

Law

"An Introduction to European Law" by Robert Schütze

Chapter 1– Union Institutions

1.) Introduction

- "The creation of governmental institutions is *the* central task of all constitutions" (Schütze, 2012, p. 7)

→ The EU consists of many various institutions:

- *The European Parliament
- *The European Council
- * The Council (= Council of Ministers)
- *The European Commission (=The Commission)
- *The Court of Justice of the European Union
- *The European Central Bank
- * The Court of Auditors

→ The European Treaties establish the European institutions to make, execute and arbitrate European Law

→ Focus of the "classical" four EU institutions (Parliament, Council, Commission, Court of Justice of the EU)

2.) The European Parliament

- In the past: - The European Parliament has been ranked behind the the Council and the Commission

- Minimal power

→ Since 1970, its role gradually increased

- Today: -The Parliament (together with the Council) build the chambers of the Union legislature

- It is the most supranational institution of the EU

Electing Parliament

- First: Elected through delegates of each member state (this election procedure lasts for two decades)

- Than: Union's 1976 "Election Act": The European Parliament became directly elected by the citizens" (Art. 10 (2) TEU)

- The EP has a maximum of 751 members

→ for a 5- year term by a direct universal suffrage in a free and secret ballot

→ The national "quotas" for the European parliamentary seats constitute a compromise between the *democratic principle* and the *federal principle*

(Remember: Democratic principle= each citizen has equal voting power → one vote, one seat;

Federal principle: concentrates on the political existence of states)

- The seats are proportional distributed: not purely proportional distributed, but *degressively* proportional distributed (means that a Luxembourg citizen has more voting power than a British, French or German citizen)

→ Based on the British election method "First- past- the post"

Parliamentary powers

- 1951 (Paris Treaty): EP has got "supervisory power"
- 1957 (Rome Treaty): EP has got "advisory and supervisory power"
- since TEU (Art.14): EP has got "legislative and budgetary functions; functions of political control and consultation as laid down in the Treaties [= supervisory power]; election of the President of the Commission"

I.) Legislative powers

= making of European laws

- The EP informally propose new legislation, but is not formally allowed to propose bills (this is a task of the Commission)
- The European legal order acknowledges a number of different legislative procedures:
 - *"Ordinary" legislative procedure
 - *Number of "special" legislative procedures (= cover various degrees of parliamentary participation, e. g. the "consent procedure" [Parliament must give its consent before the Council can adopt European legislation])
- Parliament cannot make positive amendments: must take- or leave the Council's position

II.) Budgetary powers

= Parliaments are involved in the adoption of national budgets

→ legitimating the *raising* of revenue

- EP's budgetary powers have not focused on the income side but on the expenditure side
- Parliament's formal involvement in the Union budget started with the 1970 and 1975 Budget Treaties
- Distinction between *compulsory* and *non-compulsory expenditure* (= not a result from compulsory financial commitments flowing from the application of European law)

III.) Supervisory powers

= holding the executive to account

- Power to *question, debate and investigate*

*Power to question (= formally enshrined only for the Commission):

- Oral or written reply with questions of the Commission to the European Parliament
- Introduction of the so-called "Question Time" (modelled on the procedure within the British Parliament)

*Power to debate (= The President has to present a "report" to the EP after each meeting of the EC or the ECB)

- Discussion in "open sessions"

*Power to investigate (= to set up temporary Committees of Inquiry to investigate alleged contraventions or maladministration in the implementation of European law)

- European citizens have the general right to "petition" the European Parliament

→ EP elects an Ombudsman (= Bürgerbeauftragten) who is empowered to receive complaints

III.) Elective powers

Remember: Modern constitutionalism distinguishes between "*presidential*" and "*parliamentary*" systems

Presidential system: the executive is independent from parliament

Parliamentary systems: executive is elected by parliament

→ European constitutional order sits somewhere "in between" (its executive was a long time selected without any parliamentary involvement)

- The appointment of the European executive thus requires a dual parliamentary consent:
 - Parliament must first elect the President of Commission
 - Secondly, it must confirm the Commission as collective body
- Once appointed, the Commission is responsible to the EP
- Where this consent is lost, Parliamentary vote on a motion of censure
 - if this vote of mistrust is carried, the Commission must resign as a body
- The motion of collective censure mirrors Parliament's appointment power, which is also focused on the Commission as a collective body
- Parliament is able to sharpen its tools of censure significantly by concluding a lack of confidence with the Commission

- Parliament is also involved in the appointment of other European officers, e. g. for the Court of Auditors, the ECB and the European Ombudsman
- Parliament is not involved in the appointment of judges of the European Court of Justice of the EU

3. The Council

=Treaty of Rome (1957) charged the Council with the task "to ensure that the objectives set out in this Treaty are attained".

→ legislative and executive functions

!The Council is not similar to the European Council. It constitutes a separate Union institution, composed of the Heads of State or Government of the Member States!

- The Council has been the central institution within the EU, since two rival institutions arose: The EP (limited the Council's legislative role within the Union) and the European Council (which restricted the Council's executive powers)

- Today, the Council can be best characterized as the "federal chamber" within the Union legislature

1.) Composition and configurations

- The composition of the EU shows up through its intergovernmental character

→ TEU (Art.16.(6)): "The Council shall consist of a representative of each Member State in question and cast its vote"

- Each national minister represents the interests of "his/her" Member State (these interests may vary depending on the subject matter decided in the Council)

These are the existing Council Configuration:

- *General Affairs
- *Foreign Affairs
- *Economic and Financial Affairs
- *Justice and Home Affairs
- *Employment, Social Policy, Health and Consumer Affairs
- *Competitiveness (Internal Market, Industry and Research)
- *Transport, Telecommunication and Energy
- *Agriculture and Fisheries
- * Environment

*Education, Youth and Culture

→ only the General Affairs Council and the Foreign Affairs Council has defined tasks:

- The General Affairs Council is charged to "ensure consistency in the work of the different Council configurations" (Schütze, 2012, p. 20)
- The Foreign Affairs Council is required to "elaborate the Union's external action on the basis of strategic guidelines laid down by the EC and ensure that the Union's action is consistent" (Schütze, 2012, p. 20)

II.) Internal structure and organs

- Committees are developed to assist the Council (composed of representatives of the Member States, since the Treaty of Rome [1957])

- These committees are called "Committees of Permanent Representatives" which is also known as its French acronym "CoRePer"

→ Coreper has two parts:

- Coreper 1 represents the meetings of their deputies (=Abgeordnete) and prepares technical remainders
- Coreper 2 represents the meeting of the ambassadors (=Repräsentanten) and prepares the more important political decisions

→ The function of Coreper is vaguely defined in the Treaties (TEU Art. 16 (7) and Art. 240 (1) TFEU): "A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council"

→ More specified: "All items on the agenda for a Council meeting shall be examined in advance by Coreper unless the latter decided otherwise. Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption" (Schütze, 2012, p. 21)

- Coreper introduced "working parties" below it (these are composed of national civil servants operating on instructions from national ministries)

→ If Coreper reached an agreement this is called an "A item" (→ does not necessarily mean that Coreper is entitled to make decisions itself! Acts only as a "preparer" for the decision-making in the Council)

→ If a point fails it is called a "B item", then it will be discussed by the ministers in the Council

III.) Decision-making and voting

- To make decisions, the Council will physically meet in Brussels

- These meetings are divided into two parts:

*One part deals with legislative activities

*The other part deals with non-legislative activities

→ The Commission will attend Council meetings, but has no vote

- Decision-making in the Council takes place in two principle forms:

1.) *Unanimity voting* (requires the consent of all national ministers and is provided in the Treaties for sensitive political questions (TEU Art. 31, TFEU Art. 113))

2.) *Majority voting* (represents the constitutional norm)

→ The Treaties distinguish between a simple and a qualified majority

Simple majority (very rare): "The Council shall act of its component members" (Art. 238 (1) TFEU)

Qualified majority (the constitutional default one): "The Council shall act by a qualified majority except where the Treaties provide otherwise" (Art. 16 (3) TEU)

- Most controversial constitutional question in the EU: What constitutes a qualified majority of Member States

in the Council?

→ The Treaties had instituted a *system of weighted votes*: A number of votes which correlated to the size of their population (→ similar to the degressively proportional system of the EP!)

- Voting ratio between the biggest and smallest states is ten to one

- Decision-making in the Council demands a triple majority (= a majority of the weighted votes must be cast by a majority of the Member States representing a majority of the Union population)

→ only until 1 November 2014!

→ a new system will be introduced then: The "*new Lisbon voting*", which will abolish the system of weighted votes in favour of a system that grants each state a single vote (Art. 16 (4) TEU)

- The "*new Lisbon system of qualified majority voting*" is designed to replace the triple majority with a similar double majority

→ includes the "*Ionina Compromise*" which turns the Council under an obligation to continue deliberations and the "*Luxembourg Compromise*" (1965, agreement among the six Member States of the EU, states that in cases of the vital national interest of one of the member states the Council would aim to find a consensus solution, thus creating a de facto veto right)

III.) Functions and powers

= legislative and budgetary functions, carries out policy making and coordinates functions as laid down in the Treaties

- Legislative function: Council is a co-legislator of the EP (acts as a branch of the bicameral Union legislature; exercises its legislative powers in public)

- Budgetary function: Council and Parliament share the exercise of budgetary function

- Policy-making: The European Council overtook the Council. The EC now decides on the general policy choices, The Council's role is limited to specific policy choices that implement the general ones

+ significant coordinating functions: To guarantee the compliance of the Treaties

4. The Commission

= technocratic character of the early EU

+ constitutes the centre of the ECSC

- In the EU, the Commission's role was marginalized by the Parliament and the Council

- with these two institutions constituting the Union legislature, the Commission is today firmly located in the executive branch

I.) Composition and election

- The Commission consists of one national of each Member State (Term of office: 5 years)

- During this term the nationals have to be "completely independent" (Schütze, 2012, p. 26)

- Originally, the Commission was appointed, now it becomes elected

→ two stages of election procedure:

1.) The President of the Commission will be elected (nominated by the EC; this candidate has to be elected by the EP. This procedure lasts until a President is elected)

2.) President+ Council adopt a list of candidate Commissioners on the basis of suggestions made by the Member States (Art. 17 (7) TEU). With the list being agreed, the proposed Commission is subjected "as a body to a vote of consent by the Parliament" → on basis of this election, the Commission shall be appointed by the EC

- this selection process includes a mixture of "international" and "national" elements
- The Commissioner's democratic legitimacy derives partly from the Member States and partly from the EP

II.) The President and "his" College

= helps in the sections of "his" institution → "Chief" Commissioner

*Powers of the President of the Commission (Art. 17 (6) TEU):

- lay down guidelines within which the Commission is to work
- decide on internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body
- appoints Vice- Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission

→ formidable powers!

*Ministerial responsibilities into which the Commission is structured (just a sort of, c. f. Schütze, 2012, p. 29)
 → climate action, competition, development, Education, Energy, Environment, Health and Consumer Policy, Regional policy, Trade, Transport

III.) Functions and powers

- The functions and powers of the Commission are provided in the Treaties (Art. 17 TEU) (c. f. p. 30)
- six different functions, the following three are the core ones:
 - 1.) To *promote* the general interests of the Union through initiatives, e. g. formally proposing legislative bills
 - 2.) *Ensuring* the application of the Treaties
 - 3.) To *act* as a guardian of the Union

4. The Court of Justice of the EU

= The Court constitutes the judicial branch of the EU

- it is composed of various courts and is called the "Court of Justice of the EU"
- that includes the "Court of Justice", the "General Court" and the "specialized Courts"
- their task is to "ensure that in the interpretation and application of the Treaties the law is observed" (Schütze, 2012, p. 33)

a.) Judicial architecture

- First: only the "Court of Justice"
- In increased workload led to the introduction of a judicial "assistant" (second court, in the SEA)
- takes the role of the "first instance", which means that it firstly hears and determines jurisdiction from the Court of Justice: Therefore, it has been called "Court of First Instance"
- has been renamed with the Treaty of Lisbon: "General Court"

b.) Jurisdiction and judicial powers

Remember: The traditional role of judges in modern societies is to act as independent arbitrators between

competing interests

The functions and powers of the Court are classified in Art. 19 (3) TEU:

- 1.) rule on actions brought by a Member State, an institution or a natural or legal person
- 2.) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions
- 3.) rule in other cases provided for in the treaties

→ the provision classifies the judicial tasks by distinguishing between direct (brought directly before the EC) and indirect action (arrives at the Court indirectly through preliminary references from national courts)

→ To sum it up, the Court of Justice of the European Union can be characterized as constitutional, administrative, and as an international court as well as an industrial tribunal

→ Claims to act like a "continental" civil law court, but has been fundamental in shaping the structure and powers of the EU as well in the nature of European law.

Chapter 3 Union competences

- The European Union is neither 'sovereign' nor a 'state'. Its powers are not inherent powers. They must be conferred by its foundational charter: the European Treaties. This constitutional principle is called the 'principle of conferral'. The Treaty on European Union defines it as follows :
 - ➔ Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the member state.
- So what is a legislative competence?
- The best definition is this: a legislative competence is the material field within which an authority is entitled to legislate.
- The Treaties do not enumerate the Union's competences in a single list. Instead the Treaties pursue a different technique: they attribute legal competences for each and every Union activity in the respective Treaty title.
- Each policy area contains a provision on which Union legislation can be based.
- Three legal developments have posed serious threats to the principle of conferral
 1. The rise of teleological interpretation -> interpretation of the Union's competences in such a way that they potentially spill over into other policy areas
 2. The rise of the Union's general competences. -> in addition to its thematic competences in specific areas, the Union enjoys two legal bases that horizontally cut across the various policy titles within the Treaties.
 3. The doctrine of implied external powers

Union competences: teleological interpretation

- A strict principle of conferral would indeed deny the Union the power autonomously to interpret its competences. But this solution encounters serious practical problems: How is the Union to work if every legislative bill would need to gain the consent of every national parliament?
- The interpretation of international treaties must be in line with the clear intentions of the member states. Legal competences will thus be interpreted restrictively.

- This restrictive interpretation is designed to preserve the sovereign rights of the states by preserving the historical meaning of the founding treaty.
- By contrast a soft principle of conferral allows for teleological interpretation of competences.
- Has the Union be able autonomously to interpret the scope of its competences and if so how?
- After a brief period of following international law logic, the Union embraced the constitutional technique of teleological interpretation
- With one famous exception, the European Court has indeed accepted all the teleological interpretations of Union competences by the Union legislator

The general competences of the Union

- In principle the Treaties grant special competences within each policy area. Yet in addition to these thematic competences, the Union legislator enjoys two general competences: Article 114/Article 115 TFEU*
- Article 114: represents the Union's harmonization competence
- Article 115: residual competence
- Both competences cut horizontally through the Union's sectoral policies, and have been used or some might say abused to develop policies not expressly mentioned in the Treaties.

The harmonization competence: Article 114

- The Union's competence to harmonize national law thus applies where national law affects the establishment or functioning of the internal market. The former alternative concerns obstacles to the four freedoms of movement, the latter alternative captures distortions of competition resulting from disparities between national laws.
- The European legislator was thus entitled to use its harmonization power to prevent future obstacles to trade a potential fragmentation of the internal market.
- Three constitutional limits to the Union's harmonization power:
 1. EU law must harmonize national laws
 2. A simple disparity in national laws will not be enough to trigger the Union's harmonization competences
 3. The Union's legislation must actually contribute to obstacles to the elimination of obstacles to free movement or distortion of competition

The residual competence: Article 352

- Allows the Union to legislate or act where it is necessary within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers.
- May be used in two ways:
 1. It can be employed in a policy title in which the Union is already given a specific competence, but where the latter is deemed insufficient to achieve a specific objective.
 2. The residual competence can be used to develop a policy area that has no specific title within the Treaties.
- Are there constitutional limits to article 352?
 - ➔ The provision expressly mentions two limitations
 1. Measures based on this article shall not entail harmonization of member states' laws or regulations in cases where the Treaties exclude such harmonization. This precludes the use of the Union's residual competences in policy areas in which the Union is limited to merely complementing national actions

2. Article 352 cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy.
- In addition to these two express boundaries the ECJ has also recognized an implied limitation to the Union's residual competence. While article 352 could be used for small amendments to the Treaties it could not be used to effect qualitative leaps that would change the constitutional identity of the European Union

The doctrine of implied (external) powers

- But what about the Union's treaty-making powers?
- The powers of the Union are enumerated powers; and under the 1957 Rome Treaty, these treaty-making powers were originally confined to international agreements under the Common Commercial Policy and Association Agreements with third countries or international organizations.
- This restrictive attribution of treaty-making powers to the Union protected a status quo in which member states were to remain the protagonists on the international relations scene.
 - ➔ Implied external powers
 - ➔ The battle over external competences began with ERTA, the European Road Transport Agreement
- The Lisbon Treaty has tried to codify the implied powers doctrine in article 216 TFEU. The provision states:
 - ➔ The Union may conclude an agreement with one or more third countries or international organizations where the Treaties provide or where the conclusion of an agreement is necessary in order to achieve within the framework of the Union's policies one of the objectives referred to in the Treaties or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
- The provision grants the Union a residual competence to conclude international agreements in three situations
 1. Article 216 confers a treaty power to the Union where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies one of the objectives referred to in the Treaties ^

The categories of Union competences

- Different types of competences constitutionally pitch the relative degree of responsibility of public authorities within a material policy field.
- Exclusive competences 'exclude' the other authority from acting within the same policy area while non-exclusive competences permit the co-existence of two legislators.
- What are the competence categories developed in the European legal order ?
 - ➔ The distinction between exclusive and non-exclusive competences had emerged early on
 - ➔ Outside the Common Foreign and Security Policy the Treaties thus expressly recognize four general competence categories: exclusive competences, shared competences, coordinating competences, complementary competences

Exclusive competences: Article 3

- Exclusive powers are constitutionally guaranteed monopolies. Only one governmental level is entitled to act autonomously. Exclusive competences are thus double-edged provisions.
- Their positive side entitles one authority to act while their negative side excludes anybody else from acting autonomously within its scope
 - ➔ Only the Union may legislate and adopt legally binding acts. The member states will only be enabled to act if so empowered by the Union or for the implementation of Union acts.

- What are the policy areas of constitutional exclusivity?
 - ➔ The first exclusive competence was discovered in the context of Common Commercial Policy
 - ➔ In addition to exclusive competences- the Union legal order thus acknowledges the possibility of dynamic growth of its exclusive competences in the external sphere.
 - ➔ According to article 3 (2) the Union may subsequently obtain exclusive treaty-making power where one of three situations is fulfilled.
- According to the first situation the Union will obtain a subsequently exclusive treaty-making power when the conclusion of an international agreement is provided for in a legislative act. This formulation corresponds to the WTO Doctrine
- The second situation mentioned in Article 3(2) grants the Union an exclusive treaty power where this is necessary to enable the Union to exercise its internal competences
- The third situation in Article 3 (2) appears to refer to the Court's ERTA Doctrine. Under ERTA doctrine, the member states are deprived of their treaty-making power to the extent that their exercise affects internal European law.
- Each time the Union adopts provisions laying down common rules whatever these may take the member states no longer have the right acting individually or even collectively to undertake obligations with third countries which affect those rules.

Shared competences: article 4

- Shared competences are the ordinary competences of the European Union. Unless the Treaties expressly provide otherwise a Union competence will be shared.
- Within a shared competence the Union and the member states may legislate. However according to the formulation in article 2 (2) TFEU both appear to be prohibited from acting at the same time.
- The member states may only legislate in that part which the European Union has not (yet) entered. Within one field either the European Union or the member states can exercise their shared competence
- For article 4 TFEU recognizes a special type of shared competence in paragraph 3 and 4. Both paragraphs separate the policy areas of research, technological development, space and development cooperation and humanitarian aid from the normal shared competences
- Special type of shared competences: parallel competences

Coordinating competences: Article 5

- Coordinating competences are defined in the third paragraph of article 2 TFEU and article 5 TFEU places economic policy, employment policy and social policy within this category.
- The Union's coordination effort may include the adoption of guidelines and initiatives to ensure coordination. It has been argued that the political genesis for this competence category should place it on the normative spectrum between shared and complementary competences.

Complementary competences: Article 6

- The term complementary competence is not used in article 2 (5) TFEU.
 - ➔ Actions to support coordinate or supplement the actions of the member states.
- Article 6: The protection and improvement of human health, industry, culture, tourism, education, vocational training, youth, sport, civil protection, administrative cooperation.
- After the Lisbon-Reform: complementary competences do not entail harmonization of member state laws or regulations
- Prohibition of harmonization ?
 1. The exclusion of harmonization means that the Union legislation must not modify existing national legislation
 2. The Union's legislative powers are only trimmed so as to prevent the de jure harmonization of national legislation

Chapter 4 Fundamental Rights

Introduction

- The protection of human rights is principally transferred onto the judiciary and involves the judicial review of governmental action. The protection of human rights may be limited to judicial review of the executive
- They are literally fundamental rights which constitutionally limit the exercise of all Union competences
- Three sources of European fundamental rights
 1. Unwritten bill of rights -> general principles of protection fundamental rights from the constitutions of the member states
 2. External bill of rights -> European Convention on Human Rights
 3. Written bill of rights -> The Charter of Fundamental Rights

The birth of European fundamental rights

- National fundamental rights would bind the European Union since the member states could not have created an organization with more power than themselves. This argument was rejected by the Court -> national fundamental rights could be no direct source of European Human Rights
- This position of the European Union towards national fundamental rights never changed. -> Implied European fundamental rights
- The famous answer was that the Union's unwritten bill of rights would be inspired by the constitutional traditions common to the member states
- While thus not a direct source national constitutional rights constituted an indirect source for the Union's fundamental rights.
- The Court would thus draw inspiration from the common constitutional traditions of the member states. One – ingenious- way of identifying a common agreement between the various national constitutional traditions was to use international agreements of the member states.

The European standard – an autonomous standard

- Human rights express together with the institutional structures of a polity the fundamental values of a society.
- What about the European Convention on Human Rights as a Union standard?
 - ➔ The Convention has indeed developed into a standard that is (partly) independent from what the Court sees as the constitutional traditions of the member states
 - ➔ This interpretative freedom has created the possibility of a distinct Union standard
- Today there are strong textual reasons for claiming that the European Convention is materially binding on the Union. For according to the (new) Article 6(3) TEU fundamental rights as guaranteed by the Convention shall constitute general principles of the Union's law.
- In conclusion the Union standard for the protection of fundamental rights is an autonomous standard. While drawing inspiration from the constitutional traditions common to the member states and the European Convention on Human Rights, the Court of Justice has – so far- not considered itself directly bound by a particular national or international standard.

Limitations and limitations on limitations

- Nonetheless liberal societies would cease to be liberal if they permitted unlimited limitations to human rights in pursuit of the public interest. Many legal orders consequently recognize limitations on public interest limitations.
- According to the principle of proportionality each restriction of a fundamental right must be proportional in relation to the public interest pursued
- This sets an absolute limit to all governmental power by identifying an untouchable core

United Nations law: external limits to European human rights?

- The European legal order is a constitutional order based on the rule of law. This implies that an individual where legitimately concerned must be able to challenge the legality of a European act on the basis that his or her human rights have been violated. Should there be exceptions to this constitutional rule?
- The General Court thus declined jurisdiction to directly review European legislation because it would entail an indirect review of the United Nations resolution. The justification for this self-abdication was that United Nations law was binding on all Union institutions, including the European Courts
- The United Nations Charter while having special importance within the European legal order, would in this respect not be different from other institutional agreements. Like ordinary international agreements, the United Nations Charter might if materially binding have primacy over European legislation but that primacy at the level of European law would not however extend to primary law, in particular to the general principles of which fundamental rights form part.

The Charter of Fundamental Rights

- The initiative for a Charter of Fundamental Rights came from the European Council which transferred the drafting mandate to a European Convention. The idea behind an internal codification was to strengthen the protection of a fundamental rights behind in Europe by making those rights visible in a Charter.
- The Charter reaffirms the rights that result in particular from the constitutional traditions common to the member states, the European Convention on Human Rights and the general principles of European law.
 1. The Charter aims to codify existing fundamental rights and was thus not intended to create new ones.
 2. It codifies European rights from various sources –and thus not solely the general principles found in the European Treaties.
- The Charter divides the Union's fundamental rights into six classes.
- The general principles on the interpretation and application of the Charter are finally set out in Title 7. These general provisions establish four fundamental principles.
 1. The Charter is addressed to the Union and will only exceptionally apply to the member states.
 2. Not all provisions within the Charter are rights, that is: directly effective entitlements to individuals.
 3. Rights within the Charter can, within limits be restricted by Union legislation.
 4. The Charter tries to establish harmonious relations with the European Treaties and the European Convention as well as with constitutional traditions common to the member states.

(Hard)rights and (soft)principles

- It is important to note that the Charter makes a distinction between (hard) rights and (soft) principles. Hard rights that will have direct effect and can as such be invoked before a court. Not all provisions within the Charter are rights in this strict sense.

- Principles indeed come closer to orienting objectives which do not however give rise to direct claims for positive action by the Union institutions. They are not subjective rights but objective guidelines.
- The difference between rights and principles is thus between a hard and a soft judicial claim. An individual will not have an (individual) right to a high level of environmental protection but may claim that the Union violated the (governmental) principle when adopting too low a standard.
- In line with the classic task of legal principles, the courts must thus generally draw inspiration from Union principles when interpreting European law.
- But how is one to distinguish between "rights" and "principles"? Sadly the Charter offers no catalogue of principles

Limitations and 'limitations on limitations'

- Every legal order protecting fundamental rights recognizes that some rights can be limited to safeguard the general interest. For written bills of rights these limitations are often recognized for each constitutional rights.
- But be that as it may, any legitimate limitation must be provided for 'by law' This (new) requirement seems to outlaw autonomous executive interventions into fundamental rights.

The external bill of rights: the European Convention on Human Rights

- The European Convention on Human Rights: From the very beginning the Court of Justice took the Convention very seriously, sometimes even too seriously.

Before accession: (limited) indirect review of Union law

- The Union is still not a formal party to the European Convention. Could the member states thus escape international obligations under the Convention by transferring decision-making powers to the European Union?
- Indirect review of Union acts by establishing the doctrine of (limited) direct responsibility of member states for acts of the Union.
- The Commission found that whereas the Convention does not prohibit a member state from transferring powers to international organisations a transfer of powers does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of the transferred powers.
- The state was to be held responsible for all actions of the Union. It would be contrary to the very idea of transferring powers to an international organisation to the very idea of transferring powers to an international organisation to hold the member states responsible for examining possible violations in each individual case.
- Member states would consequently not be responsible for every compulsory European Union act that violated the European Convention.
- The lower review standard represented a compromise between two extremes: No control as the Union was not a member and full control even in situations in which the member states acted as mere agents of the Union. This compromise was the price for Strasbourg achieving a level of control over the EU while respecting its autonomy as a separate legal order

After accession: (full) direct review of Union law

- The replacement of an indirect review by a direct review should also at least in theory lead to the replacement of a limited review by a full review.
- Yet the life of law is not always logic and the Strasbourg Court may well decide to cherish past experiences by applying a lower review standard to the acceded European Union.

- However what is certain already is that accession will widen the scope of application of the European Convention to include direct Union action. For the past the indirect review of Union acts was based on the direct review of member state acts implementing Union acts.
- Henceforth all direct Union actions would fall within the jurisdiction of the Strasbourg Court. Thus even if a lower external standard were to continue it would henceforth apply to all Union acts and not just acts executed by the member states.

Chapter 5 Direct effect

Introduction

- Classic international law holds that each state can choose the relationship between its domestic law and international law. Two constitutional theories thereby exist: Monism & Dualism
- International law is viewed as the law between states
- National law is the law within states.
 - ➔ While international treaties are thus binding on states, they cannot be binding in states
 - ➔ International law needs to be transposed or incorporated into domestic law and will thus only have indirect effects through the medium of national law
- Did European law leave the choice between monism and dualism to its member states?
 - ➔ The European Court indeed confirmed that some Treaty provisions would be self-executing in the national legal orders.
 - ➔ European treaties are framework treaties: they primarily envisage the adoption of European secondary law

Article 288 TFEU

1. To exercise the Union's competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions
2. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states
3. 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
4. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
5. Recommendations and opinions shall have no binding force.

- The provision acknowledges three binding legal instruments:
 1. Regulations
 2. Directives
 3. Decisions
- And two non-binding legal instruments

Direct applicability and direct effect

- The Union was entitled to adopt legal acts that were to be directly applicable in all member states.
- From the very beginning the Treaties also established a constitutional mechanism that envisaged the direct application of European law by the national courts
- The court confirmed the independence of the European legal order from classic international law. Unlike ordinary international law the European treaties were more than agreements creating mutual obligations between states.
 - ➔ Individuals are subject of European law and their rights and obligations derive directly from European law

- European law is thus directly applicable in the national legal orders
- The European legal order could itself determine the nature and effect of European law within the national legal orders.
- The direct applicability of European law thus allowed the Court centrally to develop two foundational doctrines of the European legal order
 1. Doctrine of direct effect
 2. Doctrine of supremacy
- Direct effect requires direct applicability but not the other way around.
- The direct applicability of a norm makes its direct effect possible

Direct effect of primary law

- Two views competed before the European Court
 1. According to the international view legal rights of private parties could not derive from the Treaties or the legal measures taken by the institutions, but solely from legal measures enacted by member states
 2. According to the constitutional view by contrast European law was capable of directly creating individual rights.
- The Court famously favoured the second view. It followed from the spirit of Treaties that European law was no ordinary international law. It would thus of itself be directly applicable in the national legal orders
- Wherever the Treaties contain a 'prohibition' that was 'clear' and 'unconditional' it will have direct effect. Being an unconditional prohibition thereby required two things
 1. The European provision had to be an automatic prohibition that is: it should not depend on subsequent positive legislation by the European Union.
 2. The prohibition should ideally be absolute that is: 'not qualified' by any reservation on the part of the states

Direct effect: from strict to lenient test

- The direct effect test set out in Van Gend was informed by three criteria
 1. The provision has to be clear
 2. It had to be unconditional in the sense of being an automatic prohibition.
 3. This prohibition would need to be absolute that is: not allow for reservations. In its subsequent jurisprudence the Court expanded the concept of direct effect on all three fronts
- How clear would a prohibition have to be to be directly effective ?
 - Lenient interpretation
- When is a prohibition automatic ?
- Could relative prohibitions even if clear ever be directly effective?
- Today the simple test is this:
 - A provision has direct effect when it is capable of being applied by a national court.
 - Importantly direct effect does not depend on a European norm granting a subjective right but on the contrary the subjective right is a result of a directly effective norm.
 - A norm can be invoked and applied by a court and this is the case when the Court of Justice says it is.
 - Today almost all Treaty prohibitions have direct effect- even the most general ones

Vertical and horizontal direct effect

- Where a Treaty provision is directly effective an individual can invoke European law in a national court (or administration). This will normally be against the state.
 - ➔ Vertical effect since the state is above its subjects
 - ➔ The legal effect of a norm between private parties is thus called horizontal effect
 - ➔ The horizontal direct effect of Treaty provisions has never been in doubt for the Court.
- The question whether a Treaty prohibition has horizontal direct effect must however be distinguished from the question whether it also prohibits private actions. The latter is not simply a question of the effect of a provision, but rather of its personal scope
- Many Treaty prohibitions are- expressly or impliedly- addressed to the state.
- Treaties equally contain provisions that are directly addressed to private parties.

Direct effect of secondary law: directives

- The Treaties envisaged two instruments that were designed to contain norms that were directly effective: regulations and decisions
- Directive: lack of capacity -> 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 -> binding on states but not within states -> directives would have no validity in the national legal orders.
- They seemed not to be directly applicable and would thus need to be incorporated or implemented through national legislation
- Could this indirect Union law have direct effects?
 - ➔ The Court confirmed that under certain circumstances directives could have direct effect and thus entitle individuals to have their European rights applied in national courts.
 - ➔ 2 limitations: 1. Temporal 2. Normative
 - ➔ Direct effect would only arise after a member state had failed properly to implement the directive and then only in relation to the State authorities themselves.
 - ➔ No-horizontal-direct-effect-rule

Direct effect of directives: conditions and limits

- The directives could directly rise to rights that individuals could claim in national courts was accepted in the *Van Duyn v. Home Office* case.
- Arguments
 1. The fact that a directive is not binding in national law is not 'incompatible' with its binding effect under international law.
 2. To enhance the useful effect of a rule by making it more binding is a political argument
 3. While it is true that the preliminary reference procedure generically refers to all acts of the institutions it could be argued that only those acts that are directly effective can be referred.
 4. A member state which has not adopted the implementing measures required by the directive in the prescribed periods may not rely as against individuals on its own failure to perform the obligations which the directive entails.
 - The direct effect test for directives differs from that for ordinary Union law as it added a temporal and a normative limitation
 - Temporally the direct effect of directives could only arise after the failure of the state to implement the directives occurred.

- Thus before the end of the implementation period granted to member states no direct effect can take place
- Once this temporal condition has been satisfied the direct effect would operate only as against the state
- The normative limitation on the direct effect of directives has become famous as the 'no-horizontal-direct-effect-rule'.

The no-horizontal-direct-effect-rule

- 1970s: extension of the direct effect of Union law to directives. An individual could claim her European rights against a State that had failed to implement a directive into national law.
- Arguments against the horizontal direct effect:
 1. A directive is binding in relation to each member state to which it is addressed.
 2. Estoppel argument: the direct effect for directives exists to prevent a state from taking advantage of its own failure to comply with European law.
 3. If horizontal direct effect was given to directives the distinction between directives and regulations would disappear.
- Since directives were not published they must not impose obligations on those to whom they are not addressed.
- Directives cannot directly impose obligations on individuals. They lack horizontal direct effect. This constitutional rule of European law has nonetheless been qualified by one limitation and one exception.

The limitation to the rule: the wide definition of state (actions)

- One way to minimize the no-horizontal-direct-effect rule is to maximize the vertical direct effect of directives
 - ➔ Extremely extensive definitions to what constitutes the state and what constitute public actions
- What public authorities count as the state? ->the state's central organs
- Court: direct effects are binding upon all authorities of the member states. This includes all organs of administration, including decentralized authorities such as municipalities even constitutionally independent authorities.
- Maximalist approach: Covers private bodies endowed with public functions
- Only public acts (acts adopted in pursuit of a public function,) would be covered. Yet there are situations where the state acts horizontally like a private person: it might conclude private contracts and employ private personnel
- According to the Court an individual could rely on a directive as against the state
- Vertical direct effect would thus not only apply to private parties exercising public functions but also to public authorities engaged in private activities.

The exception to the rule: incidental horizontal direct effect

- In two previous situations the Court respected the rule that directives could not have direct horizontal effects but limited the rule's scope of application.
- Yet in some cases the Court found a directive directly to affect the horizontal relations between private parties.
 - ➔ Exception to the rule.
 - ➔ CIA Security and Unilever Italia

- The Court thus did create an exception to the principle that a directly effective directive cannot itself apply in proceedings exclusively between private parties.

Indirect effects: The doctrine of consistent interpretation

- Norms may have direct and indirect effects.
- The lack of direct effect means exactly that: The norm cannot itself- that is directly be invoked. However European law may still have indirect effects on the interpretation of national law.
- The duty of consistent interpretation is a duty to achieve the desired result by indirect means.
- Where a directive is not sufficiently precise to have direct effect it is –theoretically addressed to the national legislator in order to be concretized in content and brought in line with its own national views
- To implement the directive judicially through a European interpretation of national law
- The duty of consistent interpretation may lead to indirect implementation of a directive for it can indirectly impose a new obligation both vertically and horizontally.
- The doctrine of indirect effect thus changed the horizontal relations between two private parties.
- The duty of consistent interpretation has consequently been said to amount to ‘de facto’ horizontal direct effect of the directive.
- This de facto horizontal effect is however an indirect effect for it operates through the medium of national law.
- The European Court thus accepts that there exist established national judicial methodologies and has permitted national courts to limit themselves to the application of interpretative methods recognised by national law
- This has been taken to imply that the indirect effect of directives cannot aggravate the criminal liability of a new private party as criminal law is subject to particularly strict rules of interpretation. But more importantly the Court recognizes that the clear and unambiguous wording of a national provision constitutes an absolute limit to its interpretation.
- In giving indirect effect to Union law national courts are therefore not required to stretch the medium of national law beyond breaking point.
- They are only required to interpret the text not to amend it. The latter continues to be the task of the national legislatures and not the national judiciaries.
- The indirect horizontal effect of European law is consequently limited through the medium of national law.

Chapter 6 (Legal) Supremacy

Introduction

- Since European law may have direct effect, it might come into conflict with national law in a specific situation
- The resolution of legislative conflicts requires a hierarchy of norms. -> federal law is supreme over state law (federations) -> centralist solution
- A decentralized solution is also possible: local law may reign supreme over central law.
- Supremacy and direct effect are thus not different sides of the same coin
- The simplest supremacy format is one that is absolute: all law from one legal order is superior to all law from the other.
- Two perspectives on the supremacy question:
 1. According to the European perspective all Union law prevails over all national law -> absolute view is not shared by the member states
 2. According to the national perspective the supremacy of European law is relativ: some national law is considered to be beyond supremacy of European law.
- National challenges to the absolute supremacy of European law are traditionally expressed in two contexts:
 1. Some Supreme Courts of the member states have fought a battle over human rights within the Union legal order. They claim that European law cannot violate national fundamental rights -> e.g European Court of Justice and the German Constitutional Court
 2. Ultra vires control: Member states here insist that they have the last word with regard to the competences of the Union.

The European perspective: absolute supremacy

- The strong dualist tradition within two of the member states in 1958 posed a serious legal threat to the unity of the Union legal order.
- Even in monist states the supremacy of European law will find a limit in the state's constitutional structures.

Supremacy over internal law of the member states

- Could the member states thus unilaterally determine the status of European law in their national legal order?
 - ➔ The Court rejected this reading and distanced itself from the international law thesis
 - ➔ European law would reign supreme over national law since its executive force must not vary from one state to another.
- But how supreme was European law?
 - ➔ The fact that the European Treaties prevailed over national legislation did not automatically imply that all secondary law would prevail over all national law
 - ➔ The validity of European law could thus not be affected- even by the most fundamental norms within the member state

Supremacy over international treaties of the member states

- In the event of a conflict between the two it was European law that could be disapplied within the national legal orders.

Supremacy's executive nature: disapplication, not invalidation

- What are the legal consequences of the supremacy of European law over conflicting national law?
- Must a national court hold such provisions inapplicable to the extent to which they are incompatible with (European) law, or must it declare them void?
- According to one view, supremacy indeed meant that national courts must declare conflicting national law void. European law would break national law. Yet the court preferred a milder view
 - Where national measures conflicted with European law the supremacy of European law would thus not render them void, but only inapplicable. Not invalidation but disapplication was required of national courts where European laws came into conflict with pre-existing national law.
 - The Union legal order while integrated with the national legal orders is not a unitary legal order. European law leaves the validity of national forms untouched and will not negate the underlying legislative competences of the member states.
 - The supremacy principle is thus not addressed to the state legislature but to the national executive and judicial branches.
 - This medial supremacy doctrine has a number of advantages
 1. Some national legal orders may not grant their (lower) courts the power to invalidate parliamentary laws. The question of who may invalidate national laws is thus left to the national legal order.
 2. Comprehensive national law must only be disappplied to the extent to which they conflict with European law.
 3. Once the Union act is repealed national legislation may become fully operational again.

National challenges 1: fundamental rights

- The European Union is not a federal state in which the sovereignty question is solved
- A first national challenge to the absolute supremacy of European law crystallized around Internationale Handelsgesellschaft
- The German Constitutional Court rejected the European Court's vision and replaced it with its counter-theory of the relative supremacy of European law.
- The reasoning of the German Court was as follows: while the German Constitution expressly allowed for the transfer of sovereign powers to the European Union in its Article 24 such a transfer was itself limited by the constitutional identity of the German State. Fundamental constitutional structures thus beyond the supremacy of European law.

National challenges 2: competences limits

- With the constitutional conflict over fundamental rights (temporarily) settled a second concern emerged: the ever-growing competences of the European Union.
- Who was to control and limit the scope of European law? Was it enough to have the European legislator centrally controlled by the European Court of Justice?
- Or should the national constitutional courts be entitled to a decentralized ultra vires review?
 - National courts cannot disapply let alone invalidate European law
 - This limits of the national review of European law to specific and manifest violations of the principle of conferral. There was thus a presumption that the Union institutions would generally act intra vires and only clear and exceptional violations.
 - It proves the continued existence of two political levels that compete for the loyalty of their citizens. Sovereignty within the Union thus continues to be contested.

Chapter 7 National actions

Introduction

- The European Union is based on a system of cooperative federalism all national courts are entitled and obliged to apply European law to disputes before them.
- The relationship between national courts and the European Court is based on their voluntary cooperation.
- From the very beginning the Treaties contained a mechanism for the interpretative assistance of national courts: the preliminary reference procedure
- National courts are the primary enforcers of European law. And the European legal order has traditionally recognized the procedural autonomy of the national judiciary in the enforcement of European law.
- The European Court thus established a European remedy in the national courts: the principle of state liability .
- Where an individual had not been able to enforce its European rights in a national court it could- under certain conditions- claim compensatory damages resulting from a breach of European law.

Preliminary rulings: General aspects

- Where national courts encounter problems relating to the interpretations of European law they can ask 'preliminary questions' of the European Court.
- The questions are 'preliminary' since they precede the application of European law by the national court. The preliminary rulings procedure indeed constitutes the cornerstone of the Union's judicial federalism.

The jurisdiction of the European Court

- Preliminary references may thus be made in relation to two judicial functions. They can concern the interpretation of European law.
- This includes all types of European law – ranging from the deepest constitutional foundations to the loftiest soft law.
- But national courts can equally ask about the validity of European law. The European legal order however insists on the exclusive power of the European Court of Justice to declare European acts invalid.

The legal nature of preliminary rulings

- Preliminary references are not appeals. They are discretionary acts of a national court asking for interpretative help from the European Court
- Once the latter has given a preliminary ruling this ruling will be binding. But whom will it bind- the parties to the national dispute or the national court(s)?
- Preliminary rulings cannot bind the parties in the national dispute since the European Court will not decide their case.
- It is therefore misleading to even speak of a binding effect inter partes in the context of preliminary rulings
- The Court's rulings are addressed to the national courts requesting the reference and the Court has clarified that that ruling is binding on the national courts as to the interpretation of the (Union) provisions and acts in question
 - ➔ Preliminary ruling equivalent to a decision addressed to a single court or will the European Court's interpretation be generally binding on all national courts?
 - ➔ The Court has long clarified that a preliminary ruling is not a decision indeed it is not even seen as an external act of a Union institution.

→ What then is the nature of a preliminary ruling? Two views:

1. According to the common law view, preliminary rulings are if not de jure at least de facto legal precedents that generally bind all national courts. Judgments of the European Court are binding erga omnes. -> transformation from a horizontal and bilateral relationship to a vertical and multilateral one.
 2. Accordingly its judgements do not create new legal rules but only clarify old ones.
- The vertical and multilateral effects of preliminary rulings are thus mediated through the positive rule interpreted and not as the common law view asserts, through a doctrine of precedent.
 - In the light of the civilian judicial philosophy of the European Court its judgements are not generally binding.
 - Are there constitutional problems with the Union's civil law philosophy? There indeed are temporal problems
 - For the declaratory effect of the preliminary ruling generally generates retroactive effects.

Preliminary rulings: special aspects

- Article 267 (2) defines the competences of national courts to ask preliminary questions.
- The provision allows any court or tribunal of a member state to ask a European law question that is necessary to enable it to give judgement

Who: national courts and tribunals

- Article 267 directly refers to judicial authorities and thus indirectly excludes administrative authorities.
- But what exactly is a court or tribunal that can refer questions to the Court of Justice
 - The treaties provide no positive definition.
 - Therefore an authority that is not independent from the state's administrative branch is not a court or tribunal in the meaning of European law.
 - A national court or tribunal at any level of the national judicial hierarchy and at any stage of its judicial procedure is thus entitled to refer a preliminary question to the European Court of Justice.
 - National rules allowing for an appeal against the decision of a national court to refer a preliminary question to the European Court thus violates the autonomous jurisdiction which Article 267 TFEU confers on the referring court.

What: necessary questions

- National courts are entitled to request a preliminary ruling where there is a question on which they consider it necessary for judgment to be given.
- Moreover the Court will generally not criticize the grounds and purpose of the request for interpretation.
- Nonetheless in very exceptional circumstances the Court may reject a request for a preliminary ruling.
- The Court of Justice has thus imposed some jurisdictional control on requests for preliminary rulings. To prevent an abuse of the Article 267 procedure the European Court will be able to check as all courts must whether it has jurisdiction.

The obligation to refer and 'acte clair'

- While any national courts may refer a question to the European Court under paragraph 2 Article 267 (3) imposes an obligation
 - „ Where any such question is raised in a case pending before a court or tribunal of a member state against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court“

- What is the scope of this obligation?
 1. Under the institutional theory, the formulation refers to the highest judicial institution in the country. This would restrict the obligation to refer preliminary questions to a single court in a member state
 2. The procedural theory links the definition of the court of last instance to the judicial procedure in the particular case
 - The European Court has judicially amended the provision in two significant ways.
 1. Amendment relates to references on the validity of European law -> all national courts must refer validity questions to the European Court.
 2. Has limited the obligations to refer preliminary questions. This limitation followed from constitutional common sense. -> Where the answer is clear there may be no need to raise a question.
- *Acte clair*: Where it is clear how to act a national court need not ask a preliminary question

National remedies: Equivalence and effectiveness

- The duty of sincere cooperation imposes two limitations on the procedural autonomy of the member states: The principle of equivalence and the principle of effectiveness. -> Rewe
 1. National procedural rules cannot make the enforcement of European rights less favourable than the enforcement of similar national rights. This prohibition of procedural discrimination is the principle of equivalence.
 2. National procedural rules even if not discriminatory ought not to make the enforcement of European rights impossible in practice -> principle of effectiveness.
- Both principles have led to a judicial harmonization of national procedural laws

The equivalence principle

- The idea behind the principle of equivalence is straightforward: national procedures are remedies for the enforcement of European rights 'cannot be less favourable than those relating to similar actions of a domestic nature.
- When applying European law national courts must act as if they were applying national law. National procedures and remedies must not discriminate between national and European rights.
- But what are equivalent or similar actions ?
- For the equivalence principle requires national courts to evaluate 'whether the actions concerned are similar as regards their purpose cause of action and essential characteristics'.
- Three periods of evolution:
 - Period of restraint -> is replaced by a period of invention -> period of balance
 - Each of these periods corresponds to a particular effectiveness standard
 - The European Court of Justice began to develop the principle from a minimal standard
 - Maximum standard insisting on the 'full effectiveness' of European law
 - This maximum standard was eventually replaced by a medium standard in a third period
 - In this third period the Court tried and still tries to find a balance between the minimum and the maximum standard of effectiveness.
 - The Court here had recourse to a stronger alternative to the (minimal) impossibility standard: national procedures would equally make the exercise of European rights 'excessively difficult' would equally fall foul of the principle of effectiveness.
 - The medium standard lies in between the minimum and the maximum standard.

State liability: the Francovich doctrine

- What would happen if no national remedy existed? Would the non-existence of a national remedy not be an absolute appeared to insist that the European Treaties were not intended to create new remedies in the national courts to ensure the observance of (Union) law other than those already laid down by national law.

The birth of the Francovich doctrine

- 1990: The Court receives a series of preliminary questions in Francovich and others vs Italy. Italy had flagrantly flouted its obligations under the Treaty by failing to implement a European directive designed to protect employees in the event of their employer's insolvency
- The directive had required member states to pass national legislation guaranteeing the payment of outstanding wages.
- In the course of second proceedings the national court asked the European Court whether the State itself would be obliged to cover the losses of employees.
- It followed that the person concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.
- The principle of State liability was thus rooted in the constitutional traditions common to the member states and was equally recognized in the principle of Union liability for breaches of European law. There was consequently a parallel between State liability and Union liability for tortious acts of public authorities. And this parallelism would have a decisive effect on the conditions for State liability for breaches of European law.

The three conditions for State liability

1. The result prescribed by the directive should entail the grant of rights to individuals
2. It should be possible to identify the content of those rights on the basis of the provisions of the directive
3. The existence of a causal link between the breach of the State's obligation and the loss and damage of suffered by the injured parties.
 - The original liability test: The European act must have been intended to grant individual rights and these rights would despite their lack of direct effect have to be identifiable.
 - On its face this test appeared to be complete and was thus one of strict liability: any breach of an identifiable European right would give rise to State liability.
 - A more restrictive principle of State liability in Brasserie du pecheur -> Court here clarified that state liability was to be confined to sufficiently serious breaches.
 - The new liability test could thus continue to insist on three – necessary and sufficient conditions but now read as follows:
 - ➔ European law confers a right to reparation where three conditions are met. 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 of the obligation resting on the State and the damage sustained by the injured parties.
 - ➔ Nonetheless the European Court distinguishes the incorrect implementation of a directive from its non-implementations. The use of a stricter liability regime for legislative non-action makes much sense for the failure of the state cannot be excused by reference to the exercise of legislative discretion.

Chapter 8 European actions

Introduction

- The European Treaties establish a dual enforcement mechanism for European law. Apart from the decentralized enforcement by national courts, the Union legal order envisages the centralized enforcement of European law in the European Courts

Judicial competences and procedures (Articles 158-281 TFEU)

Article 258	Enforcement Action brought by the Commission	Article 268	Jurisdiction in Damages Actions under Article 340
Article 259	Enforcement Action brought by another member state	Article 269	Jurisdiction for Article 7 TEU
Article 260	Action for a failure to comply with a court judgment	Article 270	Jurisdiction in Staff Cases
Article 261	Jurisdiction for penalties in regulations	Article 271	Jurisdiction for Cases involving the European Investment Bank and the European Central Bank
Article 262	(Potential) Jurisdiction for disputes relating to European intellectual property rights	Article 272	Jurisdiction granted by Arbitrary Clauses
Article 263	Action for judicial review	Article 273	Jurisdiction granted by special agreement between member states
Article 265	(Enforcement) Action for the Union's failure to act	Article 274	Jurisdiction of national courts involving the Union
Article 267	Preliminary rulings	Article 275	Non-jurisdiction for the Union's Common Foreign and Security Policy
		Article 276	Jurisdictional limits within the Area of Freedom, Security and Justice
		Article 277	Collateral (Judicial) Review for acts of general application

Enforcement actions against member states

- Where a member state breaches European law the central way to enforce the Treaties is to bring that state before the European Court
- The European legal order envisages two potential applicants for enforcement actions against a failing member state: The Commission and another member state

The procedural conditions under article 258

- 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.
 - ➔ If the state concerned does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice and the European Union
- The provision clarifies that before the Commission can bring the matter to the Court it must pass through an administrative stage. -> to give the member state the opportunity on the one hand to comply with its obligations under (European) law and on the other to avail itself of its right to defend itself against the complaints made by the Commission.
- In the 'letter of formal notice' the Commission will notify the state that it believes it to violate European law and ask it to submit its observations
- Where the Commission is not convinced by the explanations offered by a member state it will issue a reasoned opinion and after that second administrative stage it will go to court.
- The Commission can raise any violations of European law including breaches of the Union's international agreements. -> breach must be committed by the state which includes its legislature, executive and its judiciary
- Breaches of European law by one member state cannot justify breaches by another.

Judicial enforcement through financial sanctions

- The European Court is not entitled to void national law that violates European law. It may only declare national laws or practices incompatible with European law.
- It remains within the competences of the member states to remove national law or practices that are incompatible with European law.
- Nonetheless the Union legal order may punish violations by imposing financial sanctions on a recalcitrant state.
- The failure of a member state properly to transpose a directive: Where a member state fails to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure the Commission can apply for a financial sanction in the first enforcement action.

Actions against the Union: failure to act

- Enforcement actions primarily target a member state's failure to act properly
 - ➔ Infringement proceedings may also be brought against Union institutions
- An action for failure to act may thus be brought against any Union institution or body with the exception of the Court of Auditors and the European Court.
- It can be brought by another Union institution or body a member state and even a private party.
- As with enforcement actions against a member state the procedure is divided into an administrative and a judicial stage. The judicial stage will only commence once the relevant institution has been called upon to act and has not defined its position within two months.

Annulment actions: judicial review

- The action for judicial review in the European Union legal order is set out in Article 263 TFEU.

'Whether': the existence of a reviewable act

- Paragraph 1 determines whether there can be judicial review. This question has two dimensions:
 1. Relates to whose acts may be challenged
 2. Clarifies which act might be reviewed

- According to Article 263 (1) the Court is entitled to review 'legislative acts' that is: acts whose joint authors are the European Parliament and the Council. It can also review unilateral acts of all Union institutions and bodies except for the Court of Auditors.
- By contrast the Court cannot judicially review acts of the member states including unilateral national acts as well as international agreements of the member states.
- The European Treaties thus cannot despite their being the foundation of European law be reviewed by the Court.
- Accordingly there will be no judicial review for recommendations or opinions. The reason for this exclusion is that both instruments have no binding force and there is thus no need to challenge their legality.
- The provision equally excludes judicial review for acts of the European Parliament and the European Council and of other Union bodies.
- The Court has thus clarified that purely preparatory acts of the Commission or the Council cannot be challenged. An act is open to review only if it has a measure definitely laying down the position of the Commission or the Council.

Why legitimate grounds for review

- The extent of judicial review will differ depending on whether a procedural or a substantive version is chosen. The British legal order has traditionally followed a procedural definition of the rule of law.
- For the European legal order Article 263 (2) TFEU limits judicial review to four legitimate grounds: 'lack of competence', infringement of an essential procedure requirement, infringement of the Treaties or any rule of law relating to their application and misuse of powers.

Formal and substantive grounds

- The Union legal order recognizes three formal grounds of review.
 1. A European act can be challenged on the ground that the Union lacked the competence to adopt it. The review of a European act originates in the principle of conferral. Since the Union may only exercise those powers conferred on it by the Treaties any action beyond these powers is ultra vires and thus voidable. Secondary legislation: horizontal principle protecting institutional balance within the Union.
 2. Second a Union act can be challenged if it infringes an essential procedural requirement.
 3. Misuse of power: Which has remained relatively obscure. The subjective rationale behind it is the prohibition on pursuing a different objective from the one underpinning the legal competence.

Proportionality: a substantive ground

- The constitutional function of the proportionality principle is to protect liberal values. It constitutes one of the oldest general principles of the Union legal order.
- How will the Court assess the proportionality of a Union act?
 - The Court has developed a proportionality test
 - Tripartite structure: it analyses the suitability, necessity and proportionality of a Union act.
 - Proportionality in a strict sense thus weighs whether the burden imposed on an individual is excessive or not

'Who': legal standing before the European Court

- The Treaties distinguish between three types of applicants in three distinct paragraphs of Article 263 TFEU
 1. Privileged applicants are: the member states, the European Parliament, the Council and the Commission ->ex officio deemed to be affected by the adoption of a Union act

2. Semi-privileged: Court of Auditors, the European Central Bank, the Committee of the Regions -> may solely bring review proceedings for the purpose of protecting their prerogatives.
3. Non-privileged: natural or legal persons -> as they must demonstrate that the Union act affects them specifically

The Rome formulation and its judicial interpretation

- The Rome Treaty granted individual applicants the right to apply for judicial review in ex-article 230 (4) EC.
- Allowed any natural or legal person to institute proceedings against a decision addressed to that person against a decision which although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.
- First the drafters of the Rome Treaty had wished to confine the standing of private parties to challenge of individual decisions (administrative acts)
- The Rome Treaty hereby distinguished between three types of decisions
 1. Decisions addressed to the applicant
 2. Decisions addressed to another person
 3. Decisions in the form of a regulation
 - ➔ Only those decisions that were of direct and individual concern to a private party could be challenged. And while this concern was presumed for decisions addressed to the applicant, it had to be proven for all other decisions.
 - ➔ Plaumann test: If private applicants wish to challenge an act not addressed to them it is not sufficient to rely on the adverse- absolute-effects that the act has on them. Instead they must show that relative to everybody else the effects of the act are peculiar to them
 - ➔ The Plaumann test is therefore very strict: Whenever a private party is a member of an open group or persons -> legal standing under ex-article 230

The Lisbon formulation and its interpretative problems

- The Lisbon Treaty has substantially amended the Rome formulation. The standing of private parties is now enshrined in Article 263 (4) TFEU which allows any natural or legal person to 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
- However depending on the nature of the act article 263 (4) TFEU still distinguishes three scenarios
 1. Decisions addressed to the applicant can automatically be challenged
 2. For regulatory acts the private party must prove direct concern
 3. For all other acts the applicant must continue to show direct and individual concern
 - ➔ The Treaty of Lisbon therefore only abandoned the requirement of an individual concern only for the second but not the third category of acts.
- What are regulatory acts ? -> Term is defined in the Treaties

Damages actions: Union liability

- Where the Union has acted illegally may the Court grant damages for losses incurred?

Procedural conditions: From dependent to independent action

- The action for damages under article 340 (2) started its life as a dependent action that is: an action that hinged on the prior success of another action.
- What are the procedural requirements for liability actions?
 - ➔ The proceedings may be brought against any Union action or inaction that is claimed to have caused damage. The act (or omission) must however be an official act that is : it must be attributable to the Union. Unlike article 263 TFEU there are no limitations on the potential

applicants: anyone who feels wronged by a Union (in)action may bring proceedings under article 340

→ Liability actions can be brought within a five-year period

Substantive conditions: from Schöppenstedt to Bergaderm

- The constitutional regime governing the substantive conditions for liability actions may be divided into two historical phases.
 1. The European Court distinguished between administrative and legislative Union acts.
 - Union would be liable for almost any illegal action that has caused damage
 2. Legislative action involving measures of economic policy is concerned the (Union) does not incur non-contractual liability for damage suffered by individuals as a consequence of that action by virtue of the provisions contained in violation of a superior rule of law for the protection of the individual has occurred.
- Bergaderm: Court's wish to align the liability regime for breaches of European law by the Union with the liability regime governing the member states
 - Bergaderm formula
 1. The Court abandoned the distinction between administrative and legislative acts. The new test would apply to all Union acts regardless of their nature
 2. The Court dropped the idea that a superior rule had to be infringed. Henceforth it was only necessary to show that the Union had breached a rule intended to confer individual rights and that the breach was sufficiently serious

Chapter 9 Internal market – goods

Fiscal barriers 1: customs duties

- Custom duties are the classical commercial weapon of the protectionist state ->protect domestic goods against cheaper imports
- Customs duties on imports and exports and charges having equivalent effect shall be prohibited between member states. The prohibition shall also apply to customs duties of a fiscal nature

An absolute prohibition

- Article 30 extends the prohibition to 'charges having equivalent effect'. It also covers all those charges with an equivalent result
- All that mattered was the effect of a charge and even the smallest of effects would matter
- Would article 30 nonetheless require a protectionist effect that is: an effect that protected domestic goods?
 - The mere presence of a restricting effect in the free movement of goods will trigger article 30
 - The restriction rationale underlying article 30 thereby stems from the material scope of article 30. For the prohibition only outlaws national measures that impose a charge on the frontier-crossing of goods.
 - These measures are –by definition- not applicable to goods never leaving the domestic market.
 - For if it only applies to frontier measures it cannot cover measures qualifying as internal taxation
 - It is thus found that financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect.

Objective justifications

- Article 36 was thus confined to regulatory restrictions and could not be extended to fiscal charges. And since there was no specific justifications for measures falling into article 30 the Court concluded that the provision does not permit of any exceptions.
 - ➔ 2 Implied exceptions
 1. Relates to the situation where a fiscal charge constitutes consideration for a service rendered
 2. Charges that a member states levies as compensation for frontier checks that are required under European Law
- The rationale behind this exception is that the member states here act on behalf of the Union and in a way that facilitates the free movement of goods

Fiscal barriers: Discriminatory internal taxation

- The prohibition of customs duties and the prohibition of protectionist taxations are two sides of the same coin
 - ➔ Its aim is to ensure free movement of goods between the member states in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation.
 - ➔ Fundamental difference of the material scopes
- The former catches national measures that impose a charge on goods when crossing a frontier (Article 30)
- The other applies where foreign goods are subject with domestic goods to internal taxation (Article 110). -> deals with measures that apply to foreign and domestic goods. The aim behind art. 110 is to outlaw domestic tax systems that protect national goods. It thereby distinguishes between two types of protectionist taxes.
 1. Paragraph 1 declares illegal all national tax laws that discriminate between foreign and domestic goods. Discrimination here means that 'similar' foreign goods are treated dissimilarly
 2. Direct discrimination takes place where national tax legislation legally disadvantages foreign goods by – for example- imposing a higher tax rate than that for domestic goods. Indirect discrimination occurs where the same national tax formally applies to both foreign and domestic goods, but materially imposes a heavier fiscal burden on the former.

Paragraph 1: Discrimination against 'similar' foreign goods

- Article 110 (1) prohibits foreign goods to be taxed in excess of similar domestic goods. The key to this prohibition lies in the concept of 'similarity'.
- Similarity relates to comparability. Comparability thereby means that two goods have similar characteristics and meet the same needs from the point of view of consumers.
- What objective criteria may however be used fiscally to distinguish between seemingly similar products?
 - ➔ While a national tax system must be neutral towards foreign goods, it can discriminate between goods on the basis of objective criteria
 - ➔ Preferential treatment to a traditional and customary production over similar goods resulting from industrial production. And this objective criterion was not discriminating against foreign goods.

Paragraph 2: protection against 'competing' foreign goods

- Where there are no similar domestic products there cannot be discrimination. The scope of art. 110(2) is thus wider. It outlaws all internal taxes that grant indirect protection to domestic goods.

- Unlike national taxes that are discriminatory the provision targets national taxes that generally disadvantage foreign goods.
- However the court has held that such indirect protection only occurs where domestic goods are in competition with imported goods.
- Article 110 requires two elements to be fulfilled before a national tax is found to hinder the free movement of goods
 1. The national law will tax competing goods differently.
 2. This differentiation indirectly protects national goods.
- This dynamic understanding of product substitutability acknowledges the ability of fiscal regimes to dynamically shape consumer preference.

Regulatory barriers: Quantitative restrictions

- Regulatory barriers are legal obstacles to trade which cannot be overcome by the payment of money. They potentially range from a complete ban on (foreign) products to the partial restriction of a product's use
- Two systematic features of this constitutional arrangement strike the attentive eye.
 1. Unlike the legal regime governing customs duties the Treaties expressly distinguish between two prohibitions
 - One on foreign imports
 - One on foreign exports
 2. The constitutional regime for regulatory barriers expressly allows for exceptions

Quantitative restrictions on imports: Article 34.

- The core of this prohibition consists of the concept of 'quantitative restrictions'.
- There are restrictions that legally limit the quantity of imported goods to a fixed amount.
- Quantitative restrictions are quotas which – in their most extreme form – amount to a total ban.
- Import quotas operate as absolute frontier barriers: once a quota for a product is exhausted foreign imports cannot enter the domestic market.
- Article 30 on custom duties states a second category of measures
 - Measures having an equivalent effect to quantitative restrictions (MEEQR)
 - Directive 70/50. The directive distinguishes between two types of MEEQR
 1. National measurements that are not applicable equally to domestic and foreign products and which hinder imports which could otherwise take place
 2. Measures that are applicable equally are not generally seen as equivalent to those quantitative restrictions
- Directive also covers measures governing the marketing of products which deal in particular with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules.
 1. The restrictive effect on the free movement of goods are out of proportion to their purpose
 2. The same objective can be attained by other means which are less of a hindrance to trade
 - This provision was informed by a fundamental constitutional choice. Product requirements that were equally applicable to domestic and imported goods were in principle considered outside the scope of Article 34
 - Thus unless there are mandatory requirements in the general interest. Member states are not entitled to impose their domestic product standards on imported goods. This presumption of illegality would become known as the principle of mutual recognition. Member states must in principle mutually recognize each other's product standards.

Justifying regulatory barriers: Article 36 and mandatory requirements

- From the very beginning the Treaty acknowledged that some quantitative restrictions or measures having equivalent effect could be justified on certain grounds. This express acknowledgement reflected the fact that regulatory barriers to trade often pursue a legitimate regulatory interest.
- The provision exempts restrictions on the free movement of goods where they are justified on grounds of public morality, public policy, public security, public health, national treasures and the protection of intellectual property.
- And yet despite limiting the scope of the Treaty's express derogations the Court has allowed for implied derogations. These implied justifications for restrictions to the free movement of goods are called 'mandatory requirements'.

Implied justifications: mandatory requirements

- The existence of implied justifications -> Cassis de Dijon
- Exempted obstacles to the free movement of goods that were '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.
- Subsequently the Court indeed clarified that these mandatory requirements solely justified national laws which apply without discrimination to both domestic and imported products.
- The nature of a national restriction whether discriminatory or not thus determines which justifications are available to a member state.

The proportionality principle and national standards

- Even if a legitimate public interest can be found to justify a national measure, restrictions on the free movement of goods will be subject to a proportionality test. The Court has insisted that national laws authorized by art. 36 only comply with the Treaty in so far as they are justified, that is to say necessary for the attainment of the objective referred to by this provision
- Proportionality generally means that national legislation which restricts or is liable to restrict intra-(Union) trade must be proportionate to the objectives pursued and that those objectives must not be attainable by measures which are less restrictive of such trade.

Chapter 10 Internal market – persons

Introduction

- From the very beginning, the European Treaties tried to ensure the free movement of certain categories of persons. However the constitutional choice for an internal market in persons was informed by an economic rationale.
- The Treaties thereby distinguished between two classes of economic migrants, namely: 'employed' and 'self-employed' persons.
- The general movement right is however a residual right. It must be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.
- Yet the general provisions on the European citizenship have themselves had an effect on the specific movement rights for economically active citizens

Free movement of workers

- The Treaty contains a single provision that governs national restrictions and possible justifications to the free movement of workers. -> article 45
- The article has been given direct effect. It thus grants European rights that individuals can invoke in national courts. Yet many of the rights workers will enjoy under article 45 are also codified in Union legislation.
 - ➔ Regulation 492/2011: on freedom of movement of workers within the Union
 - ➔ Directive 2004/38: on the right of citizens and their family members to move and reside freely within the territory of the member states.

Personal scope: workers and 'quasi workers'

- When is a person a worker? Will part-time work be sufficient? And are persons searching for work already workers?
 - ➔ The Court of Justice has thereby insisted that it alone enjoys the hermeneutic monopoly to determine the scope of the term 'worker'. For if the definition of this term were a matter within the competence of national law it would therefore be possible for each member state to modify the meaning of the concept of migrant worker and to eliminate at will the protection afforded by the Treaty to certain categories of persons.
- The essential feature was 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.
- This definition contained three criteria
 1. A person would have to be settled
 2. A person would have to be under the direction of someone else
 3. The payment of remuneration
- The Court here defined 'worker' as a person remunerated for an effective and genuine activity. Under this minimalist definition the number of working hours and the level of remuneration was irrelevant except where the activity was so small that it was purely marginal and ancillary
- The Court here insisted that even where a person needs financial assistance from the state to supplement his income this would still be irrelevant for his status as a worker as long as he was engaged in an effective and genuine activity.
- But would article 45 also cover people searching for future employment or persons who had engaged in past employment ?
 - ➔ The Court has indeed found that these 'quasi-workers' form part of the personal scope of article 45. For former employees this solution is suggested by the provision itself.
 - ➔ The rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship. Non-employed persons would thus continue to enjoy

certain rights linked to the status of workers even when they are no longer in an employment-relationship.

- While the Court confirmed that the personal scope of article 45 included job-seekers it accepted that the mobility of workers would not be undermined by national measures offering a reasonable time to find work.
- The Court was nonetheless eager to add that if after the expiry of that period the person concerned provides evidence that he is engaged the job-seeker could not be forced to leave the territory of the host member state.

Material scope: discrimination and beyond

- The abolition of any discrimination based on nationality between workers of the member state as regards the employment, remuneration and other conditions of work and employment.
- Article 45 (3) clarifies that this shall entail the right to accept offers to move freely and to stay within the territory of a member state for that purpose. These textual bones are given substantive flesh by Directive 2004/38 and Regulation 492/2011 (special rights of workers and their families).
- Despite the direct effect of article 45 TFEU, article 7 of the regulation or better its predecessors has had a profound impact on the material scope of the free movement of workers. It provides a negative expression of the equal treatment principle in paragraph 1 and a positive expression of that principle in paragraph 2
- Article 7 of Regulation 492/2011 forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which by the application of other criteria of differentiation lead in fact to the same result.
- Article 7 (1) of the regulation thus covers forms of direct and indirect discrimination.
- Where national legislation treated workers differently on the ground of their origin or residence this could be tantamount as regards their practical effect to discrimination on the grounds of nationality.
 1. National laws that although applicable irrespective of nationality nonetheless affect migrant workers.
 2. National laws are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers.
 - What about non-discriminatory restrictions to the free movement of workers?
- While much of the case law on workers focuses on discriminatory national laws, the Court accepts that non-discriminatory measures might also fall within the scope of Article 45 TFEU. The famous confirmation of that possibility is *Bosman*.
- The said rules would thus constitute an obstacle to freedom of movement for workers, since they directly affect players' access to the employment market in other member states.
- Formulated as a general principle: national provisions which preclude or deter a national of a member state from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute restrictions on that freedom even if they apply without regard to the nationality of the workers concerned. Non-discriminatory restrictions are thus covered by Article 45 TFEU

Freedom of establishment

- Freedom of establishment constitutes the second side of the European coin on the free movement of persons. It guarantees the free movement of self-employed persons.

Personal scope: Self-employed persons (and companies)

- The personal scope of Article 49 captures self-employed persons. Like workers self-employed persons will need to be engaged in a genuine economic activity
- Self-employed persons (and companies) will typically produce goods or perform services. And while there are no delineation problems with regard to goods, the Union legal order had to delimit the personal scope of Article 49 from the perspective of the free movement of services.
- The decisive criterion distinguishing established service providers from temporary service providers is thus the stable and continuous basis on which the former participant in the economy of the host member state.
- A continuous presence will not need to take the form of a branch or agency but may consist of an office. Yet the existence of some infrastructure like an office is not conclusive evidence in favour of establishment.

Material scope: discrimination and beyond

- Article 49 prohibits restrictions on the freedom of establishment. The prohibition thereby expressly covers primary and secondary establishment.
- Primary establishment occurs where a natural or legal person establishes itself for the first time.
- Secondary establishment indeed covers the setting up of agencies, branches or subsidiaries by nationals of any member state (already) established in the territory of any member state. This right of secondary establishment is thereby given to every company lawfully established in a member state of the Union even if it has no business in the state of primary establishment.
- This constitutional choice allows a company to freely choose its member state of incorporation within the Union.
- Where a company moves to another state it may lose its legal personality ->each member state may decide when a company is primarily established e.g Gebhard

Justifying restrictions on (self)employed persons

- Restrictions on the free movement of persons might be justified on the basis of legitimate public interests. For workers Article 45 (3) expressly allows for limitations justified on grounds of public interest, public security or public health.

Express justifications and (implied) imperative requirements

- Article 27 of the directive thereby confirms the power of the member states to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality on grounds of public policy, public security or public health.
- With regard to the first two public interest grounds, the directive further clarifies that national restrictions must be based exclusively on the personal conduct of the individual concerned and that this personal conduct must represent a genuine, present and sufficiently serious threat affecting on the fundamental interest of society.
- Is the list of public interest justifications exhaustive? The Court has indeed held discriminatory measures whether direct or indirect- can solely be justified by reference to the express justifications recognized by the Treaty.
- As soon as the court realized that non-discriminatory measures could potentially violate the free movement provisions, it simultaneously recognized the existence of additional implied justifications (imperative requirements)
- The constitutional principles governing these imperative requirements are set out in Gebhard
- Imperative requirements offered by the member states as potential justifications will thus only apply to non-discriminatory measures and will be subject to the principle of proportionality

The public service exception

- Many states prefer to reserve 'state jobs' for their nationals. And the Treaties concede a public service exception for restrictions on the free movement of persons.
- For the freedom of establishment this special limitation can be found in article 51 excluding activities connected even occasionally with the exercise of official authority. On their surface both provisions appear to exclude different activities from their respective scopes.
- Yet despite these textual disparities the Court has developed a uniform definition for both freedoms. Early on, the Court clarified that it was of no interest whether a worker is engaged as a workman, a clerk or an official or even whether the terms on which he is employed come under public or private law.

Article 21(a): a direct source of movement rights

- Would article 21(1) TFEU be directly effective and thus directly grant movement rights to European citizens?
- Having approached the matter from various directions, the Court finally gave a straightforward answer in *Baumbast*. The question put before the European Court was this: would a Union citizen who no longer enjoyed a right of residence as a migrant worker nonetheless enjoy a right of residence on the basis of Article 21 (1) ?
 - The Court has clarified four things
 1. Article 21(1) is directly effective and will thus grant general movement of rights that can be invoked against national law.
 2. The personal scope of the citizenship provisions did not depend on the economic status of a person
 3. With regard to their material scope the citizenship provisions will be residual provisions. They will not apply whenever one of the specialized movement regimes is applicable
 4. Any limitation on citizenship rights through European legislation will be subject to judicial review. And where these legislative limitations were disproportionate the court can strike them down on the basis of article 21 (1).

Directive 2004/38: rights and limitations

- What are the most important rights recognized in the directive ?
- Having spelled out the right to exit and enter a member state on condition of a valid identity card or passport the directive distinguishes three classes of residency rights.
 1. According to article 6 all Union citizens will have the shortterm right to reside in the territory of another member state for a period of up to three months as long as they do not become an unreasonable burden on the social assistance system of the host member state
 2. All Union citizens shall have the right of residence on the territory of another member state for a period of longer than three months if they:
 - a. Are workers or self-employed persons in the host member state or
 - b. Have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state during their period of residence and have comprehensive sickness insurance cover in the host member state or
 - c. Are enrolled at a private or public establishment, accredited or financed by the host member state on the basis of its legislation or administrative practice for the principle purpose of following a course of study including vocational training and have comprehensive sickness insurance

- d. Are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points a, b, or c.
- The provision acknowledges four categories of persons who will benefit from mid-term residency rights.
- Directive subsequently confirms that Union citizens who are no longer self-employed or working shall retain the status of worker or self-employed in certain circumstances.
- This is extended to all persons with sufficient resources and with comprehensive sickness insurance with students benefiting from a slightly more generous treatment
- The directive grants a third class of rights: the right of permanent residence in certain situations.
- Article 16: Confers such a right after lawful presence in the host state for a continuous period of five years. Importantly this right if long-term residency is independent of the economic status and the financial means of the person concerned.
- Once a person is legally resident in another member state the directive expressly grants this person a right to equal treatment in article 24

Chapter 11 Competition law-cartels

Introduction

- The inclusion of a Treaty chapter on competition stemmed from the general agreement that the elimination of tariff barriers would not achieve its objective if private agreements of economically powerful firms were permitted to be used to manipulate the flow of trade.
- The first pillar of European competition law is article 101. It outlaws anti-competitive collusion between undertakings that is 'cartels'.
- The prohibition on any collusion between undertakings to restrict competition is set out in article 101 as follows
 1. The following shall be prohibited as incompatible with the internal market: 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..
 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
 3. The provisions of paragraph 1 may however be declared inapplicable in the case of
 - any agreement or category of agreements between undertakings
 - any decision or category of decision by associations of undertakings
 - any concerted practice or category of concerted practices.
- Article 101 follows a tripartite structure
 1. Paragraph 1 prohibits as incompatible with the internal market collusions between undertakings that are anti-competitive by object or effect if they affect trade between member states.
 2. Paragraph 3 exonerates certain collusions that are justified by their overall pro-competitive effects for the Union economy.
 3. Paragraph 2 determines that illegal collusive practices are automatically void and thus cannot be enforced in court.

Forms of collusion between undertakings

- Article 101 covers anti-competitive collusions between undertakings. The prohibited action must thus be multilateral.
- Three types of collusions:
 1. Agreements between undertakings

2. Decision by associations of undertakings
3. Concerted practices

Agreements 1: horizontal and vertical agreements

- What counts is 'a concurrence of wills' between economic operators. 'Gentlemen's agreements' have thus been classified as agreements under article 101 as long as the parties consider them binding.
- Horizontal agreements are agreements between undertakings that are competing with each other that is: horizontally placed at the same commercial level.
- Vertical agreements by contrast are agreements between undertakings at different levels of the commercial chain.

Agreements 2: Tacit acquiescence versus unilateral conduct

- Every agreement – whether horizontal or vertical- must be concluded on the basis of common consent between the parties.
- It must be formed by a concurrence of two wills.
- The idea of agreement will thus find a conceptual boundary where one party unilaterally impose its will on the other.
- For an apparently unilateral measure to become part of a continuous contractual relationship the other party must- at the very least- tacitly acquiesce. And this tacit acquiescence must be shown through actual compliance with the apparently unilateral measure.

Concerted practice and parallel conduct

- The conclusion of an agreement is but one form of collusion between undertakings. Another form mentioned in Article 101 (1) is concerted practice.
- The concept was designed as a safety net to catch all forms of collusive behaviour falling short of an agreement. This has been confirmed by the European Court which identifies the aim behind the concept of concerted practice as to bring within the prohibition of that article 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 risk of competition.

Cartel decision through associations of undertakings

- This third category of collusion is designed to catch institutionalized cartels -> includes professional bodies such as the Bar Council.
- A cartel decision- even in the soft form of a recommendation will thus be caught as collusive behaviour under article 101 (1).

(Potential) effect on trade between member states

- Not all agreements will fall within the jurisdictional scope of article 101.
- Article 101 only catches agreements which may affect trade between member states. What is the point behind this jurisdictional limitation around article 101?
- The answer lies partly in the principle of subsidiarity. -> only agreements that have European dimensions -> effects on trade between member states.
- Agreements must thus have an inter-state dimension, otherwise they will be outside the sphere of European competition law.
 - ➔ Capable of constituting a threat either direct or indirect actual or potential to freedom of trade between member states in a manner which might harm the attainment of the objective or a single market, between states.
 - What counts are the (potential) effects of the national agreement on the European market.

- According to its non-appreciably-affecting-trade (NAAT) rule, agreements will not fall within the jurisdictional scope of article 101 if two cumulative conditions are met:
 1. The agreement market share of the parties on any relevant market within the (Union) affected by the agreement does not exceed 5%.
 2. The agreement annual (Union) turnover of the undertaking concerned in the products covered by the agreement does not exceed 40 million euro.

Restriction of competition: anti-competitive object or effect

- In order for an agreement to violate the prohibition of article 101 (1) it must be anti-competitive that is: it must be a prevention, restriction or distortion of competition.
- If it simply referred to a restriction of the individual freedom to trade, then all binding agreements would be anti-competitive. For to bind, restrain is of their very essence
- Nonetheless protects the structural freedom offered by the market to- actual or potential- competitors. This view emphasizes the exclusionary effects of restrictions of competition and corresponds to the 'Harvard School'
- A third view has finally imported the 'Chicago School' -> the prohibition should exclusively outlaw exploitative effects in the form or allocative inefficiencies to consumer welfare.
- The case law of the European Court has been closest to the second view

Two dimensions: inter-brand and intra-brand competition

- A restriction of competition is primarily a restriction between competitors.
- Vertical agreements could restrict inter-brand competition that is: competition between producers of different brands?
- Intra-brand competition that is: competition between distributors of the same brand was independently prohibited?
 - The European Court has preferred the second reading
 - The Union legal order consequently recognizes two independent dimensions of competition
 1. Inter-brand competition
 2. Intra-brand competition

Restrictions by object: European 'per se rules'

- An agreement may fall within article 101 (1) if it is anti-competitive by object of effect. These are alternative conditions .
- The fulfilment of one will fulfil article 101 (1)
- On the contrary, it refers o the objective content of the agreement. It is designed to indentify certain hardcore restrictions within an agreement which need not be subjected to a detailed effects analysis.
- Restrictions by object operate as 'per se rules' that is: rules whose breach as such constitutes a violation of competition law.
- With regard to horizontal agreements they have been said to include price-fixing clauses, output-limiting clauses and market-sharing clauses.
- With regard to vertical agreements restriction by object will be presumed to exist if the agreement contains a clause that imposed a fixed (minimum) resale price, grants absolute territorial protection or is a restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of traide.

Restrictions by effect: a European rule of reason ?

- Article 101 (1) requires proof of the agreement's anti-competitive effect. The central question here is: will the prohibition be triggered as soon as an agreement contains clauses that have some anti-competitive effects: or will it only apply to agreements that are overall anti-competitive?
- The famous doctrine in this respect is the doctrine of ancillary restraints.
 - ➔ The doctrine of ancillary restraints thus differs from a rule of reason in that it will not involve a concrete balancing of the pro-competitive and anti-competitive effects of the agreement.
 - ➔ Only objectively necessary restrictions of competition within an overall pro-competitive agreement will thus be accepted. And these objectively necessary restrictions must be ancillary, that is: subordinate to the object of the main agreement.

Non-appreciable restrictions: the de minimis rule

- According to the common law principle "de minimis non curat lex", the law will not concern itself with trifles. Translated into the present context, the European Court has declared that it will not use article 101 to establish perfect competition but only workable competition within the internal market.
- Restrictions of competition will only fall within article 101 (1) where they do so to an appreciable extent. This is called the de minimis rule.
- With the exception of hardcore restrictions, the Commission considers that a 10 percent aggregate market share for the parties to horizontal agreements and a 15 percent aggregate market share for parties to vertical agreements will not appreciably restrict competition within the meaning of article 101 (1).

Article 101 (3): exemptions through pro-competitive effects

- Where an agreement has been found to be anti-competitive under article 101 (1), it will be void-unless it is justified and exempted under article 101 (3). The provision theoretically applies to all agreements that violate article 101 (1) and thus even restrictions per object.
 - ➔ Variety of exemption regulations

Direct exemptions under article 101 (3)

- However it makes the exemption conditional on four cumulative criteria. The first two criteria are positive the other two criteria negative in nature.
- Positively article 101 (3) stipulates that the agreement must contribute 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.
- Where the agreement thus generates productive or dynamic efficiencies, these efficiency gains might outweigh the economic inefficiencies identified in article 101 (1) but only under the conditions that consumers get a fair share in the resulting overall benefit.
- The pass-on benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under article 101 (1).
- But even if that is the case, article 101 (3) will not allow anti-competitive restrictions that are not indispensable for the pro-competitive effects of the agreement: or agreements which eliminate competition in respect of a substantial part of the products in question.
 - ➔ Two-folded test
 1. The restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies.
 2. The individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.