

FE1 EU LAW

NIGHT BEFORE NOTES

Institutional Question:

1. ***Institutions of the European Union***
2. ***Legislative Procedures***
3. ***Democratic Legitimacy/Deficit***
4. ***Separation of Powers.***

The European Commission

- **Executive** branch of the EU
- Conducts the daily business of the EU: E.g. The Budget
- **Compliance Role** - Also acts as Guardian of the Treaties - policing Compliance with EU Treaties by Member States.
- **Legislative Role**
- Also responsible for Drafting Proposals on Legislation which will then be discussed and passed by the Council and The Parliament
- Power of Initiative to initiate "First Pillar" legislation – Supranational Legislation – no Intergovernmental agreement required
- EP and Council can request Commission to draft such legislation
- Article 17(7) TEU (Treaty of the European Union)
- **Composition:**
 - One Commission member from each MS, at least
 - Larger MS have 2 x Commissioners: UK, Italy, Germany, Spain and France
 - Commissioners are put forward by the MS. Council then – by QMV – provides a shortlist which is sent to the Parliament
 - President of the Commission is nominated by A214 EC by the Council meeting as Heads of State using QMV
 - Nominees for Commissioner/President must be approved by EP
 - Commission President appointed under A214, by Council/Heads of State by QMV (Qualified Majority Voting)
 - Article 17(6) TEU governs President's Powers
 - President chairs the meetings, and assigns Portfolios to Commissioners
 - President can force Commissioner to resign/Can re-allocate Portfolios
 - President represents Commission at Council/Group of 7 Meetings
 - Article 18 TEU governs High Representative's Powers

The European Parliament – 8 Roles

- i. **Legislative Powers**
 - Legislative PROCESS dictates level of Power/Involvement of the EP
 - Co-Operation Procedure - allows EP to have amendments/rejections to Commission Proposals to be considered by the Council
 - SEA allowed the ASSENT Procedure, which essentially gave the EP a veto over the Council proceeding with legislation, for certain areas of law. (Accession)
 - EP can Initiate Legislation by requesting the Commission to submit a proposal (TEU)
 - NICE – Rendered EP Equal to Council under the Co-Decision Procedure
- ii. **Powers over Accession of Member States**
- iii. **Budgetary Powers** – oversight of EU Budget Ombudsman
- iv. **Ombudsman**
- v. **Executive Function** – Appointment of Commission/President
 - With 2/3 majority of the EP, the EP can pass a vote of Censure over the Commission. This will effectively compel the Commission to resign
- vi. **Compliance Function** - European Court of Justice
 - A263 EC: EP can initiate proceedings against another EU Institution for an Illegal or *Ultra Vires* (outside their powers) Act
- vii. **Committees of Inquiry** to investigate alleged breaches of Community Law
- viii. **Common Foreign and Security Policy/ Police and Judicial Co-Operation** - EP must be consulted

The Council:

- **The Council of Ministers is charged with debating and adopting Legislative Provisions proposed by the Commission**
- The Council will adopt a Commission Proposal by creating either:
 - *A Directive, or*
 - *A Regulation*
- **Presidency Responsibilities** (When MS has it for 6 months)
 - a) Develop POLICY Initiatives for the Council
 - b) Liaise with the President of the Commission and the EP
 - c) Present Council's AGENDA to the Commission and EP
 - d) Convene and Set the Agenda at meeting of EP/Commission
- **Council voting:**
 - *Unanimity Procedure*
 - *Qualified Majority Procedure*
- **Council also formulates the EU BUDGET**
- **Council has Sole responsibility for 2nd Pillar Decisions:**
 - Common Foreign and Security Policy
 - Immigration and Asylum Policy

The ECJ and CFI

ECJ: Types of Proceedings

1. **Proceedings under A258/259 - Failure of a Member State to fulfil an Obligation**
 1. The Commission can bring the proceedings to the ECJ.
 2. The ECJ can then impose a Financial Penalty for failure to comply.
2. **Proceedings under A263 against a Community Institution for annulment and for a Failure to Act**
 1. ECJ can make a Declaration that the Institution act is void

2. ECJ can declare that an Institution has Failed to Act
 3. A263 – Institution MUST abide by judgement of the Court
3. **Preliminary Reference/Article 267**

CFI: Types of Proceedings

- SEA established the Court of First Instance (CFI)
- Entitled to hear cases from private individuals, companies and organisations
- CFI relates predominately to areas of Competition and Trademark law
- CFI also acts as a Court of Appeal from the Tribunal established to hear EU Staff cases
- CFI also – after Nice – enjoys SOME of the powers of the ECJ,

Legislative Procedures

1. **Consultation**
2. **Co-operation**
3. **Assent**
4. **Co-Decision**

Consultation

- Commission had the power to propose legislation
- The Parliament had to be consulted on that legislation
- The Council decided had the power to decide if the legislation was decided
 - *Roquette Freres v Council and Maizena v The Council*
 - The final decision of the Council was overturned by ECJ because the EP had not first been consulted
- SEA reduces Consultation to sensitive areas, such as Regional Planning, Taxation, Industrial Policy and Social/Environmental Policy
- These areas require UNANIMITY at Council level anyway
- Consultation is used for QMV Council areas also – in the areas of Freedom, Security and Justice (Third Pillar areas)

Co-Operation

- Established By SEA 1986 To Increase Legislative Role Of EP
- Unlike the Consultation Procedure – the EP do NOT just have the right to be consulted
- However – the COMMISSION has to agree to the Amendments required by the EP
- And the EP must NOT put Political pressure on the Commission
 - Parliament has a first reading of the Commission proposal, and gives its opinion. The Council then decides by QMV on a common position and sends its proposal, relevant information and reasons for its position to the EP
 - EP can Adopt/Amend/Reject the Common Position. The EP has 3 months to make its decision. Absolute Majority of the Parliament to Amend or Reject a Proposal
 - If the proposal is rejected by the Parliament, a decision can only be made by the Council at SECOND reading UNANIMOUSLY
 - If Amendments are proposed, the Commission has 1 x Month to reconsider the proposal and forward the reconsidered proposal to the Council
 - Commission does not have to accept proposed amendments
 - Once Council receives a reconsidered proposal by the EP, it (the Council) can:
 - Accept the proposal by QMV
 - Amend the Proposal itself – unanimously.
 - Council has 3 months to decide on these options

Assent

- Established by the SEA
- Parliament must give its ASSENT to a proposal of the Council before the Council makes its decision
- Only applies to certain decisions in certain specified areas.
- Accession of New Member States
- Some International Agreements
- Some duties of the ECB/European System of Central Banks/Amending the Statutes of both
- Decisions of Council to Sanction MS for Persistent and serious breaches of fundamental EU Rights by Member States
- EP has no power of Amendment under the Assent Procedure. It is a straightforward veto.

Co Decision

- Introduced to counter "Democratic Deficit" allegations of EU
- Treaty of Maastricht (TEU) established Co-Decision
- EP can adopt measures JOINTLY with the Council
- Essentially Co-Decision gives the EP Almost equal legislative power to the Council
- This means that whichever areas are covered by Co-Decision will involve a direct increase in power of the EP over that area.
- 1, 2 or 3 Readings can be involved.
- First Pillar areas primarily – Supranational Areas relating to EU legislation – no requirement for prior Intergovernmental Negotiations. 43 Areas of First Pillar legislation are now covered by Co-Decision
- The Treaty Article that provides for power to enact legislation will – at the same time – specify what METHOD of enactment that legislation must use. Therefore Co-Decision is decided by each Treaty to apply to certain areas.
- A189 TEU created Co-Decision – initially complex and lengthy, and
- Declaration 34 of TOA streamlined the Procedure.

Democratic Deficit

- Despite the four procedures above, despite the increased legislative power to amend or reject proposals from various Treaties
- The only Democratically elected institution - The Parliament – has the least legislative power of all the institutions. This is termed the "Democratic Deficit"
- The Legislative process is not only dominated by the Council and the Commission
- It is also deemed to be too Complex, and to lack transparency
 - Many Committees used. Lengthy timescales. Occurs behind closed doors
- This phenomenon is termed COMITOLOGY.
- The ECJ – not democratically elected – is vested with the only power to consider Constitutionality of Community legislation.
- White Paper on Governance by Commission recommends a "Community Method"
- The Legislature of the EU would be a FUSION Of EP and Council
- The Commission would be the Compliance/Treaty Guardian
- Draft Constitution of the EU (rejected) would have supported this.

Separation of Powers

- Which branch of the EU would be "The Legislature"? The Council AND the EP share the Legislative process.
- The Commission – as the Executive – is not Elected at all
- The Council is not Directly Elected
- The ECJ has a more activist and legislative role than a traditional Court, which is charged only with dealing with those cases before it, and not "writing" laws.

- Notwithstanding the above differences with traditional Separation of Powers, the basic Principle of ACCOUNTABILITY is evident.
- **Case Law on the Separation of Powers in the EU**
- *Roquettes Frere v The Council [1980]*
 - Regulation was deemed void as the "Institutional Balance" provided for by the EP's role in the Consultation Procedure had not been applied.
- *European Parliament v The Council [1992] a.k.a. Cabotage II*
 - Council adopted a Regulation regarding access to non-resident carriers to National Road Haulage. EP initiated proceedings because it was not RE-Consulted on the final text.
- *European Parliament v Council [1995] a.k.a. "General Tariffs" case*
 - Court of Justice did NOT intervene on the EP's behalf. EP did not treat the Proposal as Urgent, despite indicating previously that it would. The Council adopted it under pressure of time. ECJ said if EP wanted to be consulted, they should have followed established timelines.

Principles of EU Law Question: Supremacy and Direct Effect

Supremacy:

- **A288 All EC Laws Have Priority over MS Laws. New Legal Order. Uniformity of EU Law**
- *Costa ENEL* – Domestic cannot override EU Law
- *Van gend en Loos*/ Rights Created, MS Must provide Remedy
- *Handelgesellschaft*: German Constitution subservient to EU, EU Legal Order Protects Fundamental Rights
- *Simmenthal*: Don't wait for repeal – Conflicting Laws Are Immediately Inapplicable
- Irrespective of date of Accession – *Factortame* UK
- **IRELAND: A29.4.10 "Necessitated by Obligations of Membership"**
- *Crotty* – Referendum Needed For Treaty Expanding EU Power
- *Meagher*: - Statutory instruments CAN Transpose Directives
- *Maher* – Policies IN S.I. Are okay, if ALSO in Directives

Direct Effect:

- **To Enforce EU Law/Comm. Resources/Strike Down domestic law**
- **Horizontal vs Vertical Direct Effect**
- **Emanations of the State: Marshall, Foster, Fratelli Constanzo**
- **Must be Clear/Unconditional/Final. "Clear" Is Only Re: Purpose Of Provision – Same Remedies As National Law**
- **Van Gend En Loos:**
 - Clear/Final/New EU Legal Order
- **Reyners**
 - Even If Further Legislation Required, Freedom of Expression Still DE. – "Facilitated By" Later National Legislation.
 - Ditto *Sabena* – Discrimination On Pay A157. Legislation Awaited, But A157 Still Clear Enough For DE
- **DE and DIRECTIVES – No, per A288, unless TIME expires**
- **No Horizontal effect against Private Parties – only VERTICAL DE against MS and EMANATIONS (wide definition – bodies under control of MS)**
- **DE of Directives WILL Strike down National Law**

Article 267/Ex-234 – Preliminary Reference Procedure Question

- A267 – CAN be sent to ECJ, A267(3) Final Court MUST Be Sent to ECJ (Appeal need not be “Automatic”)
- What is a “Court”:
 - Established by law
 - Permanent
 - Independent
 - Rule of law
 - Compulsory
 - *Inter partes*
- A267:
 - Necessary?
 - Not Advisory?
 - Not Hypothetical?
 - Adequate information?
 - Not Artificial
- A267(3) Exceptions:
 - Interloc
 - Already decided
 - Not Necessary
 - *Acte Claire* (Interp. By other Courts)

Compliance, Infringement and Member State Liability Question

- **Articles 258 – 260.**
- **A258 commission brings case against MS**
- **A259 MS Brings case against MS**
- **A260 – Financial Penalties**
- **A258**
 - Individuals can INITIATE Case, but no further rights
 - Implementing Directive: MS Responsible for ALL Organs (including REGIONAL and “Interpretation” of COURTS)
 - EFFECT is examined, not the Manner
 - Duty to give INFORMATION on how the Dir. Was initiated – failure can ground A258 Action
 - National Penalties for Dir Breach must be EFFECTIVE
- **A258 is Admin Procedure (LFN/RO + MS Fair Procedures) and Judicial Proc. (App to ECJ for Enforcement)**
- **Articles 258/A260 Fine** – Possible if Reasoned Opinion (RO) Compliance is even Just LATE
- **A260 - Post A258 “Declaration”.** Comm Suggest fine, ECJ Decides. Purpose of fine: INDUCE COMPLIANCE
- **Letter of Formal Notice (LFN)**, LFN/RO Procedure Again. Then Court Case. Fine dates from RO
- **A259 MS Initiates.** EVEN IF RO suggests no Infringement
- **Member State Liability**: - No New Remedies In EU Law. DE (Direct Effect) Was Rendered Effective By National Remedies

- But what if DE did not ensure Enforcement (Conditions not met / Directive Time limit...or...National Remedy not Sufficient)??
- **Supplementary remedy to DE – MSL A340 – MS as Agent of the EU. 5 Year Limitation**
- **Infringement of EU Law Which Intends To Confer Rights / Serious / Causal (per National Court).**
 - *Francovich and Brasserie/Factortame*
 - Sufficiently Serious? A2340: Clarity of Rule? Discretion to National Court? Intentional Breach? Inexcusable? Did EU itself contribute(Institution)? Offending National Laws kept, despite illegality?
 - Causation: - National Courts Decide: *Brinkmann* de Facto
 - MSL – Applies to **Emanations of the State**
 - *Effectiveness and Equivalence* – National Procedural Rules are fine, as long as E&E are Upheld
 - Clock starts ticking once the Directive implemented

Free Movement of Goods Questions

Article 30	Customs duties on Imports/Charges having equivalent effect
Article 34	Quantitative Restrictions on Imports/measures having equivalent effect
Article 110	Prohibition on Discriminatory Taxation Systems

- **A30 Customs/CEE. A 110 Discrimination by way of Tax**
- **A34 Quotas/Quantitative and MEE**
 - **Define the Goods** – Wide definition (*Comm v Italy*) – , but tangible
 - **Choosing Articles:** Money involved = A30/A110. *No money involved =*
 - **A30 – Charge crossing a border.** Automatic Prohibition.
 - **A110 – Tax on Goods** – Show Discrimination First
 - **Denkavit test x 4: to distinguish the two: A110 Tax is:**
 - General System of Internal Dues – Systematic?
 - Objective Criteria for levy (not based on origin)
 - Applied to imports AND Exports same time/manner?
 - Chargeable Event same for BOTH Imports and exports
 - **Levy with “Exemptions”?**
 - A Tax,
 - Really Two Levies, or
 - Customs Duty concealing itself with small Domestic Levy
- **Article 30:** Direct Effect/Absolute Prohib./Importer reimbursed
- CEE: (*Comm v Italy*) - even if: Small/Not called a Charge/no competition domestically/ No benefit to MS/Not discriminatory in Effect
- Agenda = Free Movement. Exceptions: 1-3
 1. **A110 Denkavit x 4 Factors** (systematic/objective/equal/Event)
 2. **Payment is Consideration** (Proportionate/Specific + genuine)
 3. **Payment to Comply with EU Law** (Accurate/Mandatory/Necessary for EU good/Remove obstacle)
- **A110– Sovereignty versus Tax that discriminates**
- **A110(1) - Direct/indirect TAX. A110 (2) Protection of Domestic**

- **Test: Relevant Product Market**
 - Same Characteristics And Same Consumer Need
 - SSNIP Switch? Implies High Cross-Price Elasticity, So Same Product

- **Article 110 Taxation**

- **Indirect A110 (1)** Tax applies to BOTH domestic/import but favours Domestic: (Humblot 16CV)
- **Identical relevance/Legitimate Policy/Objective Criteria /Non Discriminatory application (*Chemial – Synthetic Ethyl* tax)**
- **A110(2)** Applies to Dissimilar Products, But Protects Domestic Products. Test is:
 - Competitive Relationship of Dissimilar Products? (SSNIP)
 - Effect of Taxation?
- French Fruit/Wine spirits COMPETE with imported whiskey
- UK Beer competes with Imported Wine

- **Article 34:** Quantitative: Not a Payment of Money

- **Is it a Good? Money? (A30 or A110) Not money? (A34)**
- **Overt Quota = Quantitative Restriction.**
- **MEE - very Broad. INCLUDES Non-Binding Acts (i.e. Not just laws/taxes) – “Buy Irish” campaign.**
- **Examine Effect, not AIM. *Dassonville*. (Whisky Cert)**
- **All Trading Rules/Actual OR Potential/Direct OR Indirect**
 - **Distinctly Applicable** (Belgian Road Test *Schloh*) versus
 - **Indistinctly Applicable** (*Cassis* and German 25% Alcohol)
- **Distinct only excusable in A36 Derogation.**
 - Public Morality/Public Policy/Public Policy/Public Security/Health/National Treasures/Industrial Property
- **Indistinctly Applicable excusable if A36 Derogation and a “Mandatory Requirement” – (Consumer Protection/Environ).**

- **MEQR CAN** be okay if re: Manner Of Selling
- **KECK: “Selling Arrangement”** Crime to resell at a Loss. Manner of Selling, not nature of goods Themselves
- **“Selling Arrangements”** okay if: Applicable to ALL traders in MS, and AFFECTING EQUALLY MS Product and other MS
- **Selling Arrangement: Times/Sellers/Place/Advertising/Itinerant Sales/Price**
 - **Indistinct Keck 1: Size/Weight dictated by MS: A34 Applies**
 - **Indistinct Keck 2: MANNER of Selling: not always A34**
- **So (1) Is it a Selling Arrangement (2) is it A34, or are imports NOT impeded (3) if imports ARE Impeded, is it justified**
- **Justifying: A30 (Distinct) A30 or Mandatory (Indistinct), Burden on MS/Only LEGAL Products/MS Has PUBLIC POLICY/Proportionality**
- **A36: Morality - Pornography (*Henn & Darby*) vs Blow up dolls (*Conegate*) /**
- **Policy/Security. (*campus oil* + Crisis)**
- **Health (no DOUBLE regulation) but Precautionary Principle BSE: Objective risk/incomplete Scientific evidence/Reasonable grounds/Provisional Rules**

Free Movement of Services/Establishment/Workers Question

<u>Freedom of Services:</u>	Article 56
<u>Freedom of Establishment:</u>	Article 49
<u>Free Movement of Workers:</u>	Article 45

Freedom of Services

- **Checklist for applicability of A56**
 - Services for remuneration - *Deliege*
 - Cross-border Element - *Debaue*
 - Lawful and within scope of A50/56 – *SPUC v Grogan*
- Includes pursuit of an Economic Activity (A57), Profession/Trade
- To also receive services: *Luisi and Carbone*
- What is a 'Restriction'?
 - Any direct/indirect discrimination on Service Provision– *Van Binsbergen*
 - Any direct/indirect discrimination on Service Receipt - *Cowan*
 - Prohibit/impede/render less advantageous – *Sager*
 - Potential restriction – *Omega*
 - Collective/Trade Union Activity – *Laval un Partneri*
- Justification for Restrictions:
 - Official Authority Economic Activities
 - Article 52 Derogations
 - Public Policy - *Omega*
 - Public Security - *Watts*
 - Public Health
 - "General Public Interest" requirement - *Laval un Partneri, Alpine Investments*
- Services Directive

Freedom of Establishment

- Cross Border Element – *De Bobadilla*
- Applies to both EU Citizens and (A54) Undertakings incorporated
- Checklist:
 - Affects and EU Citizen/Undertaking
 - Engaged in an Economic Activity
 - Seeking to participate in EU MS Economic life on "stable and continuous basis"
 - Cannot be relied up in Internal situation
- Definition of Restriction
 - All Direct and Indirect Discrimination - *Comm v Italy [1988] and Comm v Italy [2002]*
 - No need for Discrimination of specific MS operator – *MacQuen, Gebhard*
 - Proportionate payment for justifiable cost is not a restriction – *Innoventif Ltd*
- Principle of Mutual Recognition

Free Movement of Workers

- Definition of a Worker – Case law – "Genuine and effective economic activity"
- *Levin v Staatsecretaris van Justite* – EU Law matter, not National Law Definition
- Parameters of Definition *Steymann* (Broad) and *Bettray* (narrowed, non-economic)
- Includes those seeking work, *Antonissen*
- Article 45 has Vertical and Horizontal Effect – *Cassa di Risparmio*

- **Conditions under Article 45:**
 - Affected person is a Union Citizen
 - And a worker under EU Law
 - Cannot be relied upon in an entirely internal situation – *Morsan and Thanjan*
 - Unless returning to their MS – *Surinder Singh*
 - Or if placed at a disadvantage by their MS of origin when moving to another MS – *Graf*
- **Direct Discrimination – *Comm v France***
- **Indirect Discrimination – *Sotgiu, Groener***
- **Rules tending to Hinder – *Basman, Graf***
- **Justifications for Restriction**
 - **Article 45(3), and**
 - **Overriding Requirements in the Public Interest**
 - Legitimate overriding requirement
 - Applied in a non-discriminatory manner
 - Appropriate for securing that objective
 - Not going beyond what is necessary for that objective
 - *Angonese, Schumaker, Lethonen*
- **Council Regulation 1612/68**
 - **“Social Advantages” and *Cristini v SNCF***
 - Interest free loans after childbirth
 - Legal proceedings understood/translated
 - Educational scholarship
 - Disability benefit for dependent child

Competition Law Questions

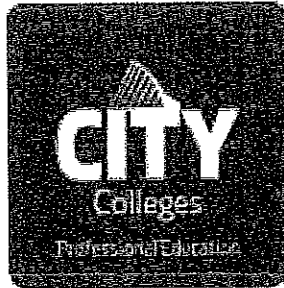
- **A101 and A102 (Agreements and Abuse of Dominant Position)**
 1. **Undertaking?**
 2. **Relevant market:**
 - a. **Product Market**
 - Objective Product vs Economic Market
 - b. **Geographic Market**
- **Applies to Undertaking**
 - Wide definition (A43/49 – Co-Op/Self-employed/Single Economic Entity for Parent/Subsidiary)
- **Relevant Market:**
 - Product Market and Geographic Market
 - Must also be substantial part of EU Market. Widely Defined. (e.g. Paris Airport)
- **Product:** Objective Traits and Economic Traits
 - **Objective:** Demand/Supply SUBSTITUTABILITY
(*United Brands* – Banana, *France Telecom* – Fast/Slow Internet)
 - **Economic:** SSNIP/OPED(own)/CPED (competitor)
 - **Geographic:** Defined by Area where competitors can operate
Borders/Bi-lateral treaties) or Defined by Statute (E.g. BT and the UK)

Article 101: Anti-Competitive Agreements

1. **Undertaking?**
2. **Relevant Market?**
3. **Agreement between U/T's or concerted Practice/Decision?**
 - a. Agreement is widely defined. Formal or Oral Consensus
 - b. Concerted Practice is Contact outside normal Market conditions - rebuttable presumption if such Contact exists.
4. **Inter Brand or Intra Brand Competition affected**
 - a. Vertical Agreement?
 - i. Exclusive Distribution Agreement (Geography)
 - ii. Selective Distribution Agreement (Expertise/Branding)
 - iii. Exclusive Purchasing Agreement
 - b. Horizontal Agreement?: Cartels/Price-Fixing//Rebates/Future Prices
5. **Affecting Inter-State Trade ?**: Actually/Potentially, Direct/Indirect,
6. **A101 Exemptions: Block Exemptions. Reg 1/2003. A101(1)/(3) D.E.**
 - a. Vertical BE 2790/99 Under €100M turnover (buyer)/30% Mkt share-Seller
 - b. Horizontal: A101(3): Improve Product/distrib/Tech for EU Generally
7. **Enforcement**: National Comp. Authority. 1% Turnover for Info. Deficit and 10% Turnover for actual Breach of A101/102
8. **De Minimis**: Competitors Aggregate u/10% Mkt Share/Non-Comp u/15%
 - If question includes: *Price-Fixing/Limiting Production/Market Sharing/Allocation of geographical areas to Distributor/Dissimilar treatment of Similar Transactions*
 - The Agreement - Whether Effective Or Not – Whether Intended Or Not –
 - **Inter Brand competition**: Granny Smith APPLES versus Golden Delicious Apples
 - **Intra-Brand competition**: Mars Bars in SPAR versus Mars Bars in CENTRA
 - "Vertical restraints" Should Be Countered By Inter Brand Competition.
 - I.E. I Stop Selling Mars To Centra (Because I Have an uncertain "Agreement" With Spar), Then Toblerone Should Start Selling More Chocolate To Centra.
 - This corrective market behaviour is why the U.S. Believe that a Vertical Restrain agreement between Mars and Spar (cutting out Centra) is perfectly acceptable.

Article 102: Abuse of a Dominant Position

1. Dominant Position is not, *per se*, a Breach.
 1. Market Share? 50% = Rebuttable Presumption
 2. Prevention of Competition?
 3. Barrier to Entry due to Intellectual Property (Magill/Volvo)
 4. Economic Dependence of Customer (*Deutschebank*)
 5. Independence from the Acts of Competitors/Customers
2. **Abuse of that Position**
 1. Objective test – A102 (a) Direct/Indirect effect on PRICE/Conditions of Trade
 2. A102(b) Limiting Production/Markets/Technology
 3. A102(c) Dissimilar Conditions to equivalent transaction (*United Brands 2 x Ports Bananas*)
 4. Loyalty rebates – *BA v Comm.* Fidelity Increase/No connection
3. **Effect on Interstate Trade?**



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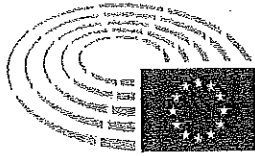
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SOURCES AND SCOPE OF EUROPEAN UNION LAW

The European Union has legal personality and as such has its own legal order, which is separate from international law. Furthermore, European Union law has a direct or indirect effect on the laws of its Member States and, once in force, becomes part of the legal system of each Member State. The European Union is in itself a source of law. The legal order is usually divided into primary legislation (the Treaties and general legal principles), secondary legislation (based on the Treaties) and supplementary law.

SOURCES AND HIERARCHY OF UNION LAW

- Treaty on European Union (TEU); Treaty on the Functioning of the European Union (TFEU); and their protocols (there are 37 protocols, 2 annexes and 65 declarations, which are attached to the treaties to fill in details, without being incorporated into the full legal text); Charter of Fundamental Rights of the European Union; as well as the two main treaties, the Treaty Establishing the European Atomic Energy Community (Euratom) is still in force as a separate treaty.
- international agreements;
- general principles of Union law;
- secondary legislation.

The Treaties and the general principles are at the top of the hierarchy, and are known as primary legislation. Following the entry into force of the Lisbon Treaty on 1 December 2009, the same value was also given to the Charter of Fundamental Rights. International agreements concluded by the European Union are subordinate to primary legislation. Secondary legislation is the next level down in the hierarchy and is valid only if it is consistent with the acts and agreements which have precedence over it.

OBJECTIVES

Creation of a legal order for the Union to achieve the objectives stipulated in the Treaties.

EU SOURCES OF LAW

- A. Primary legislation of the European Union [1.1.1](#), [1.1.2](#), [1.1.3](#), [1.1.4](#), [1.1.5](#), [1.1.6](#)
- B. Secondary legislation of the European Union
 - 1. General points

The legal acts of the Union are listed in Article 288 TFEU. They are regulations, directives, decisions, recommendations and opinions. EU institutions may adopt legal acts of these kinds only if they are empowered to do so by the Treaties. The limits of Union competences are governed by the principle of conferral, which is enshrined in Article 5(1) TEU.

The TFEU defines the scope of Union competences, dividing them into three categories: exclusive competences (Article 3), shared competences (Article 4) and supporting competences (Article 6), whereby the EU adopts measures to support or complement Member States' policies. Articles 3, 4 and 6 TFEU list the areas that come under each category of Union competence. In the absence of the necessary powers to attain one of the objectives set out in the Treaties, the institutions may apply the provisions of Article 352 TFEU, and thus adopt the 'appropriate measures'.

The institutions adopt only those legal instruments listed in Article 288 TFEU. The only exceptions are the common foreign, security and defence policies, to which the intergovernmental method still applies. In this area, common strategies, common actions and common positions have been replaced by 'general guidelines' and 'decisions defining' actions to be undertaken and positions to be adopted by the Union, and the arrangements for the implementation of those decisions (Article 25 TEU).

There are, in addition, various forms of action, such as recommendations, communications and acts on the organisation and running of the institutions (including inter-institutional agreements), the designation, structure and legal effects of which stem from various provisions in the Treaties or the rules adopted pursuant to the Treaties.

2. Hierarchy of EU secondary legislation

A hierarchy of secondary legislation is established by Articles 289, 290 and 291 TFEU between legislative acts, delegated acts and implementing acts. Legislative acts are legal acts which are adopted through the ordinary or a special legislative procedure. Delegated acts for their part are non-legislative acts of general application which supplement or amend certain non-essential elements of a legislative act. The power to adopt these acts may be delegated to the Commission by the legislator (Parliament and the Council). The objectives, content, scope and duration of the delegation of power are defined in the legislative act, as are any urgent procedures, where applicable. In addition, the legislator lays down the conditions to which the delegation is subject, which may be the authority to revoke the delegation or the right to express an objection.

Implementing acts are generally adopted by the Commission, which is competent to do so in cases where uniform conditions for implementing legally binding acts are needed. Implementing acts are a matter for the Council only in specific cases which are duly justified and in areas of common foreign and security policy. Where a basic act is adopted under the ordinary legislative procedure, the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act goes beyond the implementing powers provided for in the basic act. In this case, the Commission must revise the draft act in question.

3. The various types of EU secondary legislation

a. Regulations

Regulations are of general application, binding in their entirety and directly applicable. They must be complied with fully by those to whom they apply (private persons, Member States, Union institutions). Regulations are directly applicable in all the Member States as soon as they enter into force (on the date stipulated or, failing this, on the twentieth day following their publication in the Official Journal of the European Union) and do not need to be transposed into national law.

They are designed to ensure the uniform application of Union law in all the Member States. Regulations supersede national laws incompatible with their substantive provisions.

b. Directives

Directives are binding, as to the result to be achieved, upon any or all of the Member States to whom they are addressed, but leave to the national authorities the choice of form and methods. National legislators must adopt a transposing act or 'national implementing measure' to transpose directives and bring national law into line with their objectives. Individual citizens are given rights and bound by the legal act only once the transposing act has been adopted. Member States are given some discretion, in transposing directives, to take account of specific national circumstances. Transposition must be effected within the period laid down in the directive. In transposing directives, Member States guarantee the effectiveness of EU law, in accordance with the principle of sincere cooperation established in Article 4(3) TEU.

In principle, directives are not directly applicable. The Court of Justice of the European Union, however, has ruled that certain provisions of a directive may, exceptionally, have direct effects in a Member State even if the latter has not yet adopted a transposing act in cases where: (a) the directive has not been transposed into national law or has been transposed incorrectly; (b) the provisions of the directive are imperative and sufficiently clear and precise; and (c) the provisions of the directive confer rights on individuals.

If these conditions have been met, individuals may invoke the provision in question in their dealings with the public authorities. Even when the provision does not confer any rights on the individual, and only the first and second conditions have been met, Member State authorities are required to take account of the untransposed directive. This ruling is based chiefly on the principles of effectiveness, the prevention of Treaty violations and legal protection. On the other hand, an individual may not rely on the direct effect of an untransposed directive in dealings with other individuals (the 'horizontal effect'; *Faccini Dori* Case C-91/92, ECR, p. I-3325 et seq., point 25).

According to the case-law of the Court (*Francovich* case, joined cases C-6/90 and C-9/90), an individual citizen is entitled to seek compensation from a Member State which is not complying with Union law. This is possible, in the case of a directive which has not been transposed or which has been transposed inadequately, where: (a) the directive is intended to confer rights on individuals; (b) the content of the rights can be identified on the basis of the provisions of the directive; and (c) there is a causal link between the breach of the obligation to transpose the directive and the loss and damage suffered by the injured parties. Fault on the part of the Member State does not then have to be demonstrated in order to establish liability.

c. Decisions, recommendations and opinions

Decisions are binding in their entirety. Where those to whom they are addressed are stipulated (Member States, natural or legal persons), they are binding only on them, and address situations specific to those Member States or persons. An individual may invoke the rights conferred by a decision addressed to a Member State only if that Member State has adopted a transposing act. Decisions may be directly applicable on the same basis as directives.

Recommendations and opinions do not confer any rights or obligations on those to whom they are addressed, but may provide guidance as to the interpretation and content of Union law.

4. Provisions on competences, procedures, implementation and enforcement of legal acts

a. Legislative competence, right of initiative and legislative procedures: 1.3.2, 1.3.6, 1.3.8 and 1.4.1

Parliament, the Council and the Commission take part in the adoption of the Union's legislation to varying degrees, depending on the individual legal basis. Parliament can ask the Commission to present legislative proposals to itself and to the Council.

b. Implementation of Union legislation

Under primary law, the EU has only limited powers of enforcement, as EU law is usually enforced by the Member States. Furthermore, Article 291(1) TFEU adds that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Where uniform conditions for implementing legally binding Union acts are needed, the Commission exercises its implementing powers (Article 291(2) TFEU).

c. Choice of type of legal act

In many cases, the Treaties lay down the type of legal act to be adopted. In many other cases, however, no type of legal act is specified. In these cases, Article 296(1) TFEU states that the institutions must select it on a case-by-case basis, 'in compliance with the applicable procedures and with the principle of proportionality'.

C. General principles of Union law and fundamental rights

The Treaties make very few references to the general principles of Union law. These principles have mainly been developed in the case-law of the Court of Justice of the European Union (legal certainty, institutional balance, legitimate expectation, etc.), which is also the basis for the recognition of fundamental rights as general principles of Union law. These principles are now enshrined in Article 6(3) TEU, which refers to the fundamental rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States and the Charter of Fundamental Rights of the European Union (1.1.6).

D. International agreements concluded by the European Union

The Union may, within its sphere of competence, conclude international agreements with third countries or international organisations (Article 216(1) TFEU). These agreements are binding on the Union and the Member States, and are an integral part of Union law.

ROLE OF THE EUROPEAN PARLIAMENT

Under Article 14(1) TEU: 'The European Parliament shall, jointly with the Council, exercise legislative (via the 'ordinary legislative procedure') and budgetary (via a special legislative procedure under Article 314 TFEU) functions'. Parliament is seeking to simplify the legislative process, improve the drafting quality of legal texts and ensure that more effective penalties are imposed on Member States that fail to comply with Union law. The Commission's Annual Working and Legislative Programme presents the major political priorities of the Commission and identifies concrete actions, either legislative or non-legislative, that translate these priorities into operational terms. Parliament plays a genuine role in creating new laws, since it examines the Commission's Annual Programme of Work and says which laws it would like to see introduced.

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