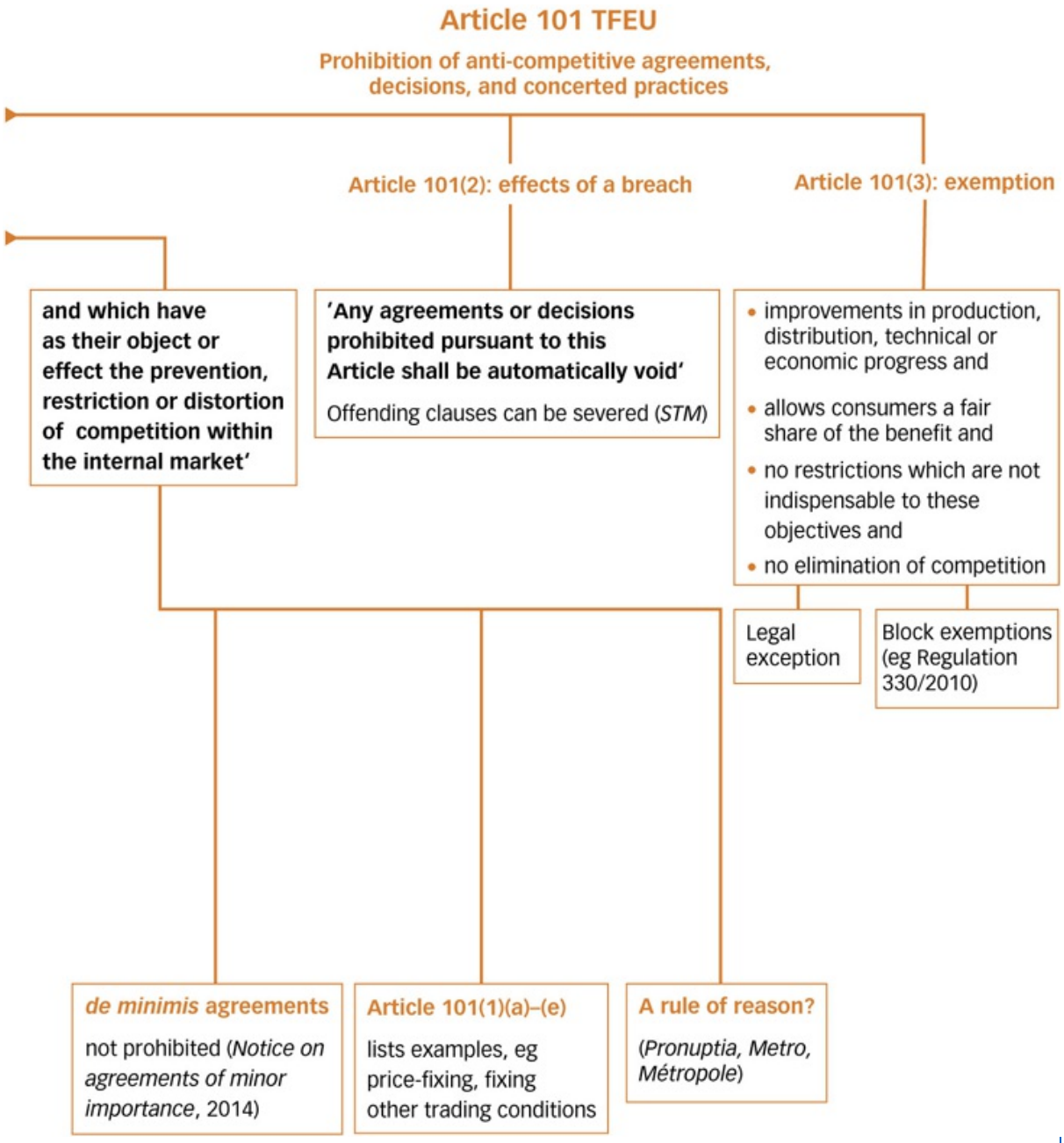
- **Exceptions or exemptions may apply to individual agreements (‘legal exception’) or categories of agreement (‘block exemption’).**
- **Regulation 330/2010 contains the current block exemption for vertical agreements.**
- **Article 102 TFEU prohibits abusive conduct by businesses (‘undertakings’) that have substantial market power.**
- **Whereas Article 101 is concerned with anti-competitive agreements or arrangements between undertakings, Article 102 will usually target behaviour by ‘dominant’ undertakings acting unilaterally (although collective dominance is possible).**
- **Article 102 prohibits, as incompatible with the internal market, any abuse by undertakings in a dominant position within the internal market insofar as it may affect trade between Member States.**
- **Articles 101 and 102 are enforced by the European Commission, national competition authorities, and national courts under powers conferred by Regulation 1/2003.**
- **Undertakings do not need to be based in the European Union to be subject to the jurisdiction of the European Commission, provided their activities have a potential impact on trade between Member**

States.

- **Market power is important in assessing breaches of Article 102 as there must be a consideration of whether the parties have enough economic strength to affect the market. This will involve a consideration of the market power within a particular market.**
- **Assessing the relevant product market and geographical market and the market share of firms is also important in assessing anti-competitive agreements between parties under Article 101. If the firms entering into an anti-competitive are small by reference to relevant product market and market share, then the effect of the agreement may be so small as to be negligible in its effect on competition and trade between Member States.**

Chapter overview


Article 101 TFEU
Prohibition of anti-competitive agreements, decisions, and concerted practices
Article 101(1): prohibits
'All agreements between undertakings, decisions by associations of undertakings and concerted practice(s)
undertakings: 'legal or natural persons engaged in commercial activity' (Höfner and Elser)
which may affect trade between Member States:
'… an influence, direct or indirect, actual or potential, on the pattern of trade between Member States' (STM)
agreements:
• not only formal binding contracts but also less formal agreements or arrangements, for instance the so-called 'gentleman's agreement' (Quinine Cartel)
• includes both horizontal and vertical agreements (Consten)
decisions by associations of undertakings include:
• non-binding recommendations if normally complied with (IAZ)
• decisions of professional associations if expressing the intention of members to carry out their economic activity in a particular way (Wouters)
concerted practice:
• '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' (Dyestuffs)
but no concerted practice where:
• no evidence of communication between the companies and the behaviour (eg parallel pricing) is the result of the normal operation of the market (eg of an oligopolistic market) (Woodpulp)


Article 101 TFEU
Prohibition of anti-competitive agreements, decisions, and concerted practices
Article 101(2): effects of a breach
Article 101(3): exemption
and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'
'Any agreements or decisions prohibited pursuant to this Article shall be automatically void'
Offending clauses can be severed (STM)
improvements in production, distribution, technical or economic progress and
allows consumers a fair share of the benefit and
no restrictions which are not indispensable to these objectives and
no elimination of competition
Legal exception
Block exemptions (eg Regulation 330/2010)
de minimis agreements
not prohibited (Notice on agreements of minor importance, 2014)
Article 101(1)(a)–(e)
lists examples, eg price-fixing, fixing other trading conditions
A rule of reason?
(Pronuptia, Metro, Métropole)

Article 102 TFEU

'Any **abuse** by one or more undertakings of a **dominant position** within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market in so far as it **may affect trade between Member States**'

Must be established: Dominant positon—Abuse—Effect on trade between Member States

Dominant position

'A position of economic strength enjoyed by an undertaking that enables it to prevent effective competition . . . on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers . . . and consumers' (*United Brands*)

Relevant market: product, geographic, temporal

relevant temporal market
(*ABG Oil*)

relevant geographic market

' . . . area where the objective conditions of competition. . . ' are the same for all traders *(United Brands)* and (Article 102) 'within the internal market or a substantial part of it' (*Hilti, United Brands, Michelin, Sealink*)

relevant product market (RPM)

product substitutability

cross-elasticity of demand:

- characteristics (*United Brands*)
- use (*Hugin, Hilti*)
- price (*SSNIP*)

cross-elasticity of supply (*Continental Can*)

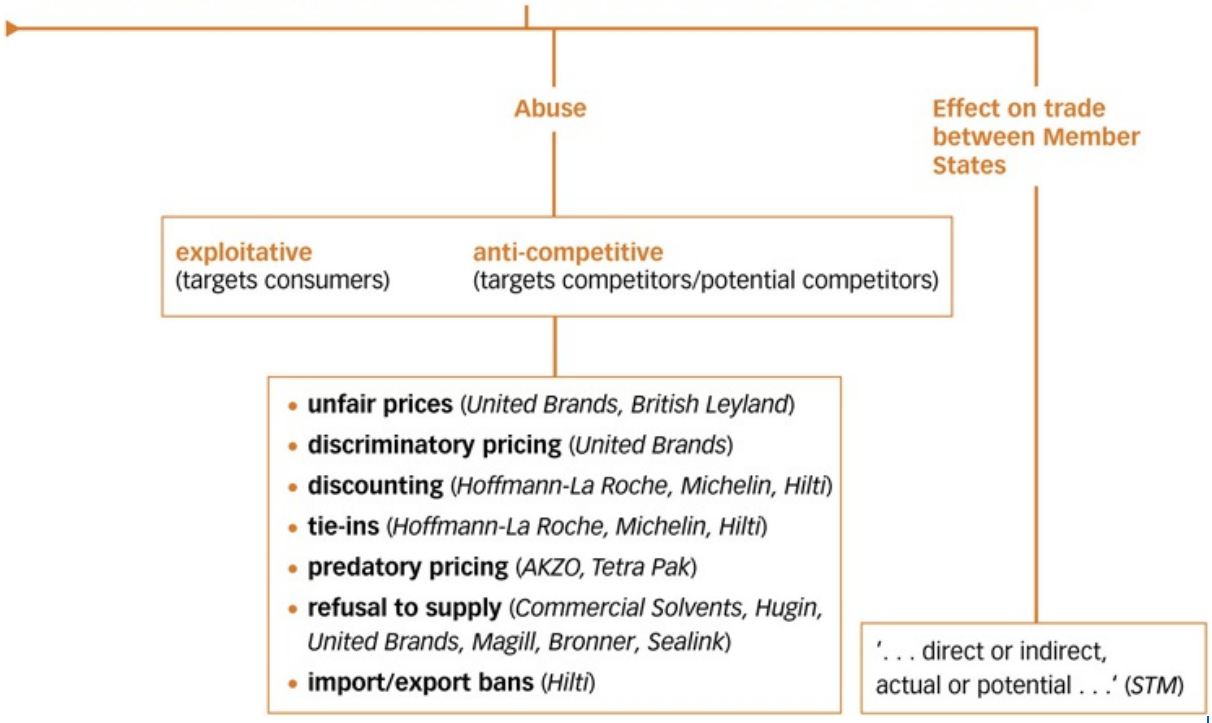
Dominance in the relevant market

Market share (*Hilti*); market structure (*United Brands*); duration of market position (*Hoffmann-La Roche*); financial and technological resources (*United Brands*); vertical integration (*United Brands*); intellectual property rights (*Magill, Hilti*); conduct (*United Brands*)

Article 102 TFEU

'Any **abuse** by one or more undertakings of a **dominant position** within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market in so far as it **may affect trade between Member States**'

Must be established: Dominant positon—Abuse—Effect on trade between Member States



Introduction to EU competition law

EU rules prohibiting barriers to trade, set out in **Articles 30**, **34**, and **110 TFEU**, continue to be fundamental to the effective operation of the internal market. They target restrictions adopted by Member States, usually in the form of national legislation. However, Member State action is not the only threat to the internal market. Restrictive business practices can also have harmful consequences. Indeed, not only do such practices prejudice the operation of the internal market, they can also have a detrimental effect on business efficiency, are likely to harm consumers, and, if engaged in by large and powerful companies, are likely to disadvantage small and medium-sized businesses.

Articles 101 and **102 TFEU** prohibit anti-competitive business practices. The European Commission, national competition authorities, and national courts enforce **Articles 101** and **102** under powers conferred by **Regulation 1/2003**. From time to time, the European Commission issues non-binding notices and other guidance providing clarification of the competition rules. This chapter begins with an outline of **Articles 101** and **102** and the rules on enforcement before moving onto the specific consideration of these **Treaty** Articles.

Article 101 TFEU

In broad terms, **Article 101** prohibits business agreements or arrangements which prevent, restrict, or distort competition within the internal market and affect trade between Member States.

Article 102 TFEU

Whereas **Article 101** applies to arrangements between businesses, **Article 102** prohibits the abuse of market power, or 'dominance', normally by businesses acting unilaterally, within the internal market.

The importance of defining the relevant market in which the businesses are operating is stressed in **Joined Cases T-68/89 & T 77-78/89**, '**Italian Flat Glass**', at the Court of First Instance (now the General Court): 'the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behaviour.'

'Undertakings'

Articles 101 and **102** refer to businesses as 'undertakings'. The precise meaning of this term will be considered below.

Revision tip

Remember that **Articles 101** and **102** concern the behaviour of businesses (referred to as ‘undertakings’) and not the Member States.

Regulation 1/2003: enforcement of Articles 101 and 102

A system of cooperation

The basis of the enforcement regime, set out in **Regulation 1/2003**, is a system of cooperation between the European Commission, national courts, and national competition authorities. The European Commission, through the Directorate-General for Competition, or D-G Comp, and national competition authorities, are empowered to investigate alleged infringements of **Articles 101** and **102**, issue decisions, and impose fines. The Commission can take over cases from the national authorities, in accordance with criteria set out in the *Commission notice on cooperation within the network of competition authorities*, 2004.

Other consequences of a breach of these provisions are set out towards the end of this chapter.

Outline of Article 101 TFEU

Article 101 is broad, covering formal agreements and also informal arrangements between undertakings.

Under **Article 101(2)** agreements or decisions in breach of **Article 101(1)** are automatically void, though if it is possible to sever (remove) restrictive clauses from an agreement, only those clauses will be void (***Établissements Consten SA and Grundig-Verkaufs-GmbH v Commission* (Cases 56 & 58/64)**).

Article 101(3) provides for a legal exception. **Article 101(1)** may be declared inapplicable to an agreement, decision, or concerted practice if certain conditions are satisfied. The parties must now decide for themselves whether they fall within any relevant exemptions and exceptions (known as 'self-assessment').

Revision tip

Be confident about the key elements of Article 101. You can then assimilate the detailed provisions and cases covered in the rest of this chapter.

Article 101(1): the prohibition

Article 101(1) prohibits:

- all agreements between undertakings, decisions by associations of undertakings, and concerted practices;
- which may affect trade between Member States; and
- which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.

All three elements must be satisfied for a breach to be established.

> Revision tip
>
> Most problem questions will require you to set out and apply each of these elements in turn.

Agreements between undertakings, decisions by associations of undertakings, and concerted practices

Undertakings

The Treaty does not define this term. '**Undertaking**' has been interpreted broadly to include natural and legal persons (individuals and companies) engaged in commercial activity for the provision of goods or services (***Höfner and Elser* (Case C-41/90)**).

Agreements

'Agreement' covers formal binding contracts and also less formal agreements or arrangements, for instance the so-called 'gentleman's agreement' concluded simply by a handshake which may not be recorded in writing. The broad scope of **Article 101(1)**, incorporating not only 'agreements' but also the much less formal 'concerted practices', means that it is unnecessary to identify the precise boundaries of 'agreement'.

Decisions by associations of undertakings

Article 101(1) is not confined to arrangements entered into directly between undertakings, but also covers decisions of associations of undertakings. Anti-competitive activity might be coordinated through a trade association, for instance through a decision requiring its members to raise their prices to a specified level or to refuse supplies to particular categories of customer. Provided all the elements of **Article 101(1)** are satisfied, there is a breach. Even a non-binding recommendation to members may be caught.

IAZ International Belgium NV v Commission (Cases 96–

102, 104, 105, 108 & 110/82) [1983] ECR 3369

Facts: A system regulating the connection of washing machines and dishwashers to the water supply, recommended to its members by a Belgian water suppliers' trade association, operated in such a way as to discriminate against imported machines.

Held: The Court of Justice held that even if a recommendation was expressed to be non-binding it would fall within [**Article 101(1)**] if it was intended to be anti-competitive and was normally complied with, resulting in an appreciable effect on competition.

Concerted practices

Like 'agreement' and 'decision', the term '**concerted practice**' has been interpreted broadly, though the outer limits of this concept have proved difficult to identify. Its meaning was first considered in ***Dyestuffs***.

Imperial Chemical Industries Ltd v Commission (Dyestuffs) (Case 48/69) [1972] ECR 619

Facts: ICI challenged a Commission decision finding that certain aniline dye producers, including ICI, had fixed prices through concerted practices. The producers maintained that their almost simultaneous and almost identical price rises did not amount to concerted practice but were a feature of an **oligopolistic market**

(a market dominated by relatively few sellers in which, where pricing policies are transparent, rival companies tend to respond without **collusion** to each other's market strategy, a form of '**parallel behaviour**').

Held: The Court of Justice defined a concerted practice as 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'. It held that, whilst parallel behaviour does not in itself constitute concerted practice, it may be strong evidence of it. That will be the case where the conduct 'leads to conditions of competition which do not correspond to the normal conditions of the market'.

Finding a concerted practice, the Court held that the companies had not reacted spontaneously to each other's pricing strategy. Advance announcements of price increases had eliminated all uncertainty between them as to their future conduct and their actions demonstrated a 'common intention' to fix prices.

Woodpulp featured an oligopolistic market and the outcome was different.

Ahlström & Ors v Commission (Woodpulp) (Cases C-89, 104, 114, 116–117, 125–129/85) [1993] ECR I-1307

Facts: A number of woodpulp producers operated a system of

quarterly price announcements.

Held: The Court of Justice found that the system operated did not amount to a concerted practice. There was no evidence of communication between the companies and the parallel pricing was the result of the normal operation of the oligopolistic woodpulp market.

In the ***Sugar Cartel case*** **[1976] 1 CMLR 295**, the Court of Justice stated that a critical issue was whether undertakings had operated independently or not.

Looking for extra marks?

The Court of Justice's approach to parallel behaviour in oligopolistic markets is controversial, since it will generally be difficult to determine with any certainty what are 'normal conditions of the market'.

Cartels

Anti-competitive arrangements sometimes operate in the form of a **cartel**, on the basis of agreements and/or concerted practices. Typically, cartel members meet secretly to collude on prices or to exchange information. Their activity may be sustained over long periods, often many years, without detection. In recent years, the Commission has increased its efforts to uncover and punish cartels.

The Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 (the Leniency Notice) provides incentives for undertakings involved in horizontal cartels only to voluntarily approach the Commission and admit their participation. This has proved a useful mechanism in encouraging cartel participants to report their existence as the first 'whistleblower' can obtain full immunity from fines.

Horizontal and vertical agreements

Article 101(1) applies to both horizontal and vertical agreements. **Horizontal agreements** are concluded between parties operating at the same level of the production/distribution chain, for instance an agreement between manufacturers or between retailers. **Vertical agreements** operate at different levels, for instance a distribution agreement between a manufacturer and a distributor. ***Consten*** established that **Article 101(1)** applies to vertical agreements. The Court of Justice in this case also emphasised the importance of intra-brand competition (competition between suppliers of the same brand) as well as competition between suppliers of different brands.

Établissements Consten SA and Grundig-Verkaufs-GmbH v Commission (Cases 56 & 58/64) [1966] ECR 299

Under a dealership agreement, Grundig supplied its electronic products to Consten for resale in France. Consten challenged the Commission's finding of an infringement, arguing that **[Article**

101] applied only to horizontal agreements. The Court of Justice disagreed, holding that both vertical and horizontal agreements are capable of falling within its scope.

EU competition law formally recognises the less harmful effects of vertical restrictions and their potential benefits, particularly in **distribution agreements**, through the vertical restraints block exemption **Regulation 330/2010**, considered later in this Chapter.

Which may affect trade between Member States

There is no breach of **Article 101(1)** unless the agreement, decision, or concerted practice 'may affect trade between Member States'. This requirement concerns jurisdiction; arrangements that have no effect on trade between Member States fall to be considered under national law. Unsurprisingly, the Court of Justice has adopted a broad interpretation of the requirement. There would be an effect on trade wherever it is 'possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States' (***Société Technique Minière v Maschinenbau Ulm GmbH* (Case 56/65) (*STM*)**). This broad test is easily satisfied.

As a potential effect is sufficient, agreements operating solely within one Member State may be caught by **Article 101(1)**.

Vacuum Interrupters Ltd (Commission Decision) OJ 1977 L48/32, [1977] 1 CMLR D67

Facts: Two UK companies had entered into a joint venture research and development agreement to design and manufacture switchgear in the UK. The Commission found that, in the absence of an agreement, the companies would have developed the product independently and marketed it in other Member States. The agreement made it more difficult for potential competitors from other Member States to enter the UK market, given the combined economic and technical strength of the two manufacturers. The agreement was capable of affecting trade between Member States.

An effect on trade between Member States means any effect, even if it results in an increase in trade.

The 'legal and economic context' of an arrangement will be taken into account. The *de minimis principle* is also relevant to this element of **Article 101(1)**. Point 4 of the 2014 Notice referred to below acknowledges that agreements between small and medium-sized undertakings 'are not normally capable of affecting trade between Member States'. Point 4 of the 2014 Notice also cross refers to another Commission Notice of 2004 which states that there is 'no appreciable effect on trade' where the aggregate market share of undertakings concerned is 5 per cent or less and aggregate turnover is EUR 40 million or less.

Brasserie de Haecht SA v Wilkin (No 1) (Case 23/67) [1967] ECR 407

Facts: Under loan agreements with the brewery, Mr and Mrs Wilkin undertook to obtain all their supplies of beer and soft drinks exclusively from the brewery. When this obligation was breached, the brewery sought repayment of the loan in the national court. The couple argued that the agreements infringed [**Article 101**] and were therefore void.

Held: Considering whether the agreements should be assessed in isolation or in the light of other similar agreements, the Court of Justice held that the effect on trade between Member States must be examined in the overall legal and economic context. The existence of similar contracts was a factor to be taken into account.

Revision tip

Be familiar with the cases demonstrating the Court of Justice's broad interpretation of 'agreements, decisions and concerted practices' and 'effect on trade between Member States'.

Object or effect: prevention, restriction, or distortion of competition

Object or effect

The agreement, decision, or concerted practice must have as its 'object or effect' the prevention, restriction, or distortion of competition. It is sufficient to establish either an anti-competitive object or an anti-competitive effect (***STM***). The Commission has stated that with regard t o particularly objectionable restrictions, such as horizontal price-fixing or market-sharing, it will be unnecessary to establish any actual effect on the market. The mere existence of such a restriction is sufficient (*Commission guidelines on the application of Article 81(3) of the Treaty*, 2004). Such restrictions are often known as hard-core restrictions (to be discussed further below).

Agreements of minor importance

The *Notice on agreements of minor importance*, 2014, sets out the Commission's current approach to ***de minimis* agreements** (and is based on earlier case law of the Court of Justice). Agreements affecting trade between Member States do not appreciably affect competition if the parties' aggregate share of the relevant market does not exceed 10 per cent (agreements between competitors, normally horizontal agreements) or if the market share of each of the parties does not exceed 15 per cent (agreements between non-competitors, normally vertical agreements) (see Point 8). *De minimis* does not apply to agreements containing **hardcore restrictions**, such as price-fixing and market-sharing (see Point 13 which also cross-refers to restrictions prohibited by any block exemptions). Furthermore, paragraph 2 of the 2014 Notice, building upon the decision in

***Expedia Inc v Autorité de la concurrence and Others* (Case 226/11)**, is also clear that agreements which have as their object the prevention, restriction, or distortion of competition cannot benefit from *de minimis*.

Prevention, restriction, and distortion of competition

'Prevention', 'restriction', and 'distortion' of competition cover all forms of anti-competitive behaviour. **Article 101(1)(a)–(e)** provide examples. It should be noted that where an agreement infringes **Article 101(1)**, it might nevertheless be subject to an exception under **Article 101(3) or a block exemption**.

As mentioned above, it is relevant to determine the relevant market in which the parties are operating for both Article 101 and 102 cases as this enables an assessment of the market power of the undertakings and the impact of their behaviour on competition and inter-state trade. Market definition will be discussed below under the heading of Article 102.

Article 101(3) TFEU: legal exception

Article 101(3) entails an assessment of an agreement's pro- and anti-competitive effects.

Article 101(3)

Article 101(3) provides that **Article 101(1)** may be declared inapplicable to any agreement, decision of an association of undertakings, or concerted practice or category of agreements, decisions, or concerted practices which:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- while allowing consumers a fair share of the resulting benefit;

and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

For the legal exception to apply, all four conditions must be satisfied.

Revision tip

You must discuss and apply all four conditions in an answer to a problem question.

Legal exception

Originally, the Commission alone had power to grant **individual exemption**. Now, **Regulation 1/2003** allows **Article 101(3)** to be applied also by national courts and national competition authorities and the Commission will not grant individual exemptions unless the situation is novel.

Improving production or distribution of goods or promoting technical or economic progress

According to the Commission guidelines, this condition requires efficiency gains (para 50). These may be quantitative, comprising reduced costs resulting, for instance, from improved production or economies of scale, or qualitative, generating better products or enhanced research and development. The causal link between the agreement and the claimed efficiencies must be demonstrated. ***ACEC/Berliet*** and ***Prym-Werke*** provide examples.

ACEC/Berliet (Commission Decision) OJ 1968 L201/7,

[1968] CMLR D35

Facts: The ACEC/Berliet agreement provided for technical cooperation and joint research on the development of a bus equipped with electric transmission. There were restrictive clauses controlling production and markets. Exemption was granted on the basis that the agreement allowed each party to concentrate on the areas within its own expertise, Berliet on research on vehicles and their manufacture and ACEC on research on electrical constructions.

Allowing consumers a fair share of the resulting benefit

The Commission's guidelines state that 'fair share' implies that the resulting benefit must at least compensate consumers for any negative impact caused by the restriction of competition (para 85). For instance, if an agreement leads to higher prices, consumers must be compensated through better quality or other benefits.

No restrictions that are not indispensable

This condition requires **proportionality**. Restrictions must not go beyond what is necessary to achieve the beneficial objectives of the agreement. If the benefits can be achieved by less restrictive means, exemption will not apply.

CECED (Commission Decision) OJ 2000 L187/47 [2000] 5 CMLR 635

Facts: Domestic appliance manufacturers undertook to phase out washing machines with low energy efficiency. The agreement was found to breach [**Article 101(1)]** because it restricted consumer choice and raised production costs for some manufacturers. The Commission, interpreting economic efficiency to include environmental benefits as well as technical efficiency, considered whether there were less restrictive ways of reducing energy consumption, such as informing consumers about the energy costs of machines, allowing them to make a choice. The Commission concluded that this would not be the most effective means. Consequently, the agreement was necessary to achieve the benefits.

Certain restrictions will rarely, if ever, be indispensable, notably clauses conferring **absolute territorial protection** or fixing prices.

No elimination of competition

There must be no elimination of competition in respect of the product in question. The Commission guidelines state that the 'protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements' (para 105). In ***CECED*** the Commission found no elimination of competition because manufacturers could still compete

on other features, such as price and technical performance. In ***ACEC/Berliet*** the Commission found that the buses would be competing with buses equipped with mechanical transmission produced by several other manufacturers.

Block exemption

Article 101(3) allows **Article 101(1)** to be declared inapplicable not only to individual agreements, but also to categories of agreement. The **block exemptions**, issued by the Commission in the form of regulations, cover agreements such as technology transfer agreements (relating to patent and know-how licensing), research and development agreements, and specialisation agreements. An agreement which is drafted in line the terms of the relevant block exemption is automatically exempt.

The following brief account of **Regulation 330/2010** provides an example of the content and scope of a commonly used block exemption.

Regulation 330/2010: block exemption for vertical agreements

Regulation 330/2010 contains the block exemption for certain categories of vertical agreements and concerted practices. Note that this block exemption expires on 31 May 2022, but at the time of writing, its replacement is still being finalised. It is likely that the

general themes of this block exemption will be carried over to the new Regulation, but you should note any key changes when this has been published, for example relating to online sales. It is expected that there will be a transitional period during which Regulation 330/2010 will continue to apply to agreements which were in force as at the expiration date.

In broad terms, **Article 2** of the Regulation exempts from **Article 101(1)** vertical agreements relating to the conditions under which the parties may purchase, sell, or resell certain goods or services, to the extent that these agreements contain otherwise prohibited restrictions. The Regulation covers, for instance, **exclusive distribution** and **selective distribution agreements**.

The exemption is subject to market-share thresholds. It applies only where both the supplier's market share does not exceed 30 per cent on the relevant market on which it sells the contract goods or services, and the buyer's market share does not exceed 30 per cent on the relevant market on which it purchases the contract goods or services.

The benefit of the block exemption does not apply to vertical agreements containing certain hardcore restrictions, set out in **Article 4**. They comprise restrictions by the supplier on the buyer's ability to determine its sale price, save for maximum or recommended sale prices, and restrictions on the territory into which the buyer may resell the goods or services, with some specified exceptions. The impact of **Article 4** is that an agreement containing hardcore restrictions is, in its entirety, outside the scope of the block exemption. The offending clauses cannot be severed (removed).

In contrast to **Article 4**, **Article 5** provides that the block exemption does not apply to certain obligations contained in agreements. Although the **Article 5** restrictions themselves fall outside the block exemption, they may be severed, allowing the remainder of the agreement to be exempted. Severable restrictions comprise certain non-compete obligations (obligations on the buyer not to sell competing goods), including non-compete clauses exceeding five years.

Any restriction falling outside **Articles 4** and **5** is permitted.

Outline of Article 102 TFEU

Article 102 TFEU sets out the prohibition:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

'**Undertaking**' means any legal or natural person engaged in economic activity; in other words, a company or an individual running a business.

To establish a breach of **Article 102**, three elements must be satisfied. The undertaking must have a dominant position; it must have abused that position; and that abuse must be capable of affecting trade between Member States.

Revision tip

Problem questions: these three elements will make up your answer plan.

Dominant position

An undertaking that has a dominant position in a market has considerable economic strength or market power. The Court of Justice defined 'dominance' in ***United Brands Co v Commission*** **(Case 27/76)**:

> A position of economic strength enjoyed by an undertaking that enables it to prevent effective competition … on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers … and consumers.

Revision tip

This definition should head up your discussion of 'dominant position'.

The ***United Brands*** definition refers to the 'relevant market'. As mentioned above, the consideration of the 'relevant market' is a key issue when considering potential breaches of **Articles 101** or **102**. In order to assess an undertaking's dominance, it is necessary first to identify the market in which it operates, the 'relevant market'.

Relevant market

There are three aspects to the relevant market: product, geographic, and temporal (or seasonal). In all cases, the Commission and the Court of Justice consider the product and geographical markets. In most cases, there will be no temporal (or seasonal) market and although this has occasionally been considered (for instance by the Commission in ***Re ABG Oil* (1977)**) a consideration of the temporal market will rarely be necessary. The Commission Notice of 1997 is also a useful resource as it reiterates principles of market definition from earlier cases. This will be discussed further below.

Revision tip

Identifying the relevant market—consider the company's product and geographical market. The temporal market may be relevant. This is also a relevant consideration for cases falling under **Article 101(1)** for the reasons mentioned above.

An undertaking that is allegedly dominant will seek to establish the widest possible market as the relevant market. The wider the market, the smaller the undertaking's market share and the less likely it is to be dominant. If dominance cannot be established, there is no breach of **Article 102**. Conversely, the Commission will argue for a narrow market.

Relevant product market (RPM)

The relevant product market is the market for the undertaking's own

product or service (**Article 102** applies to both products and services), plus the market for any substitutable products or services. The notion of **product substitution**, or product substitutability, has two elements, **demand substitutability** (or cross-elasticity of demand) and **supply substitutability** (or cross-elasticity of supply). Both must be considered to identify the relevant product market.

Demand substitutability concerns consumer behaviour. The question to be asked is whether a consumer would be willing and able to substitute one product for another or, to put it another way, to switch her/his demand from one product to another. Would a consumer consider the products to be substitutes? If the consumer would be willing and able to switch, there is said to be cross-elasticity of demand or demand substitutability. Substitutable products are in the same product market.

United Brands Co v Commission (Case 27/76) [1978] ECR 207

Facts: United Brands, a banana producer, challenged a Commission decision that it had abused a dominant position.

Held: Considering dominance, the Court of Justice first addressed the RPM. United Brands sought to define the RPM broadly, as fresh fruit. The Commission claimed that the RPM was bananas. Having considered product substitution and cross-elasticity of demand, the Court agreed with the Commission. It found that bananas are unique because of their appearance, taste, softness, seedlessness, and easy handling, all

characteristics which make them a particularly suitable fruit for the old, the sick, and the very young. In these respects, no other fruits are acceptable as substitutes and there is little cross-elasticity of demand. The RPM was the banana market.

Whereas in ***United Brands*** the Court of Justice considered the product's unique characteristics and concluded that these characteristics placed bananas in a separate product market from other fresh fruit, in other cases, such as ***Hugin*** and ***Hilti***, a product's specific use has ruled out substitutability, or interchangeability, with other products.

Hugin Kassaregister AB v Commission (Case 22/78) [1979] ECR 1869

Facts: Hugin, a Swedish company, challenged a Commission decision finding that it had infringed [**Article 102**] by refusing to supply spare parts for Hugin cash registers to Liptons, a British company that repaired and serviced Hugin cash registers.

Held: The Court of Justice found that the only spare parts that could be used for the repair and maintenance of Hugin cash registers were Hugin spare parts. Since these were not substitutable with spare parts for other kinds of cash registers, this resulted in a specific demand for Hugin spare parts. Consequently, the RPM was the market for Hugin spare parts.

Product pricing may be an important factor. In its 1997 *Notice on the Definition of the Relevant Market*, the Commission sets out a test for demand substitution based upon the consumer's response to a small but significant (between 5 and 10 per cent) permanent increase in the price of a product. If such an increase would cause the consumer to switch from one product to another, this indicates that the two products are in the same product market. If the consumer would not switch, this indicates that the products are in separate product markets. This test for product substitution is known as the SSNIP (Small but Significant Non-transitory Increase in Price) test.

The RPM need not be the market for the supply of the product or service to the ultimate consumer. It can be an intermediate market, along the chain of production and supply, for instance the market for the supply of a raw material to a producer.

Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission (Cases 6 & 7/73) [1974] ECR 223

Facts: Commercial Solvents and its subsidiary Istituto challenged a Commission decision that they had infringed [**Article 102**] by refusing to supply the raw material aminobutanol, used in the manufacture of an anti-tuberculosis drug, to Zoja, an Italian drugs manufacturer. They disputed the Commission's definition of the RPM, arguing that this was the market for the end product, the drug supplied to the ultimate consumer and not, as the Commission had found, the market for

the supply of the raw material.

Held: The Court of Justice held that the RPM was Commercial Solvents' raw material, aminobutanol.

Supply substitutability, or cross-elasticity of supply, concerns the capability of other producers supplying similar products. To assess supply substitutability, it is necessary to determine whether any such producer could easily and cheaply enter the product market in question by simply adapting their production. If products are sufficiently similar to make this feasible, there is high cross-elasticity of supply and an allegedly dominant firm's market position is not so powerful as might appear at first sight.

In ***Continental Can***, the Court of Justice found that the Commission had not assessed supply substitutability.

Europemballage Corp and Continental Can Co Inc v Commission (Case 6/72) [1973] ECR 215

Facts: Continental Can made light metal containers for meat and fish and metal closures for glass jars.

Held: The Court of Justice found that when the Commission defined the RPM, it had neglected to consider supply-side substitutability. The Commission had not determined how difficult it would have been for potential competitors from other sectors of the market for light metal containers to enter this market by

switching their production by simple adaptation to substitutes acceptable to the consumer.

Revision tip

Relevant Product Market (RPM): discuss demand substitutability (characteristics, use, price) and supply substitutability (feasible for producers of similar products to enter the market).

Relevant geographic market

The Court of Justice has defined the relevant geographic market as 'an area where the objective conditions of competition applying to the product in question' are the same for all traders (***United Brands***). Here, the relevant geographic market consisted in all the Member States except France, Italy, and the UK, since in these three Member States there were special importing arrangements that disadvantaged United Brands' products.

The cost and feasibility of transportation can be a major factor in identifying the geographic market. Where goods can be easily and cheaply transported, the Court of Justice may conclude, as it did in ***Hilti***, that the geographic market is the whole of the EU.

A geographic market may be characterised in other ways, for instance as the area to which customers are prepared to travel to buy the product or service, or in which they are prepared to look for

substitutes.

Article 102 provides that dominance must be 'within the internal market or a substantial part of it'. A geographic market need not be very extensive to satisfy this condition. An EU-wide market clearly qualifies, as in ***Hilti***. So may a market comprising of several Member States, as in ***United Brands***. Even a single Member State is sufficient, as in ***Nederlandsche Banden-Industrie Michelin NV v Commission* (Case 322/81) [1983] ECR 3461**.

In some cases, particularly in the air and sea transport sector, the geographic market has been drawn very narrowly.

> *Sealink/B and I—Holyhead: Interim Measures* (Commission Decision) [1992] 5 CMLR 255
>
> The port of Holyhead was held to be the relevant geographic market and a substantial part of the internal market.

Relevant temporal (or seasonal) market

Whilst the product and geographical markets will always feature in **Article 102**, a temporal market will rarely be identified. A rare example can be found in ***Re ABG Oil* (1977)** where the Commission defined the temporal market for oil by reference to the oil crisis precipitated by the action of the OPEC states in the early 1970s.

Dominance in the relevant market

Once the relevant market has been identified, it is next necessary to determine whether the undertaking is dominant in that market.

> Revision tip
>
> Remember to discuss dominance in the market, before moving on to consider ‘abuse’.

Indicators of dominance

Several factors may combine to indicate dominance, though market share is the primary indicator. Other relevant factors include market structure, the length of time that the undertaking has held its market share, its financial and technological resources, vertical integration, intellectual property rights, and behaviour. These other indicators are often referred to as potential barriers to entry or expansion into the relevant market.

Market share

In practice, total monopoly situations (comprising a 100 per cent market share) are rare. The Court of Justice has stated that very large market shares held for some time are, save in exceptional circumstances, evidence of a dominant position. In ***Microsoft***

Corporation v Commission **(Case T-201/04)**, Microsoft was found to have a market share of over 90 per cent of one of the identified markets. This was clear evidence of dominance. In ***Google Search (Shopping)*** **(Case AT.37940)**, Google was held to have a market share in excess of 90 per cent in most EEA countries and had done so consistently since at least 2008.

However, the importance of market share varies from market to market, according to the structure of the market (***Hoffmann-La Roche v Commission*** **(Case 85/76)**).

Market structure

Market structure is an important factor. United Brands was held to be dominant with a market share of between 40 and 45 per cent. That share was several times greater than that of its nearest rival. Other competitors were even further behind. However, a market share of below 40 per cent is unlikely to be regarded as an indicator of dominance.

Financial and technological resources

Extensive financial and technological resources may allow a company to maintain, or 'entrench', its market position, for instance through persistent price-cutting, perhaps selling below cost. With financial resources, an undertaking can retain market power by developing technological know-how, investing in product development, and providing technical services to customers. United Brands had used its

wealth to reduce cross-elasticity of demand by widespread advertising. It had invested in research to improve productivity and perfect new ripening methods.

Vertical integration

An undertaking that is vertically integrated exerts control in the production and supply chain. This may include 'upstream' control, for instance in the raw materials market and/or 'downstream' control, for instance the control of distribution. The greater the vertical integration, the more likely there is to be dominance. The Court of Justice described United Brands' operations as 'vertically integrated to a high degree'. The company owned plantations in Central and South America, controlled loading operations, had its own transportation systems, and controlled banana ripeners, distributors, and wholesalers through an extensive network of agents.

Intellectual property rights

The possession of intellectual property rights, such as copyright and patents, may indicate market power. These rights can be enforced under national law to prevent competitors from reproducing information or making products which the rights protect.

Conduct

United Brands confirmed the Commission's view that an undertaking's conduct can indicate dominance. For instance, the fact

that a company has charged unfair prices can be evidence of its dominance in the market.

Revision tip

Problem questions—having identified the relevant market, next consider dominance. Start with market share, then consider any other indicators.

Looking for extra marks?

Factors indicating dominance are often referred to as '**barriers to entry or expansion**' if they prevent potential competitors from entering the market. Such factors may also weaken the position of existing competitors or drive them out of the market. Conversely, factors indicating dominance can have positive effects. Consumers may benefit from a company's efficient distribution systems or from higher quality products, made possible through research and development. For these reasons, the Court of Justice's approach to assessing dominance can be controversial. Nonetheless, it should be noted that dominance in itself does not amount to an infringement of **Article 102**. There must also be an abuse which may affect trade between Member States.

Revision tip

Discussion of ‘dominance’—consider the complexities of market definition and the controversy surrounding indicators of dominance.

Abuse

Dominance in itself does not constitute a breach of **Article 102**. An infringement occurs only where there is an abuse of a dominant position that may affect trade between Member States. **Article 102** provides that abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This list is not exhaustive, but gives examples of abusive behaviour. Often, abuses are classified into two categories, exploitative and anti-competitive. **Exploitative abuses** exploit consumers. **Anti-competitive abuses** prevent or weaken competition or potential competition from other undertakings. Many kinds of abusive conduct can be described as both exploitative and anti-competitive.

Unfair prices

Imposing unfair, or excessively high, prices is perhaps the most obvious exploitative abuse. However, the definition of an 'unfair' or 'excessive' price is not straightforward.

In ***United Brands***, the Court of Justice defined an excessive price as one which 'has no reasonable relation to the economic value of the product'. Unfortunately, the assessment of economic value may be problematic. However careful the economic analysis, decisions on unfair or excessive pricing are likely to be controversial. Where prices rise to a higher level than the market will bear, the incentive for other firms to enter the market becomes very strong. These market forces can provide protection for the consumer, but such forces may not operate where there are significant barriers to entry.

Discriminatory pricing

In its simplest form, discriminatory pricing consists in charging different customers different prices for the same product without justification. This amounts to the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' (**Article 102(c)**).

United Brands Co v Commission (Case 27/76) [1978] ECR 207

Facts: United Brands charged different prices according to the Member State in which customers were established.

Held: There was no justification for this, since 'Chiquita' bananas were of almost consistent quality, unloading costs at the European ports of entry were similar, and transport costs from the ports to the ripening facilities were generally borne by the customer. The company's pricing policy was based purely on what the market would bear and was an abuse.

If differential pricing can be **objectively justified**, for instance on the basis of different transport costs, different labour costs, or different market conditions, there is no abuse.

Discounting

Abusive discounting is a more sophisticated kind of price discrimination. It exploits consumers and may also target competitors by undercutting their prices. This abuse takes various forms, such as discounts offered to customers who buy minimum quantities ('quantity' discounts), who agree to purchase all or most of their requirements from the supplier ('loyalty' or 'fidelity' discounts), or who reach specific sales targets ('target' discounts). Quantity discounts are unobjectionable provided they apply without discrimination to all purchasers and are justified, for instance if linked directly to the volume of goods supplied and the savings achieved by bulk production. Other kinds of discount are likely to be caught by **Article**

Hoffmann-La Roche & Co AG v Commission (Case 85/76) [1979] ECR 461

Facts: Fidelity discounts offered by Roche obliged or induced customers to buy all or most of their vitamin requirements exclusively or in preference from the company. Most contracts also contained the so-called ‘English clause’, which allowed customers, if they discovered cheaper prices elsewhere, to ask Roche to reduce its prices. If Roche did not do so, customers could buy from other suppliers.

Held: The Court of Justice found that the company’s practices were abusive. Insofar as the agreements enabled purchasers to buy at the lowest price, they were not exploitative. However, customers’ commercial freedom was limited because the fidelity discounts induced them to buy from Roche. The arrangements also gave Roche access to information about its rivals’ pricing policies, allowing it to react quickly, reducing its prices, and undermining competition.

Tie-ins

Tie-ins require or induce the purchaser of goods or services to buy other goods or services from the same supplier. Such arrangements

make ‘the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’ (**Article 102(d)**). Inducements can comprise price discounting or rebates. Microsoft abused its dominant position in the personal computer market by bundling together its Windows operating system and Windows Media Player (***Microsoft Corporation v Commission* (Case T-201/04)**). This case is particularly interesting as although customers did not have to use Windows Media Player (other streaming devices could be used) customers were not given the opportunity to obtain Windows Operating System without Windows Media Player. This amounted to an abuse.

Predatory pricing

Predatory pricing consists in price reduction below the cost of production. A dominant undertaking with sufficient resources to withstand short-term losses can use this strategy to target its smaller, less prosperous rivals. This is an anti-competitive abuse, designed to drive existing competitors out of the market or prevent market entry by potential competitors. Ultimately, predatory pricing also harms consumers. Whilst price reductions provide temporary consumer benefit, consumers suffer in the longer term, as the dominant company, having excluded its competitors, regains control of the market and becomes free to raise prices without constraint.

A certain level of price competition is clearly beneficial. It encourages

efficiency and favours consumers. At what point, then, does 'normal' price competition become predatory pricing? This question was addressed in ***AKZO***.

AKZO Chemie v Commission (Case C-62/86) [1991] ECR I-3359

Facts: AKZO produced organic peroxides for use in the plastics industry and for flour bleaching. When Engineering and Chemical Supplies (ECS), which had supplied organic peroxides for flour, decided to begin supplying to the plastics sector, AKZO reduced its prices in the flour sector. AKZO challenged a Commission decision finding predatory pricing.

Held: The Court of Justice held that prices are predatory if they are intended to eliminate competition. There is a deemed intention if prices fall below average variable costs (costs which vary depending on the quantities produced). An undertaking has no interest in applying such prices, save to eliminate competition and then subsequently increase prices, to the detriment of consumers. Where prices fall below average total costs (variable costs plus fixed costs), but above average variable costs, prices are abusive 'if … determined as part of a plan for eliminating a competitor'.

A finding of abuse is not confined to successful predation. Predatory pricing is to be penalised wherever there is a risk that competition will be eliminated, even without proof that a dominant undertaking has a

realistic chance of recouping its losses (***Tetra Pak International SA v Commission* (Case C-333/94P)**).

Refusal to supply

As a general principle of contract law, parties are free both to enter into agreements and to refuse to deal. An undertaking might justifiably refuse supplies, for instance, because a customer has not paid for goods previously supplied, or because of stock shortages or problems with production. If not objectively justified, a dominant undertaking's refusal to supply goods or services may be abusive. It will be an abuse if it is intended to eliminate competition.

Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission (Cases 6 & 7/73) [1974] ECR 223

Facts: Commercial Solvents refused to supply Zoja, an Italian drug manufacturer, with the raw material used for the manufacture of an anti-tuberculosis drug.

Held: The Court of Justice found the anti-competitive nature of Commercial Solvents' behaviour to be apparent, since at the same time as it was refusing further supplies to Zoja, its own subsidiary, Istituto, was emerging as a competitor in the same market as Zoja, the market for the manufacture and supply of the drug.

Contrast ***Commercial Solvents*** with ***BP v Commission*** **(Case 77/77)**. BP drastically reduced oil supplies to ABG, an irregular Dutch customer, because of the oil crisis of 1973/74 (a shortage of oil arising from the deliberate withholding of this commodity by oil-producing states). BP reduced its deliveries to all customers by an average of approximately 13 per cent, but ABG's reduction was 73 per cent.

The Court of Justice held that there had been no abuse. Since ABG was not a regular customer, the CJEU considered that BP could legitimately reduce deliveries to it to a much larger extent.

Microsoft Corporation v Commission (Case T-201/04) [2007] ECR II-1491

Facts: Microsoft refused to provide its competitors with 'interoperability information' that would have enabled them to develop competing products.

Held: This was condemned as an abuse, since there was a real risk that Microsoft would succeed in eliminating all effective competition on the relevant market.

Where a refusal to supply entails refusal of access to a facility, the conduct is assessed under what is known as the 'essential facilities' doctrine. A dominant undertaking which owns or controls a facility that is essential to conducting a business abuses its position if it refuses access to another undertaking which cannot feasibly set up a facility of its own to run its business. Sealink, for instance, which

controlled the port of Holyhead, restricted B&I's access to sailing facilities there and was found to have infringed **Article [102]** (***Sealink/B and I—Holyhead: Interim Measures* (1992)**).

Import and export bans

In order to maintain control of the market, a dominant undertaking may seek to impose importing/exporting restrictions on the companies it supplies. ***Hilti*** provides a good example of this abuse. The company had exerted pressure upon its distributors in the Netherlands not to supply Hilti's cartridge strips in the UK. It did this because it wished to reserve the UK market to itself. Such practices not only restrict competition but are also incompatible with the internal market because they prevent the free flow of goods between Member States.

Illegal advantage

In ***Google Search (Shopping)* (Case AT 37940)**, Google's abuse was to give its shopping comparison product an illegal advantage. It did this by providing Google Shopping (formerly Google Product Search and Froogle) with prominent placement on its search engine and by demoting comparison products through the use of algorithms. The effect of these abuses being that consumers rarely saw rival comparison services in Google's search results.

Revision tip

In discussing ‘abuse’ (essay questions) or applying ‘abuse’ to a fact scenario (problem questions), remember to discuss ‘objective justification’.

Effect on trade between Member States

There is no infringement of **Article 102** unless a dominant undertaking's abuse 'may affect trade between Member States'. This term has the same meaning as under **Article 101**, namely a 'direct or indirect, actual or potential' effect (***Société Technique Minière v Maschinenbau Ulm GmbH* (Case 56/65)**). Since an indirect or potential effect is sufficient, this element of **Article 102** is generally easily established. Evidence that abusive behaviour might affect trade between Member States will be enough, as will an effect on the competitive structure of the internal market (***Commercial Solvents***).

Hugin is one of the few cases in which an effect on interstate trade was not established. The Court of Justice endorsed the Commission's view that Hugin, a Swedish company, was dominant in the market for its own spare parts. However, the company's refusal to supply its spare parts to Liptons in London had no effect on interstate trade. Liptons operated within a very limited area in and around London and there was no indication that it intended to extend its activities further. Moreover, the 'normal' pattern of movement of the spare parts was not between Member States but between Liptons in the UK and Hugin in Sweden, which at that time was not an EU Member State.

Enforcement and remedies

You may also be required to deal with the consequences of an infringement of these Treaty Articles. These can be summarised as:

- the Commission's powers to investigate and impose sanctions in relation to alleged breaches of **Articles 101 and/or 102 TFEU**—see **Regulation 1/2003** and associated Notices and guidance, for example the Leniency Notice referred to earlier; and
- other consequences for firms if they act in breach—the possibility of private enforcement actions by way of damages claims in the appropriate national court). Damages actions are now facilitated through the implementation of Directive 2014/104.

Implications of Brexit

Business entities need to be aware that agreements or other forms of collusion between UK businesses may still be subject to EU law if they are capable of affecting trade between EU Member States and have as their object or effect the prevention, restriction, or distortion of competition within the internal EU market. Similarly, UK-based businesses can be penalised if their behaviour constitutes an abuse of a dominant (or monopoly) position in so far as it may affect trade between Member States. The European Commission still has jurisdiction to enforce the relevant Treaty Articles. However, remedies for breach of EU competition law are no longer available in the UK courts because **Articles 101** and **102** do not have direct effect in the UK.

KEY CASES

Article 101 TFEU

CASE	FACTS	PRINCIPLE
***ACEC/Berliet* (Commission Decision) OJ 1968 L201/7, [1968] CMLR D35**	Agreement providing for technical cooperation and joint research on the development of a bus equipped with electric transmission.	Exemption granted: the agreement allowed each party to concentrate on the areas within its own expertise.
***Ahlström & Ors v Commission (Woodpulp)* (Cases C-89, 104, 114, 116–117, 125–129/85) [1993] ECR I-1307**	Challenge to a finding of a concerted practice in relation to a system of quarterly price announcements.	There was no concerted practice, since there was no evidence of communication between the companies and the parallel pricing was the result of the normal operation of the oligopolistic woodpulp market.
***Brasserie de Haecht SA v Wilkin (No 1)* (Case 23/67) [1967] ECR 407**	Mr and Mrs Wilkin claimed that their loan agreement with the brewery infringed **Article 101(1)**.	Assessment of the effect on trade between Member States will take into account the 'legal and economic context' of an agreement.
***CECED* (Commission Decision) OJ 2000 L187/47, [2000] 5 CMLR 635**	Domestic appliance manufacturers undertook to phase out washing machines with low energy efficiency. The agreement was found to be anti-	Exemption granted: there were less restrictive ways to reduce energy consumption, such as informing the consumer about energy costs. However, since this would not be the most effective means, the agreement was necessary to achieve the benefits.

	competitive because it restricted consumer choice and raised production costs for some manufacturers.	
***Établissements Consten SA and Grundig-Verkaufs-GmbH v Commission* (Cases 56 & 58/64) [1966] ECR 299**	Consten and Grundig challenged a Commission decision finding that their dealership agreement infringed **Article 101(1)**.	If restrictive clauses can be severed, only those clauses will be void.
***Établissements Consten SA and Grundig-Verkaufs-GmbH v Commission* (Cases 56 & 58/64) [1966] ECR 299**	(See earlier)	Both vertical and horizontal agreements can fall within **Article 101(1)**.
***Établissements Consten SA and Grundig-Verkaufs-GmbH v Commission* (Cases 56 & 58/64) [1966] ECR 299**	(See earlier)	An 'effect on trade' includes both positive and negative effects.
***IAZ International Belgium NV v Commission* (Cases 96–102, 104, 105, 108 & 110/82) [1983] ECR 3369**	A recommendation to its members by a Belgian water suppliers' trade association discriminated against imported machines.	A non-binding recommendation falls within **Article 101(1)** if intended to be anti-competitive and normally complied with.
Imperial Chemical	ICI challenged a Commission	'Concerted practice': 'a form of coordination between undertakings

***Industries Ltd v Commission (Dyestuffs)* (Case 48/69) [1972] ECR 619**	decision finding that certain aniline dye producers, including ICI, had fixed prices through concerted practices.	which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'. Parallel behaviour does not in itself constitute concerted practice, but may be strong evidence of it, especially if the conduct 'leads to conditions of competition which do not correspond to the normal conditions of the market'.
***Metro-SB-Grossmärkte GmbH & Co KG v Commission (No 1)* (Case 26/76) [1977] ECR 1875**	Selective distribution system.	A rule of reason approach? Qualitative restrictions in a selective distribution agreement would not breach **Article 101(1)** provided they are applied uniformly across the selective distribution network.
***Métropole Television (M6) and Others v Commission* (Case T-112/99) [2001] ECR II-2459**	Challenge to a Commission decision concerning a pay-TV agreement.	Court of First Instance (now the General Court): judgments such as ***Pronuptia*** do not establish a rule of reason in EU competition law.
***Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis* (Case 161/84) [1986] ECR 353**	Distribution franchise agreement.	A rule of reason approach? The restrictions did not breach **Article 101(1)** because they were indispensable to protect the reputation and know-how of the franchisor and the uniform identity of the franchise outlets.
***Prym-Werke* (Commission Decision) OJ 1973 L296/24, [1973] CMLR D250**	Prym agree to stop making needles and instead to buy them from Beka, which agreed to supply Prym, allowing Beka to specialise in needle production.	Exemption granted: concentration of manufacture improved production.
Société Technique	Agreement for the supply of heavy	Effect on trade between Member States: wherever it is 'possible to foresee with a

***Minière v Maschinenbau Ulm GmbH* (Case 56/65) [1966] ECR 235 (*STM*)**	earth-moving equipment.	sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.
***Société Technique Minière v Maschinenbau Ulm GmbH* (Case 56/65) [1966] ECR 235 (*STM*)**	(See earlier)	It is not necessary to establish both the object and effect of an agreement. Either an anti-competitive object or effect will suffice.
***Vacuum Interrupters Ltd* (Commission Decision) OJ 1977 L48/32, [1977] 1 CMLR D67**	Joint venture research and development agreement between two UK companies to design and manufacture switchgear in the UK.	Agreements between undertakings operating solely in one Member State may have an effect on trade between Member States. A potential effect is sufficient.
***Wouters v Netherlands Bar* (Case C-309/99) [2002] ECR I-1577**	A Dutch Bar Association regulation prohibited multi-disciplinary partnerships.	'Decisions by associations of undertakings' can include decisions of professional associations.

Article 102 TFEU

CASE	FACTS	PRINCIPLE
***AKZO Chemie v Commission* (Case C-62/86) [1991] ECR I-3359**	AKZO reduced its prices below cost to target a market entrant.	Pricing below cost is predatory and an abuse if intended to eliminate competition.
British Leyland	BL had the exclusive	The prices charged were

plc v Commission **(Case 226/84) [1986] ECR 3263**	right to issue type-approval certificates for imported left-hand drive BL cars.	disproportionate to the service provided and therefore excessive.
Eurofix & Bauco v Hilti AG **(Commission Decision) OJ 1989 L65/19**	Hilti exerted pressure on its Dutch distributors not to supply Hilti's cartridge strips in the UK.	Import/export restrictions: an abuse.
Europemballage Corp and Continental Can Co Inc v Commission **(Case 6/72) [1973] ECR 215**	Challenge to a Commission decision finding an infringement.	Decision annulled: the Commission had not considered supply-side substitutability.
Hilti v Commission **(Case T-30/89) [1991] ECR II-1439**	Hilti had abused a dominant position in relation to the supply of nail guns and nails.	A share of between 70 and 80 per cent in the relevant market was 'in itself a clear indication of a dominant position'.
Hilti v Commission **(Case T-30/89) [1991] ECR II-1439**	Hilti withheld discounts from customers who bought from competitors; required purchasers of nail cartridges to buy nails; and refused to honour guarantees if non-Hilti nails were used.	Tying-in practices: an abuse.
Hoffmann-La Roche v Commission **(Case 85/76) [1979] ECR 461**	Roche induced its customers, through fidelity discounts, to buy their vitamins from Roche.	A very large market share creates a position of strength which may in itself amount to a dominant position.
Hoffmann-La Roche v Commission **(Case 85/76) [1979] ECR 461**	Roche offered fidelity discounts. Its 'English clause' allowed customers who discovered cheaper prices elsewhere to ask for a price reduction.	Customers' commercial freedom was limited. The 'English clauses' gave Roche access to information about rivals' prices, allowing it to react quickly to reduce prices and undermine competition.

***Hugin Kassaregister AB v Commission* (Case 22/78) [1979] ECR 1869**	Hugin had refused to supply spare parts for its cash registers.	Demand substitutability assessed on the basis of product use.
***Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* (Cases 6 & 7/73) [1974] ECR 223**	Commercial Solvents refused to supply an Italian drugs manufacturer with a raw material.	Refusal to supply: an abuse.
***Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* (Cases 6 & 7/73) [1974] ECR 223**	CSC had refused to supply a raw material used for producing an anti-tuberculosis drug.	RPM can be an intermediate market.
***Nederlandsche Banden-Industrie Michelin NV v Commission* (Case 322/81) [1983] ECR 3461**	Michelin challenged the Commission's finding of an abuse in the market for replacement tyres for heavy vehicles.	One Member State was the geographic market and a substantial part of the internal market.
***Sealink/B and I–Holyhead: Interim Measures* (Commission Decision) [1992] 5 CMLR 255**	The Commission found that Sealink had abused a dominant position in its operation of the port of Holyhead.	The geographic market, the seaport of Holyhead, constituted a substantial part of the internal market.
***Société Technique Minière v Maschinenbau Ulm GmbH* (Case 56/65)**	Application of **Article [101]** to import restrictions.	Effect on trade between Member States: a 'direct or indirect, actual or potential' effect is sufficient.

[1966] ECR 235		
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	Identification of the RPM: bananas or fresh fruit?	Demand substitutability assessed on the basis of product characteristics.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands had a market share between 40 and 45 per cent.	Market structure may indicate dominance.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands had used its wealth for advertising and for research and development.	Financial and technological resources indicate dominance.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands had upstream and downstream control of the market.	Vertical integration indicates dominance.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands was accused of charging excessive prices.	Excessive price: one which ‘has no reasonable relation to the economic value of the product supplied’.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands charged different prices according to the customer’s state of establishment.	Pricing was based purely on what the market would bear, and therefore an abuse.
United Brands Co v Commission **(Case 27/76) [1978] ECR 207**	United Brands refused to supply Olesen because it had taken part in an advertising campaign for a competitor of United Brands.	Refusal to supply: an abuse.
United Brands Co v	Challenge to the Commission’s finding of	Dominance: ‘A position of economic strength enjoyed by an undertaking

***Commission* (Case 27/76) [1978] ECR 207**	a breach of **Article [102]**.	that enables it to prevent effective competition … on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers … and consumers.’

EXAM QUESTIONS

Problem question—Article 101 TFEU

Blacksmiths plc ('Blacksmiths'), a Maltese horseshoe manufacturer, has agreed to supply horseshoes to Marnier SA ('Marnier'), a French wholesaler, for resale. The agreement between them provides that Blacksmiths will supply its horseshoes only to Marnier in France and that Marnier, for a period of three years from the date of the agreement, will not sell goods which compete with the contract goods.

It has already been established that Blacksmiths has a 24 per cent share of the relevant market and that Marnier has a 20 per cent share of the relevant market.

Does this agreement fall within **Article 101(1) TFEU** and, if so, does it benefit from the block exemption under **Regulation 330/2010**?

Essay question—Article 102 TFEU

In targeting both exploitative and anti-competitive abuses, **Article 102 TFEU** makes a significant contribution to the achievement of the aims of European Union competition law.

In the light of this statement and with reference to the interpretation of 'abuse' by the Court of Justice, critically discuss the extent to which **Article 102 TFEU** has succeeded in achieving the aims of European Union competition law.

ONLINE RESOURCES

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question
- An outline answer to the problem question
- Further reading
- Multiple-choice questions

CONCENTRATE Q&As

For more questions and answers on EU Law, see the *Concentrate Q&A: EU Law* by Nigel Foster.

Glossary

Absolute territorial protection Complete protection from competition in a particular geographical area ('territory'), typically afforded to an undertaking through an exclusive distribution agreement which prevents parallel imports.

Acte clair Translated literally means 'clear act'. The term is applied to provisions of EU law whose interpretation is clear.

Anti-competitive abuse Abuse by an undertaking that prevents or weakens competition or potential competition from other undertakings.

Ban A 'total restraint', blocking the import or export of particular goods altogether.

Barriers to entry Factors that prevent or hinder entry to a market by an undertaking or undertakings.

Block exemption Exemption under Article 101(3) TFEU applied to categories of agreement.

Brexit An abbreviation of 'Britain' and 'exit'. The term lacks clear definition but is used to refer to the departure of the UK from the EU following the outcome of the referendum of UK EU membership held on 23 June 2016.

Cartel A group of independent companies or businesses, operating in the same market, that collude to fix prices, share markets, or engage in other forms of anti-competitive behaviour.

CEE (charge having equivalent effect to a customs duty) A levy charged on goods by virtue of the fact that they cross a frontier, which is not a customs duty in the strict sense.

Co-decision (now known as the 'ordinary legislative procedure')
A legislative procedure involving the participation of the European Commission, the Council, and the European Parliament.

Collusion Coordination or communication between undertakings on the adoption of a common market strategy, for instance to fix prices.

Common customs tariff A common level of duty charged by all Member States on goods imported from third countries.

Common market (now known in the EU as the 'internal market')
An area within which goods, persons, services, and capital move freely without restriction.

Competence The power granted by the Treaties to the EU and the Member States, either respectively or jointly ('joint competence'), to enact legislation in a particular area.

Concerted practice A form of coordination between undertakings falling short of an agreement by which, through their cooperation, the parties eliminate or reduce competition between them.

Contra legem interpretation The interpretation of legislation against its clear meaning.

Customs duty A levy charged on goods by virtue of the fact that they cross a frontier.

Customs union A free trade area, together with a system whereby a common level of duty is charged on goods entering the free trade area from non-member countries.

Decision A form of EU secondary legislation which is addressed to one or a number of Member States or individuals and is directly applicable.

Demand substitutability (or cross-elasticity of demand) There is demand substitutability if the consumer would be willing and able to substitute one product for another.

De minimis agreement An agreement of 'minor importance', with no 'appreciable' effect on competition (or trade).

Derogation A permissible exception to a legal rule or principle.

Direct actions Proceedings brought directly before the Court of Justice or General Court. Distinguish from proceedings brought indirectly through preliminary references from national courts.

Direct discrimination A directly discriminatory measure openly discriminates on the basis, for instance, of nationality or product origin.

Direct effect If a provision of EU law has direct effect, it can be enforced by individuals and businesses in the national court.

Directive A form of EU secondary legislation which is not directly applicable but must be implemented by Member States.

Directly applicable Provisions of EU law are part of national law and automatically binding, without further enactment.

Distinctly applicable measures Measures that do not apply equally to domestic and imported products.

Distribution agreement An agreement for the supply of products for resale.

Distribution franchise An agreement between an established distributor of a product (the franchisor) and other independent traders (the franchisees). The franchisor grants the franchisees, for a fee, the right to establish themselves using its business name and methods.

Dual burden Rules impose requirements on goods that are additional to requirements that may be applied in the state of origin, creating an extra burden for producers.

Dualist system A national legal system in which international law is not binding internally until it is incorporated by domestic statute.

Economically active Persons such as workers, the self-employed and providers of services.

Economically inactive Persons such as persons other than workers, the self-employed and providers of services.

Equal burden Rules concern the marketing of goods. They

impose an equal burden on domestic and imported products.

European Union Law Comprises of Treaty provisions, secondary legislation (regulations, directives, decisions), international agreements made by the EU and the case law of the Court of Justice.

Exclusive distribution agreement An agreement under which a supplier appoints one distributor for a particular area.

Exploitative abuse Abuse by an undertaking that exploits consumers.

Force majeure Abnormal and unforeseeable circumstances, beyond the control of the person committing a breach, the consequences of which could not have been avoided through the exercise of all due care.

Four freedoms Free movement of goods, persons, services, and capital within the internal market.

Free trade area An area within which customs duties and other trade restrictions between the member countries are prohibited.

Freedom of establishment For individuals, this comprises the right to pursue activities as a self-employed person in another Member State, for instance conducting a business or practising a profession, on a permanent basis.

Hardcore restrictions The most serious restrictions on competition, notably price-fixing and market-sharing.

Harmonisation The adoption of EU legislation with a view to eliminating any existing disparities arising from Member States' respective national provisions in the relevant areas.

Harmonising legislation EU legislation adopted under the process of harmonisation.

Horizontal agreement An agreement between parties operating at the same level of the production/distribution chain, for instance between manufacturers.

Horizontal direct effect If a provision of EU law has horizontal direct effect it can be enforced by an individual (a person or a company) in a national court against another individual.

Implementation The incorporation of EU law into national law by Member States, relating in particular to directives.

Indirect discrimination An indirectly discriminatory measure appears not to discriminate but its effect is to discriminate.

Indirect effect This principle requires that national law be interpreted, by national courts. in accordance with relevant EU law.

Indistinctly applicable measures Measures that apply equally to domestic and imported products (i.e. make no distinction between domestic and imported products).

Individual exemption Exemption under Article 101(3) applied on a case-by-case basis to individual agreements.

Intergovernmental Describes decision-making entailing agreement between the Member States acting as independent sovereign states.

Internal market An area in which goods, persons, services and capital move freely without restriction.

Legal base The legal base of a particular legislative measure is the Treaty article setting out the EU's power to legislate in the relevant policy area.

Legal certainty This principle incorporates the requirement that the distinction between what is lawful and unlawful should be reasonably clear.

Legitimate expectation This principle requires that law or action must not breach the legitimate expectations of those who are affected by it.

Locus standi (or 'standing') The right to bring proceedings before the relevant court.

Mandatory requirements Justifications that allow restrictions on the free movement of goods to escape the scope of Article 34 TFEU.

Measures having equivalent effect to quantitative restrictions (MEQRs)
Non-tariff barriers to trade which are not an outright ban or quota but have a similar effect to such quantitative restrictions.

Monist system A national legal system in which EU law becomes binding from ratification, with no need for

incorporating measures.

Mutual recognition (goods) Provided goods have been lawfully produced and marketed in one Member State, there is no reason why they should not be introduced into another without restriction. This is a rebuttable presumption.

National sovereignty The power of a state to regulate its own affairs, in particular through the enactment of legislation.

Non-retroactivity This principle dictates that the law should not impose penalties with effect from a date in the past.

Non-tariff barriers Import, export, or other restrictions on the free movement of goods not involving direct payments of money, comprising quantitative restrictions and MEQRs.

Objectively justified A measure or action is objectively justified if it is based on a legitimate rationale.

Oligopolistic market A market dominated by relatively few sellers in which the parties align their behaviour as a structural response to the market.

Ordinary legislative procedure (formerly the 'co-decision procedure')
A legislative procedure involving the participation of the European Commission, the Council, and the European Parliament.

Parallel behaviour Behaviour of undertakings consisting in responding to each other's market strategy by adopting similar strategies, for instance on pricing.

Parliamentary sovereignty A UK constitutional convention under which Parliament has the exclusive right to adopt and repeal national legislation and cannot bind its successors, so that subsequent Acts can either expressly or impliedly repeal a prior Act.

Preliminary reference A request from a national court or tribunal to the Court of Justice for a ruling on the interpretation or validity of EU law.

Preliminary ruling Ruling on the interpretation or validity of EU law by the Court of Justice in response to a preliminary reference.

Product substitution Comprises demand substitutability (or cross-elasticity of demand) and supply substitutability (or cross-elasticity of supply).

Proportionality This principle requires that action or measures go no further than is necessary to achieve their objective or than is justified in the circumstances.

Proportionate An action or measure is proportionate if it goes no further than is necessary to achieve its objective or than is justified in the circumstances.

Protectionist motives A measure adopted with protectionist motives is intended to protect domestic products from competition from imports.

Provision of services This describes the situation in which an individual or company is established in one Member State and provides services into another.

Qualified majority voting (QMV) A majority voting system that is not based on a simple majority.

Quantitative restrictions Non-tariff barriers to trade that impose a limit on the quantity of goods that may be imported or exported, comprising quotas or bans.

Quota A 'partial restraint' placing a limit on the quantity of particular goods that can be imported or exported.

Reasoned opinion Issued to a Member State by the Commission under Article 258 TFEU setting out precisely the grounds of complaint and specifying a time limit for ending an infringement.

Reciprocity Non-compliance is justified because other Member States have not complied or an EU institution has failed to act. This defence has been rejected by the Court of Justice in Article 258 proceedings.

Regulation A form of EU secondary legislation which is directly applicable in all the Member States.

Rule of reason (free movement of goods) Restrictions on trade resulting from national provisions on product marketing, which differ from those applying in other Member States, are permissible if they are necessary to satisfy one of the mandatory requirements.

Selective distribution agreement An agreement under which goods or services are sold only through outlets chosen by the supplier according to its own criteria, such as the suitability of the premises.

State liability This principle gives rise to a right to damages against a Member State which has breached EU law, causing loss to the applicant.

Subsidiarity This principle requires that decisions be taken as closely as possible to the citizen and that action at EU level, rather than at national, regional, or local level, is justified.

Supply substitutability (or 'cross-elasticity of supply') There is supply substitutability if producers of similar products could easily and cheaply enter the product market in question by simply adapting their production.

Supranational Describes a level of government that operates above and independently of national governments.

Supremacy The doctrine of supremacy dictates that EU law takes precedence over conflicting provisions of national law.

Tariff barriers Import or export restrictions involving direct payments of money, comprising customs duties and charges having equivalent effect to customs duties (CEEs).

Third country nationals Persons who are not citizens of the EU.

Undertaking A natural or legal person (individual or company) engaged in commercial activity for the provision of goods or services.

Vertical agreement An agreement between parties operating at different levels of the production/distribution chain, for instance between a manufacturer and a

distributor.

Vertical direct effect If a provision of EU law has vertical direct effect it can be enforced by an individual (a person or a company) in a national court against the state or a public body.

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The Supremacy of EU Law and its Reception in the Member States

4

ARE YOU READY?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The relationship between the EU and the Member States, which will involve a consideration of the reasons for the supremacy of EU law before looking at the reception of EU law in some of the Member States. Some questions, however, may look at these two aspects independently as suggested in the next heading.
- The reception in one or two or more Member States may be undertaken and examined.
- The legal arguments for supremacy and the political and legal logic may both be considered in establishing the reasoning for EU law supremacy.
- In the topics noted above, the main cases encountered are very likely to be ***Van Gend en Loos***, ***Costa*** **v** ***ENEL***, ***Simmental***, ***International Handelsgesellschaft***, ***Factortame***, and then the principal cases of the particular Member States which may be considered in your course, as highlighted in the following answers.
- The topic of Brexit may now feature in some University courses but understandably, given the high degree of uncertainty in the negotiations and outcomes, many may also avoid it at this stage until things are clearer.
- A direct question and answer on Brexit will be included in online resources accompanying this text to be found at www.oup.com/uk/qanda/

KEY DEBATES

Debate: the key debate in this area is one that, to a greater or less extent, concerns all of the Member States.

Simply and essentially, that is, the extent to which the Court of Justice view on the supremacy of EU law is accepted by the Member States.

QUESTION 1

Is it the case that 'the doctrine of the supremacy of EU law is a logical if not a necessary inference from EU Treaties'?

CAUTION

- This is a very cryptic question which may confuse you as to how you go about answering it. The crucial sentence is posed as a question which, of course, has to be answered. So you have to address that.
- Do not then answer this as 'write all you know about the supremacy of the EU' and thus simply write the history or case law development of EU law supremacy. That would be to miss the more subtle aspects of the question. The annotated tips along the way will make everything clear.

DIAGRAM ANSWER PLAN

Provide definition and the EU position on supremacy of EU law

↓

Consider the leading cases: ***Van Gend en Loos, Costa v ENEL***, and ***Simmenthal***

↓

Address specific aspects of Constitutional law: ***Internationale Handelsgesellschaft*** and ***Simmenthal*** cases

↓

Discuss the key phrase in the question: 'a logical if not necessary inference'

↓

Consider the ***Factortame*** case

↓

Conclusion

SUGGESTED ANSWER[1]

[1] This clearly concerns the now well-established doctrine or principle of supremacy of EU law.

[2] A definition of the subject matter of the question is required. You need to state what you understand by the phrase 'the doctrine of the supremacy of EU law'.

Definition[2] and Treaties' position on supremacy of EU law

Supremacy of EU law means quite simply that when it comes to a clash between valid EU law and valid national law the EU takes priority. The question has suggested that the **EU Treaties** do not expressly provide for supremacy, i.e. there is at present no Treaty article which clearly states that EU law is supreme. If the **Constitutional Treaty** had entered into force, the supremacy of EU law would have been

expressly stated (in **Art I-6**). However, it is still the case that by a direct reading of either of the **EU** or **TFEU Treaties** you might not necessarily infer that EU law is supreme. However, whilst there is no express statement of supremacy in the Treaties, it can be argued that some of the articles of the **Treaties** impliedly or logically require supremacy.[3] Thus, a conclusion as to whether EU law supremacy is to be inferred from the **Treaties** depends upon a consideration of some of their provisions.[4] For example, see: **Art 4(3) TEU**, the good faith or fidelity clause; **Art 18 TFEU**, the general prohibition of discrimination on the grounds of nationality; **Art 288 TFEU** in respect of the direct applicability of Regulations; **Art 344 TFEU**, the obligation of Member States to submit only to Treaty dispute resolution; and **Art 260 TFEU**, the requirement to comply with rulings of the Court of Justice. From these Treaty Articles, you could conclude that EU law infers supremacy but cannot state that the Treaty expressly or categorically imposes it.[5]

[3] The question suggests that it 'is the case that it is a logical if not a necessary inference' and you have to determine exactly what this cryptic part of the question is demanding and must address both these contentions.

[4] Although the word 'logical' appears first I would address the part about the inference first, because this refers you to the Treaty provisions.

[5] Outline how the Treaties logically provide for supremacy, by reference to the Treaty and from the jurisprudence of the CoJ in which statements on supremacy are made.

The position of the Court of Justice

It is more through the decisions and interpretation of the Court of Justice (CoJ) that the reasons and logic for the supremacy of EU law were developed. The CoJ's view on this is quite straightforward. From its case law, notably ***Van Gend en Loos*** **(26/62)**, ***Costa*** **v** ***ENEL*** ***(6/64),*** and ***Simmenthal*** **(106/77)**, it is first of all clear that EU law is assumed to be an autonomous legal order which is related to international law and national law but nevertheless distinct from them.

The ***Van Gend en Loos*** case affirmed the Court's jurisdiction in interpreting EU legal provisions, the object of which is to ensure uniform interpretation in the Member States. The CoJ held that the Community (now Union) constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights.

Further elaboration of the new legal order in ***Van Gend en Loos*** was given in ***Costa*** **v** ***ENEL***. The case raised the issue of whether a national court should refer to the CoJ if it considers Community (now EU) law may be applicable or, as was the view of the Italian Government, simply apply the subsequent national law. The CoJ stressed the autonomous legal order of Community (now EU) law in contrast with ordinary international treaties. It held that the **EEC Treaty** has:

> created its own legal system which became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community the Member States have limited their sovereign rights and have created a body of law to bind their nationals and themselves.

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