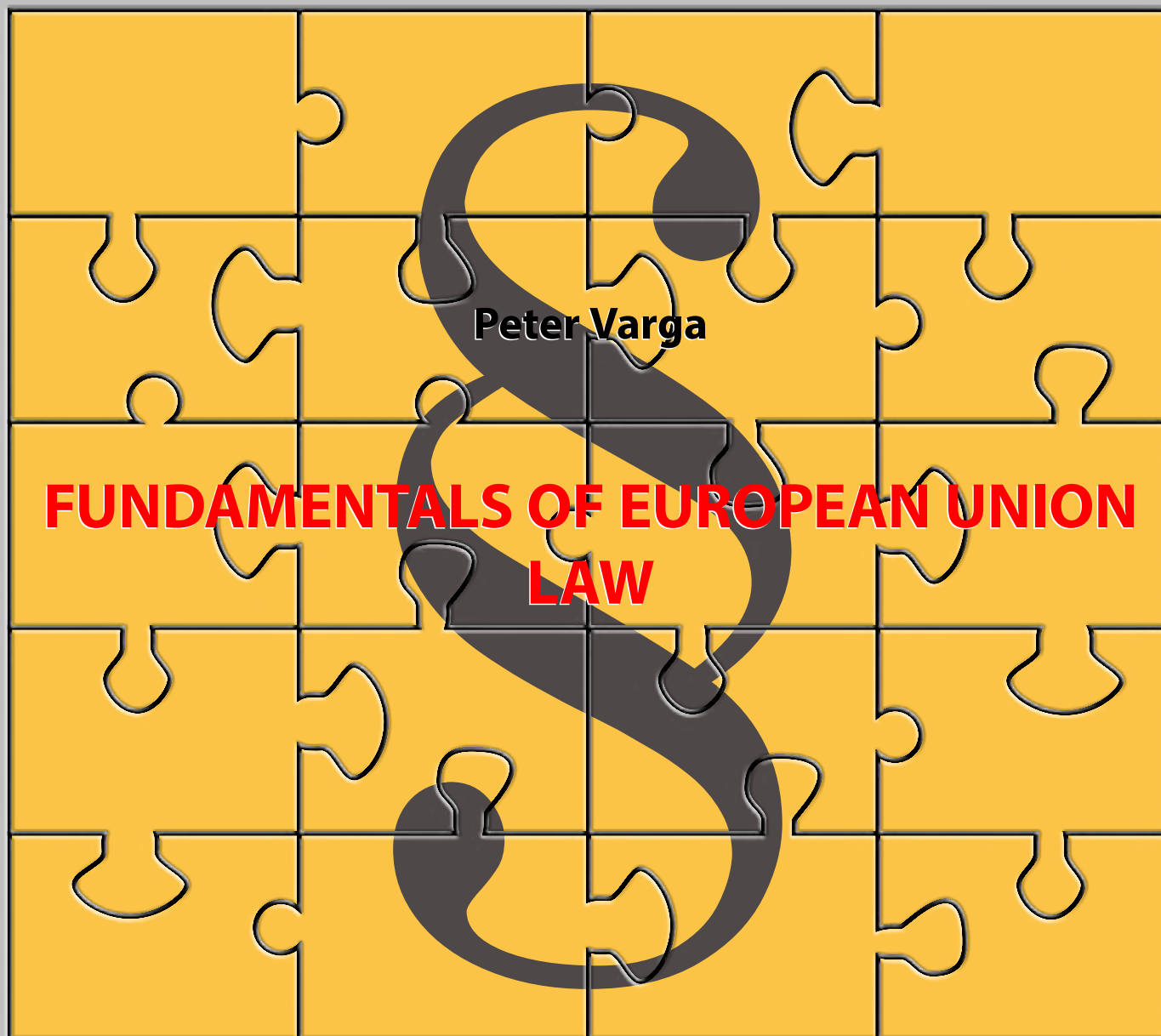
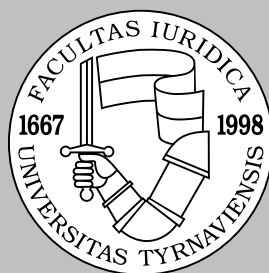


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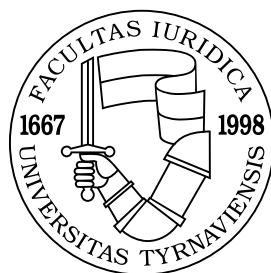


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**Peter Varga**

# **FUNDAMENTALS OF EUROPEAN UNION LAW**



## **Fundamentals of European Union Law**

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## **Preface**

European Union law has been applied in the territory of European member states for several decades. The Slovak Republic became a member state of the European Union in 2004. European Union law influences many areas of legal life in each EU country. Nowadays, every lawyer in the Slovak Republic is familiar with the necessity to work with EU law in everyday life as the EU law is a legal order that is applied in the Slovak territory.

This textbook is primarily intended to be used by students of law faculties as it contains basic knowledge about the way the European Union is functioning and describes the freedoms of EU internal market. This textbook is especially assigned for students of the Law Faculty at the Trnava University. At this faculty, the students can opt to have the seminar in European Union Law either in the Slovak language or in the English language.

The reader of this textbook can get information about the institutional framework of the European Union and the freedoms of internal market – free movement of goods, persons, workers, services, capital and payments.

This textbook is written in English. This enables the students to study the legal terminology used in European Union Law. The textbook contains abstracts from relevant legislation and from relevant judgments of EU courts. The students, at the same time, are being prepared for working in practical life. Nowadays, the employers in legal professions require knowledge of the English language, including the knowledge of legal terminology. The author hopes that this textbook fulfils two main goals. The first goal is to provide the reader information about the functioning of internal market in the European Union and the second goal represents an added value for the reader, as the reader may extend his/her knowledge of legal terminology in the English language.

This textbook reflects the latest changes and developments in EU law. It also reflects the changes introduced by the Lisbon Treaty which is effective as from 1 December 2009.

November 2012  
The Author



# 1 INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION

The institutional framework of the EU has been changed a lot over more than 50 years of its existence. Institutions are very important for functioning of the EU as these institutions are a kind of guarantee of its independent functioning under conditions stipulated in the treaties. The Article 13 TEU states that the EU has its own institutional framework for promoting of its values, objectives and interests. These should be carried out by:

- a) the European Parliament,
- b) the European Council,
- c) the Council,
- d) the European Commission (hereinafter referred to as 'the Commission'),
- e) the Court of Justice of the European Union,
- f) the European Central Bank,
- g) the Court of Auditors.

The institutions shall act within the limits of the powers conferred on it in the treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation. The Article 13(4) TEU further states that the European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

## 1.1 The European Parliament

Originally, the European Parliament was called Common Assembly and its members were delegated by national parliaments. The name parliament is used from 1962 and the first direct election was in 1979. The European Parliament is the only institution that is directly elected by EU citizens. This is the reason why the powers of the European Parliament are extended and strengthened by amendments of the treaties. The European Parliament does not have a seat in one place. This is very often criticized due to the costs connected with travelling of members of parliament and its bureaucracy. It is therefore often called as a "travelling parliament". It has its seat in Strasbourg where the 12 periods of monthly plenary sessions, including the budget session, shall be held. The periods of additional plenary sessions shall be held in Brussels. The committees of the European Parliament shall meet in Brussels. The General Secretariat of

the European Parliament and its departments shall remain in Luxembourg.

The powers of the European Parliament are strengthened in the recent years. This trend is also confirmed in the area of adopting of legislation. The Treaty of Amsterdam and lastly the Treaty of Lisbon confirmed this development.

European Parliament is the only institution in the EU that is directly elected by the EU citizens. The members of the European Parliament are elected every five years in a direct universal suffrage in each EU member state and their number shall not exceed 750 plus the President (the seats are shared proportional to the population of each member state, minimum threshold for a member state is 6 members; the maximum number of members is 96 for a member state). Currently, there are 754 members of the European Parliament elected in 27 member states. The European Parliament is elected every 5 years, since 1979 in a direct universal suffrage.

### **1.1.1 Organization of the European Parliament**

#### *1.1.1.1 President of the European Parliament*

The President is elected for a 2.5 year term (half the lifetime of the European Parliament). The role of the President is to represent the European Parliament towards other EU institutions as well as outside the world. The role of the President is to oversee the work of the European Parliament and its bodies. The President also signs all legislative acts adopted under ordinary legislative procedure.

#### *1.1.1.2 Political Groups*

The members of the European Parliament are grouped not by their nationality but by their political affiliation. Currently, in 2011, there are seven political groups functioning in the European Parliament. To form a political group, 25 members are needed. These should also represent at least one-quarter of the member states. Each member of the European Parliament may be a member of one political group. The membership in a political group is not obligatory. If a member of the European Parliament is not a member of any political group, he/she is known as non-attached member.

#### *1.1.1.3 Parliamentary Committees*

The role of Parliamentary Committees is to do preparatory work for plenary meetings of the European Parliament. Currently, in 2011, there are 20 Parliamentary Committees. The composition of Parliamentary Committees reflects the composition of plenary assembly. The role of Parliamentary Committees is evident in a legislation process, as they can draw up proposals or suggest amendment of the submitted proposals.

The European Parliament can also establish sub-committees and special *ad hoc*

temporary committees that deal with specific issues. Formal inquiry committees can also be established to investigate the alleged contraventions or maladministration in the implementation of EU law, except where the alleged contraventions or maladministration are being examined before a court and while the case is still subject to legal proceedings. The temporary Committee of Inquiry shall cease to exist on the submission of its report.

#### 1.1.1.4 Parliamentary Delegations

The role of Parliamentary Delegations is to develop and maintain international contacts of the European Parliament particularly with parliaments in third countries. Currently, in 2011, there are 41 delegations. There are the following types of Parliamentary Delegations:

- *Delegations to Joint Parliamentary Committee*: development of relations with candidate countries;
- *Delegations to Parliamentary Cooperation Committees*: created based on an international cooperation agreement concluded between the EU and third countries;
- *Inter-parliamentary Delegations*: created with parliaments of third countries that are not candidate countries and are not covered by a cooperation agreement;
- *Delegations for Multilateral Parliamentary Assemblies* (Euro-Mediterranean, EU-Latin America, ACP-EU and Euronest).

### 1.1.2 Powers of the European Parliament

The powers of the European Parliament are regulated by the primary law, i.e. in the establishing treaties. Its powers are increased by each revision of the establishing treaties. The main powers of the European Parliament include legislative power that is exercised jointly with the Council and budgetary power as well as exercising of political and democratic control over other EU institutions, including the election of the President of the Commission.

### 1.1.3 Political Parties at European level

The purpose of political parties at European level is to contribute to forming European political awareness and to expressing the will of EU citizens (Article 10(4) TEU). The Article 224 TFEU stipulates that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at European level and the rules regarding their funding. The regulation of political parties at European level was introduced into EU law by the Maastricht Treaty. The intention was to promote integration

and to introduce new mechanism of functioning of political parties on the EU level, i.e. on a level where the EU laws are adopted. The Treaty of Nice amended the regulation of political parties at European level and introduced a new provision into EU law that expected to adopt legislation regulating funding of political parties at EU level. Consequently, two regulations were adopted that regulate functioning of political parties on EU level:

- **Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding** (O.J. L 297, 15.11.2003, p. 1-4)

This regulation defines the political party at European level. A political party at European level shall satisfy the following conditions:

- a. it must have legal personality in the Member State in which its seat is located;
- b. it must be represented, in at least one quarter of Member States, by Members of the European Parliament or in the national Parliaments or regional Parliaments or in the regional assemblies, or
- c. it must have received, in at least one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent European Parliament elections;
- d. it must observe, in particular in its programme and in its activities, the principles on which the European Union is founded, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law;
- e. it must have participated in elections to the European Parliament, or have expressed the intention to do so

- **Regulation (EC) Regulation (EC) No 1524/2007 of the European Parliament and of the Council of 18 December 2007 amending Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding** (O.J. L 343, 27.12.2007, p. 5-8)

This regulation is an amendment to the Regulation No 2004/2003. It introduces the political foundation at European level which is an entity or network of entities which has legal personality in a member state, is affiliated with a political party at European level, and which through its activities, within the aims and fundamental values pursued by the European Union, underpins and complements the objectives of the political party at European level. A political foundation at European level shall satisfy the following conditions:

- a. it must be affiliated with one of the political parties at European level;
- b. it must have legal personality in the member state in which its seat is located. This legal personality shall be separate from that of the political party at European level with which the foundation is affiliated;
- c. it must observe, in particular in its programme and in its activities, the principles on which the European Union is founded, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law;
- d. it shall not promote profit goals;
- e. its governing body shall have a geographically balanced composition.

The political parties at European level may apply for funding from the general budget of the EU. The application shall be filed with the European Parliament each year. The European Parliament also verifies fulfilment of conditions for funding. Strict obligations apply to funding of political parties at European level. They must annually publish their revenues and expenditures and statement of their assets and liabilities. They must declare their resources for funding by providing a list specifying their donors, with except of donations not exceeding EUR 500. Restrictions also apply to limitation of expenditure of political parties at European level. The expenditure shall not be used to finance referenda campaigns, but shall include administrative expenditure and expenditure linked to technical assistance, meetings, research, cross-border events, studies, information and publications or financing campaigns conducted by the political parties at European level in the context of the elections to the European Parliament.

*Article 6**Obligations linked to funding*

1. A political party at European level as well as a political foundation at European level shall:
  - a. publish its revenue and expenditure and a statement of its assets and liabilities annually;
  - b. declare its sources of funding by providing a list specifying the donors and the donations received from each donor, with the exception of donations not exceeding EUR 500 per year and per donor.
2. A political party at European level as well as a political foundation at European level shall not accept:
  - a. anonymous donations;
  - b. donations from the budgets of political groups in the European Parliament;
  - c. donations from any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it;
  - d. donations exceeding EUR 12000 per year and per donor from any natural or legal person other than the undertakings referred to in point (c) and without prejudice to paragraphs 3 and 4;
  - e. donations from any public authority from a third country, including from any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.
3. Contributions to a political party at European level from national political parties which are members of a political party at European level or from a natural person who is a member of a political party at European level shall be admissible. Contributions to a political party at European level from national political parties or from a natural person shall not exceed 40 % of the annual budget of that political party at European level.
4. Contributions to a political foundation at European level from national political foundations, which are members of a political foundation at European level, as well as from political parties at European level, shall be admissible. Those contributions shall not exceed 40 % of the annual budget of that political foundation at European level and may not derive from funds received by a political party at European level pursuant to this Regulation from the general budget of the European Union.

The burden of proof shall rest with the political party at European level concerned.

*Article 7**Prohibition of funding*

1. The funding of political parties at European level from the general budget of the European Union or from any other source may not be used for the direct or indirect funding of other political parties, and in particular national parties or candidates. These national political parties and candidates shall continue to be governed by national rules.
2. The funding of political foundations at European level from the general budget of the European Union or from any other source shall not be used for the direct or indirect funding of political parties or candidates either at European or national level or foundations at national level.

### 1.1.4 Right of Petition and European ombudsman

The Article 227 TFEU guarantees any EU citizen and any natural or legal person residing or having its registered office in a member state a right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the EU's fields of activity and which affects him, her

or it directly.

The role of the European ombudsman consists in receiving of complaints from any citizen of the EU or any natural or legal person residing or having its registered office in a member state concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them (Article 228(1) TFEU). The European Ombudsman shall conduct inquiries for which he/she finds grounds, either on his own initiative or on the basis of complaints submitted to him/her direct or through a member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the European ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries. The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

The European Ombudsman shall be elected after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The European Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he/she shall neither seek nor take instructions from any Government, institution, body, office or entity. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

### **1.1.5 Relations with other EU institutions**

The European Parliament plays very important role in creation of the European Commission. The European Parliament can approve or reject the proposal of the European Council for the President of the Commission. After appointment of all members of the European Commission by the member states the European Parliament approves the whole college of members of the European Commission. The European Parliament has a right to recall the European Commission.

The European Parliament has a right to be submitted by the European Commission regular reports concerning the activities of the EU and the implementation of the budget and the members of European Parliament may submit oral or written questions to the European Commission and the Council. It also has a power of political initiative and can call on the Commission to submit a proposal to the Council on matters on which it considers that an EU act is required for the purpose of implementing the treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.

## **1.2 The European Council**

The European Council was created in 1974 with the intention of establishing an informal discussion forum between the national governments or head of member states. It developed into institution which fixed goals for the EU and set the course for achieving them. It acquired a formal status in the Maastricht Treaty, which defined its function as providing the impetus and general political guidelines for the EU's development. It became an EU institution on 1 December 2009, with entry into force of the Lisbon Treaty.

### **1.2.1 The functions of the European Council**

The European Council shall provide the EU with the necessary impetus for its development and shall define the general political directions and priorities thereof. The role of the European Council is to define the general political direction and priorities of the EU. It does not exercise legislative functions. Its president is Herman Van Rompuy.

The European Council consists of the Heads of State or Government of the member states, together with its President and the President of the Commission. The High Representative of the EU for Foreign Affairs and Security Policy takes part in its work. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. The European Council meets twice every six months, convened by its President. When the situation so requires, the President shall convene a special meeting of the European Council.

Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus. In some cases, depending on the concrete provisions of the EU Treaties, it adopts decisions by unanimity or by qualified majority.

### **1.2.2 President of the European Council**

The European Council elects its President by qualified majority for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure. The President of the European Council shall not hold a national office.

The President of the European Council has the following duties (Article 15(6) TEU):



- shall chair the European Council and drive forward its work;
- prepares the continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;
- shall endeavour to facilitate cohesion and consensus within the European Council;
- presents a report to the European Parliament after each of the meetings of the European Council;
- ensures the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

## 1.3 The Council

### 1.3.1 Composition and competences of the Council

Council is informally called also as the Council of ministers as this is an institution where national ministers from member states meet to adopt laws and coordinate different EU policies. Please, do not confuse the Council with:

European Council which is another EU institution (see above);

Council of Europe which is not an EU institution.

The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the treaties. In addition, the Council signs agreements on behalf of the EU (on subjects as the environment, trade, fisheries, transport, etc.). The Council also approves the EU budget, jointly with the European Parliament. The Council is also a forum for cooperation in the joint foreign and defence policy although the member states retain their independence to control these areas.

The Council shall consist of a representative of each member state at ministerial level, who may commit the government of the member state in question and cast its vote. There are no fixed members but the member states send the competent national minister responsible for the policy that is being discussed at the meeting.

### 1.3.2 Presidency in the Council

The Council is chaired by a member state for a six month period. That states which has a presidency in the Council chairs meetings of the Council at every level, proposes guidelines and draws up the compromises needed for the Council to take decisions. To ensure a continuity and effectiveness of work in the Council, the six monthly presidencies work together closely in groups of three and draw up a joint programme of Council work over an 18-month period by a different member state.

The Foreign Affairs Council is not chaired by the six-monthly presidency since the Lisbon Treaty introduced an office of the High Representative of the EU for Foreign Affairs and Security Policy that is a permanent chairperson in the Foreign ministers'

Council. The rotating EU presidency was limited by the Lisbon Treaty, but was not removed at all. All other Council meetings are chaired by the minister of the member state that currently holds the rotating presidency.

The Slovak Republic will hold presidency between July and December 2016.

### 1.3.3 Voting in the Council

For voting in Council different majorities are used. Unless stipulated otherwise by the treaties, qualified majority is used. The Lisbon Treaty significantly increased (by 44) the number of cases where the Council may decide by a qualified majority, thereof 24 cases related to legal bases requiring unanimity (e.g. the area of freedom, security and justice) and 20 cases concern new legal bases (e.g. operating of services of general economic interest, etc.).

In votes concerning sensitive topics – like security and external affairs and taxation – decisions by the Council have to be unanimous. This means that one single country can veto a decision.

*Qualified majority until 31 October 2014*

Transitional measures regulate the rules applicable to qualified majority until 31 October 2014. For acts of the European Council and of the Council requiring a qualified majority, members' votes shall be weighted as follows:

29 votes	Germany, France, Italy, United Kingdom
27 votes	Spain, Poland
14 votes	Romania
13 votes	Netherlands
12 votes	Belgium, Czech Republic, Greece, Hungary, Portugal
10 votes	Bulgaria, Austria, Sweden
7 votes	Denmark, Ireland, Lithuania, Slovakia, Finland
4 votes	Estonia, Cyprus, Latvia, Luxembourg, Slovenia
3 votes	Malta
<b>345 votes</b>	<b>TOTAL</b>

Acts shall be adopted if there are at least 255 (of possible 345) votes in favour representing a majority of the members where, under the treaties, they must be adopted on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 255 votes in favour representing at least two thirds of the members.

A member of the European Council or the Council (i.e. a member state) may request that, where an act is adopted by the European Council or the Council by a qualified majority, a check is made to ensure that the member states comprising the qualified majority represent at least 62 % of the total population of the EU. If this is not the case, the proposal cannot be adopted.

*Qualified majority from 1 November 2014*

From 2014 a system known as 'double majority voting' will be introduced. For a pro-

posal to go through, it will need the support of 2 types of majority:

- a majority of countries (at least 15 in an EU of 27) and
- a majority of the total EU population (the countries in favour must represent at least 65% of the EU population).

The general rule is that the decisions in the Council are taken by qualified majority, except where the treaties expressly require unanimity or simple majority.

The votes for the countries depend on their population, i.e. the bigger population a country has, the more votes it has.

The qualified majority as from 1 November 2014 is defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing member states comprising at least 65 % of the population of the EU. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

Where the Council does not act on a proposal from the Commission or from the High Representative of the EU for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing member states comprising at least 65 % of the population of the EU.

In cases where, under the treaties, *not all the members of the Council participate in voting*, a qualified majority shall be defined as follows:

- a) a qualified majority shall be defined as at least 55 % of the members of the Council representing the participating member states, comprising at least 65 % of the population of these states.

A blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating member states, plus one member, failing which the qualified majority shall be deemed attained;

- b) where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating member states, comprising at least 65 % of the population of these States.

A declaration attached to the Lisbon Treaty regulates the application of blocking minority. These rules are different for a period:

- *between 1 November 2014 and 31 March 2017*

If the member of the Council representing

- a) at least three quarters of the population, or
- b) at least three quarters of the member states

necessary to constitute a blocking minority, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

- *after 1 April 2017*

- a) at least 55% of the population, or
- b) at least 55% of the number of member states

necessary to constitute a blocking minority, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by EU law, a satisfactory solution to address concerns raised by the members of the Council. The President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him/her their assistance.

However, between 1 November 2014 and 31 March 2017, any member state may request that the current weighted voting system be applied instead of the new double majority system.

#### **1.3.4 Council configuration**

The Council shall meet in different configurations which are attended by the ministers from the member states and the European Commissioners responsible for the areas concerned. A decision establishing the list of Council configurations, other than those of the General Affairs Council and of the Foreign Affairs Council shall be adopted by a decision adopted by qualified majority (Article 236 TFEU).

In the 1990s there were 22 configurations; this was reduced to 16 in June 2000 and then to 9 in June 2002. Since the entry into force of the Lisbon Treaty, there are 10 configurations. However, there remains a single Council in that, regardless of the Council configuration that adopts a decision, that decision is always a Council decision and no mention is made of the configuration. The Council's seat is in Brussels, where it meets several times a month (meetings are held in Luxembourg in April, June and October).

The Council configuration is following:

1. *General Affairs*

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

This Council configuration deals with dossiers that affect more than one of the EU's policies, such as negotiations on EU enlargement, preparation of the EU's multi-annual budgetary perspective or institutional and administrative issues. It coordinates preparation for and follow-up to meetings of the European Council. It also exercises a role in coordinating work on different policy areas carried out by the Council's other configurations, and handles any dossier entrusted to it by the European Council.

2. *Foreign Affairs*

The Foreign Affairs Council shall elaborate the EU's external action on the basis of strategic guidelines laid down by the European Council and ensure that the EU's action is consistent.

This Council deals with the whole of the EU's external action, including common foreign and security policy, foreign trade (the EU is the leading player in international trade accounting for one fifth of total world trade and has built up a worldwide network of trade relations, including bilateral negotiations with third countries and multilateral negotiations within the World Trade Organisation) and development cooperation.

3. *Economic and Financial Affairs*

This Council configuration is one of the oldest configurations of the Council and it is known as ECOFIN Council. It is composed of the Economics and Finance Ministers of the member states, as well as Budget Ministers when budgetary issues are discussed. It meets once a month. This Council covers EU policy in a number of areas including: economic policy coordination, economic surveillance, monitoring of member states' budgetary policy and public finances, the euro (legal, practical and international aspects), financial markets and capital movements and economic relations with third countries. It decides mainly by qualified majority, in consultation or co-decision with the European Parliament, with the exception of fiscal matters which are decided by unanimity.

4. *Justice and Home Affairs (JHA)*

The JHA Council discusses the development and implementation of cooperation and common policies in this sector.

5. *Employment, Social Policy, Health and Consumer Affairs*

This Council is composed of employment, social protection, consumer protection, health and equal opportunities ministers. It adopts EU rules to harmonise or coordinate national laws, in particular on working conditions (workers' health and safety, social security, employee participation in the running of companies), strengthening of national policies to prevent illness and combat the major health scourges and protection of consumers' rights.

6. *Competitiveness (internal market, industry, research and space)*  
This Council was created in 2002 by merging the three previous Council configurations – Internal market, Industry and Research – in order to coordinate handling in these matters related to EU's competitiveness. It is composed, depending on the agenda, of European Affairs Ministers, Industry Ministers, Research Ministers, etc. It reviews competitiveness issues on the basis of analyses provided by the Commission and give its views on how competitiveness issues can be properly taken into account in all policy initiatives which have an impact on enterprises, i.e. it adopts legislation concerning the internal market, industry policy or scientific research and technological development.
7. *Transport, Telecommunications and Energy*  
This Council configuration was created in 2002 by merging these three policies into one configuration. The composition of the Council varies according to the items on the agenda (Ministers for Transport, Telecommunications or Energy).
8. *Agriculture and Fisheries*  
This Council belongs to the oldest Council configuration and is created from ministers for Agriculture and Fisheries. This Council deals with the agricultural and fisheries policies that involve regulation of the markets, organising production and establishing the resources available, improving agricultural structures and rural development.
9. *Environment*  
The Environment Council is composed of environment ministers who adopt rules to preserve the quality of the environment, human health, prudent and rational utilisation of natural resources and to promote measures at international level to deal with regional or worldwide environmental problems and to ensure a high level of environmental quality.
10. *Education, youth, culture and sport*  
This Council is composed by education, culture, youth and communication Ministers and adopt decisions in the fields of development of quality education, the implementation of a vocational training policy, cultural heritages development, while respecting the national diversity of the member states for organising education and vocational training systems.

### 1.3.5 The Committee for Permanent Representatives (COREPER)

The work of the Council is prepared and coordinated by the Committee of Permanent Representatives of the Governments of the member states (COREPER) working in Brussels and their assistants. The COREPER shall thus be responsible for preparing the work of the Council.

The decisions of the Council are prepared by a structure of more than 150 working groups and committees comprising delegates from the member states. They resolve technical issues and forward the dossier to the COREPER, made up of the member states' ambassadors to the EU, which ensures consistency in the work and resolves technical-political questions before submitting the dossier to the Council.

## 1.4 The European Commission

The European Commission is the EU's executive body and represents the interests of Europe as a whole (as opposed to the interests of individual countries). The term 'Commission' refers to both the college of commissioners and the institution itself –

which has its headquarters in Brussels with offices in Luxembourg. The Commission also has offices known as 'representations' in all EU member countries.

### 1.4.1 Functions of the European Commission

The Commission shall promote the general interest of the EU and take appropriate initiatives to that end. The Commission shall:

- ensure the application of the treaties, and of measures adopted by the institutions pursuant to them;
- oversee the application of EU law under the control of the Court of Justice of the EU;
- execute the budget and manage programmes;
- exercise coordinating, executive and management functions, as laid down in the treaties;
- ensure the EU's external representation with the exception of the common foreign and security policy, and other cases provided for in the treaties;
- initiate the EU's annual and multiannual programming with a view to achieving inter-institutional agreements.

The role of the Commission in the legislative process is very significant. The legislative acts of the EU may only be adopted on the basis of a Commission proposal, except where the treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the treaties so provide.

The Commission and the members of the Commission shall be completely independent in carrying out their responsibilities.

### 1.4.2 Composition of the European Commission

Current Commission is composed of 27 members (one from each EU country). The members of the Commission are also called as „Commissioners“. The Commission's term of office shall be five years.

As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the EU for Foreign Affairs and Security Policy, corresponding to two thirds of the number of member states, unless the European Council, acting unanimously, decides to alter this number. The members of the Commission shall be chosen from among the nationals of the member states on the basis of a system of strictly equal rotation between the member states, reflecting the demographic and geographical range of all the member states. This system shall be established unanimously by the European Council.

The Commission shall act by a majority of its members. The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate.

### 1.4.3 Members of the European Commission

Members of the Commission shall be chosen on the ground of their general com-

petence and European commitment from persons whose independence is beyond doubt.

#### *1.4.3.1 Position and status of the Commissioners*

The Commissioners shall be independent in performing their function. They shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks. The Commissioners shall refrain from any action incompatible with their duties. They may not during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 TFEU or deprived of his right to a pension or other benefits in its stead.

Apart from normal replacement, or death, the duties of a Member of the Commission shall end when he resigns or is compulsorily retired. If any member of the Commission no longer fulfils the conditions required for the performance of his duties or if he/she has been guilty of serious misconduct, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, compulsorily retire him.

#### *1.4.3.2 Creation of the European Commission*

The Commission shall be created after general election to the European Parliament. The European Council, taking into account the election to the European Parliament and after having held the appropriate consultations, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he/she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure. The Council, by common accord with the elected President, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by member states. The President of the European Commission, the High Representative of the EU for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

The Commission, as a body, shall be responsible to the European Parliament. The European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High



Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

#### 1.4.4 Departments of the European Commission

The Commission is divided into several departments and services. The departments are known as *Directorates-General* (DGs). Each DG shall be responsible for a particular policy area and headed by a Director-General, who reports directly to the President. There are approximately 23,000 staff members working for the Commission. The role of DGs is to draft laws, but their proposals become official only once the College of Commissioners adopts them during their meeting.

The Commission also established *Commission services* which deal with more general administrative issues or have a specific mandate (e.g. European Anti-Fraud Office (OLAF), Legal Services (SJ), Internal Audit Service (IAS) or Central Library).

The Commission administers also several *executive agencies* that are organisations entrusted with certain tasks relating to the management of one or more EU programmes. These agencies are set up for a fixed period.

#### 1.4.5 The High Representative of the EU for Foreign Affairs and Security Policy

The function of the High Representative was introduced by the Lisbon Treaty and combines three different functions:

- the Council's representative for the Common Foreign and Security Policy (CFSP);
- the President of the Foreign Affairs Council and
- a Vice-President of the Commission.

The High Representative shall be responsible for steering foreign policy and common defence policy and represent the EU on the international stage in the field of the CFSP. The post is designed to enhance the consistency and unity of the EU's external action.

The High Representative is assisted by the European External Action Service and has authority over some 130 delegations of the EU in third countries and to international organisations.

##### *Appointment of the High Representative*

The High Representative is appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission. The European Council may end his term of office by the same procedure. The High Representative also needs consent of the European Parliament when it votes on the Commission as a body. The term of office of a High Representative is five years and coincides with the Commission's term of office.

#### 1.4.6 The European External Action Service

The Lisbon Treaty establishes a European External Action Service (EEAS). The High Representative shall be assisted by EEAS to fulfil his/her mandate. The EEAS shall work in cooperation with the diplomatic services of the member states and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services. The Treaty stipulates that the organisation and functioning of the EEAS shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and obtaining the consent of the Commission.

## 1.5 Court of Justice of the European Union

### 1.5.1 The role and function of the Court of Justice of the European Union

The Court of Justice of the European Union which has a seat in Luxembourg shall include:

- **the Court of Justice;**
- **the General Court** (previously named as the Court of First Instance created in 1988) and
- **specialised courts** (currently there is only one specialised court: Civil Service Tribunal created in 2004).

It shall ensure that in the interpretation and application of the treaties the law is observed. The role of Court of Justice of the EU is to interpret EU law and to make sure it is uniformly applied and interpreted in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court of Justice of the EU if they feel their rights have been infringed by an EU institution. An important role of the Court of Justice of the EU is to review the legality of the acts of the institutions of the EU, to ensure that the member states act in accordance with EU law or to cooperate with national courts in interpretation of EU law.

Decisions of the Court of Justice or the General Court do not express legal opinions of individual judges. These decisions are collective decisions are often contain several legal qualifications from the judges coming from different national legal cultures where several legal institutes have a different meaning in different member states. The decisions of the courts are therefore very often a compromise – at least a compromise in the search of the wording of the decision. The effort to find a compromise may lead to problems in interpretation of the judgments. If the parties to the procedure have problems to interpret the judgment, they may ask the Court of Justice or the General Court to interpret the judgment.

### 1.5.2 Composition of the Court of Justice of the European Union

### 1.5.2.1 Composition of the Court of Justice

The Court of Justice shall consist of one judge from each member state. It shall be assisted by eight Advocates-General<sup>1</sup>. The role of Advocate-General is to act with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his/her involvement. The practical life shows that the judges usually identify with the conclusions of the Advocates-General. This is however not a rule and there were also some cases when the judges decided the case in a different way as was suggested by the Advocate-General. The Advocates-General are however not involved in every case. Where the case does not raise new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

The Court of Justice consists currently of 27 judges, i.e. one judge per member state. Every three years there shall be a partial replacement of the judges (14 and 13 judges shall be replaced alternately) and Advocates-General (4 Advocates-General are replaced alternately). The fudges shall elect the President of the Court of Justice from among their number for a term of three years. The President may be re-elected.

The Court of Justice may sit in:

- *full court*: in cases provided in the Statute, e.g. when dismissing the European ombudsman or a member of the European Commission or when the case is of exceptional importance;
- *Grand Chamber* composed of 13 judges: in case when the member state is a party to the proceeding and requests that the case is dealt with by the Grand Chamber;
- *chambers composed either of 3 or 5 judges*: in other cases.

### 1.5.2.2 Composition of the General Court

The number of judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General. Currently, there are 27 judges of the General Court – one judge from each member state. The judges of the General Court are appointed for a term of six years (renewable). There is partial replacement of judges every three years (14 and 13 judges shall be replaced alternately). The judges shall elect the President of the General Court from among their number for a term of three years. The President may be re-elected. Unlike the Court of Justice, the General Court does not have permanent Advocates General. However, that task may, in exceptional

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<sup>1</sup> Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General. The Declaration amended to the Lisbon Treaty declares that if the Court of Justice requests that the number of Advocates-General be increased by three (eleven instead of eight), the Council will, acting unanimously, agree on such an increase. In that case, Poland, Germany, France, Italy, Spain and the United Kingdom will have a permanent Advocate-General. These member states will no longer take part in the rotation system, while the existing rotation system will involve the rotation of five Advocates-General instead of three.

circumstances, be carried out by a Judge of the General Court.

The General Court may sit in:

- *full court*: if required by the complexity or importance of the case;
- *a Grand Chamber* composed of 13 judges;
- *chambers composed either of 3 or 5 judges*: most of cases
- *as a single judge*.

### 1.5.3 Criteria for appointment of the judges

The judges of the Court of Justice, Advocates-General and judges of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence (Article 253 TFEU).

They shall be appointed by common accord of the governments of the member states for six years and after consulting the *panel* that was introduced by the Lisbon Treaty and that shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the member states make the appointments (the appointments of the governments of the member states have been accepted so far). The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament.

The judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority. When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

The office of the judge terminates by:

- normal replacement;
- death;
- resignation;
- deprivation of the office if the judge no longer fulfils the requisite conditions or meets the obligations arising from his office. A judge may be deprived of the office by an unanimous opinion of the judges and Advocates-General of the Court of Justice.

### 1.5.4 Organization of the Court of Justice of the European Union

The judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat, i.e. in Luxembourg. The Court of Justice of the EU shall remain permanently in session, except of the judicial vacations.

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations. Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges. Decisions of the Grand Chamber shall be valid only if nine Judges are sitting. Decisions of the full Court shall be valid only if 15 Judges are sitting. The judges of Advocates-General may not take part in the disposal of any case in which they have previously taken part as agents or advisers or have acted for one of the parties, or in which they have been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

### 1.5.5 Jurisdiction of the Court of Justice and the General Court

#### 1.5.5.1 Jurisdiction of the Court of Justice

The Court of Justice has a jurisdiction in the following types of proceedings:

- Reference for preliminary rulings (under Article 267 et seq. of the TFEU)
- Actions for failure to fulfil obligations (under Article 258 et seq. of the TFEU)
- Actions for annulment (under Article 263 et seq. of the TFEU)
- Actions for failure to act (under Article 265 of the TFEU)

The Court of Justice has a jurisdiction to hear the cases against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of EU law by the General Court. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them. The praxis shows that the decisions of the General Court tend to be longer and contain more detailed reasoning as the judges of the General Court try to reduce any doubts that would lead to appeals. As the appeal is limited to specific grounds, the procedure before the Court of Justice does not take a long time as it is not necessary to investigate all circumstances of the case, but only those the plaintiff claims.

Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Moreover, the Court of Justice may review the decisions of the General Court on appeals against decisions of the European Union Civil Service Tribunal. This is however possible only in exceptional circumstances where there is a serious risk of the unity or consistency of EU law being affected.

### 1.5.5.2 Jurisdiction of the General Court

The General Court has jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263<sup>2</sup>, 265<sup>3</sup>, 268<sup>4</sup>, 270<sup>5</sup> and 272<sup>6</sup> TFEU, with the exception of those assigned to a specialised court set up under Article 257 TFEU and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

The General Court may hear:

1. direct actions brought by individuals against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies;
2. actions brought by a member state against the European Commission,
3. actions brought by a member state against the Council in the field of state aid, measures adopted by the Council protecting trade and acts by which it exercises implementing powers,
4. actions seeking damage compensation from EU institutions,
5. actions based on contracts made by the EU which explicitly establish the jurisdiction of the General Court,
6. actions relating to "Community trade marks".
7. The General Court also has a jurisdiction in appeals against the decisions of the European Union Civil Service Tribunal. The appeals are however limited to points of law.

### 1.5.6 Specialised courts – the European Union Civil Service Tribunal

The Treaty of Nice introduced the possibility to establish the specialised courts attached to the General Court. The role of specialised courts is to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The specialised court is established by the regulation adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure, either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission (Article 257(1) TFEU). The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court,

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<sup>2</sup> Article 263 of the TFEU regulates actions for annulment.

<sup>3</sup> Article 265 of the TFEU regulates actions for failure to act.

<sup>4</sup> Article 268 of the TFEU regulates disputes relating to compensation for damage in the case of non-contractual liability of the EU and the liability of the European Central Bank for damage caused by it or by its servants in the performance of their duties.

<sup>5</sup> Article 270 of the TFEU: disputes between the EU and its servants.

<sup>6</sup> Article 272 of the TFEU: jurisdiction to give judgment pursuant to arbitration clause contained in a contract concluded by or on behalf of the EU.

a right of appeal also on matters of fact, before the General Court (Article 257(3) TFEU).

#### *1.5.6.1 Composition of the European Union Civil Service Tribunal*

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

Currently, there has been created only one specialised court – the European Union Civil Service Tribunal established by the Council decision No 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (O.J. L 333, 9.11.2004, p. 7-11). It is composed of seven Judges. They are appointed for a period of six years (renewable), following a call for applications and after taking the opinion of a panel of seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The composition of judges shall respect a geographical balance among nationals of the member states and the national legal systems the judges represent.

The judges elect a President among them for a term of three years (renewable).  
The European

The Civil Service Tribunal may sit in (determined by its Rules of Procedure):

- *full court*: if required by the difficulty or importance of the case;
- *chambers composed of 3 or 5 judges*;
- *as a single judge*.

#### *1.5.6.2 Jurisdiction of the European Union Civil Service Tribunal*

The function of the Tribunal is to hear and determine at first instance disputes between the EU and its servants (there are approximately 35,000 servants of the EU institutions). This agenda was previously solved by the Court of Justice and then, as from 1989 by the General Court (former Court of First Instance).

The decisions given by the Tribunal may, within two months, be subject to an appeal, limited to questions of law, to the General Court.

### **1.5.7 The importance of the case-law of EU courts**

The case law of the Court of Justice of the EU is very important in the development of EU law and its interpretation. The case law of the EU courts is often described as an example of judicial activism as the decisions of the EU courts are very pro-integrationist. The case-law of the EU courts helps to build a complex legal order of the EU.

#### *1.5.7.1 Interpretation of EU law*

The Court of Justice of the EU is an institution that may officially interpret the EU legislation, especially, if some provisions are not explicit or clear enough, to provide definite interpretation. This has given the EU courts a wide scope to engage extensive interpretation of legal texts and to take a proactive role in European integration. It was the case-law of the Court of Justice that introduced the principles of EU law – supremacy, direct effects or state's liability. The concrete decisions of EU courts give a coherency and strength to European legal order and the decisions of EU courts have been highly instrumental in European integration and establishing the constitutional grounds for the EU.

One of the most important interpretation method used by EU courts is the teleological style of interpretation. This means that the EU courts try to determine what was intended by the legislation and what are the aims and goals of the legislation and the court's decision should support these aims and goals. This approach can be clearly seen in *van Gend en Loos* case where the Court uses the preamble of the treaty for interpretation of the legal text and argumentation refers to the spirit of the Treaty and European Community itself.

The EU courts also use and refer to the *effet utile* concept, i.e. the useful effects of EU law. As a consequence of this concept the EU courts use interpretation of law that follows the objectives of the treaties rather than the wording of laws.

The legal methods of interpretation of EU laws (teleological interpretation, *effet utile*) are applied in addition to standard methods of interpretation used for interpretation of national laws.

#### 1.5.7.2 The importance of previous decisions

Formally, the case-law of the EU courts is not a source of EU law. However, the EU courts try to maintain consistency in their decisions. Previous decisions are often cited in the judgments of EU courts and have thus persuasive importance. Despite the judgments of the EU courts are binding *inter partes*, i.e. within the case itself, some judgments (the leading judgments) form a kind of precedent.

As already mentioned, fundamental principles of EU law were established by the case-law of EU courts. In the first leading case *van Gend en Loos* the Court introduced the principle of the direct effect of Community law in the member states, which now enables European citizens to rely directly on rules of European Union law before their national courts. In the *Costa* case the Court established the primacy of Community law over domestic law. In that case, an Italian court had asked the Court of Justice whether the Italian law on nationalisation of the production and distribution of electrical energy was compatible with certain rules in the EEC Treaty. The Court introduced the doctrine of the primacy of Community law, basing it on the specific nature of the Community legal order, which is to be uniformly applied in all the member states. In *Francovich* case the Court developed another fundamental concept, the liability of a member state to individuals for damage caused to them by a breach of Community law by that state. Since 1991, European citizens have therefore been able to bring an action for damages against a state which infringes a Community rule.



### 1.5.8 Types of proceedings before the Court of Justice of the European Union

The Treaty on Functioning of the EU regulates several types of proceedings before the Court of Justice of the EU. Some of them are briefly described in the following text.

#### 1.5.8.1 Reference for preliminary ruling (Article 267 TFEU)

The reference for preliminary ruling is a very important proceeding in which several important principles of EU law have been laid down. The purpose of this proceeding is to ensure the cooperation between the EU courts and national courts. Another important aim of this proceeding is to ensure effective and uniform application of EU law in all member states and to prevent divergent interpretations. The proceeding is started by a national court and the Court of Justice of the EU shall have jurisdiction to give preliminary ruling concerning:

- the interpretation of the treaties;
- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU.

The national courts sometimes may and sometimes must refer to the Court of Justice with a preliminary question. Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

The answer of the Court of Justice helps the national court to clarify the interpretation or validity of EU law and the national court may thus ascertain whether national legislation complies with EU law.

The answer of the Court of Justice is not just its not-binding opinion without any consequences for the subject matter which is subject to a proceeding before the national court. The national court that asked the question is bound by the interpretation given by the Court of Justice in deciding the dispute before it. The Court of Justice introduced *acte éclairé* (the matter has already been explained by a previous judgment) and *acte éclairé* (the answer is obvious) doctrines that make the Court's judgment likewise binding also for other national courts which solve the same problem.

This reference for preliminary ruling proceeding is a proceeding that enables every EU citizen, through the national court, to seek clarification of the EU law which affects him/her. The parties to the proceeding before the national court may take part in the proceeding before the Court of Justice.

The Lisbon Treaty introduced a new provision that applies to pending cases before national courts with regard to a person in custody. In such a case the Court of Justice of the EU shall act with the minimum of delay.

#### 1.5.8.2 Actions for failure to fulfil obligations (Articles 258 – 260 TFEU)

The purpose of this proceeding is to determine whether a member state has fulfilled its obligations under the EU law. Direct actions against member states shall ensure the compliance with EU law.

*Who may initiate the proceeding?*

The action may be brought either by:

**the European Commission** (this is a usual case, Article 258 TFEU)

The European Commission is acting under its duty as a guardian of the treaties and ensures that the treaties and other EU legislation are observed. If the European 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 European Commission, the matter may be brought before the Court of Justice of the European Union.

**a member state** (Article 259 TFEU)

A member state which considers that another member state has failed to fulfil an obligation under the treaties may bring the matter before the Court of Justice of the European Union. Before a member state brings an action against another member state for an alleged infringement of an obligation under the treaties, it shall bring the matter before the European Commission.

The European Commission shall deliver a *reasoned opinion* after each of the states concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing. If the European Commission has not delivered a reasoned opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

The proceeding on actions for failure to fulfil obligations has two phases:

**before the European Commission**

Member state concerned is given an opportunity to reply the complaints addressed to it. If this phase is not terminated by ending the failure to comply with EU law, an action for infringement of EU law may be brought before the Court of Justice.

**before the Court of Justice**

The Court of Justice may

1. dismiss an action, i.e. the member state does not act against the EU law, or may
2. uphold the action and decide that there was a breach of EU law by the member state.

If the Court of Justice of the European Union finds that a member state has failed to fulfil an obligation under the treaties, the concerned state shall be required to take the necessary measures to comply with the judgment of the Court and to bring the failure to the end without any delay.

However, the Lisbon Treaty introduced a new provision that enables the Court of Justice of the EU to impose a lump sum or a penalty payment on a proposal of the European Commission if a member state has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure once the initial judgment establishing a failure to fulfil obligations has been delivered (i.e. not a special proceeding on imposing a lump sum or a penalty payment as described in the following paragraph (chapter 5.5.8.3) does not need to be started). The imposed lump sum or penalty payment on the member state concerned cannot exceed the amount specified by the Commission.

### 1.5.8.3 Failure to fulfil the judgment (procedure under Article 260 TFEU)

After the Court of Justice of the European Union finds that a member state has failed to fulfil an obligation under the treaties and the European Commission considers that the member state has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court. The European Commission shall also specify the amount of the lump sum or penalty payment to be paid by the member state concerned. The Court of Justice of the EU may impose a lump sum or a penalty payment if the member state concerned has not complied with its judgment.

#### 1.5.8.4 Actions for annulment (Article 263, 264 TFEU)

By an action for annulment, the applicant seeks the annulment of a binding measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the EU which is defective in some way. This proceeding reflects the rule of law principle and the Court of Justice of the EU reviews whether a binding measure adopted by EU institutions is in conformity with the treaties which represent the basic "constitutional" charter of the EU.

##### *The institutions whose acts may be reviewed and reviewable acts*

The review concerns the legality of legislative acts, acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council and acts of bodies, offices or agencies of the EU intended to produce legal effects. The Court of Justice of the EU provides a wide interpretation of the term act as to bring many other forms of act within the review under Article 263 TFEU. The reason for extensive interpretation is to cover all acts that create binding legal effects or affect the legal status of third parties.

##### *Who may bring the action?*

The action may be brought by a member state, the European Parliament, the Council or the Commission (these institutions are privileged applicants and have the right to attack any act) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the treaties or of any rule of law relating to their application, or misuse of powers or by the Court of Auditors, by the European Central Bank and by the Committee of the Regions (they are so called semi-privileged applicants) for the purpose of protecting their prerogatives, i.e. where their interests are clearly affected.

The action may also be brought by individuals 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. Specific conditions and arrangements concerning actions brought by individuals may be laid down by the acts setting up bodies, agencies and offices of the EU if the action is against acts of these bodies that produce legal effects in relation to them.

The most common situation when individuals seek annulment of an act is a decision addressed to the applicant. The directly addressed applicant has automatic right to bring an action provided the time limits have been observed. Other acts (e.g. decisions not addressed to the applicant or decisions in the form of a regulation) may be challengeable only if they concern the applicant directly and the applicant is indi-

vidually affected. A general rule applicable to direct concern is that if a member state is granted discretion to act under the provision then the provision cannot give rise to direct concern. The very famous case *Plaumann*<sup>7</sup> introduced a test that is used for definition of individual concern. The test decided for individual concern was whether the decision affects the applicant by virtue of the fact that he/she is a member of the abstractly defined class addressed, by the rule.

#### *Time limits*

The proceeding shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

#### *Grounds for annulment*

The Article 263(2) TFEU stipulates the grounds which must be proved to declare an act to be void. These grounds are:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the treaties or any rule of law relating to their application;
- misuse of powers.

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. The Court, that has the sole right to declare these acts void, shall however consider which of the effects of the act which it has declared void shall be considered as definitive. This means that the Court of Justice of the EU shall specify which of the parts of the act will be annulled and those which will remain in force. The institution whose act has been declared void shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

The Court of Justice has exclusive jurisdiction over actions brought by a member state against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.

The Lisbon Treaty introduced a competence of the Court of Justice which shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU (this article regulates the sanction of suspension of voting rights for a member state in the Council) solely at the request of the member state concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request (Article 269(2) TFEU).

#### *1.5.8.5 Actions for failure to act (Article 265 TFEU)*

<sup>7</sup> Case 25/62 *Plaumann & Co. v Commission of the European Economic Community*, Judgment of the Court of 15 July 1963 ECR [1963] p. 199.

This action concerns the European Parliament, the European Council, the Council, the Commission, the European Central Bank or other bodies, offices and agencies of the EU for failure to act. The failure to act means unlawfulness of the EU institutions where the treaties clearly presuppose that there is a duty imposed on the institutions to act. This proceeding complements the action for annulment proceeding under Article 263 TFEU. There are many similarities between these two articles although they were designed to cover different situations: illegal actions under Article 263 TFEU and illegal inaction under Article 265 TFEU. These two proceedings follow the same aim, which is to terminate the illegal situation.

*Who may bring the action?*

The action may be brought by (i) privileged applicants, i.e. member states and the other institutions of the EU and by (ii) the non-privileged applicants, i.e. individuals. Privileged applicants can request actions without having to show any special interest. Non-privileged applicants must have been legally entitled to make a claim for action as a potential addressee. The action is brought before the Court of Justice of the European Union.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months. The institution whose failure to act has been declared contrary to the treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

Jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.

*1.5.8.6 Other types of proceeding before the Court of Justice of the European Union*

The Court of Justice of the EU has a jurisdiction in the following types of proceedings:

***Non-contractual liability of the EU (Article 268 TFEU)***

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage arising from non-contractual liability of the EU.

***Disputes of the servants of the EU institutions (Article 270 TFEU)***

The Court of Justice of the European Union shall have jurisdiction in any dispute between the EU and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the EU. These disputes are solved by the Civil Service Tribunal.

***Disputes under arbitration clause (Article 272 TFEU)***

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

***Disputes between member states (Article 273 TFEU)***

The Court of Justice shall have jurisdiction in any dispute between member states which relates to the subject matter of the treaties if the dispute is submitted to it under a special agreement between the parties.

***Disputes specified in Article 271 TFEU***

The Court of Justice of the European Union shall have a jurisdiction in disputes concerning the fulfilment by member states of obligations under the Statute of the European Investment Bank and measure adopted by the organs of the European Investment Bank and fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB.

## 1.6 European Central Bank

### 1.6.1 European Central Bank

The European Central Bank (ECB) is one of the institutions of the EU based in Frankfurt, Germany. Its main purpose is to keep price stability and stability of the financial system. The ECB manages the single European currency – euro and safeguards the price stability in the EU. The ECB is responsible for implementation of economic and monetary policy of the EU.

The ECB shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. EU institutions, bodies, offices and agencies and the governments of the member states shall respect that independence. Neither the ECB, the national central banks in the Eurosystem, nor any member of their decision-making bodies can ask for or accept instructions from any other body.

### 1.6.2 European System of Central Banks (ESCB)

The ECB, together with the national banks constitutes the ESCB. The ESCB shall be governed by the decision-making bodies of the ECB. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the EU in order to contribute to the achieve-

ment of the EU's objectives.

### 1.6.3 Eurosystem

The ECB, together with the national central banks of the member states whose currency is the euro, constitute the Eurosystem. There are currently 17 countries who introduced the euro currency.

### 1.6.4 Bodies of the European Central Bank

The ECB has the following decision-making bodies:

#### ***Executive Board***

The role of the Executive Board is to oversee day-to-day management.

The Executive Board has 6 members and shall comprise the President, the Vice-President and four other members. The President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank. Their term of office shall be eight years (renewable). Only nationals of member states may be members of the Executive Board.

#### ***Governing Council***

The function of the Governing Council is to define eurozone monetary policy. It fixes the interest rates at which commercial banks can obtain money from the ECB.

The Governing Council of the ECB shall comprise the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the member states whose currency is the euro.

#### ***General Council***

The function of the General Council is to contribute to the ECB's advisory and coordination work and it helps prepare for new countries joining the euro.

It consists of the ECB President and Vice-president and the governors of the national central banks of all 27 EU countries.

## 1.7 The Court of Auditors

### 1.7.1 The role and functions of the Court of Auditors

The EU Court of Auditors' function is to audit EU finances and to improve the financial management and report on the use of public funds. It is based in Luxembourg. The role of the Court of Auditors is examination of the accounts of all revenue and expenditure of the EU. It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the EU, whether all expenditure incurred were used in a lawful and regular manner and whether the financial management has been sound. The purpose of the Court of Auditors establishment was to ensure

that the money of tax payers is used efficiently. The Court of Auditors therefore often carries out on-spot checks and its findings are submitted to the European Commission or governments of the member states. If auditors discover fraud or other discrepancies, they inform the European Anti-Fraud Office (OLAF). The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the EU, on the premises of any body, office or agency which manages revenue or expenditure on behalf of the EU and in the member states, including on the premises of any natural or legal person in receipt of payments from the budget. The Court of Auditors cooperates with the with national audit bodies in a spirit of trust while maintaining their independence.

One of the most important tasks of the Court of Auditors is to draw up an annual report after the close of each financial year and assistance the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

### **1.7.2 Composition**

The Court of Auditors shall be completely independent in the performance of its duties from other EU institutions and institutions of the member states. The Court of Auditors has one member from each member state appointed for a six year term (renewable). The members of the Court of Auditors shall be chosen from among persons who belong or have belonged in their respective member states to external audit bodies or who are especially qualified for this office. Their independence must be beyond doubt. The members of the Court of Auditors shall elect the President from among them for a term of three years. The President may be re-elected. The members of the Court of Auditors shall neither seek nor take instructions from any government or from any other body and shall refrain from any action incompatible with their duties. They may not, during their term of office, engage in any other occupation, whether gainful or not. A member of the Court of Auditors may be deprived of his/her office (or benefits connected with function performance) only if the Court of Justice, at the request of the Court of Auditors, finds that he/she no longer fulfils the requisite conditions or meets the obligations arising from his office.

## **1.8. Advisory Bodies of the European Union**

The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions that exercise advisory functions. The members of these advisory committees shall not be bound by any mandatory instructions and they shall be completely independent in the performance of their duties, in the EU's general interest.

### **1.8.1 The European Economic and Social Committee**

The European Economic and Social Committee (EESC) is a consultative body that



gives representatives of Europe's socio-occupational interest groups, and others, a formal platform to express their points of views on EU issues. Its opinions are forwarded to institutions that take part in the legislative process. The EESC has thus a key role in the decision making process in the EU. The EESC shall contribute to strengthening the democratic legitimacy and effectiveness of the EU by enabling civil society organisations from the member states to express their views at European level.

#### *1.8.1.1 Composition of the EESC*

The EESC shall consist of representatives of organisations of employers, of the employed, and of other representatives of civil society, notably in socio-economic, civic, professional and cultural areas. The members of EESC shall not exceed 350. The members are nominated by national governments and are appointed by the Council for a five year term (renewable). The members belong to one of three groups:

- *Employers* (created from entrepreneurs and representatives of entrepreneur associations working in industry, commerce, services and agriculture);
- *Employees* (this group comprises of representatives from national trade unions, confederations and sectoral federations);
- *Various Interests* (to this group belong other representatives and stakeholders of civil society, particularly in the economic, consumer, civic, professional and cultural field).

### **1.8.2 The Committee of the Regions**

The Committee of the Regions is a consultative body that gives the local and regional authorities voice in the EU. The Committee of the Regions plays an important role in the legislative process. If the legislative proposal concerns areas that directly affect local and regional authorities, the consultation of the Committee of the Regions is obligatory. Consulting the Committee of the Regions is obligatory when adopting legislation in areas like trans-European infrastructure, education, culture, climate change, services of general interests, etc.

The opinions of the Committee of the Regions are issued to the European Commission proposals. There is an obligation to consult the Committee of the Regions by the European Parliament where the treaties so provide and in other cases, in particular those which concern cross-border cooperation.

#### *1.8.2.1 Composition of the Committee of the Regions*

The members of the Committee of the Regions are representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly. Their number shall not exceed 350.

The members of the Committee of the Regions shall be appointed for five years (renewable). The term of office commences on the date on which the formal appoint-

ment takes effect. The appointment is made by the Council that shall adopt the list of members drawn up in accordance with the proposals made by each member state. Currently, there are six commissions to consider different policy areas:

- Territorial Cohesion Policy
- Economic and Social Policy
- Education, Youth and Research
- Environment, Climate change and Energy
- Citizenship, Governance, Institutional and External Affairs
- Natural Resources

## 1.9 The European Investment Bank

The European Investment Bank (EIB) is the EU's financing institution. Its shareholders are the 27 member states of the EU, which have jointly subscribed its capital. It borrows money on the capital markets and lends it at a low interest rate to projects that improve infrastructure, energy supply or environmental standards both inside the EU and in neighbouring or developing countries. The task of the EIB is to contribute to the balanced and steady development of the internal market in the interest of the EU. The EIB is operating on a non-profit basis. For this purpose it grants loans and gives guarantees which facilitate the financing of the following projects in all sectors of the economy:

projects for less developed regions;  
projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual member states;  
projects of common interest to several member states which are of such a size or nature that they cannot be entirely financed by the various means available in the individual member states.

The EIB provides with a massive support to projects that fall to the priority objectives for lending set out in the EIB's business plan. Among these priority objectives belong stimulation for small and medium sized enterprises, support for the convergence regions and disadvantaged regions, fight against climate changes, promotion of sustainable, competitive and secure sources of energy, support of knowledge economy or constructing the trans-European networks in transport, energy or communication. The statute of the EIB is attached as Protocol No 5 to the treaties.

## **2 THE LAW OF INTERNAL MARKET IN THE EU**

### **2.1 Economic integration in the European Union**

The current state of economic integration has been achieved by a continuous integration of member states' economics. Nowadays, most of the member states even use the common currency – euro. Common monetary union represents the highest stage of economic integration.

#### **2.1.1 A Free trade area**

A free trade area is a kind of economic cooperation that involves removal of customs between cooperating states. However, the member states do not cooperate in external policies, i.e. the customs payment paid by third states are not subject of cooperation. As a consequence, the third countries may target the country with the lowest customs to enter the free trade area. Such goods compete consequently with the internal goods produced in member states of the free trade area.

#### **2.1.2 Customs Union**

Customs union is a next stage of economic integration which creates a common customs policy towards third countries. The same amount of duties are imposed on goods coming from third states regardless into which country they are imported. Once the goods are imported into one member state they may circulate freely within the member states of the customs union.

#### **2.1.3 Internal Market**

Another and further step of economic integration is the internal market (also called as common market in the past). Internal market comprises of free movement of goods, persons, services and capital. Customs union is a necessary condition for existence of the internal market. Important for functioning of the internal market is the so called mutual recognition principle. This principle guarantees the free movement of goods and services without the need to harmonise member states' national legislation. Goods which are lawfully produced in one member state cannot be banned from sale on the

territory of another member state, even if they are produced to technical or quality specifications different from those applied to its own products. The only exception allowed – overriding general interest such as health, consumer or environment protection – is subject to strict conditions. The same principle applies to free movement of services. This principle means that the rules of the Member State of origin shall prevail.

#### **2.1.4 Economic and Monetary Union**

Economic and monetary union is the current state of harmonization of economics of the member states. It brings harmonization of monetary, fiscal policies, including a creation of common currency (euro).

##### *2.1.4.1 How does the Europe react on the economic crises?*

Member states in difficulty may use the financial assistance mechanism and thereby to preserve the financial stability. The EU established a package of stabilisation actions which provide financial assistance to member states in difficult financial conditions. The EU and the member states that use euro currency, set up in May 2010 a stabilisation mechanism that consists of:

- the *European Financial Stabilisation Mechanism* (EFSM)
- the *European Financial Stability Facility* (EFSF) which provides temporary stability support to euro area member states. It obtains financing by issuing bonds or other debt instruments on the financial markets backed by guarantees of the shareholder member states. The EFSF provides financial assistance on a temporary basis and enters into new programmes until 30 June 2013 (although the EFSF will continue to service existing commitments thereafter). The European Stability Mechanism will take over in providing stability support to euro area member states.

In October 2012 the *European Stability Mechanism* (ESM) entered into force. The ESM is a permanent international financial institution that assists in preserving the financial stability of the European Union monetary union by providing temporary stability support to euro area member states. The Treaty Establishing the European Stability Mechanism was signed on 2 February 2012, establishing the ESM as an inter-governmental organisation under public international law. The ESM will be the primary support mechanism to euro area member states. It will issue bonds or other debt instruments on the financial markets to raise capital to provide assistance to member states. The ESM will have a subscribed capital of 700 billion EUR (unlike the EFSF, which was based upon guarantees of the euro area member states).

#### **2.1.5 Political union**

Creation of a political union (confederative or federal state) would be the next stage of integration. With respect to global economic crises it is not excluded that a

deeper political and economic cooperation will lead to creation of a political union.

## 3 FREE MOVEMENT OF GOODS

Free movement of goods is one of the freedoms of the internal market. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capita is ensured. Since January 1993, controls on the movement of goods within the internal market have been abolished and the European Union is now a single territory without internal frontiers. The abolition of customs tariffs promotes trade between member states, which accounts for a large part of the total imports and exports of the member states.

The Treaties specify the conditions under which these freedoms shall be realized. The free movement of goods is established on:

- customs union;
- prohibition of quantitative restrictions between member states;
- prohibition of discriminatory taxation;
- competition policy, i.e. rules applicable to undertakings.

It is however necessary to define the term "goods". From the case law of EU courts arises that by goods there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions<sup>8</sup>.

### 3.1 Customs Union

The EU shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. The provisions regulating the customs union shall apply to products originating in member states and to products coming from third countries which are in free circulation in member states. Products coming from a third country shall be considered to be in free circulation in a member state if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state, and if they have not benefited from a total or partial drawback of such duties or charges.

The EU law prohibits customs duties on imports and exports and charges having equivalent effect. This prohibition shall also apply to customs duties of a fiscal nature, i.e. a broad definition of customs is applied in EU law. The Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

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<sup>8</sup> Case 7/68 Commission of the European Communities v Italian Republic, ECR 1968 page 562.

When a tax is caught by EU law then it is *per se* unlawful and there are no exemptions in EU law.

*Charges having equivalent effects*

Article 30 TFEU prohibits not only customs duties but also charges having equivalent effects. The reason that the prohibition also covers the charges having equivalent effects is simple as it is designed to cover also protectionist measures that create a similar barrier to free movement of goods as customs. The role of EU courts was important in interpretation of the term charges having equivalent effect and it is not a surprise that this term has been interpreted extensively.

**Case 24/68 Commission of the European Communities v Italian Republic  
Judgment of the Court of 1 July 1969  
ECR 1969 page 193**

1. CUSTOMS DUTIES ARE PROHIBITED INDEPENDENTLY OF ANY CONSIDERATION OF THE PURPOSE FOR WHICH THEY WERE INTRODUCED AND THE DESTINATION OF THE REVENUE OBTAINED THEREFROM.

2. (A) ANY PECUNIARY CHARGE, HOWEVER SMALL AND WHATEVER DESIGNATION AND MODE OF APPLICATION, WHICH IS IMPOSED UNILATERALLY ON DOMESTIC OR FOREIGN GOODS WHEN THEY CROSS A FRONTIER, AND WHICH IS NOT A CUSTOMS DUTY IN THE STRICT SENSE, CONSTITUTES A CHARGE HAVING EQUIVALENT EFFECT WITHIN THE MEANING OF ARTICLES 9, 12, 13 AND 16 OF THE TREATY, EVEN IF IT IS NOT IMPOSED FOR THE BENEFIT OF THE STATE, IS NOT DISCRIMINATORY OR PROTECTIVE IN EFFECT OR IF THE PRODUCT ON WHICH THE CHARGE IS IMPOSED IS NOT IN COMPETITION WITH ANY DOMESTIC PRODUCT.

(B) THE REGULATIONS RELATING TO THE COMMON ORGANIZATION OF THE AGRICULTURAL MARKETS ARE NOT INTENDED TO CONFER ON THE CONCEPT OF A CHARGE HAVING EQUIVALENT EFFECT A SCOPE DIFFERENT FROM THAT WHICH IT HAS WITHIN THE FRAMEWORK OF THE TREATY ITSELF, ESPECIALLY AS, WHEN THOSE REGULATIONS TAKE ACCOUNT OF THE PARTICULAR CONDITIONS FOR ESTABLISHING A COMMON MARKET IN AGRICULTURAL PRODUCTS, THEY PURSUE THE SAME OBJECTIVES AS ARTICLES 9 TO 13 OF THE TREATY WHICH THEY IMPLEMENT.

3. (A) THE PROHIBITION OF NEW CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT, LINKED TO THE PRINCIPLE OF THE FREE MOVEMENT OF GOODS, CONSTITUTES A FUNDAMENTAL RULE WHICH, WITHOUT PREJUDICE TO THE OTHER PROVISIONS OF THE TREATY, DOES NOT PERMIT OF ANY EXCEPTIONS.

(B) IT FOLLOWS FROM ARTICLES 95 ET SEQ. THAT THE CONCEPT OF A CHARGE HAVING EQUIVALENT EFFECT DOES NOT INCLUDE TAXATION WHICH IS IMPOSED IN THE SAME WAY WITHIN A STATE ON IMPORTED PRODUCTS AND SIMILAR DOMESTIC PRODUCTS, OR WHICH FALLS, IN THE ABSENCE OF COMPARABLE DOMESTIC PRODUCTS, WITHIN THE FRAMEWORK OF TAXATION OF THIS NATURE WITHIN THE LIMITS LAID DOWN BY THE TREATY.

THE RENDERING OF SPECIFIC SERVICE MAY IN CERTAIN CASES WARRANT THE PAYMENT OF A FREE IN PROPORTION TO THE SERVICE ACTUALLY RENDERED.

A charge having equivalent effect is a charge which is imposed unilaterally on goods imported from another member state when they cross a frontier.

**Case 87/75 Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze**  
**Judgment of the Court of 5 February 1976**  
**ECR 1976 page 129**

9 CONSEQUENTLY, ANY PECUNIARY CHARGE, WHATEVER ITS DESIGNATION AND MODE OF APPLICATION, WHICH IS UNILATERALLY IMPOSED ON GOODS IMPORTED FROM ANOTHER MEMBER STATE BY REASON OF THE FACT THAT THEY CROSS A FRONTIER, CONSTITUTES A CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY. IN APPRAISING A DUTY OF THE TYPE AT ISSUE IT IS, CONSEQUENTLY, OF NO IMPORTANCE THAT IT IS PROPORTIONATE TO THE QUANTITY OF THE IMPORTED GOODS AND NOT TO THEIR VALUE.

10 NOR, IN DETERMINING THE EFFECTS OF THE DUTY ON THE FREE MOVEMENT OF GOODS, IS IT OF ANY IMPORTANCE THAT A DUTY OF THE TYPE AT ISSUE IS PROPORTIONATE TO THE COSTS OF A COMPULSORY PUBLIC HEALTH INSPECTION CARRIED OUT ON ENTRY OF THE GOODS. THE ACTIVITY OF THE ADMINISTRATION OF THE STATE INTENDED TO MAINTAIN A PUBLIC HEALTH INSPECTION SYSTEM IMPOSED IN THE GENERAL INTEREST CANNOT BE REGARDED AS A SERVICE RENDERED TO THE IMPORTER SUCH AS TO JUSTIFY THE IMPOSITION OF A PECUNIARY CHARGE. IF, ACCORDINGLY, PUBLIC HEALTH INSPECTIONS ARE STILL JUSTIFIED AT THE END OF THE TRANSITIONAL PERIOD, THE COSTS WHICH THEY OCCASION MUST BE MET BY THE GENERAL PUBLIC WHICH, AS A WHOLE, BENEFITS FROM THE FREE MOVEMENT OF COMMUNITY GOODS.

11 THE FACT THAT THE DOMESTIC PRODUCTION IS, THROUGH OTHER CHARGES, SUBJECTED TO A SIMILAR BURDEN MATTERS LITTLE UNLESS THOSE CHARGES AND THE DUTY IN QUESTION ARE APPLIED ACCORDING TO THE SAME CRITERIA AND AT THE SAME STAGE OF PRODUCTION, THUS MAKING IT POSSIBLE FOR THEM TO BE REGARDED AS FALLING WITHIN A GENERAL SYSTEM OF INTERNAL TAXATION APPLYING SYSTEMATICALLY AND IN THE SAME WAY TO DOMESTIC AND IMPORTED PRODUCTS.

### **3.3 Prohibition of quantitative restrictions between member states**

Quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between member states. Quantitative restrictions cover non-financial restrictions and equivalent effects on free movement of goods. These are mostly caused by different national legislative measures applicable to goods and trade. Very often, their purpose is not to impose barriers on trade between member states. Nevertheless, if they are an obstacle for free movement of goods between member states, they are illegal.

#### **3.3.1 What is a quantitative restriction?**

A quantitative restriction is a measure restricting imports or exports of goods by amount or value.



**Case 2/73 Riseria Luigi Geddo v Ente Nazionale Risi**  
**Judgment of the Court of 12 July 1973**  
**ECR 1973 page 865**

1. IN PROVIDING THAT MEMBER STATES SHALL TAKE ALL APPROPRIATE MEASURES TO ENSURE FULFILMENT OF THEIR OBLIGATIONS AND THAT THEY SHALL ABSTAIN FROM ANY MEASURE WHICH COULD JEOPARDISE THE ATTAINMENT OF THE OBJECTIVES OF THE TREATY, ARTICLE 5 PLACES A GENERAL OBLIGATION ON MEMBER STATES THE PRECISE TENOR OF WHICH IN EACH PARTICULAR CASE DEPENDS ON THE PROVISIONS OF THE TREATY OR THE RULES WHICH EMERGE FROM ITS GENERAL FRAMEWORK.

2. THE PROHIBITION OF THE LEVYING OF ANY CUSTOMS DUTY OR CHARGE HAVING EQUIVALENT EFFECT, CONTAINED IN ARTICLE 20(2) OF REGULATION NO 359/67, COVERS ANY CHARGE LEVIED AT THE TIME OF OR BY REASON OF IMPORTS OR EXPORTS TO A THIRD COUNTRY.

3. THE PROHIBITION OF THE LEVYING OF ANY CUSTOMS DUTY OR CHARGE HAVING EQUIVALENT EFFECT IN TRADE WITHIN THE COMMUNITY, CONTAINED IN ARTICLE 23 OF REGULATION NO 359/67, COVERS ANY PECUNIARY CHARGE LEVIED AT THE TIME OF OR BY REASON OF IMPORTS OR EXPORT OF THE PRODUCT IN QUESTION WHICH, BY CHANGING THE COST PRICE, HAS ON THE FREE MOVEMENT OF GOODS THE EQUIVALENT EFFECT OF A CUSTOMS DUTY. THIS DOES NOT APPLY TO AN INTERNAL TAX LEVIED EXCLUSIVELY ON NATIONAL PRODUCTS SUBJECT TO A CONTRACT AND THE PURPOSE OF WHICH IS TO PROVIDE FUNDS TO ASSIST NATIONAL PRODUCTION. SUCH A TAX COULD ONLY INFRINGE THE PROVISIONS OF REGULATION NO 359/67 RELATING TO EXPORT REFUNDS IF IT WOULD APPEAR TO BE A MEANS OF REDUCING THE AMOUNT OF SUCH REFUNDS.

4. THE PROHIBITION OF ALL QUANTITATIVE RESTRICTIONS OR MEASURES HAVING EQUIVALENT EFFECT CONTAINED IN ARTICLE 20(2) OF REGULATION NO 359/67 HAS AMONG ITS OBJECTS THE PREVENTION OF MEMBER STATES FROM UNILATERALLY ADOPTING MEASURES RESTRICTING EXPORT TO THIRD COUNTRIES UNLESS THEY ARE PROVIDED FOR IN REGULATIONS. THE PROHIBITION, UNDER ARTICLE 23, OF SUCH A MEASURE IN THE INTERNAL TRADE OF THE COMMUNITY IS DESIGNED TO ENSURE THE FREE MOVEMENT OF GOODS WITHIN THE COMMUNITY.

5. THE PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT COVERS ANY TOTAL OR PARTIAL PROHIBITION ON IMPORTS, EXPORTS OR GOODS IN TRANSIT AND ANY ENCUMBRANCE HAVING THE SAME EFFECT.

The development of free movement of goods and the approach of EU courts can be seen in *Dassonville* case.

**Case 8/74 Procureur du Roi v Benoît and Gustave Dassonville**  
**Judgment of the Court of 11 July 1974**  
**ECR 1974 page 837**

5 ALL TRADING RULES ENACTED BY MEMBER STATES WHICH ARE CAPABLE OF HINDERING, DIRECTLY OR INDIRECTLY, ACTUALLY OR POTENTIALLY, INTRA-COMMUNITY TRADE ARE TO BE CONSIDERED AS MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS.

6 IN THE ABSENCE OF A COMMUNITY SYSTEM GUARANTEEING FOR CONSUMERS THE AUTHENTICITY OF A PRODUCT'S DESIGNATION OF ORIGIN, IF A MEMBER STATE TAKES MEASURES TO PREVENT UNFAIR PRACTICES IN THIS CONNEXION, IT IS HOWEVER SUBJECT TO THE CONDITION THAT THESE MEASURES SHOULD BE REASONABLE AND THAT THE MEANS OF PROOF REQUIRED SHOULD NOT ACT AS A HINDRANCE TO TRADE BETWEEN MEMBER STATES AND SHOULD, IN CONSEQUENCE, BE ACCESSIBLE TO ALL COMMUNITY NATIONALS.

7 EVEN WITHOUT HAVING TO EXAMINE WHETHER OR NOT SUCH MEASURES ARE COVERED BY ARTICLE 36, THEY MUST NOT, IN ANY CASE, BY VIRTUE OF THE PRINCIPLE EXPRESSED IN THE SECOND SENTENCE OF THAT ARTICLE, CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE BETWEEN MEMBER STATES.

8 THAT MAY BE THE CASE WITH FORMALITIES, REQUIRED BY A MEMBER STATE FOR THE PURPOSE OF PROVING THE ORIGIN OF A PRODUCT, WHICH ONLY DIRECT IMPORTERS ARE REALLY IN A POSITION TO SATISFY WITHOUT FACING SERIOUS DIFFICULTIES.

9 CONSEQUENTLY, THE REQUIREMENT BY A MEMBER STATE OF A CERTIFICATE OF AUTHENTICITY WHICH IS LESS EASILY OBTAINABLE BY IMPORTERS OF AN AUTHENTIC PRODUCT WHICH HAS BEEN PUT INTO FREE CIRCULATION IN A REGULAR MANNER IN ANOTHER MEMBER STATE THAN BY IMPORTERS OF THE SAME PRODUCT COMING DIRECTLY FROM THE COUNTRY OF ORIGIN CONSTITUTES A MEASURE HAVING AN EFFECT EQUIVALENT TO A QUANTITATIVE RESTRICTION AS PROHIBITED BY THE TREATY.

In *Dassonville* case can be seen that measures which have discriminatory effects are covered by Articles 34 and 35 TFEU. No intent to discriminate must be proved, the fact that a measure is discriminatory is enough to prove.

Quantitative restrictions between member states may have various forms. Promotion or favouring domestic products is acknowledged as a form of quantitative restriction. The most obvious is a situation when a member state supports a campaign which promotes domestic products as opposed to imported goods.

**Case 249/81 Commission of the European Communities v Ireland**  
**Judgment of the Court of 24 November 1982**  
**ECR 1982 page 4005**

21 THE IRISH GOVERNMENT MAINTAINS THAT THE PROHIBITION AGAINST MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS IN ARTICLE 30 IS CONCERNED ONLY WITH "MEASURES", THAT IS TO SAY, BINDING PROVISIONS EMANATING FROM A PUBLIC AUTHORITY. HOWEVER, NO SUCH PROVISION HAS BEEN ADOPTED BY THE IRISH GOVERNMENT, WHICH HAS CONFINED ITSELF TO GIVING MORAL SUPPORT AND FINANCIAL AID TO THE ACTIVITIES PURSUED BY THE IRISH INDUSTRIES.

22 THE IRISH GOVERNMENT GOES ON TO EMPHASIZE THAT THE CAMPAIGN HAS HAD NO RESTRICTIVE EFFECT ON IMPORTS SINCE THE PROPORTION OF IRISH GOODS TO ALL GOODS SOLD ON THE IRISH MARKET FELL FROM 49.2% IN 1977 TO 43.4% IN 1980.

23 THE FIRST OBSERVATION TO BE MADE IS THAT THE CAMPAIGN CANNOT BE LIKENED TO ADVERTISING BY PRIVATE OR PUBLIC UNDERTAKINGS, OR BY A GROUP OF UNDERTAKINGS, TO ENCOURAGE PEOPLE TO BUY GOODS PRODUCED BY THOSE UNDERTAKINGS. REGARDLESS OF THE MEANS USED TO IMPLEMENT IT, THE CAMPAIGN IS A REFLECTION OF THE IRISH GOVERNMENT'S CONSIDERED INTENTION TO SUBSTITUTE DOMESTIC PRODUCTS FOR IMPORTED PRODUCTS ON THE IRISH MARKET AND THEREBY TO CHECK THE FLOW OF IMPORTS FROM OTHER MEMBER STATES.

24 IT MUST BE REMEMBERED HERE THAT A REPRESENTATIVE OF THE IRISH GOVERNMENT STATED WHEN THE CAMPAIGN WAS LAUNCHED THAT IT WAS A CAREFULLY THOUGHT-OUT SET OF INITIATIVES CONSTITUTING AN INTEGRATED PROGRAMME FOR PROMOTING DOMESTIC PRODUCTS; THAT THE IRISH GOODS COUNCIL WAS SET UP AT THE INITIATIVE OF THE IRISH GOVERNMENT A FEW MONTHS LATER; AND THAT THE TASK OF IMPLEMENTING THE INTEGRATED PROGRAMME AS IT WAS ENVISAGED BY THE GOVERNMENT WAS ENTRUSTED, OR LEFT, TO THAT COUNCIL.

25 WHILST IT MAY BE TRUE THAT THE TWO ELEMENTS OF THE PROGRAMME WHICH HAVE CONTINUED IN EFFECT, NAMELY THE ADVERTISING CAMPAIGN AND THE USE OF THE "GUARANTEED IRISH" SYMBOL, HAVE NOT HAD ANY SIGNIFICANT SUCCESS IN WINNING OVER THE IRISH MARKET TO DOMESTIC PRODUCTS, IT IS NOT POSSIBLE TO OVERLOOK THE FACT THAT, REGARDLESS OF THEIR EFFICACITY, THOSE TWO ACTIVITIES FORM PART OF A GOVERNMENT PROGRAMME WHICH IS DESIGNED TO ACHIEVE THE SUBSTITUTION OF DOMESTIC PRODUCTS FOR IMPORTED PRODUCTS AND IS LIABLE TO AFFECT THE VOLUME OF TRADE BETWEEN MEMBER STATES.

26 THE ADVERTISING CAMPAIGN TO ENCOURAGE THE SALE AND PURCHASE OF IRISH PRODUCTS CANNOT BE DIVORCED FROM ITS ORIGIN AS PART OF THE GOVERNMENT PROGRAMME, OR FROM ITS CONNECTION WITH THE INTRODUCTION OF THE "GUARANTEED IRISH" SYMBOL AND WITH THE ORGANIZATION OF A SPECIAL SYSTEM FOR INVESTIGATING COMPLAINTS ABOUT PRODUCTS BEARING THAT SYMBOL. THE ESTABLISHMENT OF THE SYSTEM FOR INVESTIGATING COMPLAINTS ABOUT IRISH PRODUCTS PROVIDES ADEQUATE CONFIRMATION OF THE DEGREE OF ORGANIZATION SURROUNDING THE "BUY IRISH" CAMPAIGN AND OF THE DISCRIMINATORY NATURE OF THE CAMPAIGN.

27 IN THE CIRCUMSTANCES THE TWO ACTIVITIES IN QUESTION AMOUNT TO THE ESTABLISHMENT OF A NATIONAL PRACTICE, INTRODUCED BY THE IRISH GOVERNMENT AND PROSECUTED WITH ITS ASSISTANCE, THE POTENTIAL EFFECT OF WHICH ON IMPORTS FROM OTHER MEMBER STATES IS COMPARABLE TO THAT RESULTING FROM GOVERNMENT MEASURES OF A BINDING NATURE.

28 SUCH A PRACTICE CANNOT ESCAPE THE PROHIBITION LAID DOWN BY ARTICLE 30 OF THE TREATY SOLELY BECAUSE IT IS NOT BASED ON DECISIONS WHICH ARE BINDING UPON UNDERTAKINGS. EVEN MEASURES ADOPTED BY THE GOVERNMENT OF A MEMBER STATE WHICH DO NOT HAVE BINDING EFFECT MAY BE CAPABLE OF INFLUENCING THE CONDUCT OF TRADERS AND CONSUMERS IN THAT STATE AND THUS OF FRUSTRATING THE AIMS OF THE COMMUNITY AS SET OUT IN ARTICLE 2 AND ENLARGED UPON IN ARTICLE 3 OF THE TREATY.

29 THAT IS THE CASE WHERE, AS IN THIS INSTANCE, SUCH A RESTRICTIVE PRACTICE REPRESENTS THE IMPLEMENTATION OF A PROGRAMME DEFINED BY THE GOVERNMENT WHICH AFFECTS THE NATIONAL ECONOMY AS A WHOLE AND WHICH IS INTENDED TO CHECK THE FLOW OF TRADE BETWEEN MEMBER STATES BY ENCOURAGING THE PURCHASE OF DOMESTIC PRODUCTS, BY MEANS OF AN ADVERTISING CAMPAIGN ON A NATIONAL SCALE AND THE ORGANIZATION OF SPECIAL PROCEDURES APPLICABLE SOLELY TO DOMESTIC PRODUCTS, AND WHERE THOSE ACTIVITIES ARE ATTRIBUTABLE AS A WHOLE TO THE GOVERNMENT AND ARE PURSUED IN AN ORGANIZED FASHION THROUGHOUT THE NATIONAL TERRITORY.

30 IRELAND HAS THEREFORE FAILED TO FULFIL ITS OBLIGATIONS UNDER THE TREATY BY ORGANIZING A CAMPAIGN TO PROMOTE THE SALE AND PURCHASE OF IRISH GOODS WITHIN ITS TERRITORY.

*Indistinctly applicable measures – Cassis de Dijon case*

Indistinctly applicable measures are measures that apply only to imported or exported goods. Even measures that make no difference between domestic and imported products may be considered as indistinctly applicable measures where the restrictive effects exceed the necessary and proportional aim and thus protect the domestic products.

**Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein  
Judgment of the Court of 20 February 1979  
ECR 1979 page 649**

8 IN THE ABSENCE OF COMMON RULES RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL – A PROPOSAL FOR A REGULATION SUBMITTED TO THE COUNCIL BY THE COMMISSION ON 7 DECEMBER 1976 (OFFICIAL JOURNAL C 309, P. 2) NOT YET HAVING RECEIVED THE COUNCIL'S APPROVAL – IT IS FOR THE MEMBER STATES TO REGULATE ALL MATTERS RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL AND ALCOHOLIC BEVERAGES ON THEIR OWN TERRITORY.

OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF THE PRODUCTS IN QUESTION MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION, THE PROTECTION OF PUBLIC HEALTH, THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER.

9 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, INTERVENING IN THE PROCEEDINGS, PUT FORWARD VARIOUS ARGUMENTS WHICH, IN ITS VIEW, JUSTIFY THE APPLICATION OF PROVISIONS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES, ADDUCING CONSIDERATIONS RELATING ON THE ONE HAND TO THE PROTECTION OF PUBLIC HEALTH AND ON THE OTHER TO THE PROTECTION OF THE CONSUMER AGAINST UNFAIR COMMERCIAL PRACTICES.

10 AS REGARDS THE PROTECTION OF PUBLIC HEALTH THE GERMAN GOVERNMENT STATES THAT THE PURPOSE OF THE FIXING OF MINIMUM ALCOHOL CONTENTS BY NATIONAL LEGISLATION IS TO AVOID THE PROLIFERATION OF ALCOHOLIC BEVERAGES ON THE NATIONAL MARKET, IN PARTICULAR ALCOHOLIC BEVERAGES WITH A LOW ALCOHOL CONTENT, SINCE, IN ITS VIEW, SUCH PRODUCTS MAY MORE EASILY INDUCE A TOLERANCE TOWARDS ALCOHOL THAN MORE HIGHLY ALCOHOLIC BEVERAGES.

11 SUCH CONSIDERATIONS ARE NOT DECISIVE SINCE THE CONSUMER CAN OBTAIN ON THE MARKET AN EXTREMELY WIDE RANGE OF WEAKLY OR MODERATELY ALCOHOLIC PRODUCTS AND FURTHERMORE A LARGE PROPORTION OF ALCOHOLIC BEVERAGES WITH A HIGH ALCOHOL CONTENT FREELY SOLD ON THE GERMAN MARKET IS GENERALLY CONSUMED IN A DILUTED FORM.

12 THE GERMAN GOVERNMENT ALSO CLAIMS THAT THE FIXING OF A LOWER LIMIT FOR THE ALCOHOL CONTENT OF CERTAIN LIQUEURS IS DESIGNED TO PROTECT THE CONSUMER AGAINST UNFAIR PRACTICES ON THE PART OF PRODUCERS AND DISTRIBUTORS OF ALCOHOLIC BEVERAGES.

THIS ARGUMENT IS BASED ON THE CONSIDERATION THAT THE LOWERING OF THE ALCOHOL CONTENT SECURES A COMPETITIVE ADVANTAGE IN RELATION TO BEVERAGES WITH A HIGHER ALCOHOL CONTENT, SINCE ALCOHOL CONSTITUTES BY FAR THE MOST EXPENSIVE CONSTITUENT OF BEVERAGES BY REASON OF THE HIGH RATE OF TAX TO WHICH IT IS SUBJECT.

FURTHERMORE, ACCORDING TO THE GERMAN GOVERNMENT, TO ALLOW ALCOHOLIC PRODUCTS INTO FREE CIRCULATION WHEREVER, AS REGARDS THEIR ALCOHOL CONTENT, THEY COMPLY WITH THE RULES LAID DOWN IN THE COUNTRY OF PRODUCTION WOULD HAVE THE EFFECT OF IMPOSING AS A COMMON STANDARD WITHIN THE COMMUNITY THE LOWEST ALCOHOL CONTENT PERMITTED IN ANY OF THE MEMBER STATES, AND EVEN OF RENDERING ANY REQUIREMENTS IN THIS FIELD INOPERATIVE SINCE A LOWER LIMIT OF THIS NATURE IS FOREIGN TO THE RULES OF SEVERAL MEMBER STATES.

13 AS THE COMMISSION RIGHTLY OBSERVED, THE FIXING OF LIMITS IN RELATION TO THE ALCOHOL CONTENT OF BEVERAGES MAY LEAD TO THE STANDARDIZATION OF PRODUCTS PLACED ON THE MARKET AND OF THEIR DESIGNATIONS, IN THE INTERESTS OF A GREATER TRANSPARENCY OF COMMERCIAL TRANSACTIONS AND OFFERS FOR SALE TO THE PUBLIC.

HOWEVER, THIS LINE OF ARGUMENT CANNOT BE TAKEN SO FAR AS TO REGARD THE MANDATORY FIXING OF MINIMUM ALCOHOL CONTENTS AS BEING AN ESSENTIAL GUARANTEE OF THE FAIRNESS OF COMMERCIAL TRANSACTIONS, SINCE IT IS A SIMPLE MATTER TO ENSURE THAT SUITABLE INFORMATION IS CONVEYED TO THE PURCHASER BY REQUIRING THE DISPLAY OF AN INDICATION OF ORIGIN AND OF THE ALCOHOL CONTENT ON THE PACKAGING OF PRODUCTS.

14 IT IS CLEAR FROM THE FOREGOING THAT THE REQUIREMENTS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES DO NOT SERVE A PURPOSE WHICH IS IN THE GENERAL INTEREST AND SUCH AS TO TAKE PRECEDENCE OVER THE REQUIREMENTS OF THE FREE MOVEMENT OF GOODS, WHICH CONSTITUTES ONE OF THE FUNDAMENTAL RULES OF THE COMMUNITY.

IN PRACTICE, THE PRINCIPLE EFFECT OF REQUIREMENTS OF THIS NATURE IS TO PROMOTE ALCOHOLIC BEVERAGES HAVING A HIGH ALCOHOL CONTENT BY EXCLUDING FROM THE NATIONAL MARKET PRODUCTS OF OTHER MEMBER STATES WHICH DO NOT ANSWER THAT DESCRIPTION.

IT THEREFORE APPEARS THAT THE UNILATERAL REQUIREMENT IMPOSED BY THE RULES OF A MEMBER STATE OF A MINIMUM ALCOHOL CONTENT FOR THE PURPOSES OF THE SALE OF ALCOHOLIC BEVERAGES CONSTITUTES AN OBSTACLE TO TRADE WHICH IS INCOMPATIBLE WITH THE PROVISIONS OF ARTICLE 30 OF THE TREATY.

THERE IS THEREFORE NO VALID REASON WHY, PROVIDED THAT THEY HAVE BEEN LAWFULLY PRODUCED AND MARKETED IN ONE OF THE MEMBER STATES, ALCOHOLIC BEVERAGES SHOULD NOT BE INTRODUCED INTO ANY OTHER MEMBER STATE; THE SALE OF SUCH PRODUCTS MAY NOT BE SUBJECT TO A LEGAL PROHIBITION ON THE MARKETING OF BEVERAGES WITH AN ALCOHOL CONTENT LOWER THAN THE LIMIT SET BY THE NATIONAL RULES.

The assumption of this case is that if one product had been lawfully marketed in one member state, it should be enabled to be marketed also in other member states without any restrictions, unless the state of import could successfully invoke one of the mandatory requirements. The *Cassis de Dijon* case brings the principle of mutual recognition into the free movement of goods. This case also brought the rule of reason into the free movement of goods which is expressed by the principle that if there is an absence of harmonized legislation on EU level, reasonable measures can be taken by the state to prevent unfair trade practices.

The EU courts also had to deal with cases in which the traders objected national rules which they considered to be affecting the trade between member states. In case *Keck and Mithouard* the French institutions prosecuted the Keck and Mithouard for resale at a loss (selling goods at price which was lower than their actual purchase price). However, the French law did not prohibit sales at loss directly by manufacturers. Keck and Mithouard claimed that this is contrary to EU law, concretely against the provisions regulating the free movement of goods.

**Joined cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard****Judgment of the Court of 24 November 1993****ECR 1993 page I-6097**

12 National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13 Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14 In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15 It is established by the case-law beginning with "Cassis de Dijon" (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18 Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

**3.3.2 Exceptions to the prohibitions of quantitative restrictions between member states**

Article 36 TFEU provides general exception from general prohibition of quantitative restrictions between member states. It says that the provisions of Articles 34 and 35 TFEU shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (i) public morality, public policy or public security; (ii) the protection of health and life of humans, animals or plants; (iii) the protection of national treasures possessing artistic, historic or archaeological value; or (iv) the protection of industrial and commercial property. Such prohibitions or restrictions shall

not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.

This article enables the member states, under exactly specified cases, to restrict the free movement of goods. This is only possible from reasons specified in Article 36 TFEU, which provides an exhaustive list. The EU courts confirmed that this article is derogation from the principle of free movement of goods to the extent to which this can be objectively justified in order to achieve the objectives set out in this article. This article is construed narrowly and the reasons of derogation cannot follow economic reasons.

Very famous case how to deal with this article was the case *Henn & Darby* that concerned the ban on the importation of pornographic magazines, despite these magazines may be legally available in the UK.

**Case 34/79 Regina v Maurice Donald Henn and John Frederick Ernest Darby  
Judgment of the Court of 14 December 1979  
ECR 1979 page 3795**

15 UNDER THE TERMS OF ARTICLE 36 OF THE TREATY THE PROVISIONS RELATING TO THE FREE MOVEMENT OF GOODS WITHIN THE COMMUNITY ARE NOT TO PRECLUDE PROHIBITIONS ON IMPORTS WHICH ARE JUSTIFIED INTER ALIA "ON GROUNDS OF PUBLIC MORALITY". IN PRINCIPLE, IT IS FOR EACH MEMBER STATE TO DETERMINE IN ACCORDANCE WITH ITS OWN SCALE OF VALUES AND IN THE FORM SELECTED BY IT THE REQUIREMENTS OF PUBLIC MORALITY IN ITS TERRITORY. IN ANY EVENT, IT CANNOT BE DISPUTED THAT THE STATUTORY PROVISIONS APPLIED BY THE UNITED KINGDOM IN REGARD TO THE IMPORTATION OF ARTICLES HAVING AN INDECENT OR OBSCENE CHARACTER COME WITHIN THE POWERS RESERVED TO THE MEMBER STATES BY THE FIRST SENTENCE OF ARTICLE 36.

16 EACH MEMBER STATE IS ENTITLED TO IMPOSE PROHIBITIONS ON IMPORTS JUSTIFIED ON GROUNDS OF PUBLIC MORALITY FOR THE WHOLE OF ITS TERRITORY, AS DEFINED IN ARTICLE 227 OF THE TREATY, WHATEVER THE STRUCTURE OF ITS CONSTITUTION MAY BE AND HOWEVER THE POWERS OF LEGISLATING IN REGARD TO THE SUBJECT IN QUESTION MAY BE DISTRIBUTED. THE FACT THAT CERTAIN DIFFERENCES EXIST BETWEEN THE LAWS ENFORCED IN THE DIFFERENT CONSTITUENT PARTS OF A MEMBER STATE DOES NOT THEREBY PREVENT THAT STATE FROM APPLYING A UNITARY CONCEPT IN REGARD TO PROHIBITIONS ON IMPORTS IMPOSED, ON GROUNDS OF PUBLIC MORALITY, ON TRADE WITH OTHER MEMBER STATES.

17 THE ANSWER TO THE SECOND AND THIRD QUESTIONS MUST THEREFORE BE THAT THE FIRST SENTENCE OF ARTICLE 36 UPON ITS TRUE CONSTRUCTION MEANS THAT A MEMBER STATE MAY, IN PRINCIPLE, LAWFULLY IMPOSE PROHIBITIONS ON THE IMPORTATION FROM ANY OTHER MEMBER STATE OF ARTICLES WHICH ARE OF AN INDECENT OR OBSCENE CHARACTER AS UNDERSTOOD BY ITS DOMESTIC LAWS AND THAT SUCH PROHIBITIONS MAY LAWFULLY BE APPLIED TO THE WHOLE OF ITS NATIONAL TERRITORY EVEN IF, IN REGARD TO THE FIELD IN QUESTION, VARIATIONS EXIST BETWEEN THE LAWS IN FORCE IN THE DIFFERENT CONSTITUENT PARTS OF THE MEMBER STATE CONCERNED.



21 IN ORDER TO ANSWER THE QUESTIONS WHICH HAVE BEEN REFERRED TO THE COURT IT IS APPROPRIATE TO HAVE REGARD TO THE FUNCTION OF THIS PROVISION, WHICH IS DESIGNED TO PREVENT RESTRICTIONS ON TRADE BASED ON THE GROUNDS MENTIONED IN THE FIRST SENTENCE OF ARTICLE 36 FROM BEING DIVERTED FROM THEIR PROPER PURPOSE AND USED IN SUCH A WAY AS EITHER TO CREATE DISCRIMINATION IN RESPECT OF GOODS ORIGINATING IN OTHER MEMBER STATES OR INDIRECTLY TO PROTECT CERTAIN NATIONAL PRODUCTS. THAT IS NOT THE PURPORT OF A PROHIBITION, SUCH AS THAT IN FORCE IN THE UNITED KINGDOM, ON THE IMPORTATION OF ARTICLES WHICH ARE OF AN INDECENT OR OBSCENE CHARACTER. WHATEVER MAY BE THE DIFFERENCES BETWEEN THE LAWS ON THIS SUBJECT IN FORCE IN THE DIFFERENT CONSTITUENT PARTS OF THE UNITED KINGDOM, AND NOTWITHSTANDING THE FACT THAT THEY CONTAIN CERTAIN EXCEPTIONS OF LIMITED SCOPE, THESE LAWS, TAKEN AS A WHOLE, HAVE AS THEIR PURPOSE THE PROHIBITION, OR AT LEAST, THE RESTRAINING, OF THE MANUFACTURE AND MARKETING OF PUBLICATIONS OR ARTICLES OF AN INDECENT OR OBSCENE CHARACTER. IN THESE CIRCUMSTANCES IT IS PERMISSIBLE TO CONCLUDE, ON A COMPREHENSIVE VIEW, THAT THERE IS NO LAWFUL TRADE IN SUCH GOODS IN THE UNITED KINGDOM. A PROHIBITION ON IMPORTS WHICH MAY IN CERTAIN RESPECTS BE MORE STRICT THAN SOME OF THE LAWS APPLIED WITHIN THE UNITED KINGDOM CANNOT THEREFORE BE REGARDED AS AMOUNTING TO A MEASURE DESIGNED TO GIVE INDIRECT PROTECTION TO SOME NATIONAL PRODUCT OR AIMED AT CREATING ARBITRARY DISCRIMINATION BETWEEN GOODS OF THIS TYPE DEPENDING ON WHETHER THEY ARE PRODUCED WITHIN THE NATIONAL TERRITORY OR ANOTHER MEMBER STATE.

22 THE ANSWER TO THE FOURTH QUESTION MUST THEREFORE BE THAT IF A PROHIBITION ON THE IMPORTATION OF GOODS IS JUSTIFIABLE ON GROUNDS OF PUBLIC MORALITY AND IF IT IS IMPOSED WITH THAT PURPOSE THE ENFORCEMENT OF THAT PROHIBITION CANNOT, IN THE ABSENCE WITHIN THE MEMBER STATE CONCERNED OF A LAWFUL TRADE IN THE SAME GOODS, CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR A DISGUISED RESTRICTION ON TRADE CONTRARY TO ARTICLE 36.

## 4 FREE MOVEMENT OF PERSONS

Free movement of persons, i.e. the right of EU citizens to move from one member state to another, belongs to basic rights of the internal market. Free movement of persons was much more sensitive in the integration process as the free movement of goods due to the fact that the free movement of persons is connected also with safety issues and social issues. This was also the reason why the original legal regulation was strictly connected with economic freedoms of the internal market. Economically active citizens brought also many advantages as these persons were very often skilful and educated and were thus able to promote the economic progress. It is important to note that the free movement of persons belongs only to EU citizens and does not cover third country nationals. However, the third countries nationals who are the family members of EU nationals have a special position. They derive their rights from EU nationals who realizes his/her freedom to free movement and who has the position of the primary beneficiary.

It is necessary to realize that the primary law does not enable the free movement of persons without any restrictions. Some conditions must be fulfilled in order the EU nationals may realize their right of free movement of persons. Firstly, the natural persons must be EU nationals or the legal person must have their registered seat within the territory of EU member state and secondly, these persons must perform certain economic activity assumed by EU law, whether as a worker (Articles 45-48 TFEU), self-employed person, company, organizational unit, or a subsidiary (Articles 49-55 TFEU) or as a service provider or their recipient (Articles 56-62 TFEU). Persons who perform one from these activities may realize a right of free movement of persons. However, always in connection with certain economic activity that forms the legal basis for free movement. Free movement of persons is in fact a requirement for realization of freedoms of internal market. This freedom however underlies to specific restrictions consisting in public policy, public security, protection of public health or restrictions for employment public service or state service.

Prohibition of discrimination based on nationality is a common characteristic feature for the freedoms of internal market. This means that a person from one member state has a right to equal treatment in a comparable situation as a person from the home member state.

The initial reason of member states why the Articles were included into primary law was to ensure the free movement of economically active persons (i.e. persons who contribute to economic development) without any barriers. The intention was also to balance the price of work within the EU and to achieve the prosperity for EU citizens. This intention was realized gradually as in the early years the free movement of persons was used only by a small number of EU nationals. There were several reasons,

especially there was a need to ensure the free movement also for family members and to ensure social security guarantees when the EU nationals decided to realize their freedom to move. There are however also other social, cultural or language restrictions that became significant after the EU was expanded to 27 (or 28 from 1 July 2013) member states.

The EU adopted measures aimed to fight against different restrictions for free movement of persons. This was especially made by adoption of secondary legislation in 60s and 70s years of the 20<sup>th</sup> century. The content of secondary legislation was significantly influenced by the case-law of European Court of Justice. In the secondary legislation can be seen the shift from understanding the freedom of free movement of persons from strictly economic concept to political concept, especially after the Maastricht Treaty introduced the concept of EU citizenship. The Maastricht Treaty introduced the political concept of EU citizenship and introduced new political rights for EU citizens.

#### **Treaty on European Union**

##### *Article 9*

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. **Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.**

#### **Treaty on the Functioning of the European Union**

##### *Article 20*

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

- a. **the right to move and reside freely within the territory of the Member States;**
- b. the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- c. the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- d. the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

*Article 21*

**1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.**

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

*Article 22*

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

*Article 23*

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

In the area of free movement of persons the Court of Justice of the EU decided several cases. It emphasized the importance of EU citizenship and the legal provisions regulating the EU citizenship and their influence on the interpretation of the freedoms of the internal market, including the free movement of persons. In an important decision *Grzelczyk* the Court of Justice emphasized the need of equal treatment with nationals of other EU member states:

**C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve  
Judgment of the Court of 20 September 2001  
ECR 2001 page I-6193**

31. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.

The efforts to unify the rules on free movement of persons within the EU secondary legislation resulted in 2004 in the adoption of a Directive of the European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of EU citizens and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72 / 194/EHS, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (hereinafter "Directive 38/2004"). This Directive, except the fact that it unified the fragmented legal regulation and cancelled the partial legal regulation of free movement of persons, it also strengthened the rights of EU citizens and their family members if they realize the freedom of free movement of persons. Directive 2004/38 is based on the principle that the longer EU citizens lives in another member state, the more rights he/she has. In connection with the residence in another member state, the EU citizen does not need to prove any economic relationship, if his/her residence is shorter than three months or longer than five years. This is a clear evidence of how the EU has moved away from the original roots of integration, specifically related to the internal market towards civil rights.

## **4.1 The scope of provisions of the TFEU regulating the free movement of persons**

A person who plans to apply the provisions of EU law in the area of free movement of persons must prove that he/she falls within the

- personal,
- material and
- territorial

scope of application of the TFEU provisions and must be able to prove his/her right. Otherwise, the EU law regulating the free movement of persons would not apply to this person but only national rules of each member state would be applicable.

### **4.1.1 Personal scope of the free movement of persons**

Personal scope means that person who intends to apply the rules on free movement, must fulfil the following criteria:

- must be a national of EU member state in case of a natural person, or a legal entity with its registered seat in a EU member state;
- must perform an economic activity in a position of a worker, self-employed or service provider/recipient.

From the above mentioned conditions it is clear that the free movement of persons is only applicable to persons who are nationals of EU member states.

The member states set their own criteria for acquirement of state citizenship. In order a person may use the rights arising from EU law it is important the fact that he/she is a national of the EU member state. The member states are not competent to investigate the intention, way or other circumstances how the person acquired the

citizenship of another EU member state.

**C-200/02 Kunqian Catherine Zhu, Man Lavette Chen v Secretary of State for the Home Department**

**Judgment of the Court of 19 October 2004**

**ECR 2004 page I-9925**

39. Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, *Micheletti*, paragraph 10, and *Garcia Avello*, paragraph 28).

40. However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.

With respect to legal entities, the decisive fact for assignment of their origin is the country of their registration. The seat of a legal entity is the state where the legal entity was established, in accordance with the laws of the member state where it has the registered seat.

We also mentioned that the persons must perform certain economic activity in order they have a right to free movement of persons. Performance of certain economic activity as predicted by EU legislation (performance of employment, self-employed activity or providing or receiving of services) is a condition for application of rules on free movement of persons.

The situation is different if the legal basis for free movement of persons is the Article 21(1) TFEU that established a right of each EU national to free movement and residence in another EU member state. This right may only be restricted by the requirements stipulated in the treaties. From the Maastricht Treaty that introduced the citizenship of the EU the understanding of the freedom of movement of persons became different.

**C-413/99 Baumbast v Secretary of State for Home Department  
Judgment of the Court of 17 September 2002**

80. According to settled case-law, the right of nationals of one Member State to enter the territory of another Member State and to reside there constitutes a right conferred directly by the EC Treaty or, depending on the case, by the provisions adopted to implement it.

81. Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty [*now Articles 45, 48 and 56 TFEU*] (see Case C-363/89 *Roux* [1991] ECR I-273, paragraph 9), it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC [*now Article 21(1) TFEU*] has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.

82. Under Article 17(1) EC [*now Article 20(1) TFEU*], every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, to that effect, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31).

83. Moreover, the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the EC Treaty by virtue of that citizenship.

84. As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC [*now Article 21(1) TFEU*], that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC [*now Article 21(1) TFEU*].

85. Admittedly, that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.

86. However, the application of the limitations and conditions acknowledged in Article 18(1) EC [*now Article 21(1) TFEU*] in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC [*now Article 21(1) TFEU*] from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7).

#### 4.1.2 Material Scope

Under material scope we understand the condition of the movement of individuals from one member state (usually the home member state) to the host member state for the purpose which is determined by the provisions of the TFEU regulating the free movement of workers, freedom of establishment and the free movement of services.

From the above mentioned it is clear that the EU law will not apply to relationships within one member state. With respect to clearly internal matters there is not a reason to apply the EU law. Only national law will be applied. In other words, the EU law will not apply to situations that have not a connection with situations predicted by EU law and that only apply to situations within one member state.

**175/78 The Queen v. Vera Ann Saunders**  
**Judgment of the Court of Justice of 28 March 1979**  
**ECR 1979 page 1129**

11. THE PROVISIONS OF THE TREATY ON FREEDOM OF MOVEMENT FOR WORKERS CANNOT THEREFORE BE APPLIED TO SITUATIONS WHICH ARE WHOLLY INTERNAL TO A MEMBER STATE, IN OTHER WORDS, WHERE THERE IS NO FACTOR CONNECTING THEM TO ANY OF THE SITUATIONS ENVISAGED BY COMMUNITY LAW.

The wholly internal situations are also those situations that are hypothetical and those where the circumstances do not provide an adequate assumption for application of EU law. This was also confirmed by the Court of Justice of the EU in its decisions where the Court of Justice confirmed that hypothetical possibility does not establish an adequate connection with EU law.

**C-299/95 Friedrich Kremzov v. Republik Österreich**  
**Judgment of the Court of 29 May 1997**  
**ECR 1997 page I-2629**

16. The appellant in the main proceedings is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons. Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions (see in particular to this effect Case 180/83 Moser [1984] ECR 2539, paragraph 18).

### 4.1.3 Territorial Scope

Territorial scope means that the free movement of persons may be realized within the territory of the EU member states.

## 4.2 Directive 2004/38<sup>9</sup>

### 4.2.1 Family member

Free movement of persons within the EU would not be possible if the free movement was not enabled also to family members of the primary beneficiary who intends to realize the rights connected with internal market functioning. The rights of family members are derived from the rights of that EU national who realizes one of the internal market freedoms. The Directive 2004/38 legally defines the term „family member“.

<sup>9</sup> Directive Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L22, 29 June 2004, p. 35-48)



**Article 2(2) of the Directive 2004/38**

2) "Family member" means:

- a. the spouse;
- b. the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- c. the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- d. the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)

Article 3 of the Directive 2004/38 identifies the extent of application of the Directive and identifies the beneficiaries covered by the Directive. Except of family members, the Article 3(2) also includes other categories of persons who may have the benefit of the free movement of persons, depending from the primary beneficiary.

**Article 3 of the Directive 2004/38**

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
  - a. any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
  - b. the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

#### 4.2.2 Right to enter the territory of another member state

The right to free movement is guaranteed by the economic freedoms of the internal market (free movement of workers, freedom of establishment and free movement of services) as well as by the right of EU national guaranteed in Article 21 TFEU. These provisions are without any restrictions. In case of free movement of workers, freedom of establishment and free movement of services, the restrictions are directly regulated in the relevant provisions regulating the relevant category. The restrictions are however questionable in case of Article 21 TFEU. The Court of Justice of the EU confirmed that restriction of this right is in accordance with the Treaties that regulate the extent of restrictions for reasons of public policy, public security or protection of public health. These restrictions must be strictly essential and proportional. The Directive 2004/38 regulates:

- the right of exit (Article 4);
- the right of entry the territory of a member state (Article 5).

#### 4.2.3 Right of Residence

The right to enter the territory of another member state is connected with the right of residence. Without this right it would not be possible to realize the freedoms of internal market. The Directive 2004/38 recognizes the residence rights depending on the duration of the residence.

##### *right of residence for up to three months (Article 6)*

The Directive 2004/38 enables the EU citizens to stay on the territory of other EU member states without any formal requirements. They must however not be a burden for the social security system of the host member state.

##### **Article 6 of the Directive 2004/38**

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

##### *Right of residence for more than three months (Article 7)*

EU citizens have a right of residence for more than three months in another EU member states if they fulfil the conditions laid down in Article 7(1) of the Directive 2004/38:

- 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 principal purpose of following a course of study, including vocational training; and
- d. have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or
- e. are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

Another requirement is that the EU nationals must have comprehensive sickness insurance in a host member state and must 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. A right of residence applies also to a family member accompanying or joining an EU national.

Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person (i.e. including a right of residence) in the following circumstances (Article 7(3)):

Union citizen who is no longer:

- a. he/she is temporarily unable to work as the result of an illness or accident;
- b. he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
- c. he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
- d. he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

- *Right to permanent residence (Article 16)*

Directive 2004/38 regulates the right of EU nationals and their family to permanent residence. The Article 16 enables that the

- i. EU nationals and

- ii. their family members who are not EU nationals,

who have legally resided in the host member state for a continuous period of five years, shall have the right of permanent residence in the host member state.

The Directive 2004/38 defines the continuity of residence as a period of five years. This period is however not affected by temporary absences not exceeding a total of six months a year, or absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another member state or a third country. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

## **5 FREE MOVEMENT OF WORKERS**

The free movement of workers, together with the free movement of goods and free movement of services, contributes to the realization of mobility within the internal market. It is regulated in the Article 45 TFEU and is considered to be one of the most important rights of EU nationals. A worker shall have the right to full mobility between member states.

Free movement of workers is more closely connected with the free movement of persons and it has implications beyond the economics of market integration. The free movement of workers is a free movement of human beings who are the beneficiaries of this freedom. This chapter only deals with the rights of persons connected with their right to perform work in another EU member state, i.e. it regulates the right of an individual to labour mobility. The worker has two basic rights, first, to move freely to take up employment in another member state, and second, to be handled non-discriminatory in comparison to domestic workers, including the access to social protection once installed in the host member state. However, the free movement of workers is not applied to all EU nationals, although the free movement of persons is a fundamental precondition of the internal market and an essential element of the EU citizenship. Transition period to full mobility of workers is applicable to nationals of new member states (this was applied in 2002 and 2007).

### **5.1 Who is a worker?**

The TFEU provides a wide definition of the term worker to include not only persons performing dependant economic activity, but also persons engaged in vocational training (e.g. students) and unemployed persons searching for work.

*Article 45 TFEU*

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - a. to accept offers of employment actually made;
  - b. to move freely within the territory of Member States for this purpose;
  - c. to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - d. to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Since the term worker is not defined either in the Treaties or secondary legislation, it has been shaped by the Court of Justice of the EU. It insisted that the term worker is a term of EU law and cannot thus be defined by national legislation. Otherwise, the member state could restrict the freedoms established by the Treaties and to eliminate the protection awarded by the EU law to migrant workers. The worker is a person who performs economic activities in an employment relationship which are effective and genuine and performs these activities in a subordinate position.

In *Levin* case, the British national, Mrs Levin married to South African national was refused to obtain the residence in Holland because she was not in gainful employment. The case was decided by national Dutch court that asked the preliminary question in which the Court was asked to explain the notion of a worker. The Court was asked if a person who earns less than the minimum required for subsistence as defined under national law, is considered to be a worker. As this question is not defined by the EU legislation it was up to the Court to interpret this term.

**53/81 D.M. Levin v. Staatssecretaris van Justitie  
Judgment of the Court of Justice of 23 March 1982**

11 THAT ARGUMENT CANNOT, HOWEVER, BE ACCEPTED. AS THE COURT HAS ALREADY STATED IN ITS JUDGMENT OF 19 MARCH 1964 IN CASE 75/63 HOEKSTRA (NEE UNGER) (1964) ECR 1977 THE TERMS "WORKER" AND "ACTIVITY AS AN EMPLOYED PERSON" MAY NOT BE DEFINED BY REFERENCE TO THE NATIONAL LAWS OF THE MEMBER STATES BUT HAVE A COMMUNITY MEANING. IF THAT WERE NOT THE CASE, THE COMMUNITY RULES ON FREEDOM OF MOVEMENT FOR WORKERS WOULD BE FRUSTRATED, AS THE MEANING OF THOSE TERMS COULD BE FIXED AND MODIFIED UNILATERALLY, WITHOUT ANY CONTROL BY THE COMMUNITY INSTITUTIONS, BY NATIONAL LAWS WHICH WOULD THUS BE ABLE TO EXCLUDE AT WILL CERTAIN CATEGORIES OF PERSONS FROM THE BENEFIT OF THE TREATY.

12 SUCH WOULD, IN PARTICULAR, BE THE CASE IF THE ENJOYMENT OF THE RIGHTS CONFERRED BY THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS COULD BE MADE SUBJECT TO THE CRITERION OF WHAT THE LEGISLATION OF THE HOST STATE DECLARES TO BE A MINIMUM WAGE, SO THAT THE FIELD OF APPLICATION RATIONE PERSONAE OF THE COMMUNITY RULES ON THIS SUBJECT MIGHT VARY FROM ONE MEMBER STATE TO ANOTHER. THE MEANING AND THE SCOPE OF THE TERMS "WORKER" AND "ACTIVITY AS AN EMPLOYED PERSON" SHOULD THUS BE CLARIFIED IN THE LIGHT OF THE PRINCIPLES OF THE LEGAL ORDER OF THE COMMUNITY.

13 IN THIS RESPECT IT MUST BE STRESSED THAT THESE CONCEPTS DEFINE THE FIELD OF APPLICATION OF ONE OF THE FUNDAMENTAL FREEDOMS GUARANTEED BY THE TREATY AND, AS SUCH, MAY NOT BE INTERPRETED RESTRICTIVELY.

14 IN CONFORMITY WITH THIS VIEW THE RECITALS IN THE PREAMBLE TO REGULATION (EEC) NO 1612/68 CONTAIN A GENERAL AFFIRMATION OF THE RIGHT OF ALL WORKERS IN THE MEMBER STATES TO PURSUE THE ACTIVITY OF THEIR CHOICE WITHIN THE COMMUNITY, IRRESPECTIVE OF WHETHER THEY ARE PERMANENT, SEASONAL OR FRONTIER WORKERS OR WORKERS WHO PURSUE THEIR ACTIVITIES FOR THE PURPOSE OF PROVIDING SERVICES. FURTHERMORE, ALTHOUGH ARTICLE 4 OF DIRECTIVE 68/36/EEC GRANTS THE RIGHT OF RESIDENCE TO WORKERS UPON THE MERE PRODUCTION OF THE DOCUMENT ON THE BASIS OF WHICH THEY ENTERED THE TERRITORY AND OF A CONFIRMATION OF ENGAGEMENT FROM THE EMPLOYER OR A CERTIFICATE OF EMPLOYMENT, IT DOES NOT SUBJECT THIS RIGHT TO ANY CONDITION RELATING TO THE KIND OF EMPLOYMENT OR TO THE AMOUNT OF INCOME DERIVED FROM IT.

15 AN INTERPRETATION WHICH REFLECTS THE FULL SCOPE OF THESE CONCEPTS IS ALSO IN CONFORMITY WITH THE OBJECTIVES OF THE TREATY WHICH INCLUDE, ACCORDING TO ARTICLES 2 AND 3, THE ABOLITION, AS BETWEEN MEMBER STATES, OF OBSTACLES TO FREEDOM OF MOVEMENT FOR PERSONS, WITH THE PURPOSE INTER ALIA OF PROMOTING THROUGHOUT THE COMMUNITY A HARMONIOUS DEVELOPMENT OF ECONOMIC ACTIVITIES AND A RAISING OF THE STANDARD OF LIVING. SINCE PART-TIME EMPLOYMENT, ALTHOUGH IT MAY PROVIDE AN INCOME LOWER THAN WHAT IS CONSIDERED TO BE THE MINIMUM REQUIRED FOR SUBSISTENCE, CONSTITUTES FOR A LARGE NUMBER OF PERSONS AN EFFECTIVE MEANS OF IMPROVING THEIR LIVING CONDITIONS, THE EFFECTIVENESS OF COMMUNITY LAW WOULD BE IMPAIRED AND THE ACHIEVEMENT OF THE OBJECTIVES OF THE TREATY WOULD BE JEOPARDIZED IF THE ENJOYMENT OF RIGHTS CONFERRED BY THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS WERE RESERVED SOLELY TO PERSONS ENGAGED IN FULL-TIME EMPLOYMENT AND EARNING, AS A RESULT, A WAGE AT LEAST EQUIVALENT TO THE GUARANTEED MINIMUM WAGE IN THE SECTOR UNDER CONSIDERATION.

16 IT FOLLOWS THAT THE CONCEPTS OF "WORKER" AND "ACTIVITY AS AN EMPLOYED PERSON" MUST BE INTERPRETED AS MEANING THAT THE RULES RELATING TO FREEDOM OF MOVEMENT FOR WORKERS ALSO CONCERN PERSONS WHO PURSUE OR WISH TO PURSUE AN ACTIVITY AS AN EMPLOYED PERSON ON A PART-TIME BASIS ONLY AND WHO, BY VIRTUE OF THAT FACT OBTAIN OR WOULD OBTAIN ONLY REMUNERATION LOWER THAN THE MINIMUM GUARANTEED REMUNERATION IN THE SECTOR UNDER CONSIDERATION. IN THIS REGARD NO DISTINCTION MAY BE MADE BETWEEN THOSE WHO WISH TO MAKE DO WITH THEIR INCOME FROM SUCH AN ACTIVITY AND THOSE WHO SUPPLEMENT THAT INCOME WITH OTHER INCOME, WHETHER THE LATTER IS DERIVED FROM PROPERTY OR FROM THE EMPLOYMENT OF A MEMBER OF THEIR FAMILY WHO ACCOMPANIES THEM.

17 IT SHOULD HOWEVER BE STATED THAT WHILST PART-TIME EMPLOYMENT IS NOT EXCLUDED FROM THE FIELD OF APPLICATION OF THE RULES ON FREEDOM OF MOVEMENT FOR WORKERS, THOSE RULES COVER ONLY THE PURSUIT OF EFFECTIVE AND GENUINE ACTIVITIES, TO THE EXCLUSION OF ACTIVITIES ON SUCH A SMALL SCALE AS TO BE REGARDED AS PURELY MARGINAL AND ANCILLARY. IT FOLLOWS BOTH FROM THE STATEMENT OF THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS AND FROM THE PLACE OCCUPIED BY THE RULES RELATING TO THAT PRINCIPLE IN THE SYSTEM OF THE TREATY AS A WHOLE THAT THOSE RULES GUARANTEE ONLY THE FREE MOVEMENT OF PERSONS WHO PURSUE OR ARE DESIROUS OF PURSUING AN ECONOMIC ACTIVITY.

18 THE ANSWER TO BE GIVEN TO THE FIRST AND SECOND QUESTIONS MUST THEREFORE BE THAT THE PROVISIONS OF COMMUNITY LAW RELATING TO FREEDOM OF MOVEMENT FOR WORKERS ALSO COVER A NATIONAL OF A MEMBER STATE WHO PURSUES, WITHIN THE TERRITORY OF ANOTHER MEMBER STATE, AN ACTIVITY AS AN EMPLOYED PERSON WHICH YIELDS AN INCOME LOWER THAN THAT WHICH, IN THE LATTER STATE, IS CONSIDERED AS THE MINIMUM REQUIRED FOR SUBSISTENCE, WHETHER THAT PERSON SUPPLEMENTS THE INCOME FROM HIS ACTIVITY AS AN EMPLOYED PERSON WITH OTHER INCOME SO AS TO ARRIVE AT THAT MINIMUM OR IS SATISFIED WITH MEANS OF SUPPORT LOWER THAN THE SAID MINIMUM, PROVIDED THAT HE PURSUES AN ACTIVITY AS AN EMPLOYED PERSON WHICH IS EFFECTIVE AND GENUINE.

THIRD QUESTION

19 THE THIRD QUESTION ESSENTIALLY SEEKS TO ASCERTAIN WHETHER THE RIGHT TO ENTER AND RESIDE IN THE TERRITORY OF A MEMBER STATE MAY BE DENIED TO A WORKER WHOSE MAIN OBJECTIVES, PURSUED BY MEANS OF HIS ENTRY AND RESIDENCE, ARE DIFFERENT FROM THAT OF THE PURSUIT OF AN ACTIVITY AS AN EMPLOYED PERSON AS DEFINED IN THE ANSWER TO THE FIRST AND SECOND QUESTIONS.

20 UNDER ARTICLE 48(3) OF THE TREATY THE RIGHT TO MOVE FREELY WITHIN THE TERRITORY OF THE MEMBER STATES IS CONFERRED UPON WORKERS FOR THE "PURPOSE" OF ACCEPTING OFFERS OF EMPLOYMENT ACTUALLY MADE. BY VIRTUE OF THE SAME PROVISION WORKERS ENJOY THE RIGHT TO STAY IN ONE OF THE MEMBER STATES "FOR THE PURPOSE" OF EMPLOYMENT THERE. MOREOVER, IT IS STATED IN THE PREAMBLE TO REGULATION (EEC) NO 1612/68 THAT FREEDOM OF MOVEMENT FOR WORKERS ENTAILS THE RIGHT OF WORKERS TO MOVE FREELY WITHIN THE COMMUNITY "IN ORDER TO" PURSUE ACTIVITIES AS EMPLOYED PERSONS, WHILST ARTICLE 2 OF DIRECTIVE 68/360/EEC REQUIRES THE MEMBER STATES TO GRANT WORKERS THE RIGHT TO LEAVE THEIR TERRITORY "IN ORDER TO" TAKE UP ACTIVITIES AS EMPLOYED PERSONS OR TO PURSUE THEM IN THE TERRITORY OF ANOTHER MEMBER STATE.

21 HOWEVER, THESE FORMULATIONS MERELY GIVE EXPRESSION TO THE REQUIREMENT, WHICH IS INHERENT IN THE VERY PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS, THAT THE ADVANTAGES WHICH COMMUNITY LAW CONFERS IN THE NAME OF THAT FREEDOM MAY BE RELIED UPON ONLY BY PERSONS WHO ACTUALLY PURSUE OR SERIOUSLY WISH TO PURSUE ACTIVITIES AS EMPLOYED PERSONS. THEY DO NOT, HOWEVER, MEAN THAT THE ENJOYMENT OF THIS FREEDOM MAY BE MADE TO DEPEND UPON THE AIMS PURSUED BY A NATIONAL OF A MEMBER STATE IN APPLYING FOR ENTRY UPON AND RESIDENCE IN THE TERRITORY OF ANOTHER MEMBER STATE, PROVIDED THAT HE THERE PURSUES OR WISHES TO PURSUE AN ACTIVITY WHICH MEETS THE CRITERIA SPECIFIED ABOVE, THAT IS TO SAY, AN EFFECTIVE AND GENUINE ACTIVITY AS AN EMPLOYED PERSON.

22 ONCE THIS CONDITION IS SATISFIED, THE MOTIVES WHICH MAY HAVE PROMPTED THE WORKER TO SEEK EMPLOYMENT IN THE MEMBER STATE CONCERNED ARE OF NO ACCOUNT AND MUST NOT BE TAKEN INTO CONSIDERATION.

23 THE ANSWER TO BE GIVEN TO THE THIRD QUESTION PUT TO THE COURT BY THE RAAD VAN STATE MUST THEREFORE BE THAT THE MOTIVES WHICH MAY HAVE PROMPTED A WORKER OF A MEMBER STATE TO SEEK EMPLOYMENT IN ANOTHER MEMBER STATE ARE OF NO ACCOUNT AS REGARDS HIS RIGHT TO ENTER AND RESIDE IN THE TERRITORY OF THE LATTER STATE PROVIDED THAT HE THERE PURSUES OR WISHES TO PURSUE AN EFFECTIVE AND GENUINE ACTIVITY.

The Court confirmed that the worker's activity must be effective and genuine as opposed to marginal and ancillary activities not covered by the relevant rules regulating the free movement of workers. In case 139/85 *R.H. Kempf v. Staatssecretaris van Justitie* the Netherlands government expressed doubts as to whether the work of a teacher who gives 12 lessons a week may be regarded as constituting in itself effective and genuine work.

**139/85 R.H. Kempf v. Staatssecretaris van Justitie  
Judgment of the Court of Justice of 3 June 1986**

13 THE COURT HAS CONSISTENTLY HELD THAT FREEDOM OF MOVEMENT FOR WORKERS FORMS ONE OF THE FOUNDATIONS OF THE COMMUNITY. THE PROVISIONS LAYING DOWN THAT FUNDAMENTAL FREEDOM AND, MORE PARTICULARLY, THE TERMS 'WORKER' AND 'ACTIVITY AS AN EMPLOYED PERSON' DEFINING THE SPHERE OF APPLICATION OF THOSE FREEDOMS MUST BE GIVEN A BROAD INTERPRETATION IN THAT REGARD, WHEREAS EXCEPTIONS TO AND DEROGATIONS FROM THE PRINCIPLE OF FREEDOM OF MOVEMENT FOR WORKERS MUST BE INTERPRETED STRICTLY.

14 IT FOLLOWS THAT THE RULES ON THIS TOPIC MUST BE INTERPRETED AS MEANING THAT A PERSON IN EFFECTIVE AND GENUINE PART-TIME EMPLOYMENT CANNOT BE EXCLUDED FROM THEIR SPHERE OF APPLICATION MERELY BECAUSE THE REMUNERATION HE DERIVES FROM IT IS BELOW THE LEVEL OF THE MINIMUM MEANS OF SUBSISTENCE AND HE SEEKS TO SUPPLEMENT IT BY OTHER LAWFUL MEANS OF SUBSISTENCE. IN THAT REGARD IT IS IRRELEVANT WHETHER THOSE SUPPLEMENTARY MEANS OF SUBSISTENCE ARE DERIVED FROM PROPERTY OR FROM THE EMPLOYMENT OF A MEMBER OF HIS FAMILY, AS WAS THE CASE IN LEVIN, OR WHETHER, AS IN THIS INSTANCE, THEY ARE OBTAINED FROM FINANCIAL ASSISTANCE DRAWN FROM THE PUBLIC FUNDS OF THE MEMBER STATE IN WHICH HE RESIDES, PROVIDED THAT THE EFFECTIVE AND GENUINE NATURE OF HIS WORK IS ESTABLISHED.

The rules on free movement of workers also apply to job-seekers who must be treated as workers for the purposes of a right to residence permit. This was confirmed by the Court of Justice in the case *Collins*.

**C-138/02 Brian Francis Collins v. Secretary of State for Work and Pensions  
Judgment of the Court of 23 March 2004**

(36) In the context of freedom of movement for workers, Article 48 of the Treaty grants nationals of the Member States a right of residence in the territory of other Member States in order to pursue or to seek paid employment (Case C-171/91 *Tsiotras* [1993] ECR I-2925, paragraph 8).

(37) The right of residence which persons seeking employment derive from Article 48 of the Treaty may be limited in time. In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose. However, if after expiry of that period, the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State (see Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 21, and Case C-344/95 *Commission v Belgium* [1997] ECR I-1035, paragraph 17).



## 5.2 The rights of a worker

The rights of a worker are very closely connected with the rights arising from free movement of persons. The rights to entry and to obtain a residence permit (including permanent residence permit) are granted by the Directive 2004/38 that provides a legislative framework of the free movement of persons. The rights of a worker are regulated both by the TFEU and the secondary legislation (Regulation 492/2011).

### 5.2.1 Regulation 492/2011

**Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1-12)**

Regulation 492/2011 guarantees several rights to persons who decide to perform work in another EU member state. The basic principle is prohibition of discrimination of the migrant worker in the host member state as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the EU in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health. The right to work in another EU member state should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.

#### 5.2.1.1 Eligibility to employment

*Article 1*

1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

*Article 2*

Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

*Article 4*

1. Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.

2. When in a Member State the granting of any benefit to undertakings is subject to a minimum percentage of national workers being employed, nationals of the other Member States shall be counted as national workers, subject to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

*Article 5*

A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.

The principle of equal treatment means that the migrant workers enjoy the same priority as regards employment as the national workers. Migrant workers shall be guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the member states.

*5.2.1.2 Equality of treatment in employment*

*Article 7*

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

*Article 8*

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.

The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

*Article 9*

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

The right to free movement requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country.

*5.2.1.3 The rights of workers' families and the right of housing*

*Article 9*

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

*Article 10*

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

### 5.3 Organisation of work – EU labour law

The EU regulates not only the freedom of movement of workers but also introduced some minimum requirements in the area of worker rights and organisation of work. These requirements concern the following areas:

#### 5.3.1 Collective redundancies

*Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998, p. 16–21)*

This Directive requires the employers to consult the employee representatives in case of collective redundancies. It regulates the process of collective redundancies and the extent of information that must be provided to employee representatives during the consultations. The purpose of consultations is to reach an agreement with employee representatives to avoid collective redundancies or to reduce the number of affected workers or to adopt measures that make the consequences of collective redundancies less severe (redeploying or retraining of redundant workers).

The Directive also specifies the type of information that must be provided in writing by the employer to employee representatives during consultation process: (i) reasons of collective redundancies, (ii) the period during which redundancies are to be effected, (iii) the number and category of employees normally employed, (iv) the number to be made redundant, (v) the criteria used to select those workers to be made redundant, (vi) the method used to calculate compensation.

The Directive also specifies the procedure of collective redundancies. It is also obligatory to notify the competent authority of any projected collective redundancies and to provide all relevant information about collective redundancies. The employer also sends a copy of the notification to employee representatives. Collective redun-

dancies can take effect at the earliest 30 days after the notification.

### **5.3.2 Insolvency of the employer**

Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (*OJ L 283, 28.10.2008, p. 36–42*).

The purpose of this Directive is to protect employees who were not paid their remuneration by their insolvent employer. All employees may benefit from this Directive, irrespective of the duration of their employment relationship, i.e. it is applicable to part-time employees, employees working on a fixed-term or temporary employees. The member states shall be obliged to establish a guarantee institution that shall guarantee the payments of employees' claims.

### **5.3.3 Transfer of undertaking**

*Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16–20)*

Transfer of undertaking is a situation if there is a transfer of an economic entity that retains its identity, defined as an organised grouping of resources that has the objective of pursuing an economic activity. The Directive stipulates that the transferee becomes an employee of the transferor. In this situation, the rights and duties of the employment contracts (irrespective the number of working hours performed, part-time employees, employees working on a fixed-term or temporary employees) of the employees from the transferred undertaking will be recognised.

The basic principle of the Directive is that the rights and obligations of the transferred employees maintain after the transfer and are connected with the existing employment relationship. The transfer shall not constitute a ground for dismissal. If there is a collective agreement concluded, the working conditions arising from the concluded collective agreement are maintained for the duration of this agreement (at least one year after the transfer).

The employer must fulfil information and consultation obligations towards employees. Employees shall be informed about the transfer through the employee representatives or directly if there are no employee representatives. They shall be informed about the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications, and any measures envisaged in relation to the employees.

### **5.3.4 Consultation and information of workers**

*Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ L*

288, 18.10.1991, p. 32–35)

The purpose of this directive is to ensure that the employees are informed about facts relevant to their employment. Employers must provide the employees with the following information relating to their employment: (i) identity of the parties, (ii) place of work, (iii) title, grade, nature or category of the work for which the employee is employed, (iv) brief job description, (v) date of work commencement, (vi) expected duration of a temporary contract, (vii) the amount of paid leave, (viii) the length of a notice period, (ix) the amount of remuneration and the frequency of payment of the remuneration, (x) the length of a working day or working week, (xi) collective agreements governing the employee's conditions of work. All this information must be provided in an employment contract or in a letter of engagement or in one or more other written documents. The information must be given to the employee within two months of commencement of employment, failing which the employee must be given a written declaration signed by the employer. If the employee shall work in another country, the employer must provide him/her information about duration of employment abroad, currency for payment of remuneration or other benefits attendant on the employment abroad or the conditions governing the employee's repatriation.

### 5.3.5 Working hours

*Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 195, 1.8.2000, p. 41–45)*

This directive regulates the organisation of working time of employees. The working time is defined as a period during which the employee is working, at the employer's disposal and carrying out his activity or duties. The directive regulates the entitlement of the employee to (i) a minimum daily rest period of 11 consecutive hours per 24-hour period, (ii) a rest break if the working time exceeds 6 hours, (iii) a minimum uninterrupted rest period of 24 hours for each seven-day period, which is added to the 11 hours' daily rest, (iv) maximum weekly working time of 48 hours, including overtime, (v) paid annual leave of at least four weeks. The directive also regulates the night work. Its duration must not exceed an average of eight hours in any 24-hour period. Night workers must have a level of safety and health protection adapted to the work they perform. They are entitled to a free health assessment before being assigned to night work and thereafter at regular intervals. Employers who regularly use night workers must bring this information to the attention of the competent health and safety authorities. A special regulation of working time applies to certain sectors of employment, e.g. road transport, civil aviation, etc.

### 5.3.6 Equal treatment and equal pay

*Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16–22)*

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men*

*and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, p. 23–36)*

*Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22–26)*

These directives reflect the principles on which the EU is founded – liberty, democracy, respect for human rights and fundamental freedoms and rule of law. The area of employment and occupation are crucial for ensuring equal treatment and equal opportunities for all. Employment is one of the most frequent areas where discrimination is detected. The EU is empowered to combat against discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 TFEU). These directives define the scope of their application, i.e. the areas where the discrimination is prohibited as well as the forms of discrimination. Further details are described in a chapter 8 below.

*Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327, 5.12.2008, p. 9–14)*

Temporary work is an area which is regulated by EU law. The regulation on EU level was necessary due to increasing number of temporary workers employed by temporary work agencies. Temporary workers are persons with a contract of employment or an employment relationship with a temporary-work agency with a view to being posted to a user employer to work temporarily under its supervision. This directive ensures that the temporary workers and workers employed directly by the user employer for the same type of position receive equal treatment. The principle of equal treatment applies to employment conditions (remuneration, duration of working hours, overtime, rest periods, night work, holidays) and to protection of special categories of workers (pregnant women and nursing female workers, children and juveniles) and equal treatment for men and women and protection against discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation. The directive enables the temporary workers to conclude an employment contract with the user undertaking at the end of their posting. They must therefore be informed of vacancies for permanent employment. Temporary workers must have access to the amenities and collective services of the user undertaking (canteens, childcare facilities and transport) under the same conditions as the workers of the user employer.

### **5.3.7 Posting of workers**

*Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1–6)*

The Directive applies to employers that post their workers to another member state to perform the services, provided there is an employment relationship between the posting employer and the posted worker during the period of posting. The posted worker carries out duties, for a limited period, in the territory of a member state other than the state in which the employee performs work. The Directive requires the member states that they ensure that the posted worker is guaranteed core of mandatory protective legislation laid down in the member state where the work is performed.

The worker shall be granted the following rights regulating the conditions of employment in the member state where the work is performed: (i) maximum work periods and minimum rest periods, (ii) minimum paid annual holidays, (iii) minimum remuneration, (iv) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, (v) health and safety at work, (vi) protection of pregnant women or women who have recently given birth, of children and of juvenile employees, (vii) equality of treatment between men and women and equal treatment provisions.



## 6 FREE MOVEMENT OF SELF-EMPLOYED

The free movement of self-employed persons is regulated in the TFEU by articles regulating the freedom of establishment and free movement of services. Both these freedoms apply to economically active persons who perform independent activity.

### 6.1 Freedom of establishment

*Article 49 TFEU*

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

#### 6.1.1 Restrictions to the free movement of self-employed

With respect to natural persons, these derogations are regulated, together with the application to workers, by relevant provisions of the Directive 2004/38. With respect to self-employed persons, the derogations are regulated by the TFEU and general principles of EU law (principle of proportionality, prohibition of discrimination, etc.), together with the relevant provisions of the Services Directive.

*Article 51 TFEU*

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

*Article 52 TFEU*

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

### 6.1.2 Prohibition of discrimination of self-employed

The freedom of self-employed persons is regulated by the principle of national treatment that includes the principle of non-discrimination based on national origin. The self-employed persons shall be subject to national rules, conditions or regulations of various professional organizations.

*Article 54*

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

*Article 55*

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

## 6.2 Freedom to provide services

The free movement of services in the EU is one of the fundamental freedoms guaranteed by the TFEU. To ensure the free movement of services the national legislation has been harmonized. Providing of services is defined as an economic activity that is provided for remuneration. Free movement of services is guaranteed to the service provider and the recipient. The basic principle in the free movement of services is prohibition of discrimination on grounds of nationality. Freedom to provide services is not absolute. Member states may, where justified by public policy, public safety and public health, adopt measures which restrict this freedom. Restrictions must pursue a legitimate aim, must not conflict with the objectives of the EU and shall be proportionate

to the objective to be achieved.

Freedom to provide services entails the right to carry out an economic activity for a temporary period in which either the provider or recipient of services is not established.

*Article 56*

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

*Article 57*

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- a. activities of an industrial character;
- b. activities of a commercial character;
- c. activities of craftsmen;
- d. activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

### 6.2.1 Secondary legislation

The obstacles to freedom to establishment and free movement of services could be removed by harmonization, i.e. by enactment of secondary legislation. Several directives were adopted that harmonized the rules regulating free movement of services or the freedom to establishment. Directives regulating mutual recognition of qualifications were adopted in various trades and professions. This process was however achieved very slowly and took several years.

#### 6.2.1.1 Services Directive 2006/123

The Services Directive was enacted after long discussions and with a delay. Its purpose was to consolidate the freedoms to provide services and to liberalize the internal market between the member states. The directive is complex in the scope of the regulation (Article 2(1)). Certain sectors are excluded from its application (Article 2(2) and Article 3).

*Article 2**Scope*

1. This Directive shall apply to services supplied by providers established in a Member State.
2. This Directive shall not apply to the following activities:
  - a. non-economic services of general interest;
  - b. financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;
  - c. electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;
  - d. services in the field of transport, including port services, falling within the scope of Title V of the Treaty;
  - e. services of temporary work agencies;
  - f. healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;
  - g. audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;
  - h. gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;
  - i. activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;
  - j. social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
  - k. private security services;
  - l. services provided by notaries and bailiffs, who are appointed by an official act of government.
3. This Directive shall not apply to the field of taxation.

*Article 3**Relationship with other provisions of Community law*

1. If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include:
  - a. Directive 96/71/EC;
  - b. Regulation (EEC) No 1408/71;
  - c. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities;
  - d. Directive 2005/36/EC.
2. This Directive does not concern rules of private international law, in particular rules governing the law applicable to contractual and non contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member State.
3. Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

The directive simplifies the national administrative procedures for providers of services or for those who want to establish in another EU member state.

*Article 16**Freedom to provide services*

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- a. non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
- b. necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
- c. proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

- a. an obligation on the provider to have an establishment in their territory;
- b. an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
- c. a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
- d. the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
- e. an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
- f. requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
- g. restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

*Rights of recipients of services**Article 19**Prohibited restrictions*

Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

- a. an obligation to obtain authorisation from or to make a declaration to their competent authorities;
- b. discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.

*Article 20**Non-discrimination*

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

### 6.2.2 Case law of EU courts

At the same time, as the Commission was negotiating adoption of harmonization regulation, the Court of Justice of the EU had to deal with cases in which the self-employed persons had to face hard restrictions in trying to practice their profession in another EU member state.

In *Van Binsbergen* case, the Court of Justice had to deal with the residency requirement. The case concerned a Dutchman resided in Belgium who was refused audience rights before Dutch courts. The Court of Justice confirmed that the Article 56 TFEU was directly effective and was not conditional on the issue of subsequent directive, nor on a residence requirement in Holland.

**33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid.****Judgment of the Court of 3 December 1974****ECR 1974 page 1299**

20 WITH A VIEW TO THE PROGRESSIVE ABOLITION DURING THE TRANSITIONAL PERIOD OF THE RESTRICTIONS REFERRED TO IN ARTICLE 59, ARTICLE 63 HAS PROVIDED FOR THE DRAWING UP OF A "GENERAL PROGRAMME" – LAID DOWN BY COUNCIL DECISION OF 18 DECEMBER 1961 (1962, P. 32) – TO BE IMPLEMENTED BY A SERIES OF DIRECTIVES.

21 WITHIN THE SCHEME OF THE CHAPTER RELATING TO THE PROVISION OF SERVICES, THESE DIRECTIVES ARE INTENDED TO ACCOMPLISH DIFFERENT FUNCTIONS, THE FIRST BEING TO ABOLISH, DURING THE TRANSITIONAL PERIOD, RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES, THE SECOND BEING TO INTRODUCE INTO THE LAW OF MEMBER STATES A SET OF PROVISIONS INTENDED TO FACILITATE THE EFFECTIVE EXERCISE OF THIS FREEDOM, IN PARTICULAR BY THE MUTUAL RECOGNITION OF PROFESSIONAL QUALIFICATIONS AND THE COORDINATION OF LAWS WITH REGARD TO THE PURSUIT OF ACTIVITIES AS SELF-EMPLOYED PERSONS.

22 THESE DIRECTIVES ALSO HAVE THE TASK OF RESOLVING THE SPECIFIC PROBLEMS RESULTING FROM THE FACT THAT WHERE THE PERSON PROVIDING THE SERVICE IS NOT ESTABLISHED, ON A HABITUAL BASIS, IN THE STATE WHERE THE SERVICE IS PERFORMED HE MAY NOT BE FULLY SUBJECT TO THE PROFESSIONAL RULES OF CONDUCT IN FORCE IN THAT STATE.

24 THE PROVISIONS OF ARTICLE 59, THE APPLICATION OF WHICH WAS TO BE PREPARED BY DIRECTIVES ISSUED DURING THE TRANSITIONAL PERIOD, THEREFORE BECAME UNCONDITIONAL ON THE EXPIRY OF THAT PERIOD.

25 THE PROVISIONS OF THAT ARTICLE ABOLISH ALL DISCRIMINATION AGAINST THE PERSON PROVIDING THE SERVICE BY REASON OF HIS NATIONALITY OR THE FACT THAT HE IS ESTABLISHED IN A MEMBER STATE OTHER THAN THAT IN WHICH THE SERVICE IS TO BE PROVIDED.

26 THEREFORE, AS REGARDS AT LEAST THE SPECIFIC REQUIREMENT OF NATIONALITY OR OF RESIDENCE, ARTICLES 59 AND 60 IMPOSE A WELL-DEFINED OBLIGATION, THE FULFILMENT OF WHICH BY THE MEMBER STATES CANNOT BE DELAYED OR JEOPARDIZED BY THE ABSENCE OF PROVISIONS WHICH WERE TO BE ADOPTED IN PURSUANCE OF POWERS CONFERRED UNDER ARTICLES 63 AND 66.

In *Reyners* case the Dutchman was refused the access to Belgian Bar on the grounds of nationality. The Dutch government argued that the current Article 56 TFEU (then Article 52 EEC Treaty) was not directly effective because it was incomplete without issue of the directive required by that article. The Court confirmed that the nationality cannot be a barrier for a qualified lawyer to enter a country to practice.

**2/74 Jean Reyners v Belgian State**  
**Judgment of the Court of 21 June 1974**  
**ECR 1974 page 631**

43 HAVING REGARD TO THE FUNDAMENTAL CHARACTER OF FREEDOM OF ESTABLISHMENT AND THE RULE ON EQUAL TREATMENT WITH NATIONALS IN THE SYSTEM OF THE TREATY, THE EXCEPTIONS ALLOWED BY THE FIRST PARAGRAPH OF ARTICLE 55 CANNOT BE GIVEN A SCOPE WHICH WOULD EXCEED THE OBJECTIVE FOR WHICH THIS EXEMPTION CLAUSE WAS INSERTED.

44 THE FIRST PARAGRAPH OF ARTICLE 55 MUST ENABLE MEMBER STATES TO EXCLUDE NON-NATIONALS FROM TAKING UP FUNCTIONS INVOLVING THE EXERCISE OF OFFICIAL AUTHORITY WHICH ARE CONNECTED WITH ONE OF THE ACTIVITIES OF SELF-EMPLOYED PERSONS PROVIDED FOR IN ARTICLE 52.

45 THIS NEED IS FULLY SATISFIED WHEN THE EXCLUSION OF NATIONALS IS LIMITED TO THOSE ACTIVITIES WHICH, TAKEN ON THEIR OWN, CONSTITUTE A DIRECT AND SPECIFIC CONNEXION WITH THE EXERCISE OF OFFICIAL AUTHORITY.

46 AN EXTENSION OF THE EXCEPTION ALLOWED BY ARTICLE 55 TO A WHOLE PROFESSION WOULD BE POSSIBLE ONLY IN CASES WHERE SUCH ACTIVITIES WERE LINKED WITH THAT PROFESSION IN SUCH A WAY THAT FREEDOM OF ESTABLISHMENT WOULD RESULT IN IMPOSING ON THE MEMBER STATE CONCERNED THE OBLIGATION TO ALLOW THE EXERCISE, EVEN OCCASIONALLY, BY NON-NATIONALS OF FUNCTIONS APPERTAINING TO OFFICIAL AUTHORITY.

47 THIS EXTENSION IS ON THE OTHER HAND NOT POSSIBLE WHEN, WITHIN THE FRAMEWORK OF AN INDEPENDENT PROFESSION, THE ACTIVITIES CONNECTED WITH THE EXERCISE OF OFFICIAL AUTHORITY ARE SEPARABLE FROM THE PROFESSIONAL ACTIVITY IN QUESTION TAKEN AS A WHOLE.

### **6.2.3 Providing of services and the obligation to be established**

The EU rules make a difference between providing of services and a right to establishment. The difference between applications of these rights is crucial for obligations of a service provider established in the EU country that provides services outside its country of origin, including the obligation to have licences required by local legislation.

The key factor distinguishing services from establishment is duration, i.e. if a company stays in the host member state permanently, it is likely to be covered by the rules relating to establishment, but if it stays in the host member state temporary, it is likely to provide services only. Generally, it is sometimes very difficult to distinguish which situation is applicable. The Court of Justice of the EU confirmed that the temporary nature of the activities performed has to be determined "*in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity*"<sup>10</sup>.

<sup>10</sup> C-55/94 [1995] ECR I-4165, para. 27



**C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano**

**Judgment of the Court of 30 November 1995**

**ECR 1995 page I-4165**

25 The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to this effect, Case 2/74 *Reyners v Belgium* [1974] ECR 631, paragraph 21).

26 In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.

27 As the Advocate General has pointed out, the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

28 However, that situation is to be distinguished from that of Mr Gebhard who, as a national of a Member State, pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State. Such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

.....

39 Accordingly, it should be stated in reply to the questions from the Consiglio Nazionale Forense that:

- the temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity;
- the provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question;
- a national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services;

From the above mentioned facts and with respect to the obligation to have a licence for providing of services in the host member state, there is necessary to distinguish, whether the company will permanently provide recruitment services in the host member state. If the services are provided on a permanent basis, there is necessary to have a licence in the host member state, as the EU rules regulating the freedom of establishment will be used. On the other hand, if the services are not provided permanently, i.e. the relevant company does not provide the services permanently, EU rules on free movement of services are applied.

It is thus up to the national court to determine the situation on a case to case basis. However, in case *Trojani*, the Court of Justice of the European Union made clear that an activity carried out on a permanent basis, or at least without a foreseeable limit to

its duration, would not fall within the services provisions.

**C-456/02 Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)**

**Judgment of the Court of 7 September 2004**

**ECR 2004 page I-7573**

27 Now, first, the freedom of establishment provided for in Articles 43 EC to 48 EC, includes only the right to take up and pursue all types of self-employed activity, to set up and manage undertakings, and to set up agencies, branches or subsidiaries (see, in particular, Case C-255/97 *Pfeiffer* [1999] ECR I-2835, paragraph 18, and Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 24). Paid activities are therefore excluded.

28 Second, according to the settled case-law of the Court, an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, does not fall within the Community provisions concerning the provision of services (see Case 196/87 *Steymann* [1988] ECR 6159, paragraph 16, and Case C-215/01 *Schnitzer* [2003] I-0000, paragraphs 27 to 29).

### 6.2.4 Providing of services and measures adopted by member states

The basic principle is the principle of non-discrimination on the ground of nationality against those wishing to provide and receive services. Article 57 TFEU stipulates that a person providing services may pursue his activities in the member state, where the service is provided, under the same conditions as are imposed by that state on its own nationals.

However, from the case law of EU courts results that a member state may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaties whose object is, precisely, to guarantee the freedom to provide services.

**C-76/90 Manfred Säger v Dennemeyer & Co. Ltd.**

**Judgment of the Court of 25 July 1991**

**ECR 1991 page I-4151**

13 In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services. Such a restriction is all the less permissible where, as in the main proceedings, and unlike the situation governed by the third paragraph of Article 60 of the Treaty, the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided.

This was also confirmed by the *Laval* case which stipulates that host member states cannot require service providers and their staff to comply with all of the host state's labour standards since they have already satisfied the standards in the home state. Applying both sets of rules imposes a double burden and this would deprive Article 56 TFEU of all practical effectiveness<sup>11</sup>. This conclusion was also supported by the Court of Justice which found that German rules requiring insurance companies

<sup>11</sup> C-164/99 *Portugaia Construções L<sup>da</sup>* [2002] ECR I-787.

wishing to provide insurance in Germany to be both established and authorized in Germany breached articles 56 and 57 TFEU because the rules increased costs for those providing services in Germany, especially when the insurer conducted business there only occasionally.

**C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet,**  
**Judgment of the Court of 18 December 2007**  
**ECR 2007 page I-11767**

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

**C-164/99 Portugaia Construções L<sup>da</sup>**  
**Judgment of the Court of 24 January 2002**  
**ECR 2002 page I-787**

16. It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services.

17. In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment, thereby depriving of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services (see *Säger*, paragraph 13).

18. In that regard, the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services by persons or undertakings established in other Member States to the extent that it involves expenses and additional administrative and economic burdens (*Mazzoleni and ISA*, paragraph 24).

### 6.3 Free movement of lawyers

The free movement of legal services is regulated by directives. Member states have the obligation to transpose the objectives of the directives into their national laws. In order to harmonize member states' legislation in the area of the free movement of legal services, two directives were adopted that reflect a different degree of integration of providers of legal services into national systems operating in different member states. The system is based on the mutual recognition of qualification of the legal profession between the member states. Member states mutually recognize the qualification obtained in another member state and they shall enable to perform the profession of a lawyer on their territory under the same conditions as are applicable to domestic lawyers. The directive also defines the term "lawyer" and thus defines the personal scope. Free movement of legal services is regulated by the following direc-

tives:

- *Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.3.1977, p. 17–18)*
- *Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77, 14.3.1998, p. 36–43)*

### 6.3.1 Directive 77/249

This directive regulates providing of legal services on the territory of another member state, or the European Economic Area other than the state in which the lawyer is established, on a temporal basis. The directive does not provide for permanent operation of the legal profession in another member state, but greatly facilitates the activities of lawyers within the EU. The lawyers who provide legal services in another EU member state must use the professional title used in the member state from which he/she comes, expressed in the language or one of the languages, of that state, with an indication of the professional organization by which he/she is authorized to practise or the court of law before which he/she is entitled to practise pursuant to the laws of that state.

#### 6.3.1.1 Rights and obligations arising from the directive

The scope of legal assistance which the lawyers may provide under this directive is limited. This is related to the effort to protect the legitimate interests of the beneficiaries of legal services, as different countries have specific rules set out in the specific areas. Member states may decide that the broad freedom to provide legal services is restricted in the inheritance law and land law in preparing the documents creating or transferring rights in land.

##### *Article 1*

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services.

Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land.

Member states may impose condition requiring collaboration with a local lawyer in cases where a lawyer from another member state represents a client before a court or tribunal. The local lawyer assumes responsibility for the operation of a lawyer from another member state. Cooperation with a local lawyer shall also eliminate the problems with delivery of documents.

### 6.3.1.2 Practical problems with application of the directive 77/249

In *Vlassopoulou* case, the Court of Justice was dealing with non-discrimination provisions of the primary law regulating the freedom to provide services. This case was decided before adoption of a secondary legislation regulating the free movement of lawyers. Irène Vlassopoulou was not enabled the profession of a lawyer in Germany despite she was a member of the bar in Greece and was performing legal praxis in Germany for five years.

**C-340/89 Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg**

**Judgment of the Court of 7 May 1991**

**ECR 1991 page I-2357**

16 Consequently, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

In *Gebhard* case the Court was dealing with the right to establishment in another member state and the conditions for application of this right that are determined in the light of the intended activity on the territory of the host member state. If the area is not regulated in the host member state, there exist any obstacles to establish in the host member state. However, if there are specific standards, these must be fulfilled by the concerned person. Such standards include, for example possession of a diploma, membership in a professional organization or adaptation to the professional rules. Compliance with these standards shall be subject to the following four requirements.

- these standards must be applied on a non-discrimination basis,
- must be justified by legitimate public interest requirements,
- must be suitable for achieving the objective and goals,
- must satisfy the requirement of proportionality, must not exceed what is necessary to achieve them.

**C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano****Judgment of the Court of 30 November 1995****ECR 1995 page I-4165**

31 The provisions relating to the right of establishment cover the taking-up and pursuit of activities (see, in particular, the judgment in *Reyners*, paragraphs 46 and 47). Membership of a professional body may be a condition of taking up and pursuit of particular activities. It cannot itself be constitutive of establishment.

32 It follows that the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

33 Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.

34 In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

35 However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability (see Case C-71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as *avvocato*.

36 Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

37 It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32).

38 Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in *Thieffry*, paragraphs 19 and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgment in *Vlassopoulou*, paragraph 16).

**6.3.2 Directive 98/5**

This directive enables, under certain conditions, be permanently incorporated into the bar of the host member state.

*Article 1**Object, scope and definitions*

1. The purpose of this Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.

The benefit of this directive is that it enables to perform the legal praxis under the professional title of the host member state. The knowledge of the lawyer from the other member state will not be subject to review by the host country, although he/she has never studied the law of the host member state. The directive meets the needs of consumers of legal services who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out cross-border transactions in which international law, EU law and domestic laws often overlap.

*6.3.2.1 Rights and obligations arising from the directive 98/5*

The lawyers are entitled to practice the legal profession in a host member state, provided that he/she is registered with the competent authority in that member state. The competent authority has the obligation to register the lawyer upon submission of a certificate attesting to his/her registration in their home member state. The competent registering authority of the host member state is obliged to inform the competent authority of the home member state of that fact. A lawyer practising in a host member state under his home-country professional title shall do so under that title, which must be expressed in the official language or one of the official languages of his home member state, in an intelligible manner and in such a way as to avoid confusion with the professional title of the host member state.

*Article 5**Area of activity*

1. Subject to paragraphs 2 and 3, a lawyer practising under his home-country professional title carries on the same professional activities as a lawyer practising under the relevant professional title used in the host Member State and may, inter alia, give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State. He shall in any event comply with the rules of procedure applicable in the national courts.

2. Member States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.

3. For the pursuit of activities relating to the representation or defence of a client in legal proceedings and insofar as the law of the host Member State reserves such activities to lawyers practising under the professional title of that State, the latter may require lawyers practising under their home-country professional titles to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an 'avoué' practising before it.

Nevertheless, in order to ensure the smooth operation of the justice system, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers.

The directive regulates the rules of professional conduct, including the obligation to be insured as requested by the rules of the host member state.

*Article 6**Rules of professional conduct applicable*

1. Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

2. Lawyers practising under their home-country professional titles shall be granted appropriate representation in the professional associations of the host Member State. Such representation shall involve at least the right to vote in elections to those associations' governing bodies.

3. The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.

### Disciplinary proceedings



*Article 7**Disciplinary proceedings*

1. In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply.

2. Before initiating disciplinary proceedings against a lawyer practising under his home-country professional title, the competent authority in the host Member State shall inform the competent authority in the home Member State as soon as possible, furnishing it with all the relevant details.

The first subparagraph shall apply *mutatis mutandis* where disciplinary proceedings are initiated by the competent authority of the home Member State, which shall inform the competent authority of the host Member State(s) accordingly.

3. Without prejudice to the decision-making power of the competent authority in the host Member State, that authority shall cooperate throughout the disciplinary proceedings with the competent authority in the home Member State. In particular, the host Member State shall take the measures necessary to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.

4. The competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules, in the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home-country professional title.

5. Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.

The directive also enables full integration. It makes easier for the lawyers from other member states to obtain the professional title of that host member state. After effectively and regularly pursuing in the host member state an activity in the law of that state including EU law for a period of three years, a lawyer may reasonably be assumed to have gained the aptitude necessary to become fully integrated into the legal profession there.

*Article 10**Like treatment as a lawyer of the host Member State*

1. A lawyer practising under his home-country professional title who has effectively and regularly pursued for a period of at least three years an activity in the host Member State in the law of that State including Community law shall, with a view to gaining admission to the profession of lawyer in the host Member State, be exempted from the conditions set out in Article 4(1)(b) of Directive 89/48/EEC, 'Effective and regular pursuit' means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.

It shall be for the lawyer concerned to furnish the competent authority in the host Member State with proof of such effective regular pursuit for a period of at least three years of an activity in the law of the host Member State. To that end:

(a) the lawyer shall provide the competent authority in the host Member State with any relevant information and documentation, notably on the number of matters he has dealt with and their nature;

(b) the competent authority of the host Member State may verify the effective and regular nature of the activity pursued and may, if need be, request the lawyer to provide, orally or in writing, clarification of or further details on the information and documentation mentioned in point (a).

Reasons shall be given for a decision by the competent authority in the host Member State not to grant an exemption where proof is not provided that the requirements laid down in the first subparagraph have been fulfilled, and the decision shall be subject to appeal under domestic law.

2. A lawyer practising under his home-country professional title in a host Member State may, at any time, apply to have his diploma recognised in accordance with Directive 89/48/EEC with a view to gaining admission to the profession of lawyer in the host Member State and practising it under the professional title corresponding to the profession in that Member State.

3. A lawyer practising under his home-country professional title who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years but for a lesser period in the law of that Member State may obtain from the competent authority of that State admission to the profession of lawyer in the host Member State and the right to practise it under the professional title corresponding to the profession in that Member State, without having to meet the conditions referred to in Article 4(1)(b) of Directive 89/48/EEC, under the conditions and in accordance with the procedures set out below:

(a) The competent authority of the host Member State shall take into account the effective and regular professional activity pursued during the abovementioned period and any knowledge and professional experience of the law of the host Member State, and any attendance at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct.

(b) The lawyer shall provide the competent authority of the host Member State with any relevant information and documentation, in particular on the matters he has dealt with. Assessment of the lawyer's effective and regular activity in the host Member State and assessment of his capacity to continue the activity he has pursued there shall be carried out by means of an interview with the competent authority of the host Member State in order to verify the regular and effective nature of the activity pursued.

Reasons shall be given for a decision by the competent authority in the host Member State not to grant authorisation where proof is not provided that the requirements laid down in the first subparagraph have been fulfilled, and the decision shall be subject to appeal under domestic law.

4. The competent authority of the host Member State may, by reasoned decision subject to appeal under domestic law, refuse to allow the lawyer the benefit of the provisions of this Article if it considers that this would be against public policy, in a particular because of disciplinary proceedings, complaints or incidents of any kind.

5. The representatives of the competent authority entrusted with consideration of the application shall preserve the confidentiality of any information received.

6. A lawyer who gains admission to the profession of lawyer in the host Member State in accordance with paragraphs 1, 2 and 3 shall be entitled to use his home-country professional title, expressed in the official language or one of the official languages of his home Member State, alongside the professional title corresponding to the profession of lawyer in the host Member State.

Free movement of legal services brings the lawyers a possibility of providing legal services within the whole area of the EU and the EEA. This possibility enables the free movement of legal services within the internal market. The Court of Justice of the EU has developed praxis, where no restrictions of this freedom are accepted. Free movement of legal services is harmonized field of European internal market. Directives have been adopted to make this freedom available for practicing lawyers in the EU. Lawyers shall provide legal services under their professional title used in state of their registration. The professional title shall be expressed in the language of state of their registration. Lawyers also have the possibility to become a member of a bar in the member state where they are practicing their profession. Free movement of legal services helps the EU to create an area without restrictions in the field of providing legal services. This is closely connected with the growth of trade between member states.

## 7 FREE MOVEMENT OF CAPITAL

The free movement of capital was necessary for proper functioning of the internal market. The member states were prohibited to introduce new restrictions on capital movement. The Treaty on EU completely revised the provisions on free movement of capital.

*Article 63 TFEU*

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

As was confirmed by the Court of Justice of the EU, Article 63 TFEU has direct effect as it laid down clear and unconditional prohibition for which no implementing measure was required.

*Exceptions from the free movement of capital*

Article 65(1) TFEU regulates the exceptions from the free movement of capital. The first exception concerns taxation and constitutes one of the main exceptions to Article 63 TFEU. The second exception concerns the grounds of public policy and public security.

*Article 65 TFEU*

1. The provisions of Article 63 shall be without prejudice to the right of Member States:
  - a. to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
  - b. to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

## 8 PROHIBITION OF DISCRIMINATION IN EU LAW

Prohibition of discrimination forms an important part of EU legislation. EU legislation covers various grounds for which the discrimination is prohibited.

In antidiscrimination legislation, two main approaches are used. These two approaches have their origin in Aristotle's understanding of equality as treating like cases alike and unlike cases unlike, in proportion to their difference:

- **Formal approach to equality**
  - *Treating like cases alike – treating the same persons in the same way*
  - *Practical problem: where cases are alike?*
- **Substantive approach to equality**
  - *Treating unlike cases unlike – the focus is not put on the treatment itself, but on the effect of the treatment – the result should be equal, even if the treatment must be different. The substantive approach takes into account the differences between people.*
  - *Practical problem: how far to go to accommodate differences?*

The EU law represent a combination of formal and substantive approach to equality. The substantive approach is reflected in prohibition of indirect discrimination.

### 8.1 EU law on equality

The EEC Treaty (1957) introduced Article 119 (now Article 157 TFEU) that established the right to equal pay regardless sex. Introduction of this article was demanded by France as it was bound by the ILO Equal Pay Convention and German attitude on free economy (competitive disadvantage of French economy if all countries could pay women less). Nowadays, both primary and secondary legislation contain provisions on equality.

#### 8.1.1 Primary legislation

Both Treaties (and the Charter) contain provisions on equality. The primary legislation has precedence over secondary legislation. This has influence on interpretation of directives.

*Articles of the TEU*

*Article 2*

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

*Article 3*

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

*Articles of the TFEU**Article 8*

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

*Article 10*

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

*Article 157*

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- a. that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- b. that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 157 was amended by the Amsterdam Treaty. Paragraph 3 enables to adopt measures to ensure equal opportunities in employment and occupation, i.e. it constitutes a legal basis for adoption of secondary legislation (before only other general or harmonising articles were used) and paragraph 4 enables to adopt positive actions.

As was confirmed by the Court of Justice in case *Defrenne v. Sabena*, the article 157 is directly applicable. The Court of Justice established that the right to equal pay was legally binding. Ms Defrenne, a Belgian air hostess, felt that she was entitled to a similar salary as male air stewards (as a woman she was required to retire at 40, had been paid less, she had a shorter working life and thus smaller pension). Although there was no equal pay legislation in Belgian law, she argued that her entitlement was derived

**directly** from Art 119 (now Article 157). The Court of Justice recognised for the first time the **binding nature** and **direct effects** of Article 119 and confirmed that equality between the sexes was eventually recognised by the Court as a **fundamental constitutional principle of EU law**: “...respect for fundamental personal human rights is one of the **general principles of the Community law**... There can be no doubt that the **elimination of discrimination based on sex forms part of those fundamental rights**”.

**149/77 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena**  
**Judgment of the Court of 15 June 1978**  
**ECR 1978 page 1365**

2. FUNDAMENTAL PERSONAL HUMAN RIGHTS FORM PART OF THE GENERAL PRINCIPLES OF COMMUNITY LAW, THE OBSERVANCE OF WHICH THE COURT HAS A DUTY TO ENSURE. THE ELIMINATION OF DISCRIMINATION BASED ON SEX FORMS PART OF THOSE FUNDAMENTAL RIGHTS. HOWEVER, IT IS NOT FOR THE COURT TO ENFORCE THE OBSERVANCE OF THAT RULE OF NON-DISCRIMINATION IN RESPECT OF RELATIONSHIPS BETWEEN EMPLOYER AND EMPLOYEE WHICH ARE A MATTER EXCLUSIVELY FOR NATIONAL LAW.

The argumentation from the *Defrenne* case was also confirmed by the subsequent case law of EU courts. The Court of Justice confirmed that the right not to be discriminated on ground of sex constitutes a fundamental human right.

**C-50/96 Deutsche Telekom AG v Lilli Schröder**  
**Judgment of the Court of 10 February 2000**  
**ECR 2000 page I-743**

4 Moreover, the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to its social aim, which constitutes the expression of a fundamental human right not to be discriminated against on grounds of sex.

### 8.1.2 Secondary antidiscrimination legislation

The equal treatment is regulated by the secondary legislation (directives) that was transposed by the member states into their national legislation. Secondary legislation harmonized antidiscrimination legislation within the EU and requires the member states its effective enforcement. The following main directives regulate the equal treatment:

- *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, p. 23–36)*

The purpose of this directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. To that end, it contains provisions to implement the principle of equal treatment in relation to (a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; (c) occupational social

security schemes. The Directive has the following titles:

- **General Provisions** on the aim of the directive and definition of concepts;
- **Equal Pay provisions** and equal treatment in occupational social security schemes and equal treatment as regards access to employment, vocational training and promotion and working conditions;
- **Remedies and enforcement provisions**, including burden of proof, penalties prevention of discrimination, etc.

The directive includes also transgender persons, i.e. transgender people are protected against employment discrimination.

*Recital 3*

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

- *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37–43)*

The directive lays down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the member states the principle of equal treatment between men and women.

The scope of its application:

*Article 3*

*Scope*

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

3. This Directive shall not apply to the content of media and advertising nor to education.

4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

- *Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.7.2010, p. 1–6)*

This directive introduces a framework for putting into effect in the member states the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC.



The material scope of the directive: the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

- *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ( OJ L 180, 19.7.2000, p. 22–26)*

This directive lays down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the member states the principle of equal treatment.

*The scope of its application:*

<p><i>Article 3</i> <i>Scope</i></p> <p>1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:</p> <ol style="list-style-type: none"> <li>conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;</li> <li>access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;</li> <li>employment and working conditions, including dismissals and pay;</li> <li>membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;</li> <li>social protection, including social security and healthcare;</li> <li>social advantages;</li> <li>education;</li> <li>access to and supply of goods and services which are available to the public, including housing.</li> </ol>
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- *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ( OJ L 303, 2.12.2000, p. 16–22)*

The directive lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment.

## 8.2 Key concepts of discrimination

All these directives work with and define the key concepts of discrimination. These include:

### 8.2.1 Direct discrimination

Direct discrimination occurs where one person is treated less favourably on grounds of [sex, racial or ethnic origin, religion, belief, disability, age, sexual orientation] than another is, has been or would be treated in comparable situation.

Direct discrimination occurs when someone is treated differently just because of his or her characteristic feature that constitute a ground for which the discrimination is prohibited.

*When does the direct discrimination occur?*

1. inequality of treatment (less favourable);
2. specific characteristic for which discrimination is prohibited is a ground for different treatment;
3. comparison (real life comparator is not necessary).

Direct discrimination is prohibited *per se*. However, the specific directives may contain a closed system for exceptions, e.g. the Directive 2006/54 stipulates that member states may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

### **8.2.2 Indirect discrimination**

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of one [sex, racial or ethnic origin, religion, belief, disability, age, sexual orientation] as a particular disadvantage compared with persons of the other [sex, racial or ethnic origin, religion, belief, disability, age, sexual orientation], unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

In *Bilka* case the Court was dealing with the access to pension scheme. Part-timers could only access the scheme if they had worked at least 15 years full time over a total period of 20 years. The Court found that if a lower proportion of women worked full time, the policy regarding part-timers would be contrary to 157 TFEU, if that result could not be explained by factors other than discrimination on the ground of sex. The Court however said that the practice could then nevertheless still be justified if the company could show that they addressed a real need of the company and were appropriate and necessary to address that need to achieve that aim.

**170/84 Bilka-Kaufhaus GmbH v Karin Weber vorn Hartz**  
**Judgment of the Court of 13 May 1986**  
**ECR 1986 page 1607**

29 IF, THEREFORE, IT SHOULD BE FOUND THAT A MUCH LOWER PROPORTION OF WOMEN THAN OF MEN WORK FULL TIME, THE EXCLUSION OF PART-TIME WORKERS FROM THE OCCUPATIONAL PENSION SCHEME WOULD BE CONTRARY TO ARTICLE 119 OF THE TREATY WHERE, TAKING INTO ACCOUNT THE DIFFICULTIES ENCOUNTERED BY WOMEN WORKERS IN WORKING FULL-TIME, THAT MEASURE COULD NOT BE EXPLAINED BY FACTORS WHICH EXCLUDE ANY DISCRIMINATION ON GROUNDS OF SEX.

30 HOWEVER, IF THE UNDERTAKING IS ABLE TO SHOW THAT ITS PAY PRACTICE MAY BE EXPLAINED BY OBJECTIVELY JUSTIFIED FACTORS UNRELATED TO ANY DISCRIMINATION ON GROUNDS OF SEX THERE IS NO BREACH OF ARTICLE 119.

The indirect discrimination assessment includes the objective justification test. This represents the substantive equality approach and includes the potential objective justification of unequal treatment that must follow a legitimate aim and the means of achieving the aim are appropriate and necessary.

### **8.2.3 Harassment**

Harassment occurs where unwanted conduct related to the [characteristic for which the discrimination is prohibited] of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The unwanted conduct must result in violating the dignity of a person and creates a hostile degrading, humiliating or offensive environment.

### **8.2.4 Sexual harassment**

Sexual harassment occurs where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. There is less strict definition in comparison to harassment as the violation of dignity suffices. No intent of the perpetrator must be proved. It is enough if the behaviour has sexual connotation and is unwanted by the victim and results in violation of his/her dignity.

### **8.2.5 Instruction to discriminate**

Instruction to direct or indirect discrimination shall be deemed to be discrimination. It applies in hierarchical relationships.

## **8.3 Enforcement of antidiscrimination legislation**

Member states have an obligation to ensure effective enforcement of antidiscrimination legislation. The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the member states. This includes the obligation of member states to introduce adequate judicial or administrative procedures for the enforcement and effective implementation of the principle of equal treatment.

### **8.3.1 Defence of rights**

With a view to further improving the level of protection offered by EU antidiscrimination law, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the member states so determine, either on behalf or in support of a complainant, without prejudice to national rules of procedure concerning representation and defence. Member states shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the antidiscrimination law provisions are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure.

### **8.3.2 Burden of proof**

The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.

### **8.3.3 Compensation and reparation**

Member states have an obligation to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the member states so determine for the loss and damage sustained by a person injured as a result of discrimination, in a way which is dissuasive and proportionate to the damage suffered.

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***Important Internet Sites (the list of internet sites was created on 30 November 2011):***

Official Internet Site of the European Union: [www.europa.eu](http://www.europa.eu)

*EU Institutions:*

Committee of the Regions: <http://www.cor.europa.eu/pages/HomeTemplate.aspx>

Council of the European Union: <http://www.consilium.europa.eu/homepage.aspx?lang=en>

European Economic and Social Committee: <http://www.eesc.europa.eu/?i=portal.en.home>

European Central Bank: <http://www.ecb.int/home/html/index.en.html>

European Commission: [http://ec.europa.eu/index\\_en.htm](http://ec.europa.eu/index_en.htm)

European Council: <http://www.european-council.europa.eu/home-page.aspx?lang=en>

European Court of Auditors: [http://eca.europa.eu/portal/page/portal/eca\\_main\\_pages/home](http://eca.europa.eu/portal/page/portal/eca_main_pages/home)

European Investment Bank: <http://www.eib.europa.eu/index.htm>

European Ombudsman: <http://www.ombudsman.europa.eu/home/en/default.htm>

European Parliament: <http://www.europarl.europa.eu/portal/en>

*EU Legislation:*

Access to European Union Law database (EUR-Lex): [http://eur-lex.europa.eu/RECH\\_legislation.do?i-hmlang=en](http://eur-lex.europa.eu/RECH_legislation.do?i-hmlang=en)

*Case-law of EU courts:*

Access to the case-law by case number: [http://curia.europa.eu/jcms/jcms/Jo2\\_7045/](http://curia.europa.eu/jcms/jcms/Jo2_7045/)

Research form of the case-law of the Court of Justice of the EU: <http://curia.europa.eu/juris/recherche.jsf?language=en>