ECL2001 EUROPEAN UNION LAW

The European Law Students' Association

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ACKNOWLEDGMENTS

ELSA Malta President: Luke Bonanno

ELSA Malta Secretary General: Jake Mallia

ELSA Malta Director for External Relations: Beppe Micallef Moreno

Writer: Rachel Lowell

EU Law

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EU Competences

1. Central Issues

The General Principle is that the EU only has the competence conferred on it by the Treaties. Prior to the Lisbon Treaty, it was difficult to decide on the limits of that competence because there were no categories of competence, and thus the limits of competence in a specific area could only be discerned by paying close attention to the detailed Treaty provisions.

The existence and scope of EU competence were key elements in he reform process that culminated in the Lisbon Treaty. There are now categories of competence specified in the Lisbon Treaty: exclusive, shared, competence for supporting, coordinating and supplementary action. Legal consequences flow from that categorisation.

The Lisbon Treaty makes provision not only for the existence and scope of EU competence, but also for whether the competence should be exercised. This issue is governed by the principle of subsidiarity, initially introduced by the Maastricht Treaty.

2. Impetus for Reform

The EU can only act within the limits assigned to it. It has in that sense attributed competences which are affirmed by Article 5(2) TFEU stating that; “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member States in the Treaties to attain the objectives set out therein. Competencies not conferred upon the Union in the treaties remain with the Member Sates”.

Prior to the Lisbon treaty it wasn’t easy to specify with exactitude the division of competence between the EU and the Member States because it was felt that Article 5 EC which embodied the concept of competences provided insufficient protection for rights of Member States, and little safeguard against an increasing shift of power from the states to the EU.

We should nonetheless be cautious about the assumption that this ‘competence problem’ was the result primarily of some unwanted arrogation of power by the EU to the detriment of states’ rights. The reality was that the EU competence resulted from the symbiotic interaction of four variables; Member State, and, since the SEA, EP acceptance of legislation that fleshed out the Treaty Articles; the jurisprudence by the EU Courts; and decisions taken by institutions on how to interpret, deploy, and prioritise the power accorded to the EU.

The Laeken Declaration specified in greater detail the inquiry into competence that had been left open after the Nice Treaty. Four principal forces drove from the reform process; clarity, conferral, containment, and consideration. These reflected that the provision on competences were unclear (clarity) , that the EU should be accorded the powers necessary to fulfil the tasks assigned to it (conferral), the concern that the EU had too much power (containment), while consideration

reflected whether the EU should continue to have the powers that it had been given in the past.

However, the Convention on the Future of Europe did not conduct any root and branch re-consideration of all heads of EU competence. The general strategy was to take the existing heads of competence as given. The real emphasis was on clarity, conferral, and containment.

3. Lisbon Strategy

a. Categories and Consequences

The Lisbon Treaty repeats with minor modifications the provision in the Constitutional Treaty. The provisions are contained in the TEU and the TFEU. Article 4 TEU states that competences not conferred on the Union remain with the Member States while Article 5 TEU stipulates that the limits of the Union competencies are governed by the principle of conferral. However, it is the TFEU that contains the main provisions on competence. The principal categories are where the EU's competence is exclusive, where it is shared with the Member States, where the EU is limited to supporting/coordinating action, with special categories for EU action in the sphere of economic and employment policy, and Common Foreign and Security Policy. This is all found in Article 2 TFEU.

b. Express and Implied Power

There can be disagreement as to the ambit of a particular Treaty Article, and this is so irrespective of the category of competence which applies to the area. The ECJ has in general been disinclines to place limits on broadly worked Treaty Articles. In the Tobacco advertising case the ECJ held that a directive relating to taboo advertising could not be based on Article 95 EC.

The Case: 376/98 Germany v EP and Council (2000) - Germany sought the annulment of a Directive designed to harmonise the law relating to the advertising and sponsorship of tobacco. The directive was based on Articles 57(2), 66 and 100A (today Arts 53(2), 62, 114 TFEU and Art 19 TEU). Article 100A allows the adoption of harmonisation measures for the functioning of the internal market.

So, while there are limits to what is now Article 114 TFEU, subsequent case law on related subject matter has shown that the ECJ is willing to accept use of tis Article as the legal basis for the enacted measure as seen in another case of Netherlands v Parliament and Council (Case C–377/98 - 2001). Again, this is exemplified by the 2006 CaseC–380/03 Germany v European Parliament and Council [2006]ECRI–11573 'Tobacco Advertising Case' where the ECJ upheld the validity of a revised directive on tobacco advertising, which included, subject to limited exceptions, prohibitions of advertising in the press and radio and contrasts on sponsorship by tobacco companies. The Court concluded that this could be adopted under what was Article 95 EC, since there were disparities between national law on advertising and sponsorship of tobacco products, which could affect competition and inter-state trade.

Secondary, the EU institutions may claim that a particular Treaty Article contains an implied power to make the particular regulation. Under the narrow formulation, which has been long accepted, the existence of a given power implies to existence of any other power hat is reasonably necessary for the exercise of the former.

The wider formulation, which has also been accepted by the EU, is that the existence of a given objective implies the existence of power reasonably necessary to attain it. The adaptation of the wider formulation by the EU is seen in Cases 281, 283–285, 287/85 Germany v Commission (1987) ECR 3203. In this case, the commission made a decision pursuant Article 118 (now Article 153 TFEU) which established a prior communication and consultation process in relation to migration policies affecting workers from non-EU countries. A number of states challenged this measure as being ultra-vires the Commission because Article 118 did not expressly give the Commission power to make binding decisions. The ECH held that migration policy in relation to a non-EU state could fall within this article, because of the effects of such migration on the employment situation in the EC.

4. Exclusive Competence

a. Basic Principles

Article 2(1) TFEU establishes the category of exclusive competence, which carries the consequence that only the Union can legislate and adopt legally binding acts. The Member States can only do so if empowered by the Union or for implementation of Union Acts.

The subject matter areas that fall within exclusive competence are set out in Article 3(1) TFEU, some of which being; customs union, monetary policy for Member States whose currency is the Union, the common commercial policy, amongst some others. Article 3(2) TFEU states that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion mat affect common rules.

b. Area Exclusivity

The areas specified in Article 3(1) that fall within the EU's exclusive competence are limited because of earlier concern to contain the EU's power. The importance of containment is because the consequences of inclusion are severe; the Member States have no autonomous legislative competence, nor can they legislate or make any legally binding non-legislative act.

The creation of categories means that some problems may arise in establishing the borderlines between such categories. Such problems can arise in demarcating the line between exclusive and shared competence. There are, for example, abilities about the relationship between the competition rules, which are a species of exclusive competence, and the internal market, which is a shared competence.

c. Conditional Exclusivity

The EU is also accorded exclusive competence to make an international agreement, provided that the conditions in Article 3(2) are met. This article should be read in conjunction with Article 216 TFEU which is concerned with whether the EU has competence to conclude international agreements.

The catalyst for Article 216 TFEU was the report of the Working Group on External Action. Prior to the Lisbon Treaty, the EC Treaty accorded express power to make international agreements in certain limited instances, supplemented by the ECJ's jurisprudence delineating the circumstances in which there could be an implied external competence to make an international agreement. The Working Group suggested that there should be a Treaty Provision resulting this case law which is now embodied in the Lisbon Treaty in article 216 TFEU. The case law on the scope of the EU's eternal competence, and the extent to which it is exclusive or parallel with that of the Member States, is complex.

Article 3(2) TFEU stipulates three instances in which the EU has exclusive external competence. The interpretation of this provision is not easy. However, this article read together with Article 216 TFEU comes close to eliding the EU's power to act via an international agreement with the exclusivity of that power, an issue which pre-occupied much of the case law in this area.

i. External Competence and Exclusivity: Pre-Lisbon

The ECJ has for some considerable time recognised Community competence to conclude an international agreement where this was necessary to effectuate its internal competence, even where there was no express external competence. The issue of whether this implied external power was exclusive was treated as distinct from the existence of such power. Implied external competence, but the criteria for such divide was unclear. The ECJ's formulations as to when exclusivity could arise were far-reaching.

In ERTA the ECJ held that when the Community acted to implement a common policy pursuant to the Treaty, the Member States no longer had the right to take external action where this would affect the rules thus established or distort their scope. In Kramer, this position was modified because the ECJ held that the EC could possess implied external powers even though it has not taken internal measures to implement relevant policy, but that until the EC exercised its internal power the Member States retained competence to act.

The scope of exclusivity was thrown into doubt in the Opinion 1/76 Inland Waterways (n19) Case, where the ECJ held that the EC could have exclusive internal competence, even though it had not exercised its internal powers, if Member State action could place in jeopardy the Community objective sought to be attained.

The ECJ pulled back from the reading of exclusivity in the aforementioned case in Opinion 1/94 on the WTO Agreement. It held that exclusive central competence was dependent on the actual exercise of internal powers.

Following jurisprudence nonetheless revealed that the ECJ construed broadly the idea of the EC having exercised its powers internally, and that the ECJ was also prepared to give a wider interpretation to the circumstances where this gave rise to exclusive external competence for the EC, as apparent from the 'open skies' litigation, involving Commission action against Member States (e.g. Case C–466/98 Commission v UK [2002]).

ii. External Competence and Exclusivity: Post-Lisbon

Article 3(2) TFEU specifies three situations where the EU has exclusive external competence. The first is where conclusion of an international agreement is provided for by a legislative act of the Union. The wording means that express external empowerment to conclude an international agreement is taken to mean exclusive internal competence, with the corollary that Member States are preempted from concluding any such agreements independently, and from legislating any legally binding act.

The second situation has the same elision of external power and exclusive external power. The effect of this Article 3(2) is that the EU has exclusive external competence to conclude an international where this is necessary to enable the Union to exercise its competence internally, irrespective of the type of internal competence possessed by the EU.

The third of the situations mentioned is that the EU shall have exclusive competence insofar as the conclusion of an international agreement 'may affect common rules or alter their scope' - this is in accord with ECJ's case law. The reality is that this phrase has been interpreted broadly by the ECJ, such that in most instances where the EU has exercised its power internally it will be held to have an exclusive external competence.

In 'Defining Competence', Cremona argued that this Article 'conflates the two separate questions of the hesitance of implied external competence and the exclusivity of that competence' and that the combination of this Article with Article 216 TFEU is that implied shared competence could disappear.

The result is moreover difficult to square with the practical realities in this area. The reality was that prior to the Lisbon Treaty many external powers where shared between age member States and the EU, through mixed agreements where power to conclude the agreement was shared with the Member States.

5. Shared Competence

a. Basic Principles

Article 2(2) TFEU defines shared competence and the areas that fall within shared competence are found in Article 4 TFEU. Article 4(1) provides that the Union shall share competence with the Member States where the Treaties confer on it a competence which does relate to categories found in Articles 3 and 6 TFEU. Article 4(2) continues to state that shared competence applies in 'principal areas' listed, implying that the list is not exhaustive.

There can be boundary problems between shared competence and the other two principal categories; exclusive competence and category where the EU is limited to take supporting, coordinating or supplementary action. For example, it is not always easy to decide which aspects of social policy come within shared competence.

b. Pre-Emption

Article 2(2) TFEU stipulates that the Member State can exercise competence only to the extent that the Union has not exercised or has decided to cease to exercise its competence within any such area. Member State action is thus pre-empted where the Union has exercised its competence, with the consequence that the amount of state power in these areas may diminish over time. This conclusion is qualified in four ways;

1. Member States will lose their competence within the regime of shared power only to the extent that the Union has exercised its competence.
2. The pre-emption will occur only to the extent that the EU has exercised its its competence in the relevant area. The EU may choose to make uniform regulations, it may harmonise national laws, may engage in minimum harmonisation, or may impose requirements of mutual recognition. Thus, for example, where the EU chooses mini harmonisation, Member States will have no room for action in the relevant area.
3. Article 2(2) expressly provides for the possibility that the EU will cease to exercise competence in an are subject to shared competence, the competence then obviously being shifted to the Member States.
4. The final qualification concerns Article 4(3) and Article 4(4) TFEU intended to make clear that Member States can continue to exercise power even if the EU has exercised its competence within these areas.

c. Scope and Variation

Shared Competence constitutes, subject to the above, the default position in relation to division of competence within the Lisbon Treaty, but that does not mean that the nature of the sharing will be the same in all areas where shared competence is possible. ‘Shared Competence’ as a term is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU Law.

The sharing of power in relation to the four freedoms is very different from the complex world of power sharing that operates between the area of freedom, security, and justice. There is no magical formula that applies to all areas of shared power that determines the precise delineation of power in any specific area.

6. Supporting, Coordinating, or Supplementary Action

a. Basic Principles

The third category allows the EU to take action to support, coordinate, or supplement Member State action, without thereby superseding their competence in these areas, and without entailing harmonisation of Member States’ laws - Article 2(5) TFEU. While the EU cannot harmonise law, it can still pass binding acts

to provisions specific to them. Thus, it still has significant power in these areas, albeit falling short on harmonisation.

The areas that fall within such competence are set out in Article 6 TFEU. Some of which include; industry, culture, education, and civil protection. Even though that at first it seems like the list is finite, it becomes clear that there are other important areas in which the EU is limited, prima facie at least, to supporting, notably in respect to some aspects of social policy and employment policy.

b. Scope and Variation

Each substantive area begins with a provision setting out the objectives of Union action. The EU is to complement national actions on topics such as Public Health. Member States have an obligation to coordinate their policies on such matter, in liaison with the Commission. The Commission can coordinate action on such matters by exchanges of best partake, periodic monitoring, and evaluation. The EU can also pass laws to establish 'incentive measures' designed to protect, in the case of public health, human health, and combat cross-border health scourges. This shows that the EU still has room for intervention through 'persuasive soft-law', in forms of guidelines.

The standard approach under the Lisbon Treaty is for the EU to be empowered to take measures to attain the objectives listed in that area. The language of the empowerment varies from incentive measures, necessary measures, or specific measures.

c. Legal Acts, Harmonisation, and Member State Consequence

There are three important points that flow from Article 2(5) TFEU.

1. Where the EU passes such legal acts they will bind the Member States and the competence of the Member States will be constrained to the extent stipulated by the legally binding act. It is clear that the EU can pass legislative acts in these areas, provided that they do not entail harmonisation and provided that there is foundation for the passage of such laws in the detailed provisions of the TFEU.
2. The meaning of harmonisation, which the EU cannot do in relation to this category of competence, is not entirely clear. The proscription of harmonisation measures means that legally binding acts cannot be adopted pursuant to Article 114 TFEU since this would be an admission that the objective was to harmonise national law, the very thing prohibited by Article 2(5) FTEU. This however takes us so far, because the EU may enact a legally binding act in one of the areas covered by this category, which is based on the relevant Treaty Article authorising the making of such acts.
3. It should not be assumed that the consequences for the Member States of enactment of legally binding acts in these areas will necessarily be less far-reaching than harmonisation. The assumption behind Article 2(5) TFEU is that harmonisation of national laws is by its very nature more intrusive for Member States than other EU Legal Norms. This rationale may or may not be true. It depends on the nature of the particular harmonisation measure and the non-harmonisation legally binding act.

7. Economic, Employment, and Social Policy

a. Basic Principles

The creation of a particular head of competence to deal with economic and employment police does little to enhance the symmetry of the new scheme. The Lisbon Treaty has a separate category of competence for these matters. Article 2(3) FTEU stipulates that 'the Member States shall coordinate their economic and employment policies with arrangements determined by this Treaty, which the Union shall have competence to provide'. The detailed rules are then set out in Article 5 TFEU.

The explanation of this separate category was political. There would have been significant opposition to the inclusion of these areas within shared competence, with the consequence of pre-emption of state action when the EU exercised power within this are. It is equally clear that there were those who felt that the category of supporting, coordinating, and supplementary action.

The difficulties in this area are especially marked, since certain aspects of social policy fall within shared competence, although it is not precisely cleat which; other aspects appear within the category of supporting, coordinating, and supplementary action, even though they are not within the relevant list; and there is in addition separate provision for social policy in the category considered here.

b. Category and Legal Consequence

The Treaty schema for competence in Article 2 TFEU is in general premised on the ascription of legal consequences for EU and Member State power as a result of coming within a particular category. Article 5 TFEU stands as an exception, since article 2(3) does not spell out the legal consequence of inclusion within such category. Legal consequences of inclusion within this category can only be divined by considering the language of Article 5 TFEU, which is couched largely in terms on coordination.

8. Common Foreign and Security Policy

There are district rules that apply in the context of foreign and security policy, and this warrants a separate head of competence for this area as set out in Article 2(4) TFEU. Rules concerning common foreign and security policy are set out under Title V TEU with decision making being more inter-governmental and less supranational since the European Council and Council dominate decision-making.

Article 2(4) does not specify which competence applies to the CFSP, when in truth none seem to fit. This is because it is never mentioned in one of the three general categories, however, one might say that it falls in the default category of shared competence, even though, as stated, it is not listed in the list.

If indeed, the CFSP falls within shared competence, then the need for close examination of the respective powers of the EU and Member States, in order to be clear about the nature of power sharing, is of great significance.

9. Broad Treaty Provisions: The Flexibility Clause

Articles 352 and 114 TFEU are the successor provisions to Articles 308 and 95 EC. These provisions are broadly framed, and give the EU a wide regulatory competence, member State concern over the extensive use of such provisions was a principal factor behind Treaty reform in this area, and this was reflected in the desire to ensure that EU power is contained.

a. Article 308 EC (successor provision to 352 TFEU)

This article states that; "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the EP, take appropriate measures".

This article was a valuable legislative power, particularly when the Community did not possess specific legislative authority in certain areas e.g. environment and regional policy. The article required that the power should be used to attain a Community objective. However, given the breath of the Treaty objectives, and the ECJ's purposive mode on interpreting Community aims, these conditions did not place a severe constraint on Council.

The most problematic aspect of this article was the condition that the Treaty has not 'provided the necessary powers', and thus whether another Treaty Article could be used instead of Article 308. This could be of significance where a specific Treaty Article provided for more involvement of the EP than this article. The choice between Treaty Article is also significant in case of different voting rules since Article 308 require unanimity in Council, whereas many other provisions demanded a qualified majority.

b. Article 352 TFEU

The issue of Article 308 was placed on the post-Nice and Laeken agenda for reform of the EU. The Laeken Declaration expressly asked whether this Article ought to be revised, in light of the twin challenges of preventing the 'creeping expansion of competences' from encroaching on national powers, while allowing the EU to 'continue to be able to react to fresh challenges and developments and… to explore new policy areas'. The Working Group on Complementary Competences recognised the concerns about the use of such article and recommended the retention of it in order that it could provide for flexibility in limited instances. The flexibility clause is now enshrined in Article 352 TFEU.

Article 352(1) TFEU is framed broadly in terms of 'places defined in the Treaties', with the exception of the CFSP serving as the basis of competence for many areas of EU Law. The unanimity requirement means that it will be more difficult to use this power in an enlarged EU, further maintained by consent of the EP. The German Federal Court was still concerned about the scope of this article and stipulated that the exercise of such competence constitutionally required ratification by the German Legislature.

The conditions in sub-article 2 to 4 are novel. Sub-article 2 of this article is not entirely clear and Weatherhill has argued that uniquely within the Lisbon Treaty it provides national Parliaments with the opportunity to contest the existence of competence when legislative action is based on the flexibility clause, other than on grounds of subsidiarity. This may be so but does not still well with the wording of Article 352(2) which is framed in terms of subsidiarily. The more natural explanation is that because of such clause, the Commission has an additional obligation to draw attention to national parliaments, in order that they may contest on grounds of subsidiarity.

10. Broad Treaty Provisions: The Harmonisation Clause

The Lisbon Treaty has done little to alleviate problems of 'competence creep' in the terrain covered by Article 114TFEU, which has not been changed. It is the main Treaty Article used to enacted certain harmonisation measures.

Concerns about extensive use of this legislative competence arose because it was felt that the EU was too readily assuming power to harmonise national laws based on mere national divergence, with scant attenuation being given to the impact of that divergence of the functioning on the internal market. Today, the ECJ is more willing to find that regulatory competence exists because divergent national laws constitute an impediment to the functioning of the internal market and EU harmonisation contributes to the elimination of obstacles to the free movement of goods, or to the freedom to provide services, or to the removal of distortions or competition.

Impact assessment is a framework of a set of steps to be followed when policy proposals are prepared, alerting political decision-makers to the advantages and disadvantages of policy options by assessing potential impacts - results are summarise in an Impact Assessment Report. Still, this does not replace political decision-makers, which remains the preserve of the College of Commissioners.

This impact assessment will not dispel all concerns as to 'competence creep' but it is central to address such concerns because it considers the very issues that are pertinent to this inquiry. For example, this includes the justification for EU action in terms of the need for harmonisation because of the impact of diverse national laws on the functioning on the internal market. It also includes the subsidiary calculus, which is of great importance.

The fact that there is a framework within which these issues are now considered is a positive step which facilitates scrutiny as to the nature of the justificatory arguments and their adequacy which should in turn facilitate judicial review. The ECJ should be properly mindful of the Commission's expertise as evinced from the Impact Assessment while also being cognisant f the precepts in the Treaty, which in the case of Article 114 TFEU condition EU intervention on proof that approximation of laws is necessary for the functioning of the internal market. If the justificatory reasoning to this effect in the Assessment is wanting then the ECH

should invalidate the relevant instrument, and signal to the political institutions that the precepts in the Treaty are to be taken seriously.

11. Subsidiarity

a. Pre-Lisbon

Subsidiarity, which regulated the exercise of competence, was introduced in the Maastricht Treaty and was intended to curb the federalist learning of the Community with the formulation contained in Article 5 EC.

This article makes it clear that the Community only had competence within areas it had powers int while affirming that subsidiarity would have to be considered only in areas which do not fall under exclusive competence. The problem was that pre-Lisbon there was no criterion to determine the scope of the Community's exclusive competence and so Commission took a broad view of exclusive competence.

Subsidiarity had three components; Community had to take action only if objectives could not be sufficiently achieved by the Member States, if Community could better achieve such action, and if Community did take action then this should not go beyond the objectives. The first two parts are termed as a test of comparative efficiency, while the latter was a proportionality test.

The 1993 Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity required all three institutions to have regard to the principle when devision Community legislation, later confirmed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Amsterdam Treaty.

The very existence of Article 5 EC had an impact on the existence and form of Community action. The Commission considered whether action was really required at Community level, and if this was so it would often proceed through directives rather than regulations.

b. Post-Lisbon

i. Subsidiarity Principle

The subsidiarity principle distinguishes between the existence of competence and the use of it, the latter being determined by subsidiarity and proportionality. The principles are embed in Articles 55(3)-(4) TEU.

The Subsidiarity Protocol (n94 2003) applies only to draft legislative acts, and does not cover delegated or implementing acts.

ii. Subsidiarity Calculus

The Subsidiarity Protocol imposes an obligation on the Commission to consult widely before proposing legislative acts. A statement must be provided, containing some assessment of the financial impact of the proposals, and there should be qualitative and quantitative indictors to substantiate the conclusion that the

objective can be better attained at Union Level. The Commission must submit an annual report on the application of subsidiarity to the EC, EP, Council and National Parliaments while the ECJ has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU.

iii. Enhanced Role for National Parliaments

The most important innovation in the Subsidiarity Protocol is the enhanced roles accorded to the NPs since Commission has to send all legislative proposals to NPs and other Union Institutions. NPs are to be provided with legislative resolutions of the EP, and positions adopted by Council.

A NP or Chamber thereof may, within eight weeks, send a resend opinion as to why it considers a proposal does not comply with subsidiarity - the EP, Council, and Commission must take this opinion into account.

If non-compliance is expressed by one-third of all the votes allocated to NPs, the Commission must review its proposal. The Commission, after review, mist decide to maintain, amend, or withdraw the proposal.

If at least a simple majority of votes given to NPs signals non-compliance with subsidiarity, then the proposals must be reviewed, and although the Commission can decide not the amend it given a reasoned opinion, this can be overridden by Council or the EP.

While the Protocol imposes obligation on the Commission with regards to subsidiarily and proportionality, NPs are afforded a role only in relation to the former and not the latter. This is regrettable, as Weatherill notes, since it is difficult to disaggregate the two principles, and insofar as one can do there is little reason why NPs should not be able to proffer a reasoned opinion on proportionality as well.

iv. Political Control: Evaluation

In an enlarged EU, Article 5(3) TFEU still favour Union action. It is also clear that subsidiarity has impacted the form of Union action. If EU action is requires, Commission will often proceed through directives rather than regulation, and there has been a greater use of guidelines and codes of conduct.

The power to NPs will depend on their willingness to devote the needed time and energy to the matter. The NP has to submit a reasoned opinion as to why there is non-compliance with subsidiarity and why the Commission's comparative efficiency calculus is defective.

The tension between desire to make subsidiarity a reality and the need to address problems at EU level in order to achieve its overall objectives is, however, ever present, as evident from the extract by JM Barroso, Commission President. He said that "We must kill off the idea that the Member States and the EU levels are rivals. Everyone should be working to the same goal - to secure the best results for citizens". He continues by saying that "subsidiarity is the translation of a

democratic principle". The rest of his speech focuses on the important on subsidiarity, the good relation and balance between the EU and NPs, and NPs enhanced role.

v. Legal Control: Evaluation

The Protocol provides for recourse to the ECJ for infringement of subsidiarity under Article 263 TFEU, in an action brought by a Member State. There may be instances where the the Member State has agreed in the Council to the EU measure, which the NP then regards as infringing subsidiarity. This is he rationale for the provision allowing the Member State to notify the action on behalf of its Parliament. This still leaves open to how a case will be tackled.

The central issue is the intensity of judicial review because usually the ECJ will not lightly overturn EU action on the ground of non-compliance with subsidiarity as seen (in procedural terms) from Germany v EP and Council (CaseC– 233/94). The ECJ held that the duty to give reasons did not require that Community measures contain an express reference to the principle of subsidiarity.

The difficulty of overturning a measure in substantive terms is apparent from the Working Time Directive Case (Case C-84/94) where the UK argued that the Directive infringed subsidiarity. However, the ECJ said that it was the responsibility of the Council under Article 118a EEC to adopt minimum requirements to contribute to improvement of health and safety.

If the ECJ continues with very light touch review, it will be open to criticism that it is effectively denuding the obligation in Article 5(3/4) of all content. If, by way of contrast, the ECJ takes a detailed look at the evidence underlying the Commission's claim it will have to adjudicate on what may be a complex socio-economic calculus concerning the most effective level of government for different regulatory tasks.

The very fact that the Impact Assessment serves as a framework within which these issues are considered is a positive step, which facilitates scrutiny as to the nature of the justificatory arguments and their adequacy which should facilitate judicial review.

vi. Subsidiarity: Evaluation

Legal academics have criticised the low intensity judicial review undertaken by EU Courts when dealing with subsidiarity claims. In 'Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time', Davies argued that the subsidiarity inquiry is misplaced, and that focus should rather be on whether the challenged EU legislation is disproportionate by intruding too far into Member State values in relation to the objective.

Some points have to be made when discussing the issues brought forward. Firstly, there have been very few challenges based on subsidiarity since its introduction to the Treaty. During this period there have been thousands of regulations, directives, and decisions enacted, with just over ten subject to legal challenge.

Secondly, in a number of cases the subsidiarity challenge was opposed by other Member States, who argued that the contested EU legislation was consistent with the subsidiarity principle. Thirdly, it is by no means clear that the ECJ decisions in actual subsidiarity cases were wrong, or that they would have been different if judicial review was more intensive. Finally, it might be argued that the focus should be on whether the EU norm violates proportionality by infringing too greatly on Member States values, and that if this were so then more cases would be brought by Member States and might be more successful.

12. Conclusion

EU competence is the result of the interaction of four variables; Member State choice as to the scope of EU competence, Member State and EP acceptance of legislation that fleshed out the Treaty Articles; jurisprudence of the EU Courts; and decisions taken by the institutions as to how to interpret and priorities power accorded to the EU.

The two principal objectives driving reform were clarity of competence and containment of EU Power. Shared Competence, Exclusive Competence and Competence to support, coordinate and supplement Member States helped in the aspect of clarity.

Another principal concern driving reform was the desire to contain EU Powers because of Articles 114 and 352 TFEU. Finally, the strengthening of the role of NPs in relation of subsidiarity is to be welcomed even though it remains to be seen how this is effective in practice.

EU Instruments and the Hierarchy of Norms

The principle legal instruments used to attain the Union's objectives are regulations, directives, and decisions. These are often used in conjunction with each other. The EU also has numerous soft law methods for developing Union Policy. Formal and Informal Law can be used together to attain the EU goals. Additionally, the treaties lay down a number of conditions for the legality of such instruments. Thus, reasons must be given for all legal acts, and there are requirements concerning publication and signature.

EU instruments are regulated through Article 288 TFEU. Before going into detail about each instrument, it is important to point out certain relevant points.

First, there is no formal hierarchy between the instruments, and it cannot be thought that, for example, regulations are superior to directives. Secondly, regulations, directives, and decisions may take the form of legislative, delegated, or implementing acts. Thirdly, the Treaties may specify the type of instrument to be used, but will often not do so. As per Article 296 TFEU, in the case of non-specification, the institutions shall select on a case-by-case basis. Fourthly, this same provision imposes an obligation to give reasons for legal acts, and this includes reference to any proposals, initiatives, recommendations, requests, or opinions required by the Treaties. Finally, Article 297 TFEU specifies rules for the making of the legal acts under Article 288.

Regulations

These are binding on their entirety and directly applicable in all Member States. Regulations can be regarded as being akin to legislation made by Member States.

Regulations are said to be directly applicable as per Article 288. However, it is unclear whether the Treaty framers meant for this term to connote the idea that individuals have rights, which they can enforce through national courts. The ECJ had on occasion interpreted directly applicable in this manner. However, such term has another meaning and it is concerned with the way in which international norms enter national legal systems. In some Member States, this must be done either by the national system transforming the measure into national law, or by a shorter national act adopting the relevant International act. Directly applicable means that the regulations are part of the national legal systems, without the need for transformation or adoption by separate national legal measures.

In Variola v Amministrazione delle Finanze (1973), the ECJ held that the direct application of a regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law.

Any individual may allege that a measure which is called a regulation is really a decision. The test of whether a measure really is a regulation is one of substance, and not of form. The fact that the contested act is called a regulation is not conclusive.

Directives

These do not have to be addressed to all Member States and are binding as to the end to be achieved while leaving some choice as to form and method to the Member States. The ability to act through directives as well as regulations gives the EU valuable flexibility.

Directives are particularly useful when the aim is to harmonise the laws within a certain area, or to introduce complex legislative change. This is because discretion is left to Member States as to how the directive is to be put into implementation. It should not however be thought that directives are vague. The force of directives have been increased by ECJ rulings. The Court held that directives have direct effect, enabling individuals to rely on them, at least in actions against the state, and that a Member State can be liable in damages for non-implementation of a directive.

Decisions

Article 288 TFEU states that a decisions is binding in its entirety, and a decision which specifies those to whom it is addressed is binding only on them. This captures the duality in the use of decisions as legal acts prior to the Lisbon Treaty.

In most instances, decisions were used as binding legal acts in relation to specific addresses, as exemplified by the many decisions made in the context of competition and state aids. Some decisions were however, of a more generic nature, setting out the legal rules to govern an inter-institutional issue such as Comitology, or providing the legal foundation for Community programmes.

Inter-Institutional Agreements

These agreements between the Council, Commission, and the European Parliament have long been an important part of the EU. They are a form of constitutional glue through which the major institutional players can resolve high level issues, provide guiding principles, or lay the foundations for more concrete legislative action.

Article 295 FTEU provides that the EP, Council, and Commission shall consult each other and by common agreement make arrangements for their cooperation. They also may conclude inter-institutional agreements which may be binding. There is specific treaty foundation for rendering such agreement binding.

Recommendations, Opinions, and Soft Law

Article 288 states that these have no binding force. While this precludes such measures from having direct effect, it does not immunise them from judicial process.

Recommendations and opinions forms of soft law but are not the only species. There are moreover other EU initiatives, such as the open method of coordination, which straddle the divide in certain respects between soft and hard law.

Hierarchy of Norms

Prior to the Lisbon Treaty, the legal acts of the Community were those aforementioned. The EC Treaty contained no formal hierarchy of legal acts, but this has now changed.

Treaties and the Charter

It is common to focus only on legislative, delegated, and implementing acts, and the hierarchy between them when discussing the hierarchy of norms. It is the constituent treaties, the TEU and TFEU, which sit at the top of such hierarchy. The Charter of Rights has the same status as per Article 6(1) TEU. Any legislative act must be made pursuant to some Treaty Article, and the Union Courts will determine the scope and interpretation of such Treaty and Charter provisions.

General Principles

The second tier of the hierarchy belongs to what are known as the general principles of EU Law, they sit below the constituent treaties, and may be used when interpreting certain provisions of such Treaties. However, they sit above legislative, delegated, and implementing acts.

These principles have been fashioned by the Union Courts. They have red principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedural justice into the Treaty, and used them as the foundation for judicial review under Article 263 and 267 TFEU. The principles of judicial review will normally form part of administrative law, and provide the basis for legal challenges to governmental actions.

Article 263(2) TFEU stipulates that judicial review shall be available for 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. Article 19 TEU charged the Union Courts with the duty of ensuring that in the interpretation and application of the Treaty, the law should be observed.

The judicial task of elaborating principles of judicial review was further facilitated by more specific Treaty articles, which made reference to, for example, non-discrimination.

In Artegodan GmbH and Others v Commission (2002), a case concerning marketing authorisation issued for drugs to control obesity, the CFI was willing to extrapolate from limited Treaty references to the precautionary principle, and from mention of the principles in some case law, and enshrine it as a general principle of law.

Legislative Acts

The basic premise of Article 289 TFEU is that legislative acts are legal acts adopted by a legislative procedure. The legal acts that can be legislative are regulations, directives, or decisions. The default position is that this will be ordinary legislative procedure, which is the successor to co-decision. A special legislative procure is mandated in certain instances.

The main point that comes out is that any legal act enacted by the ordinary or special legislative procedure is by definition a legislative acts, and if a legal act is not enacted in this manner then it does not constitute a legislative act. However, there are two consequences of this:

1. If a legislative procedure is prescribed for the enactment of a legal act then it is by definition a legislative act, notwithstanding that the content of the measure might well be regarded as administrative in nature. Conversely, if the Lisbon Treaty does not prescribe a legislative procedure for the passage of a legal act then it is not a legislative act, even if judged by its content it lays down rules of general application that would in substantive terms be regarded as legislative in nature.
2. The second consequence of the formalistic approach is that the only legal acts that constitute legislative acts for the purposes of the Lisbon Treaty are those made in accordance with the ordinary or special legislative procedure as defined in Article 289(1)–(2) TFEU, including in the case of the latter the requirement that this special procedure is mandated in the specific cases provided for by the Treaties.

Delegated Acts

Article 290 TFEU establishes the new category of delegated acts, and sets the conditions and controls over the making of such acts. There is still a divide between delegated and implementing acts and this was to distinguish between secondary measures that were legislative in nature (delegated acts), and those that could be regraded as more purely executive (implementing acts).

Delegated acts are described as being non legislative acts of general application. They are only non-legislative in the formal sense that they are not such because they have not been made in accordance with the ordinary our special legislative procedure. In practice, many delegated acts are still legislative in nature.

The legislative act must define the objectives, content, scope, and duration of the delegation of power. This is reinforced by the injunction that the essential objectives of an area must be reserved to the legislative act, and cannot be delegated. Moreover, the delegated act can amend or supplement non-essential elements of the legislative acts. Any general measure that amends or supplements a legislative act must be delegated act made under Article 290, and not Article 291.

The fourth feature delegated acts is that they are subject to the controls specified in Article 290. In addition to the requirement that the legislative act specifies the essential features of the subject matter, the EP or the Council is empowered to revoke the delegation and can veto the particular delegated act.

Implementing Acts

Article 291 defines the new category of implementing acts and specifies the conditions for the making of such acts. It should be noted that an implementing act can be made pursuant to a legislative act or a delegated act.

The term ‘implementation’ as used in Community legislation and on official websites covered what are now termed delegated acts, as well was the terrain now covered by implementing acts.

The post-Lisbon world now offers a point of contrast between delegated acts and implementing acts. The former are of general application and amend or supplement the legislative act, while the latter will normally be of general application, since Article 291 specifies their use in circumstances where uniform conditions for implementing legally binding acts are needed.

Incomplete Categorisation

Certain acts of not seem to fit the aforementioned categories. An example could be a standard administrative decision addressed to a particular person, which falls within the definition of decision in Article 288 TFEU. It will not be a legislative act if it is not made by a legislative procedure. It will not be a delegated act, since these can only be made pursuant to a legislative act and must be of general application. It will not be an implementing act, since the paradigm administrative decision addressed to a particular person has nothing to do with uniform conditions for implementation as that term is used in Article 291.

Supremacy of EU Law

The wide scope of the EC Treaty, covering a number of areas normally reserved to national law alone, coupled with the extended application by the CJEU of the principles of direct effect led inevitably to a situation of conflict between national and EC Law. The way in which this conflict was to be resolved was of crucial importance to the Community legal order because this question was to a great extent a constitution problem that concerned the relationship between the Member States and the Community, and the Member States' sovereignty and autonomy.

The EC Treaty and the TEU, as well as other treats which came before were silent on the issue on which law is to prevail in case of conduit between national law and EC Law. This lapse may have been due to many reasons such as a diplomatic or political omission or because at that time it was not thought necessary to make the matter explicit. Whatever the reason, in the absence of guidance, the matter was left to be decided by the Courts of Member States, assisted by the CJEU in its jurisdictions under what is now Article 267 TFEU, the preliminary reference procedure. In fact, as with the concept of direct effect, the CJEU has proved to be extremely influential in developing the law.

The question of priorities between directly effective international law and domestic law is normally seen as a matter of national law, to be determined according to the constitutional rules of the state concerned. However, this will depend on a number of factors. It will depends on the terms on which international law has been incorporated into cosmetic law, and this in turn will depend on whether the state concerned in monist i.e. France or dualist i.e. Germany, Italy, and Belgium in its approach to international law. In the case of the former, such law will be received automatically into national law from the moment of its ratification. On the other hand, in the case of the latter, the law will not become binding until it has been incorporated into national law.

The way in which an international law is incorporated into national law will not solve the problem of priorities, rather, it is perhaps important to illustrate how this new legal order, being the EU Legal System, is truly unique and peculiar, with its very own special rules.

The ECJ

The ECJ deployed a number of arguments to justify its conclusion that EU Law should be accorded supremacy over national law.

The first is termed as being a contractual argument stating that EU Law should be accorded primacy because it flowed from the agreement made by the Member States when the joined the Union. The Treaty created its own legal order which immediately became an integral part of the legal systems of Member States.

The second aspect captures the idea that the very aims of the Treaty could not be achieved unless primacy were accorded to EU Law, and this is where the principles of integration and cooperation were to be included.

A third argument holds that the obligations undertaken by the Member States in the Treaty would be merely contingent rather than unconditional if they were to be subject to later legislative acts on the part of the states. Thus, the ECJ adverts to Article 288 TFEU, which provides that regulations are directly applicable, and concludes that this would be meaningless if states could negate the effect of EU Law by inconsistent domestic legislation.

Relation with Direct Effect

The key issue is whether direct effect is a condition precedent for EU Law to have supremacy over national law. Four points can be made about the relationship:

1. In terms of positive law, it is clear that the primacy model best explains case law on incidental horizontal effect. Supremacy has been used to exclude national law that is inconsistent with EU Law, even though the EU provision does not have horizontal direct effect as between the parties to the case.
2. The distinction between the two model was important generally pre-Lisbon because direct effect did not exist in relation to the second and third pillars. This prompted inquiry as to whether supremacy could operate in these areas in the absence of direct effect. The ECJ applied to principle of indirect effect to the Third Pillar in the Pupino Case of 2005 but never conclusively answered the supremacy issue.
3. In conceptual terms, it should be recognised that whether a provision is intended to accord rights to the individuals in the strict sense of being sufficiently clear, precise, and unconditional is conceptually distinct from the issue of supremacy.
4. In normative terms, the primacy model places supremacy in the driving seat, with direct effect being relevant only in relation to substitution effects, while the trigger model places direct effect in the driving seat, with supremacy being the remedial manifestation of using directly effective EU rights in national courts.

Van Gend en Loos Case (26/62)

The first statement of the principle of supremacy came in this case where the principal question was the question of the direct effect of a relevant treaty provision i.e. now Art. 30 TFEU. Following the preliminary reference, the Court held that the article was directly effective, while also stating that: “the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within a limited field”.

Costa v ENEL (6/64)

This case posed a more difficult legal problem to the Italian Courts because in this case the provision which was allegedly breached was enacted sometimes after the Italian Ratification Act, and thus, *lex posterior derogat priori.* The Court made reference to the Van Send en Loos Case affirming the principle of supremacy and held that:

> “the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a

basis of reciprocity… Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty... The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories... It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail".

Supremacy Principle Applicable against all National Law

The legal status of a conflicting national measure was not relevant to the question whether EU Law should take precedence as seen in Commission v Luxembourg (1996). Not even a fundamental rule of national constitutional law could be invoked to challenged the supremacy of a directly applicable EU Law.

Internationale Handelsgesellschaft (11/70) - the conflict in this case was between an EC regulation and provisions of the German Constitution. Normally, any ordinary law which is in contrast to the Constitution is null and void, and Germany had incorporated EC Law by means of the EC regulation, thus the claimant tries to nullify the effect of such regulation. However, the CJEU maintained, under its jurisdiction of Article 267 TFEU, that the legality of a Community Law can never be judged in the light of national law. However, it must be said that the CJEU made it clear that the Court's reasoning was in no way ignoring fundamental human rights. In fact, it held that respect for such rights was one of the principal aims of the Community, and as such was part of its own law, albeit unwritten.

Supremacy Principle Applicable to National Laws that Pre-Date and Post-Date EU Law

In the **Simmenthal Case,** the ECH developed further its supremacy doctrine by making clear that supremacy of EU Law applied irrespective of whether the national law pre-dated or post-dated EU Law. The reasoning in the aforementioned case was also reaffirmed in the **Winner Wetten Case.** The Court considered whether provisions of national law held incompatible with EU Law could be maintained provisionally in force during the period necessary for the somatic authorities to redress the violation. The Court neither confirmed nor excluded the possibility, but made it clear that if it were to be recognised, a national county could make use of it only 'where overriding considerations of legal certainty involving all the interest, public as well as private', justified it, and only during the period of time 'necessary in order to allow such illegality to be remedied'.

National Bodies that must apply this Supremacy Doctrine

The clear message from the ECJ was that, even if the Constitutional Court was the only national Court empowered to pronounce on the constitutionality of a national law, where a conflict between national law and EU Law arose before another national court, that court must give immediate effect to Union Law without awaiting the prior ruling of the Constitutional Court.

The principles confirmed in the Simmenthal Case, were further upheld in other cases such as the **Factortame Case** and the **Larsy Case.** In the case of the latter, the ECJ ruled that not only national courts but also the relevant administrative agencies, in this case a national social insurance institution, should disapply conflicting national laws in order to give effect to the primacy of EU Law.

The Simmenthal Principle was of great importance since the supremacy of EU Law penetrated throughout the national legal system and was to be applied by all national courts in cases that fell within their jurisdiction.

Impact on National Law

The Simmenthal Principle does not require the national court to invalidate or annul the provision of national law that conflicts with EU Law, bur rather to refuse to apply it, and considerations of legal certainty may mean that the inapplicability of the national law will not expose those who relied on it to penalties.

Secondly, a national court is not always obliged to review and set aside a final judicial decision which infringes EU Law. The ECJ recognised the importance of the principle of res judicata, whereby judicial decisions that have become definitive can no longer be called into question.

Declaration 17 on Primacy

The primacy of EU Law over national law has been developed by the EU Courts and has not hitherto been enshrined in the Treaties. It might be argued that dropping the primacy clause from the Lisbon Treaty was unwise because its removal might cause national courts to doubt to continuing validity of the supremacy principle.

The ECJ will continue to espouse its version of primacy, using the Declaration appended to the Lisbon Treaty to reinforce this principle. It is nonetheless very unlikely that national Constitutional Courts will be persuaded to forget their previous concerns, and accept that EU law prevails over national constitutions, based on a Declaration appended to the Treaties.

Supremacy from the Perspective of the Member States

From the ECJ's perspective, all EU Law is supreme over national law. There is a continuing tension between national accounts of EU Law and the ECJ's account. Constitutional conflicts continue to arise in specific cases, and it remains for national courts to resolve cases arising before them involving a conflict between EU and national law.

There are four particular issues that can arisen any Member State concerning supremacy:

1. Whether the Member State accepts the supremacy of EU Law, assuming that the EU Acts within its proper sphere of competence.
2. Assuming an affirmative answer to the first issue, the second issue tackles the conceptual basis on which the Member State accord supremacy to EU law.
3. The third issue is whether the national legal order places limits on its acceptance of EU Law supremacy derived from its won national constitution and/or national fundamental rights.
4. The last issue is termed as being Kompetenz-Kompetenz. It addresses the issue of who has ultimate authority to define the allocation of competence between EU and the Member States. The ECJ, under Article 19 TEU regard this as its task, whereas virtually all national constitutional or supreme courts determine such questions ultimately by reference to their own national constitutional provisions, although they will treat with respect the ECJ's own view on the matter.

France

The French Courts do now accept the supremacy of EU law, but it took some time before all French Courts did so. The French judicial system is divided between the administrative courts and the ordinary courts. In 1970, the supreme administrative court rejected in practice the supremacy of EU Law.

A doctrinal split occurred when the supremacy of EU Law over French Law was accepted in 1975 in the Cafe Jacques Varies Case by the Cour de Cassation. The Court held that the question was not other it could review the constitutionality of a French Law. Instead, when a conflict existed between internal law and a property ratified international act which had entered the internal legal order, the Constitution install accorded priority to the latter. It was not until 1989 that the administrative court adopted the same position as the other Courts.

The Counsiel d'Etat recognised the primacy of both EU regulations and directives. Its jurisprudence concerning directive was nonetheless complex since directives could not be used to challenge an individual administrative act. The Council developed an increasing number of qualifications to this basic proposition, which allowed directives to be relied on in a number of situations.

In the case of France, the initial conceptual basis for the acceptance of supremacy was Article 55 of the French Constitution and not the ECJ's communautaire reasoning in the Costa Case. Article 55 of the French Constitution provided for the superiority of international treaties over national law.

The Council D'etat has not recognised primacy of EU Law over the Constitution itself. EU Law ranks above statute, but not the Constitution. This is also the same in the case of Malta.

Finally, there has not been a clear case in the French Courts raising the issue of Kompetenz-Kompetenz, but the predominant view is that this wold be regard as residing in the French Courts.

Germany

Subject to some limits which shall be discussed, the German Courts accept the supremacy of EU Law. The Federal Constitutional Court expressly adverts to the ECJ's functional argument in Costa: primacy of application of EU Law is demanded because "the Union could not exist as a legal community if the uniform effectiveness of the Union were not safeguarded in the Member states".

As already are still limits to the acceptance of EU supremacy.In the **Honeywell Ruling of 2010** it was held that: "unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German Legal System, the primacy of application of Union Law cannot be comprehensive". It is the nature of those limits that has been subject to most debate, judicial, and extra-judicial.

The three limits relate to fundamental rights, competence, and constitutional identity. The German Courts initially focused on fundamental rights as a limit to acceptance of supremacy of EU Law.

In 1986, in a case in which an EC import license system was challenge despite am ECJ ruling on its validity, there was the so-called delivery of the **Solange II Judgement**, which qualified the 1974 **Solange Judgement.** The term 'Solange' means 'so long as' and refers to the statement that so long as the EU had not removed the possible conflict of norms between EU Law and national constitutional rights, the German Court would ensure that those rights took precedence.

However, the Solange II Case did not surrender jurisdiction over fundamental rights, but only stated that it would not exercise that jurisdiction as long as the present conditions as to protect fundamental rights by the ECJ prevailed. The Federal Constitutional Court preserved its final authority to intervene if real problems concerning the protection of fundamental rights in EU Law arose.

The Federal Constitutional Court articulated a competence-based limit to its acceptance of EU Supremacy in the so-called **Maastricht Judgement,** when the constitutionality of the state's ratification of the Maastricht Treaty was challenged. This was a powerful judgement which warned the EU institutions and the ECJ that Germany's acceptance of the supremacy of EU Law was conditional. The Federal Court asserted its jurisdiction to review the actions of European 'institutions and agencies', which presumably included the ECJ, to ensure that they remained within the limits of their powers and did not transgress the basic constitutional rights of German inhabitants.

Moving forward, the June 2000 decision of the **Bundesverfassungsgericht**, which rejected as inadmissible the claim that EU legislation violated German fundamental rights, was hailed as evidence of a renewed cooperative relationship between the

two Courts. These sentiments have been maintained in the Honeywell judgement in which it set out the conditions on which it would refuse to accept EU Law on the grounds that the EU had acted beyond its competence, and hence ultra vires.

A related, but different, limit to the acceptance of EU supremacy within the German legal order was fashioned in a ruling on the compatibility of the Lisbon Treaty with the German Constitution. The Court reiterated the existence of the ultra vires lock, based on excess of competence, although it should be noted that the Honeywell ruling is more recent, and thus, it serves as the most modern word. In the Lisbon Ruling the Court articulated what became known as the identity lock.

If a legal system decides to apply locks then it must determine their content and how to apply them. The very language of locks is indicative of asymmetrical power: someone imposes constraints on someone else, but the reality is more complex.

The German jurisprudence reveals how the imposition of locks can be controversial or problematic, in terms of content and application. The empirical and conceptual foundation of the recent identity lock has also been questioned by German Scholars. The national court should be wary of condemning the ECJ for activist interpretation of the kind that the national court itself regularly engages in at domestic level.

Italy

The Italian Courts have accepted the supremacy of EU Law, subject to certain qualifications. Such supremacy is based on Article 11 of the Italian Constitution, and not the communautaire reasoning of the ECJ. The Italian Courts of not accept that EU Law has superiority over the Italian Constitution and hence, they retain ultimate authority over the issue of fundamental human rights. It seems that the Italian Courts regard themselves as being the ultimate Kompetenz-Kompetenz, being prepared in principle to adjudicate on the division of competence between national and EU Law.

Poland

The Polish Courts accept the supremacy of EU Law over statute, but again, subject to some objections. The conceptual foundation for this is to be found in the Polish Constitution, and not the communautaire reasoning provided by ECJ. Supremacy over the Constitution is not accepted and the Courts regard themselves as being Kompetenz-Kompetenz.

Central and East European States

The judicial approach in the new Member States from Central and Eastern Europe is not uniform, and space precludes examination of all such jurisprudence. The Czech Constitutional Court has, for example, adopted a nuanced approach. The judgment was in many respects ‘Euro-friendly’, and the Court accepted that EU protection for fundamental rights was in accord with that in the Czech Republic; at the same time it stipulated some limits on its acceptance of the primacy of EU law.

Many countries joined together in order to provide a secure foundation for democracy and human rights, and points to the paradox that their constitutional courts have resisted the supremacy of EU Law on the ground that it might endanger domestic constitutional protection of such rights.

Direct Effect and Beyond

This topic takes off from the principle established that EU Law is supreme to National Law and thus, domestic courts are obliged to give effect to such primacy. The doctrine of Direct Effect applies in principle to all binding EU Law including the Treaties, secondary legislation, and international agreements.

The starting point is the distinction between public and private enforcement. Law can be enforced wither though a public arm of government, or through actions brought by private individuals, or even an admixture of the two. The Treaty has an express mechanism for public enforcement in Article 258 TFEU, allowing the Commission to bring an action against Member States before the CJEU for breach of EU Law. Under the original Article, there was limits to this mode of enforcement since the Commission did not have the cavity to prosecute more than a tiny fraction of possible infringements and this article could not be used against private individuals.

Since the aforementioned article was weak, the CJEU took the step of legitimating private enforcement. It held that Treaty Articles could on certain conditions have direct effect, such that individuals could rely on them before their national courts and challenge national action for violation of Community law. However, this created uncertainty about the exact meaning of the term direct effect.

The next step was the expansion of direct effect; the loosening of the conditions for direct effect and this led to the doctrine being modified to apply to regulations and decisions. The focus shifted to directives, but Article 288 TFEU only provides that only regulations are directly applicable.

Since direct applicability is a necessary pre-condition for direct effect; it would seem that only regulations are capable of direct effect. However, this has not proved to be the case, because in a series of landmark decisions, the CJEU has extended the principle of direct effect of European Community (EC) law to apply in principle to all binding Community law including the EC Treaties, secondary legislation, and international agreements. However, the most problematic issues concern EC directives and international agreements; thus, in order to determine to what extent individuals can rely on EC law before their national court, the ECJ has developed three interrelated doctrines; direct effect, indirect effect, and state liability.

In a series of judgements, the Court not only declared Community laws to be binding but also required them to be internalised within the domestic legal systems of the Member States. There are many different ways of giving effect to EC law and not all of them necessarily involve direct effect in its strict or original sense. It is possible on the basis of the ECJ's case law to adopt either a broad or a narrow definition of direct effect.

The Definition

The meaning of direct effect remains contested. In a ***broad sense*** it means that provisions of binding EU law which are sufficiently clear, precise, and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts. This definition was derived from the Van Gend en Loos Case. There is also a '***narrower***' or classical concept of direct effect, which is defined in terms of the capacity of a provision of Union law to confer rights on individuals.

The Van Gend en Loos Case

Van Gend en Loos imported a quantity of chemicals from Germany into the Netherlands. It was charged with an import duty which had allegedly been increased since the coming into force of the EEC Treaty, contrary to what is now Article 30 TFEU. On appeal against payment before the Dutch Court, now Article 30 was raised in argument and this dealt with whether such provision has direct application within the territory of a Member State.

This was a ground-breaking judgement, with interventions made on behalf of three governments indicated that the concept of direct effect, understood as the immediate enforceability by individual application of those provisions in national courts, probably did not accord with the understanding of those states of the obligations they assumed when the created the EEC. They argued that international treaties were really just a compact between states and did not give rise to rights that individuals could enforce in national courts. The ECJ still argued that Treaty Articles in principle have direct effect.

The ECJ held that the Community constitutes a new legal order of international law for the benefit of States and their people. Necessarily, states have limited their sovereign rights, albeit within limited fields and the subjects of which compromise not only Member States but also their nationals.

Independently of the legislation of Member States, Community law, therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

The ECJ held "the wording of Article 12 (now Art. 30 TFEU) contains a clear and unconditional prohibition which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate its application to a positive act of internal law."

The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. Thus, the general scheme and the wording of the Treaty must be interpreted as

producing direct effects and creating individual rights which national courts must protect.

Here, the Court developed the concept of direct effect principally in view of the kind of legal system it considered necessary to carry through the ambitious economic, and political program outlined in the Treaties. Pescatore stated that:

"the Treaty has created a Community not only of states but also of peoples and persons and that therefore not only Member States but also individuals must be visualised as being subjects of Community Law. The Community calls for participation of everybody, with the result that private individuals are not only liable to burdens and obligations, but that they have also prerogatives and rights which must be legally protected".

Broadening the Conditions

The aforementioned judgement established the conditions for the direct effect of a Treaty Article: **clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure.**

The development of direct effect saw the broadening and loosing of the above-mentioned conditions.

The 'clear and unconditional' aspects were qualified within a few years of the Van Gend en Loos ruling. In **Salgoil v Italian Ministry of Foreign Trade**, the ECJ held that the existence of Member State discretion to, for example, prevent the free movement of goods on the ground of what is now Article 36 TFEU (restriction on grounds of public policy, public morality or health, or preservation of treasures) did not preclude the direct effect of Article 34 TFEU, since the cases concerning Article 36 TFEU were exceptional and did not undermine the clear obligation in Article 34 TFEU.

Similarly, in **Van Duyn**, the ECJ rejected the argument that what is now Article 45(3) TFEU which allows limitations on free movement of persons on grounds of public policy, public security or health, prevented Article 45(3) TFEU from having direct effect, because the applications of the limitations contained in the article were subject to judicial control. Hence, the ECJ was permitting direct effect to apply even in areas where Member States possessed discretion. This represented a judicial shift in thinking about direct effect.

The idea that direct effect was precluded where further measures were required at national level was also modified. The ECJ's strategy was to fasten on the basic principle that governed the relevant area, and, provided that this was sufficiently certain, it would accord it direct effect, notwithstanding the absence of implementing measures and Community and national level.

The ECJ determined that the Treaty could be directly involved by individuals to challenge obvious instances of nationality discrimination. The basic principle of

non-discrimination was held to be directly effective, even though the conditions for genuine freedom of establishment were far from being achieved.

Reyners v Belgium (1974) - Jean Reyners, a Dutch national who obtained his legal education in Belgium, was refused admission to the Belgian Bar solely on the ground that he lacked Belgian nationality. He challenged the relevant Belgian legislation before the Conseil d'Etat, which in turn referred several questions to the ECJ, including the question whether Article 52 was directly effective in the absence of implementing directives under Articles 54 and 57. In this case the ECJ appeared determined that despite the slow pace of harmonisation of national laws in the field of free movement and establishment of self-employed persons, the Treaty could be directly invoked by individuals in order to challenge obvious instances of nationality discrimination against them. In this case, the Court employed the direct effect concept to compensate for insufficient action on the part of the Community legislative institution

Vertical and Horizontal Direct Effect

In most instances the claimant will seek to use direct effect vertically, against the state or an emanation of the state. It is clear that Treaty Articles can have horizontal direct effect, such as to impose an obligation on a private party.

Defrenne v Sabena - it was held that all Treaty Articles have Horizontal Direct Effect, provided the Van Gend test is met. A private company airline 'Sabena' paid female cabin crew members less wages than their male counterparts doing the same job, which Belgian law did not prohibit. Defrenne sought to rely on a Treaty Article which would protect her. The Belgian courts asked the ECJ whether an individual could rely on a Treaty Article to enforce rights against another individual in national courts. The ECJ used the purposive approach to interpret Article 119 and recognising social aims of the Union, and thus, held yes.

In fact the Court held: ***"the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."***

Article 288 TFEU

The principle types of EU Legal Act are set out in Article 288 TFEU. All binding from of EU Law are capable of direct effect, but the same cannot be said for non-binding law, although they are influential in other ways and may have what is known as indirect effect.

Regulations

Regulations shall have general applications are binding in they entirety and directly applicable in all Member States. Since it is general in its application, where the criteria for direct effect are satisfied, a regulation may be invoked vertically or horizontally.

Commission v Italy (Slaughtered Cows Case) - the Commission, by a series of regulations instituted a system of provisions for slaughtering cows and withholding milk products from the market. Taking the view that Italy had not complied with these, the Commission brought infringement proceedings under Article 169, claiming that the delay and the eventual manner of giving effect to the system were in breach of the Commission Regulations. In this case the ECJ emphatically confirmed the direct effect of regulations and criticised any attempt by a Member State to alter or dilute the requirements of a Community regulation.

Munoz v Frumar LTD - the trader Munoz brought civil proceedings against Frumar for selling grapes under particular labels which did not comply with Regulation 2200/96. This Regulation did not confer rights specifically to Munoz, but to all operators in the market. However, the CJEU ruled that, since the purpose of the Regulation was to keep products of unsatisfactory quality off the market, a trader could rely on the provisions of the Regulation and bring an action against a competitor before national courts. This is an example of **Horizontal Direct Effect** in which it was held: "***that owing to their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect*".**

Decisions

In the case of decisions, the ECJ took the view that, since they were intended to be binding upon addressees, there was no reason why they should not be directly enforced before a national court where their provisions were sufficiently clear.

Directives

The key reason given by the Court for the direct effect of Treaty provisions was that the fundamental aims of the Treaty would be seriously hampered if its provisions could not be domestically enforced by those affected. A directive is binding as to the result to be achieved, upon each Member State of which it is addressed, but shall leave to the national authorities the choice of form and methods.

Directives are one of the main EU harmonisation instruments used to coordinate Member States' laws. The directive may be a compromise between Member States on a complex matter, and may leave discretionary options to state. Eventual implementation need not be uniform in every Member State, although the actual aim of the directive must be properly secured in each.

Because of their character and nature, it was difficult to reconcile the original criteria for direct effect. As they are not directly applicable, it was originally thought that they would not produce direct effect. However, the CJEU reached a different conclusion.

The direct effect of directives was established in the **Van Duyn v Home Office Case**. Van Duyn was a Dutch National who went to the UK to work for the Church of Scientology. She was refused leave to enter the UK since Scientology was officially regarded by the British Government as socially harmful, although no legal

restrictions were placed upon its practice. She challenged the refusal inter alia on the basis of a directive which regulated the free movement of workers within the Community. The High Court asked the ECJ whether the provisions of the directive in question could have direct effect.

The ECJ replied that if directives are binding, then the possibility of relying on them directly before national courts cannot be ruled out. Each provision must be examined in its context to see whether the obligation imposed is sufficiently clear and exact to be capable of being applied directly by a national court. The directive allowed Member States to take measures restricting the movement of non-nationals on grounds of public policy, public security and public health; however, the measures taken on grounds of public policy had to be based exclusively on the personal conduct of the person concerned. The ECJ ruled that by providing this restriction, the directive had limited the discretionary power conferred on States. The obligation imposed was clear, precise and legally complete. Despite the lack of clarity as to the scope of the concept of 'personal conduct'; yet, the ECJ held that Van Duyn could invoke the directive directly before her national court.

Immediately after the Van Duyn judgement, however, some Member States felt the Court had gone too far in advancing its conception of Community law at the expense of the clear language of the Treaty, and the obvious limitations on directives as a form of legislation; that is, if directives were specifically intended to leave Member States with choices of how to enact a particular Community obligation, then, the ECJ should not allow this to be overridden by individuals invoking the directive directly.

The three main points were the following:
1. Directives are binding and will be more effectively enforced if individuals can rely on them
2. Article 267 TFEU allows national courts to refer questions concerning any EU measure to the ECJ, including directives, implying that such acts can be invoked by individuals before national courts.
3. Estoppel Argument: Member States were precluded by their failure to implement a directive properly from refusing to recognise its binding effect in cases where it was pleaded against them. Thus, the argument is as follows. The Member State should have implemented the directive.

Vertical v Horizontal Distinction

While directives can be enforced directly be individuals against the State after the time limit for their implementation has expired, that is the vertical direct effect, resulting where applicable in the misapplication of conflicting domestic law, on the other hand, the ECJ ruled that they cannot impose obligations on individuals, that is, there is no horizontal direct effect. Thus, they can be enforced against the State or institutions of the State but not against private individuals.

Marshall v Southampton and South West Hampshire Area Health Authority - the ECJ stated explicitly that a directive may not of itself impose obligations on an individual and that a provision of a directive, which constitutes the basis for the

possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed. In other words, a directive is not bidding on private individuals, and thus, it cannot impose obligations on them.

Expanding Vertical Direct Effect: A Broad Concept of the State

The rule of non-applicability of directives in a horizontal manner leads to discrimination between the private and public sectors. The ECJ therefore began to develop other strategies to advance the domestic enforcement of these measures. The first was to expand the notion of a public body against which directives could be enforced. In the **Marshall Case,** having ruled out the direct enforcement of a directive against an individual, the Court concluded that the complaint could nevertheless rely on the provisions of this Directive as against the Health Authority, since it could be regarded as a organ of the State.

So here, the distinction of vertical and horizontal direct effect requires the ECJ to delineate what is to be regarded as the 'state' for the relevant purposes.

In the case of **Foster v British Gas,** the Court considered a company in the position of British Gas to be an organ of the State. In this case, the CJEU applied the three criteria to detainee if a body id an emanation of the state:

a. Provision of public service
b. Provision of service under control of state
c. Exercise of special powers when providing the service, beyond those normally applicable in relation between individuals

Evidently, a broad range of bodies has been included in the state for these purposes, including local authorities, regions, nationalised industries, privatised undertaking, and even universities.

Dori v Recreb Srl - the ECJ was invited to reconsider the Marshall judgement. This case was about a directive regulating a doorstep Selling which was not yet implemented in Italy. The ECJ affirmed the principle that directive could not be enforced against private individuals, however, continued to point out that other remedies may be available based on principles introduced by the Court prior to this case, namely the principle of indirect effect and the principles of State Liability as introduced in the case of **Francovich v Italy.**

Indirect Effect

The most important way in which the ECJ encouraged the effectiveness of directives was by developing a principle of harmonious interpretation which requires national law to be interpreted 'in the light of' directives.

The Court in the **Von Colson Judgment** expressly identified the national courts as organs of the state responsible for fulfilment of Community obligations, and encouraged the German Court to supplement the domestic legislation, which did not on its face seem to provide an adequate remedy, by reading it in conformity with the Directive's requirement to provide a real and effective remedy.

The principle has been strengthened over time, with the Court declaring it to be 'inherent in the system of the Treaty', derived from the obligation in Article 4(3) TFEU, and an aspect of the requirement of full effectiveness of EC law, which applies to national courts and all competent authorities called upon to interpret national law.

The Marleasing Case - The Spanish Civil Code provides that contracts have no legal effect if they are without a cause or have an illegal cause, and it was argued, on the basis of this provision, that a contract leading to the incorporation of a Spanish company was void, since it lacked cause, was a sham transaction, and was entered into in order to defraud the creditors of another company. It was therefore claimed that the incorporation of the company was a nullity.

The defendant claimed that the Company Directive 68/151, which set out an exhaustive list for nullity of companies, did not include lack of cause. Spain had not transposed the Directive, although the prescribed time had elapsed.

The ECJ reaffirmed the ruling in the Marshall case, that a directive cannot directly impose obligations on a private party. However, it then went on to consider the doctrine of indirect effect. It extended the ruling in the Von Colson case to apply to national legislation passed before or after the directive, thus making it possible for the doctrine to apply to the relevant provisions of the Spanish Civil Code. Moreover, it said that the national law had to be interpreted so as to preclude the declaration of nullity of a company other than on the grounds permitted by the directive, thus suggesting that the national court had no option but to reach that result.

If by this the Court meant that the result envisaged by the directive had to be attained irrespective of whether or not there could be any doubt as to the meaning of the national provision and irrespective of whether or not the words of that provision could reasonably bear the meaning required by the directive, the effect would be that, <u>while pretending to uphold the Marshall principle, the ECJ was in fact making directives directly effective against individuals</u>.

There are three points to note about the scope of the interpretive obligation:
1. The obligation of harmonious interpretation applies even where the national law predates the directive and has no specific connection with it
2. The interpretive obligation applies not only to national law that implements the directive, but to the national legal system as a whole
3. The interpretive obligation is strong but does not require an interpretation of national law that is cannot bear

The Marleaisng Cases strict line was modified in **Wagner Miret v Fondo de Garantira Salaria.** In this case, the ECJ held that the national courts must presume that the state intended to comply with Community law. They must strive "as far as possible" to interpret domestic law to achieve the result intended by the Directive. In this case, the ECJ acknowledged that national courts will not always be able to translate domestic law to comply with an EC directive.

Incidental Horiztonal Effects

There is a line of case law which permits, in some instances, the use of unimplemented directives between private parties.

In the case of **CIA Security International SA v Signalson SA and Securitel SPR,** CIA security brought proceedings against the defendants before the Belgian commercial courts asking for orders requiring them to cease unfair trading practices in the marketing of security cameras. CIA argued that the two companies had libelled it by claiming that the alarm system which it marketed had not been approved as required under Belgian legislation. CIA agreed that it had not sought approval but argued that the Belgian legislation was in breach of Article 28 and had not been notified to the Commission as required by Directive 83/189 on technical standards and regulations.

The Court held "it remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals. The Court ruled that part of the aim of this directive was to protect the free movement of goods by preventive control, and that it would enhance the effectiveness of that control to provide that a breach of the obligation to notify would render the lack of notification of domestic regulation inapplicable to individuals.

The ECJ concluded that the relevant articles of this directive had to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

Legal Status of General Principles of Law

It was initially assumed by everyone that general principles of law can have no direct effect. However, the alternative line of reasoning pursued by the Court in the **Mangold Case** was that non-discrimination on grounds of age is a general principle of Union law.

As such, the Court said, its observance cannot be dependent on whether or not the deadline for implementing a directive giving effect to it has expired. If the Court meant, as its words appear to mean that general principles of law have horizontal direct effect, or any direct effect at all, for that matter, the implications for legal certainty are immense.

Mangold was a case between two private individuals: the effect of the Court's ruling was to deprive one of them of the rights he would otherwise have had, on the basis of a principle, the details of which were completely uncertain. Hartley holds that it is hard to believe that a mere general principle can do this. It may well be that non-discrimination on grounds of age as in some sense a general principle of law; however, it is subject to numerous qualifications and exceptions. Until it has

been clarified and given a clear form, it comes nowhere near satisfying the test for direct effect, one of the requirements for which is a reasonable degree of clarity and precision.

Perhaps what the Court meant in Mangold is that where such clarity and precision are provided by a directive, the principle has direct effect, even in proceedings between two individuals and even if the deadline for implementation has not yet expired. To give direct effect, whether horizontal or vertical, to a directive before the deadline has expired is objectionable because it deprives the Member State in question of the right given by the Treaty to choose the form and methods of implementation. The Member State cannot be accused of being in default until the deadline has expired. In view of the defective reasoning in Mangold, however, even this is doubtful. Further confirmation will be required.

The Legal Effects of International Agreements in EC Law

There are three types of international agreements capable of being invoked in the context of EC Law arising from the Community's powers under Articles 243, 260, 294, and 272 TFEU. First, agreements concluded by the Community institutions falling within the treaty-making jurisdiction of the EC; secondly, 'hybrid' agreements, such as World Trade Organization (WTO) agreements, in which the subject matter lies partly within the jurisdiction of Member States and partly within that of the EC; and thirdly, agreements concluded prior to the EC Treaty, such as General Agreement on Trade and Tariffs (GATT) which the EC has assumed as being within its jurisdiction, by way of succession.

The issue which has dominated this area of law in recent years and which has generated a vast academic literature, namely whether the provisions of GATT and the successor WTO agreements can have a direct effect, was first raised several decades ago. In the **International Fruit Co NV v Produktschap voor Groenten en Fruit** (No 3) (21 and 22/72), the Dutch Court made a preliminary reference to the ECJ, asking whether it had jurisdiction to rule on the validity of Community regulations in relation to a provision of international law and if so whether the regulations in question were contrary to GATT. In this case the ECJ stated that in terms of the criteria for direct effect laid down in earlier cases, the provisions of GATT were insufficiently precise and unconditional in the sense that they permitted the obligations contained therein to be modified, and they allowed for too great a degree of flexibility. The ECJ was unwilling to accord direct effect to international obligations of this nature, in particular since they were normally invoked to challenge the legality of EC legislation.

There were some cases where the ECJ examined certain trade agreements on their individual merits and held that they were directly effective. Hartley suggests that this conflict is due to the desire of the ECJ to provide an effective means of enforcement of international agreements against member states and the fact that there is no legal basis for the ECJ to do this.

In **Kupferberg**, it was argued that a German tax on wine could not apply to imports from Portugal (before Portugal joined the EU) because it conflicted with a

provision in the Free Trade Agreement between the Union and Portugal. This raised the question whether the relevant provision of the agreement was directly effective in Germany. The ECJ held that this question could not be left to the national law of each Member State because a uniform solution throughout the Union was desirable. So Union law had to decide, and the Court held, after examining the provision, that it was directly effective. The fact that it was probably not directly effective in Portugal was regarded as irrelevant.

The result is that non-Union businessmen selling in the Union could have a more effective means of enforcing the agreement than Union businessmen exporting to the foreign country. However, the ECJ has made it clear that provisions in agreement with non-member States are not necessarily to be given the same wide and policy-oriented interpretation that is given to the EU Treaties. This is even so, in cases where the agreement reproduces almost exactly the wording of a provision of the EU Treaties. The reason behind this is when the Union enters into an agreement with a non-member State, it is under an obligation to ensure that the agreement is carried out. Frequently, however, the agreement on the Union side will depend on the Member States. The Union could, therefore, be embarrassed in its relations with the non-members State, if the Member States failed to give effect to the agreement.

Agreements between the Union and a non-member State are, of course, binding on the Member States, and an action under Article 258 TFEU could be brought against any Member State which failed to abide by it. But this is a cumbersome remedy. By making such agreement directly effective, the ECJ has established an easy means of enforcement. At the same time, by refusing to apply its normal method of interpretation to such agreements, it has ensured that non-member States will not be given too great an advantage.

State Liability in Damages

An important way for an individual to enforce a directive despite the prohibition on horizontal direct effect is to sue the Member State in damages, pursuant to the Francovich Ruling, for loss caused by the state's failure to implement a directive. Rather than attempting to enforce the directive against the private party on whom the obligation would be imposed if the directive were properly implemented, the individual can instead bring proceedings for damages against the state. This was another incentive for Member States to implement directives in a proper and timely manner.

The private claimant may have to pursue two legal actions, one against the private party and the other against the Member State. This is because the action against the Member State is premised on the claimant having suffered loss, and the claimant may not be able to prove this unless she has failed to have the obligations from the directive imposed on the private defendant through indirect effect or one of the other mechanisms describe above. It follows that the private defendant may still have to go through the calculations discussed above even if the national court decides that it is unable to interpret national law to be in conformity with the directive, and thus that the one recourse for the claimant is an action against the Member State in damages.

Origins of the Principle

The most distinctive of the Court's interventionist rulings which required the availability of a particular remedy as a matter of EU Law is the **Francovich Judgement** which established the principle of state liability to pay compensation for breach of EU Law. In essence, it prescribes that an EU Member State could be liable to pay compensation to individuals who suffered a loss by reason of the Member State's failure to transpose an EU directive into national law. It is one of the cornerstones of EU law, as it puts pressure on Member States to implement EU Law correctly and timely.

In **Francovich v Italy**, under the Insolvency Protection Directive EU member states were expected to enact provisions in their national law to provide for a minimum level of insurance for employees who had wages unpaid if their employers went insolvent. Mr Francovich, and many other employees were owed millions of Lira, when their company went bankrupt. The Directive was meant to be implemented by 1983, but Italy failed to transpose the Directive and the liquidators informed them that no money were left for them. They brought a claim against the Italian State, arguing that it must pay damages to compensate for their losses, on account of a failure to implement the Directive. Following a preliminary ruling, the CJEU confirmed that, as the provisions of this Directive were not sufficiently clear to be directly effective, Italy was liable to compensate the workers' loss resulting from the breach.

It should be noted that in the case of **Commission vs. Italy (22/87)**, the Court had already held, in an enforcement action procedure, that Italy was in breach of its obligations in failing to implement the directive.

In the Francovich Case, the Court clarified that in order to establish state liability on the basis of the failure to implement a directive, claimants must prove that:

- The directive conferred specific rights on them
- The content of these rights must be clearly identifiable by reference to the Directive
- There is a casual link between the state's failure to implement the directive and the loss suffered.

Moreover, the ECJ's reasoning was based on three points; firstly, the Member States' obligation to implement directives under Article 288 TFEU and their general obligation under Article 4 TEU to "take all appropriate measures to ensure fulfilment of their obligations" under EC law; secondly, on its jurisprudence in the cases of Van Gend en Loos and Costa v ENEL, where it was held that certain provisions of EC law are intended to give rise to rights for individuals; and thirdly, that national courts are obliged to provide effective protection for those rights, as established in the case of Amministrazione della Finanze dello Stato vs. Simmenthal (106/77), and in the Factortame Case (C–213/89).

An opportunity for further clarification came in other judgements such as the in C-46/93, **Brasserie du Pêcheur**, in which a French brewery sued the German government for damages for not allowing it to export beer to Germany in late 1981, because it did not comply with the purity standards imposed by the German Law on Beer Duty. In a case brought by the Commission against Germany, the CJEU had already ruled that Germany was infringing EU Treaties. The Court held that Germany was liable to make reparation for damages caused to Brasserie and clarified that the principle of state liability did not only apply to breaches of EU Law related to non implementation of Directives.

This reasoning intended to legitimate the development of the principle of state liability, ostensibly deriving it from well-established principles of the national legal orders rather from the imagination of the ECJ.

In the joined case C-48/93, **Factortarne III**, Spanish fishers sued the UK government for compensation over the Merchant Shipping Act 1988, which imposed on fishing vessels nationality and residence requirements, depriving Factortame of its right to fish within UK quota. The UK government argued the legislation had been passed in good faith, and should not therefore be liable. However, in previous judgements, the CJEU had already held that the UK provisions were contrary to EU Law. Therefore, the CJEU held that UK was liable to make reparation for damages caused to Factortame.

In the aforesaid cases, the CJEU clarified that: a member state is liable for its breaches of EU Law regardless of the organ whose acts or omissions has breached EU Law; to be held liable the member state must have manifestly and gravely disregarded the limit of its discretion; it is irrelevant whether the provisions of EU is directly breached or not; reparation for loss or damage cannot be made conditional upon fault.

Drawing on international law principles, and on its case law under Article 258 TFEU, the Court ruled that the state is liable whichever of its organs is responsible for the breach and regardless of the internal division of powers between constitutional authorities. Moreover, Member States are not required to change the distribution of powers and responsibilities between public bodies, that reparation for damage caused within federal states does not have to be provided by the federal state, and that states are permitted though not requires to impose liability on individual official responsible for the breach as well on the state.

The Court ruled in the **Kobler Case,** that the principle of state liability applies even to violations of EU Law by national courts of final appeal. The *Köbler* ruling was later reinforced in **Traghetti del Mediterraneo**, where the ECJ condemned Italian legislation which sought substantially to restrict state liability for damage caused by a last instance court

The question arose whether liability to compensate for violation of EU Law would be extended also to violations by private parties, as in the competition law case of **Courage.** Having first reiterated its famous 'new legal order' reasoning from *Van Gend en Loos*, the ECJ emphasised the fundamental nature of the prohibition on anti-competitive agreements in Article 101 TFEU, breach of which would render any such agreement automatically void. This showed that national law must provide actions for damages against a private party for breach of the Treaty competition law rules, but the extent to which it extends beyond competition to other Treaty provisions such as those on free movement or discrimination remains uncertain.

Having affirmed the basic principle of state liability, the ECJ in *Brasserie du Pêcheur* then elaborated on the conditions for liability, drawing on Article 340 TFEU governing liability of the EU institutions. In the Court's words, the conditions under which states incur liability for breach of EU law cannot differ from those governing the liability of the EU in similar circumstances.

In the aforementioned case, the ECJ suggested that the national authorities must have known that the German beer designation rules were in breach of EU Law given earlier ECJ rulings to this effect. The Court also indicated that while the existence of a prior ECJ ruling finding an infringement of EU law would suggest that a subsequent similar infringement constitutes a sufficiently serious breach, such a ruling would not be *necessary* to establish a **sufficiently serious** breach. Since liability depends on the breach by a Member State of a Community obligations; then, liability should in all cases depend on whether the breach is sufficiently serious.

Given the lack of clarity of much EC law and that Member States have no choice to act in breach of Community law, in Brasserie du Pecheur Advocate-General Teasuro argued that it seems that the crucial element is the clarity and precision of the rule breached.

This view obtained some support in the case of **R v Her Majesty's Treasury, ex parte British Telecommunications (C–392/93)**. In this case, British Telecommunications claimed that a particular directive concerning public procurement had been applied incorrectly, and thus, suffered financial disadvantages. The company sought compensation under Francovich. The ECJ focused on the question of whether the alleged breach was sufficiently serious. It applied the test of paragraph 56 of Brasserie du Pecheur and it found that although the UK's implementing regulations were contrary to the requirements of the directive, yet, it suggested that the relevant provisions of the directive were sufficiently unclear as to render the UK's error excusable.

Where EU law leaves considerable discretion to the national authorities, state liability will depend on a finding of manifest and grave disregard for the limits of that discretion.

A serious breach was found in the **Lomas Case,** and this is because the refusal of the UK to grant export licenses for live sheep to Spain, on the ground that Spanish slaughterhouse were not complying with terms of an EU Directive left lack of discretion to state under the directive, the clarity of the Treaty provision breached, and the absence of a property verified justification.

While the mentioned cases provided some guidance on the conditions governing state liability, many issues were left to be governed by national law, subject ti the familiar principles of equivalence and effectiveness. While the core conditions of the principle of state liability for breach of EU Law are determined by EU Law, the action for compensation is provided within the framework of domestic legal systems, with varying procedural and substantive rules on matter such as time limits, causation, mitigation of loss, and assessment of damages.

In a trilogy of Italian cases concerning claims arising out of the *Francovich* litigation, the compatibility of national provisions restricting the availability of compensation for the state's prior breach of EU law arose. This breach was the failure to implement Directive 80/987 on the protection of employees following their employer's insolvency, and the ECJ found various provisions of the legislation limiting the period from which wage claims could be made to be excessively restrictive.

The question which arises deals with the advantages available for an individual to choose EU-mandated action for compensation rather than another existing national remedy to enforce EU Law. It was held that where a national remedy is unsatisfactory due to the existence of a legitimate national procedural restriction, an action in damages against the state might provide an alternative remedy which is not affected by that particular restrictive national rule. In each case, having conceded that restrictions on the availability of national remedies were potentially legitimate, the ECJ went on to consider the possible liability of the state in damages.

One reading of the cases is that they assume that a *Francovich*-style action for compensation may prove to be a more effective remedy than others available under national law. This assumption has, however, been criticised on the basis that an action based on *Francovich* requires the establishment of additional onerous conditions, such as a sufficiently serious breach and causation of loss.

Remedies in National Courts

Early in ECJ Case-Law it was ruled that it was for the national legal system to determine how the interests of a person adversely affected by an infringement of EU Law were to be protected, and this is now termed as procedural competence or national procedural responsibility.

The CJEU has developed the doctrines of equivalence and effectiveness. This is in order to ensure effective juridical protection as regards enforcement of EU rights and in line with the right to fair trial set out in Article 47 of the EU Charter of Fundamental Rights. The principle of sincere cooperation between the EU and its members set out in Article 4 TEU and the obligation to ensure effective legal remedies set out in Article 19 TEU are also important in this matter.

Procedural Protection is governed by three principles:
1. **The Principle of National Procedural Autonomy**: it is for the domestic systems to prescribe procedural conditions and jurisdictions of national courts for enforcement of EU Rights.
2. **The Principle of Equivalence**: the conditions imposed cannot be less favourable than the ones for similar actions of domestic nature.
3. **The Principle of Effectiveness**: the conditions should not render impossible or excessively difficult the exercise of rights conferred by EU Law.

Equivalence and Practical Possibility

These two requirements mean that the remedies and forms of action available to ensure the observance of national law must be made available in the same way to ensure the observance of EU Law and that national rules and procedures should not make the exercise of an EU Law tight impossible in practice.

Subject to these two requirements, the early case law provided that procedures and remedies for breach of EU Law were primarily a matter for Member States. In the absence of EU Rules to that effect, the states were not required to provide remedies which would not be available under national law.

However, such **no new remedies rule** has been qualified in multiple ways, in some of its early ruling in one particular branch of case law concerning repayment of charges levied in breach of EU Law, the Court insisted that a right t repayment must be available under national law, on the basis that this flowed directly from substantive provisions of EU Law in question.

In the ***San Giorgio Case,*** the Court held that: "*in that connection it must be pointed out in the first place that entitlement to the repayment of charged levied by*

a member state contrary to the rules of Community law is a consequence of, and an adjunct to, the right conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties, or as the case may be, discriminatory application of internal taxes".

Even in these repayment cases the Court continued to emphasise the primary role of the national legal system in laying down the conditions governing the grant of such remedy, as long as they satisfied the ***twin principles of equivalence and practical possibility.***

On the words of Advocate General Warner: "to that one might object that, if so, there will be a lack of uniformity in the consequences of the application of Community Law in the different Member States. The answer to that objection is… that tis Court cannot create Community Law where none exists: that must be left to the Community's legislative organs".

Additionally, despite some of the more striking later cases, the ECJ gas continued to insist, notably in the **Unibet Ruling of 2007,** that EU Law does not require the creation of new national remedies. In fact, in the aforementioned case, the Court rules that there was no need for Swedish Law to provide a self-standing action to challenge the compatibility of a national provision with EU Law, since there were other domestic legal remedies available which enabled the compatibility question to be raised indirectly and which complied with the twin principles.

Proportionality, Adequacy, and Effective Judicial Protection

Cases have also arisen concerning state repossess to the beach of EU Law by individuals. In the **Sagulo Case,** the Court maintained that while states are entitled to impose reasonable penalties for infringement of administrative requirements governing EU residence permits by migrants workers, the penalties must not be disproportionate to the offence in question and must not constitute an obstacle to the exercise of Human Rights.

However, Member States are **required** by EU Law (Art. 4(3) TEU) to take **all effective measure to sanction conduct which affects the financial interests** of the EU.

Other cases concern the adequacy and deterrent effect of national penalties for breaches by private parties of fundamental EU rules. InIn C-14/83, Von Colson and Kamann, both females argued that they were discriminated on grounds of gender. Von Colson, when she applied in the public sector for the post of a prison social worker and Kamman, when she applied to join training with a private company. Based on German Law, they ere only entitled to nominal damages for the discrimination. They claimed before the national court that this was contrary to Equal Treatment Directive and that they should receive substantial damages. The national court asked whether this was an effective remedy. The CJEU ruled that in other to ensure the compensation has a deterrent effect, it should be analogous to the damage sustained.

This ruling gave way to similar rulings such as **Johnston, Heylens, and Panayotova** which confirmed that the requirement to provide adequate and effective remedies was a general one, and thus extending beyond sex discrimination law.

Development of the Effectiveness Requirement

There was some tension in early caselaw between the emphasis on national procedural autonomy and the requirement that national remedies must secure the effectiveness of EU Rights.

In the **Dekker Case,** the applicant sought damages before the Dutch courts against an employer who, in breach of the EU Equal Treatment Directive, refused to employ her on grounds of her pregnancy. Citing *Von Colson* on the Directive's requirement of effective judicial protection, the ECJ ruled that to subject a claim for redress to a requirement of 'fault' on the part of the employer, or to a defence of justification or another ground of exemption, would undermine the Directive.

The fact that the Directive itself required access to a judicial remedy may account in part for the strength of the ruling, but the judgment marked a further dilution of the principle of national procedural autonomy, especially since the national rule did not discriminate between situations involving EU law and those involving domestic law, and the requirement of fault might not render the exercise of the EU right 'impossible' in practice.

In fact, a claim for redress could be subject to a requirement of fault on the part of the defendant, The CJEU held that to be effective "any infringement of non discrimination suffices in itself to make the person guilty fully liable".

In **Cotter and McDermott Case**, the Court held that to permit reliance by the national authorities on a domestic law principle against unjust enrichment to deny married women payment of social welfare benefits for dependants which has previously been paid to married man but denied to married women in breach of EU sex discrimination law would allow the authorities to use their own unlawful conduct to undermine the Directive. The desire to prevent the state profiting from its own wrong seems to have played in much a part in the Court's reasoning as the desire not ti weaken the effectiveness of the Directive.

The ECJ gave robust remedial rulings in may other discrimination cases. After important case law, it seemed that the requirement that remedies for breach of EU Law should be effective had become stronger and had modified considerably the basic notion of national procedural autonomy.

Through this there was an expectation that national courts would be creative in deciding which national rules should not be applied in order to enforce EU Law in an effective manner, but this created a greater degree of uncertainty. In the **Marshall II Case,** the complainant was faced with a domestic statutory ceiling on awards of compensation for discrimination in breach of EU Law, and the question

was whether the national court should ignore or override the statutory limit even though it did not render the exercise of her right 'practically impossible'.

In this case, two national rules governing remedies had to not be applied by the national court to provide an effective remedy for the breach of EU Law. This case contrasts with earlier case law such as the **Humblet Case** and the **Roquette Case,** in which the Member States has decided whether or not to award interest on the reimbursement of sums wrongly levies under Community Law, whereas under the Marshall II Case, it was not open to the MS to refuse ti pay interest.

Another case which illustrated the tension between the no new remedies rule and the principle of effectiveness was **Factortame I.** The Court insisted on the priority of the requirement of effectiveness over settled principles of UK Law to rather drastic effect, since the national rule in question was basic principle which prohibited the grant of the particular remedy in an absolute manner. The ECJ left it it to House of Lords to specify the conditions under which interim relied should be granted but made clear that a rule which is prohibited absolutely the grant of interim relief would be unacceptable.

After the list of aforementioned judgments, the Court seemed to pull back from the boldness of its rulings and adopted a more cautious approach. The **case of *Steenhorst-Neerings*** concerned an action for retrospective payment of several years of disability benefit, covering the period when the Directive on sex discrimination in social security had not been properly implemented into Dutch law. Dutch law provided that such benefits should not be payable retroactively for more than one year.

The ECJ however distinguished the case from ***Emmott***, despite the similarities between the two, ruling that the one-year period for retroactive payment was not a time limit for bringing proceedings, and did not operate (as in *Emmott*) as an absolute bar on bringing an action. Instead, it satisfied the twin conditions of equivalence and practical possibility, and more particularly it served a legitimate purpose including "preserving financial balance... in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year".

Confirming the trend of *Steenhorst-Neerings*, the ECJ in ***Johnson II*** ruled that 'the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under the directive'. The case in question also represented a retreat from the principle of adequacy of compensation for sex discrimination established in *Marshall II*.

In C-208/90, Emmott, the applicant challenged the refusal of the Irish authorities to grant her disability benefit, in breach of the Directive on equal treatment of men and women in social security matters. Her application for compensation was deferred pending a related ruling before the CJEU. When she was allowed to institute the proceedings she was found to be out of time. The national Court

referred the issue to the CJEU, which ruled that a state may not take advantage of its own wrongdoing, that Ms Emmott should not be denied an effective remedy where the denial is caused by the Member States' own failure to implement a directive and that she could receive compensation under "state liabilty" provisions.

This was reinforced in *Johnson II*, where the Court ruled that, even in the absence of state concerns to ensure administrative convenience and financial balance, a provision restricting to one year the retroactive effect of a claim for a non-contributory incapacity benefit was compatible with Community law.

The **Sutton Case** went on to suggest that the requirements imposed by EU Law on the availability of national remedies may depend on the nature of the right at stake and on the EU measure which has been breached. Moreover, even if there is a requirement of adequate compensation for damage caused by a breach, a ceiling on damages which not always be impermissible. A maximum upper limit on damages is acceptable in certain cases, such as a case of sex discrimination in access to employment, where the claimant would not have been successful in obtaining the job even in the absence of discrimination, so that the loss sustained is more limited.

However, the very important point to note is that **in certain circumstances national law mist still provide for a particular kind of remedy for a violation of EU law.**

In the **Metallgesellschaft & Hoechst Case,** the Court ruled that it was for the national court to classify the nature of an action brought, whether as an action for restitution or an action for compensation for damage. The very substance of the plaintiffs' claim was the interest which would have accused had they not been subject to discriminatory advance taxation.

While **restitution** was not a remedy unknown to English Law, the ECJ brushed aside the national court's argument that restitution might not be available in these circumstances by characterising the claim as damage flowing directly from the breach of Article 49 TFEU.

This ruling was echoed in other cases such as the **Munoz Case.** In C-253/00, Munoz v Frumar Ltd, the trader Munoz brought civil proceedings against its competitor for selling grapes under particular labels which did not comply with regulation 2200/96. This regulation did not confer rights specifically to Munoz, but to all operators in the market. However, the CJEU ruled that, in line with the principle of effectiveness, a trader could rely on the provisions of the regulation and bring an action against a competitor before national courts.

Current Approach: Balancing Effectiveness & National Procedural Autonomy

The position reached in the field of national remedies for EU Rights can be summarised as follows: **it requires national courts to strike an appropriate, proportionality-based, case-by-case balance between the requirement of**

effective judicial protection for EU Law rights and the application of legitimate national procedural and remedial rules.

In deciding whether a national rule or principle could undermine the exercise of an EU Law rights, national courts must weigh the requirements of effectiveness and equivalence in the light of the aim and function of the national rule.

Effectiveness

In the **Van Schijndel Case,** while Van Schijndel indicated that the principle of judicial passivity was compatible with the exercise of the EU Right, the opposite conclusion was soon reached in the **Peterbroeck Case.** In the latter case, where similar aims of legal certainty and the property conduct of procedure underpinned a procedural provision of the Belgian Tax Code preventing parties and the Court from raising a point of law of EU Law after sixty days, the application of the rule was held by the ECJ to render the exercise of the EU Right excessively difficult.

These rulings and their different outcomes indicate clearly that each national provision governing enforcement of an EU right before national courts must be examined and weighed not in the abstract, but in the very specific circumstances of each case, to see whether it renders the exercise of that right excessively difficult.

In the case of Kuhne and Heitz, the Court ruled that a national administrative body had to reopen a decision that had become final following a national court ruling which was based on a misunderstanding of EU Law. This judgement was affirmed in the Kempter Case, in which the Court ruled that an obligation of review would arise where the contested administrative decision which had become final was based on a misinterpretation of EU Law adopted without any preliminary reference being made to the ECJ on the question.

In other cases, the ECJ went further and ruled that EU Law precludes a national rule on res judicata from being applied by a Court to prevent the recovery of aid which had been found by the Commission to be definitively incompatible with EU Law.

All of this means that the principle of *res judicata*, will often be required to give way to the need to take a binding ruling of EU law into consideration.

The general position laid down by the ECJ is that reasonable national limitation periods are compatible with EU requirements, unless the effective protection of EU Rights is negatively affected by other factors i.e. uncertainty, retroactive application.

In the **Manfredi Judgment,** the Court declared that a national rule under which the limitation period begins to run from the day on which an anti-competitive agreement or concerted practice is adopted could make it practically imolssinle to exercise the right to seek compensation for the harm caused, particularly if the limitation period is a short one and not capable of being suspended.

The diversity of national time limited means that the Court grants considerable latitude in determining what is reasonable, but it is nonetheless clear that some kind of comparative judgement is being made with references to practices of different Member States.

Rules of Evidence are also of extreme importance. In **Boiron,** the question was whether national rules placing the burden of proof for demonstrating overpayment of competitors on an economic operator coupled with the principle of effectiveness. The Court maintained that where the national court found that this evidentiary requirement rendered it difficult for the operator to produce the necessary proof, the Court was required to 'use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document' to comply with the EU requirement of effective judicial protection.

Moroever, the Court emphasised the importance of access to judicial control for the vindication of EU Law rights since the very early judgements. However, the ECJ also accepted the imposition of reasonable national restrictions and preconditions on the fundamental right of access to Court.

In **Upjohn,** it was held that EU Law did not require the availability of a domestic judicial review procedure under which national courts would be competent to substitute their assessment of the facts and the scientific evidence found for that of the national decision making body, provided that those courts were empowered effectively to apply principle of EU Law when conducting judicial review.

In the **Evans Case,** a system of national redress which provided for a combination of administrative review, arbitration, and appellate judicial review for accident compensation claims was held to satisfy the requirement of effective protection.

However, in **Commission v Greece,** a provision of national law concerning tax exemption could deprive individuals of effective judicial protection under EU law where it induced them, for the purposes of avoiding criminal proceedings, to refrain from seeking the legal remedies provided for as a matter of course by national law.

<u>Equivalence</u>
Examples of this requirement where evident in cases of res judicata where the ECJ rules that if a national court may raise certain points of national law of its own motion, it must also have a power to raise similar points of EU Law. However, it is unclear what the requirement actually entails, or when cases of action may be deemed sufficiently similar to requirement 'equivalent' treatment.

The Edis Case, concerned the repayment of charges which had been paid but were not due under EU Law, where national law imposed a time limit of three years for bringing proceedings for repayment for such charges. This was less favourable

than the ordinary time limits governing actions between individuals for repayment of sums paid but not due.

It was held that: "*observance of the principle of equivalence implies, for its part, that the procedural rule at issue applied without distinction to actions alleging infringements of Community Law and to those alleging infringements of national law, with respect to the same kind of charges or dues. That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community Law*".

Many other cases affirmed the acceptability of national time limits which were not the most favourable within the national remedial system, but which applied equally to actions based on EU Law and similar actions based on national law.

While the ECJ has said that it is for the national courts to determine the question of equivalence, it has intervene many times to indicate that an application of a remedial rule did not satisfy the requirement. In **Eman and Sevinger**, concerning violation of the right to vote in European Parliament elections, the ECJ proposed that the national court 'may usefully refer to the detailed rules for legal redress laid down in cases of infringement of the national rules in the context of elections to the institutions of the Member State'.

Moreover, in **Club Hotel Loutraki,** the ECJ found that the principle of equivalence was violated due to the differences between domestic action for compensation in the filed of public service contracts governed by EU Law and domestic actions for compensation for other unlawful action on the part of state actors.

This notion of genuine equality of remedies for EU rights and national law rights is also mirrored by another development in ECJ case law which points to the need for parity between national-level and EU-level remedies for the enforcement of EU rights. In other words, EU law should not demand better enforcement of EU law from the national legal orders than it is prepared to provide itself at the European level.

Failure to Act and Plea of Illegality

Article 265: Failure to Act

An action for a wrongful failure to act is provided in Article 265 TFEU. The starting point is to notice the close relationship between Article 263 and 265, and this should be reflected in the omissions that are reviewable under the latter. On the other hand Article 263 deals with actions which are illegal. Both of these instances bring about liability. So here one speaks of illegal action and illegal inaction. Under Article 13 TEU the EU institutions are obliged to operate according to the rule of law, so they have to be held responsible in cases where they act ultra vires or when they fail to act.

In principle, the only failures to act which should come within this article are **failures to adopt a reviewable act,** in the sense of an act which has legal effects, but the article refers simply to failure to act.

An argument can be made that this allows the action to be used in relation to the failure to adopt a non-binding act, such a recommendation or opinion. However, there are conceptual and practical objections to this view, which would create an odd distinction between the action for annulment and that for failure to act.

However, in **Comitology,** it was held that Parliament could bring an action under this article for failure to adopt a measure that was not itself a reviewable act. If this is indeed so it will apply only in the context of Article 265(1), since Article 265(3) makes it clear that the action cannot be brought by private individuals with respect to recommendations or opinions.

The importance is the applicant's proof to show the obligation to act. Additionally, the article has been held to refer to failure to act in the sense of a failure to make a decision or hold a position.

The interrelationship between Articles 263 and 265, and the scope of reviewable omissions, is evident in the **Eridania Case.** The ECJ's reference to the use of what is now Article 265 to evade limits placed on Article 263 includes the ability to bypass the time limits for contesting an action under Article 263

Procedure

Article 265 required the applicant to call upon the institution to act, since it may not be easy, in the context of an omission, to say when it came into existence and its content. The omission is deemed to have taken place at the end of the first two-month and its content defined by the terms of the request. The Treaties do not specify a time limit, but the Court specified that this procedure must be initiated within a reasonable time. Once the request to act has been made, the institution has a period of two months within which to define its position. If it has not done this, the applicant has a further two months within which to bring the action under Article 265.

Standing
Article 265 draws a distinction between privileged and non-privileged applicants. The former are Member States and other EU institutions while the latter allow natural or legal person to complain of a failure to address an act, other than a recommendation or an opinion, to that person.

In the **ENU Case,** the ECJ held that standing under Article 148 of the Euratom, equivalent of Article 265, would be available to an applicant provided that it was directly and individually concerned: it was not necessary for the applicant to be the actual addressee of the decision. This test applies in the same restrictive manner as under Article 263.

Reviewable Omission
For privileged applicants, they may also challenge an act which is not reviewable under Article 263. Individuals are not capable to challenge failure to adopt a non-binding act. In the Comitology Case, the Court held that action could be brought for a failure to adopt an act which was not a reviewable act under Article 263, but this only applies to privileged applicants being the member states and institutions.

Privileged Applicants
Privileged applicants can challenge any failure to adopt any binding acts with no need to prove interest in action. Prior to the Treaty of Maastricht the nation under Article 265 could not be brought against the EP's omissions.

Member States are not obliged to bring an action and this is seen in the **Netherlands v Ten Kate Holding Case** C-511/03. The Member States are not watch dogs and one has to keep in mind that bringing forward a case takes time and will cost a large amount of money. There is no legal obligation for the MS to take an action.

Parliament v Council (Case 13/83) - failure to implement provision dealing with transport services. The EP successfully chdannaged this failure but the challenged to the Council's failure to introduce a common transport policy was unsuccessful, as the obligation was not sufficiently precise.

The obligations must be sufficiently defined to allow the Court to establish the failure of action. An applicant must specify the measures which the erring institutions has failed to take and so allow for remedial action.

Non-Privileged Applicants
This is trickier because there is the need to show interest, in contrast to privileged applicants. Article 265 therefore limits locus standi because there is no express locus standi to challenge an omission addressed to another person as seen in many CJEU case law such as in the **Nordgentreide Case** 42/71. The AG invoked the unity principles suggested that there should be locus standi for individuals to demand a decision addressed to a third party if they are directly and individually concerned, as much as hat third party.

Bethell v Commission Case 246/81 - the Lord sought to force the Commission to enforce competition rules against a number of its airlines by claiming that the Commission has failed to adopt an act under Article 109 TFEU which he was legally entitled to claim. Obviously, the applicant did not prove that he would be affected by the decision of the Commission. This means that he could not challenge the Commission's inactions Article 265 as well as its refusal to act under Article 263 TFEU.

In order for one to have standing in a case where an omitted act was not addressed to the applicant, he or she must prove that the omitted act would have concerned the individuals in the same way if she was an addressee. The **T Port Case** C-68-95 failed on this basis.

Star Fruit v Commission Case (247/87) - A banana importer sought to compel the Commission to institute Article 258 proceedings against France in respect of the French regime regulating banana imports, which they considered was in breach of Article 34 TFEU. They had complained to the Commission and it acknowledged their request with no further action taken under Article 258 TFEU. The applicant brought two further actions under Article 265 and 263.

Definition of Position
Article 265(2) states that once an institution has been called to act and has acted or defined its position within two months, the action cannot go further. If so, Article 263 comes into play. Failure to define a position or to take an action would then be challenged under article 265 within further two months.

The term aforementioned is very vague, however, it is normally a relapsed opinion of an institution. In the **Lutticke Case** the Court held that the definition of position ends the institution's failure to act.

Effect of the Action
The respective defendant would be required to comply with the judgement of the Court, and this is per Article 266 of the TFEU. The institution will be required to take action to remedy its failure, yet it will not necessary be the action required by the applicant. If the applicant is not satisfied with the institutions action, it can continue by challenging the action under Article 263. No further penalties could be imposed on the institution, and this is contrast to penalties imposed on a Member States under Article 260 TFEU.

Article 277: The Plea of Illegality
An individual may wish, in the course of proceedings initiated for a different reason, to call into question the legality of some other measure. Article 277 does not constitute an independent cause of action and cannot be used in proceedings before a national court. A declaration of the inapplicability of a regulation pursuant to this article can only be sought in proceedings before the Court of Justice under some other provision of the Treaty, and then only incidentally and with limited effect.

This Article can only be used in conjunction with Article 263. This could be brought by the applicant or the defendant, however, it can only be used in proceedings before the CJEU. A plea can only be raised as an incidental matter only in the course of other legal proceedings. Locus standing restrictions and time limits still apply to the principal and main action.

The most common usage of Article 277 is an additional, incidental challenge in an annulment action brought under Article 263 as in the **Simmenthal Case.** In this case, it was stated that it is substance not form that indicates the true character of a measure, so the action could also apply to generic decisions. In this case, it was held that a general notice of invitation to tender was normative in character and capable of indirect challenge under Article 277.

The applicant must still meet the time limit for the principal action. While Article 277 allows the applicant incidentally to raise the illegality of a regulation outside time limits in Article 263, the applicant must still be within such limits in relation to the primary challenge.

Moreover, this article can only be used to challenge acts of general applications i.e. regulations or directives made pursuant to Article 289 or 290 TFEU, but might also include generic decisions. However, there must be a real connection between the individual subject matter of the decision and the general measure the legality of which was being contested.

If the Courts decide that the measure is in substance an act of general application, Article 241 can be used as in the Simmenthal Case.

Private Parties can use Article 277, subject to the qualification that they cannot do so if it is clear that the act could have been challenged via Article 263 as in substance a decision in relation to which the applicant is directly and individually concerned.

A Member State can invoke this Article even if it did not contest the measure within the time limits under Article 263. This is because of the wording of the law i.e. “any party” and given that Member States are privileged applicants they can always challenge EU Acts.

Preliminary Rulings

Preliminary Rulings are dealt with under **Article 267 TFEU** and this is termed to be the 'jewel of the Crown' of the ECJ's jurisdiction. Prior to the Nice Treaty only the ECJ could give preliminary rulings. This was changed by the Nice Treaty, and this change has been carried over to the Lisbon Treaty. Article 256(3) TFEU accords the General Court jurisdiction to give such rulings in specific areas laid down by the Statute of the Court of Justice, subject to certain qualifications. However, the power to accord the General Court jurisdiction to give preliminary rulings has not been acted on thus far. The ECJ hears all Article 267 TFEU Cases.

Given the emphasis on the supremacy of EC law, one may question why the system created by the EC Treaty was not one based upon an appellate structure, whereby cases begun in national courts could be appealed in the European Court of Justice (ECJ) for final disposal. Rather, the system is one of reference, whereby national courts conduct the proceedings throughout but may, and sometimes must, ask the ECJ for its view on the interpretation of any point of EC law relevant to the case. Thus, the national court is described as making a reference to the ECJ to obtain a preliminary ruling. After the ECJ has given its view, the case is finally resolved by the national court in light of the legal opinion received.

The ECJ does not have the power to make final orders or enforce its judgements in the Member States national legal systems. As a result, the willingness of the national courts to refer cases to the ECJ and follow its interpretation in good faith has been critical to the whole evolution of the European legal system.

Fairhurst notes that the whole object of the reference procedure is to retain the independence of the national courts, while at the same time preventing "a body of national case law not in accord with the rules of Community law from coming into existence in any Member State" as held in the case of **Hoffman La Roche vs. Centrafarm (107/76).**

Article 267:
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

a. **The interpretation of the Treaties;**
b. **The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;**

2. 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.

3. 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.

4. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Questions that can be referred
It is through Article 267(1)(a) that the Court has given many of its seminal judgments concerning direct effect and supremacy. The ECJ does not pass judgment of the validity as such of national law. It merely interprets the Treaty. The consequence of this interpretation may be that a provision of national law is incompatible with EU Law, and the supremacy principle will mean that there is an obligation on the national court to redress the situation, even som the ECJ is not directly making any judgment on the validity of national law.

Article 267(1)(b) also allows for preliminary references to be made which relate to the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Here the validity of an EU regulation, directive, or decision is contested before a national court i.e. the **ICC Case.** References can however be made under Article 267(1)(b) irrespective of whether or not the EU provision is directly effective, in order, for example, to clarify the interpretation of the relevant provision. References may also be made in relation to non-binding acts such as recommendations, and also agreements with non-Member States.

Courts or Tribunals which Can Refer
Article 267(2) and (3) are framed in terms of courts or tribunals of a Member State, which may or must refer to the ECJ. It is for the ECJ to decide whether a body is a court or tribunal for these purposes, and the categorisation under national law is not conclusive. Many characteristics are taken into account; whether the body is established by law, permanent, compulsory jurisdiction, the inter partes procedure, rules of law, and independence.

In **Cartesio,** although Article 267 does not make reference to the ECJ dependent proceedings being inter partes, such a reference could only be made if there were a case pending before the national court, which led to a decision of a judicial nature. A reference could not be made where a court made what was in essence an administrative decision that did not resolve a legal dispute, since the national court could not be regarded as exercising a judicial function in this instance.

Moreover, it is necessary that the body making the reference be a court or tribunal of a Member State. This is problematic in the context of arbitration. Whether an arbitral court or tribunal can be regarded as an emanation of a Member State will depend on the nature of the arbitration. The fact that the arbitral body gives a judgment according to law, and that the award is binding between the parties, will not, however, be sufficient. There must be a closer link between the arbitration procedure and the ordinary court system in order for the former to be considered as a court or tribunal of a Member State.

Courts or Tribunals which Must Refer
There is a distinction between the second and third subsection of Article 267. The former refers to courts or tribunals with a discretion to refer to the ECJ, while the latter refers to courts or tribunals 'against whose decisions there is no judicial remedy under national law', and thus have the obligation to refer, provided that a decision on a question is necessary is enable for a judgement to be given. The duty to refer to the third sub article is to prevent a body of national case law that is not in accordance with EU Law from being established in any Member State.

There are two views about the types of bodies under Article 267(3). The abstract theory holds that the only bodies that come within this Article are those whose decisions are never subject to appeal. As per the concrete theory, the real test is whether the court or tribunal's decision is subject to appeal in the type of case in question. For example, the **Costa Case,** suggested that the ECJ favoured the latter theory. In this case the magistrate made a reference to the ECJ. Although his decisions were capable of being appealed in some instances, there was no such right of appeal in the particular case, because the sum involved was relatively small. The ECJ treated the national court as one against whose decision there was no judicial remedy in the actual case at hand.

The important issue of the relationship between national courts was considered in the **Cartesio Court,** where the ECJ supported the ability of lower courts to refer to the ECJ, even in the face of a negative decision by a higher national court.

National Court raising EU Law of its own Volition
The issue of whether national courts can be limited by national procedural rules as to whether they can raise a matter of EU Law of their own volition is as follows. In **Peterbroeck,** the Court held that a national procedural rule which prevented a national court from raising a matter of EU Law of its own motion concerning the compatibility of a national law with EU Law was itself contrary to the latter.

This case was distinguished in **Van Schijndel.** The ECJ held that there was no such obligation on national courts if it would oblige the national court to abandon the passive rile assigned to it by the cosmetic procedural rules by going beyond the ambit of the dispute as defined by the parties themselves.

Development of Precedent
It is up to the national court to decide whether to make a reference. The fact that a party before such court contends that the dispute gives rise to a question concerning the validity of EU Law does not mean that the Court is compelled to consider that a question has been erased within the meaning of Article 267 TFEU. The national court may conclude that a reference is not required because the Union Courts have already resolved the issue, because there is no doubt as the validity of the EU measure, or because a decision on the question is not necessary for the case before the national court.

National Law in Breach of EU Law and Prior ECJ Rulings
Article 267 TFEU is designed to be used only if there is a question to be answered which falls into the categories of the article's first sub-section. There may be a number of reasons of why a question posed by the national court does not necessitate a ruling, the most obvious being that the ECJ has already ruled on the matter.

In a number of cases, the Court held that the national court is still able to refer a matter to the ECJ, even where the ECJ has ruled in the issue. However, such an application must raise some new factor or argument. The existence of an earlier ruling can deprive the national court's obligation to refer 'of its purpose and thus empty it of its substance'. The **Da Costa Case,** initiated a system of precedent. Provided that the point of law has already been determined by the ECJ, it can be relied on by a national court in a later case, thereby obviating the need for a reference.

The validity of EU Legislation and Prior ECJ Rulings
The **ICC Case** provides further evidence of the ECJ's approach to precedent. The national court has discretion to refer a matter to the Court, even if the latter has already given judgment. However, the ECJ makes it clear that, although such a judgement is addressed primarily to the Court requesting the ruling, it should be relied on by other national courts. The original ruling will have a multilayer and not a bilateral effect. Moreover, a national court cannot themselves find that an EU Norm is invalid.

In **Atalanta,** the ECJ provided guidance on the issue of interim relief. Where a national measure is challenged because of an alleged invalidity of an EU Regulation on which it was based, the national court can grant interim relief, as long as certain conditions are met.

ECJ Rulings and Legal Certainty
The ECJ does not delve into the national legal system and determine the validity of a national law. It gives an interpretation of the compatibility of the relevant national law with EU Law. The general principle is that the ECJ's ruling establishes the law from the time that it entered into force, and should therefore be applied to legal relationships before the ruling was given. However, this sometimes leads to difficulties of legal certainty.

The ECJ is placed in a superior position to the national courts and the very existence of a system of precedent is indicative of a shift to a vertical hierarchy between the two. The creation of precedent serves also to render that relationship less bilateral, and more multilateral, since an earlier ECJ ruling can be relied on by any national court dealing with the point of law that has already been decided by the ECJ.

The Acte Clair Doctrine
A national court may feel that the answer to the issue is so clear that there is no need for reference. Acte Clair is a doctrine originating in French administrative law

whereby, if the meaning of a provision is clear, and incapable of having more than one interpretation; then, no question of interpretation may arise. In the European scenario, some national courts felt that in such question, they could safely rule upon themselves. Thus, the ECJ was under pressure from some national courts to adopt this principle, and allow national courts not to refer questions when the issue was particularly obvious. The conditions in which this is legitimate were considered in the **CILFIT Case**.

In this case, the Court held: “that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, **unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt**. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergencies in judicial decisions within the Community ". This judgement does not really cede much power to the national courts because the benchmark set by the ECJ was quite high.

The ECJ’s caution is probably justified because sometimes even matters considered to be obvious by national courts may be interpreted wrongly. In the case of **R v Henn**, Lord Widgery suggested that it was clear from case law of the ECJ that a ban on the import of pornographic books was not a quantitative restriction within Article 28 (Article 34 TFEU). Subsequently the House of Lords proved him wrong. Moreover, Lord Diplock warned English judges that sometimes, the way in which UK courts and the ECJ expressed themselves differed considerably, and thus, may ascribe different interpretation to the same provisions.

The Decision to Refer

There are more general factors that a national court may take into account when making the decision whether to refer. There are two criteria to be satisfied before a reference can be made.

1. **The question must be raised before the court or tribunal of a Member State**

However, it has been seen that the CILFIT Case held that a national court may raise a matter of its own motion, even if this has not been done by the parties.

2. **The national court must consider that a decision on the question is necessary to enable it to give judgment.**

Article 267 does not provide that reference must be necessary, but a decision on the question be necessary to enable the national court to give judgment. The danger of confusing the two is brought out in the Bulmer Case which shows the early approach of UK Courts to the exercise of the discretion accorded to them. Lord Denning, in holding that reference was not needed, suggested that the judge should consider a wide range of factors. Furthermore, a decision would only be

necessary if it was conclusive to the judgement. On the other hand, it would not be necessary if the ECJ has already given judgement on the question or the matter was reasonably clear and free from doubt. He defined 'other factors' as time, cost, workload of the ECJ, and the wishes of the parties.

Time - On the question of timing, in the case of Irish Creamery Milk Suppliers Association vs. Ireland (36 and 71/80), the ECJ suggested that the facts of the case should be established and questions of purely national law settled before a reference is made. This would ensure that a referral is not made too early.

Cost - The factor of cost should be treated with caution, because sometimes, an early referral would be appropriate and a referral at a later stage would only increase the cost for the parties.

Workload - The question of the workload of the ECJ is an inevitable trut

Wishes of the Parties - The wishes of the parties should also be treated with caution. In the case of SAT Fluggesellschaft vs. European Organization for the Safety of Air Navigation (C–364/92) the ECJ held that a claimant has the right to go to the ECJ; thus, even if the other party does not want the case referred, or that if he thinks that the national court had erred in its findings; yet, nevertheless, the ECJ will still hear the question referred.

Acceptance of the Reference

1. The Liberal Initial Approach

The ECJ was very liberal and it would read the reference as to preserve its ability to pass judgement on the case. It was prepared to correct improperly framed references. In **Costa** it stated that it had power to extract from a question imperfectly formulated by the national courts those questions which did pertain to the Treaty's interpretation.

The ECJ commonly rejected claims that references should not be accepted because of the reasons for making it, or the fact on which it was based. The ECJ was not empowered to 'investigate the facts of the case or to criticise the grounds and purpose of the request for interpretation'.

The ECJ stressed the point in **Simmenthal,** stating that Article 267 was based on a distinct separation of function between national courts and the ECJ, such that the latter did not have jurisdiction to take cognisance of the facts of the case or to criticise the reasons for the reference.

2. The ECJ asserts authority over Cases referred

The ECJ regards itself as having the ultimate authority to decide whether a reference is warranted or not. The seminal case in this respect is **Foglia,** in which the ECJ declines to give a ruling, but the Italian judge was undaunted and referred further questions to the ECJ. He asked whether the preceding decision was

consistent with the principle that it was for the national judge to determine the facts and the need for a reference.

The important principle in **Foglia (No. 2)** was that the ECJ would be the ultimate decider of its own jurisdiction. The reasoning is both subtle and dramatic. In fact, the judgement began in orthodox fashion in demarcating the role of the national court and the ECJ. A few paragraphs later this was transformed: due regard was to be given to the view of the national court as to whether a response was required to a question, but the ultimate decision rested with the ECJ. If, in order to resolve this issue, further and better particulars were required from the national courts, then these must be forthcoming.

The decision in the case, concerning the allegedly hypothetical nature of the proceedings, was simply one manifestation of this assertion of jurisdictional control. The ECJ would, in the future, 'make any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction'.

3. Cases where the ECJ has declined Jurisdiction

The principle in Foglia lay dormant and attempts to invoke it were unsuccessful. The ECJ however, started to use this again, particularly from after the 1900s.

Hypothetical Cases

There are a number of reasons for refusing to give such ruling. They are practical since it would be a waste of judicial resources to give a ruling in a hypothetical case, because the problem would never transpire. Moreover, it may be unclear precisely who should be the appropriate parties to the action, and the relevant arguments may not be put.

The Questions Raised not Relevant to Resolution of Dispute

In **Meilicke,** the action was brought by a German lawyer, who challenged a throw developed by the German Courts on the ground that it was not compatible with the Second Banking Directive. The ECJ, citing Foglia 2, declined to give a ruling because it had not been shown that the issue was actually at stake in the main action.

Questions not Articulated Sufficiently Clearly

A case may be that the questions are not clear enough for the ECJ to be able to give a meaningful legal response.

Facts are Insufficiently Clear

This is closely linked to the third reason. It is often thought the ECJ merely responses in the abstract manner to very general framed questions under Article 267, but this is not so. The Court will normally be able to characterise the nature of the legal issue only if the reference has an adequate factual foundation.

4. Information Note on Preliminary References

The ECJ has incorporated the results of its case law in an Information Note. Paragraph 22 states that the order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court a clear understanding of the factual and legal context of the main action.

5. Limits on the Power to Decline a Case

The ECJ has made it clear that it will decline to give a ruling only if the issue of EU Law on which an interpretation is sought is manifestly inapplicable to the dispute before the national court or bears no relation to the subject matter of that action. This has already been discussed.

The Decision on the Reference: Interpretation v Application

Article 267 gives power to the ECJ to interpret the Treaty but does not specifically empower it to apply the Treaty to the facts of a particular case. The distinction between interpretation and application is said to characterise the division of authority between the ECJ and national courts: the former interprets the Treaty, and the latter applies such interpretation to the facts of a particular case.

However, the more detailed the interpretation provided by the ECJ, the close it approximates to application. It is common for the ECJ to give guidance to the national court as to how the point of law should be applied in the case, and this further diminishes the difference between interpretation and application.

The **Marleasing Case,** provides an example of the detailed nature of the ECJ rulings. The ECJ produced a detailed reposes to the question whether Article 11 of Directive 68/151 was exhaustive of the types of case in which the annulment of the registration of a company could be ordered. The judgement furnished the national court with a very specific answer, which simply required the Spanish Court to execute the ECJ's ruling.

This renders the idea of the ECJ and the national courts being separate but equal, was with their own assigned roles, more illusory. The more detailed the ECJ's ruling, the less there is for the national court to do, other than execute the ruling in the instant case. The ECJ will be particularly motivated to provide 'the answer' where it wishes to maintain maximum control over development of an area of the law, as exemplified by cases concerning damages liability of Member States.

The EU Judicial System

1. Precedent

The **Da Costa Decision** was a rational step for the ECJ. The relationship between national courts and the ECJ was altered. It was no longer bilateral, where rulings were of relevance only to the national court that requested them. It became multilateral, in the sense that ECJ rulings had an impact on all national courts. The decision in ***CILFIT*** to reinforce precedent was similarly significant: the ECJ's rulings were to be authoritative in situations where the point of law was the same, even though the questions posed in earlier cases were different, and even though the types of legal proceeding in which the issue arose differed.

This system of precedent is very much practical and realistic. If it were not the case, the Court would be forced to solemnly hear the matter, only to reach the same conclusion as it had done previously. A judicial system could not be supposed to exist on such terms. The ECJ would quickly tire of the waste of time and resources. The national courts would not see the sense of a system which placed pressure on them to allow issues to be litigated again where the ECJ had already given a considered judgment.

Precedent has other benefits, one being that national courts have become enforcers of EU Law in their own right. When the ECJ has decided an issue, national courts apply that ruling without further resort to the ECJ. The national courts are, in this sense, 'enrolled' as part of a network of courts adjudicating on EU law, with the ECJ at the apex of that network. They become 'delegates' in the enforcement of EU law, and part of a broader EU judicial hierarchy.

2. Acte Clair

The Court in **CILFIT** gave the doctrine limited support. It might be conceded that the real objective was to deal it a death-blow, by hedging it around with multiple restrictions or, more moderately, to convince national courts to be responsible when using *acte clair*.

The conditions in *CILFIT* help to ensure that national courts will not readily regard cases as *acte clair* unless they really are free from interpretive doubt, although it is doubtless true that national courts can interpret these conditions rather differently.

The fact that a national court might misapply the criteria does not render the exercise a failure. These costs have to be balanced against the benefits: straightforward cases can be disposed of expeditiously by national courts. Moreover, this method of dealing with such cases further emphasises the role of national courts as but part of a broader judicial hierarchy, with the ECJ at the apex.

The concern is that a national court may refuse to make reference, even though the conditions in CILFIT are not met. A national court minded to do this intentionally would, however, now be aware of the possibility of damages liability pursuant to **Kobler.**

3. Sectoral Delegation

This is the conscious choice made by the EU to devolve certain application and enforcement functions to the national courts, as occurred in the context of competition policy. The rationale for this devolution was instructive. Prior to reforms, the Commission was charged with the initial role in the enforcement of competition policy. It did not, however, possess the resources necessary for this task and therefore called on the national courts. These always played a role in the enforcement of competition law, but this was consciously generalised, so that straightforward competition violations could be dealt with at national level, thereby allowing the Commission and EU Courts to deal with more difficult cases, or those which raised new issues of principle. Such sectoral delegation was facilitated because of the accumulated weight of EU precedent.

Development of an EU Judicial System: ECJ, General, and National Courts
The development of preliminary rulings enrolled national courts as part of the EU Judicial System broadly conceived, with both the power and the duty to apply EU Law in cases that come before them. There are still some problems with the current regime which have prompted discussion concerning reform.

The catalyst was the ECJ's increasing workload, which inevitably had implications for the length of time to process a preliminary ruling.

Because of such workload, there is now an obligation on the ECJ to decide cases with a minim of delay where a person is in custody. There is a provision for expedited hearings in cases of urgency. Preliminary rulings can be given by reasoned order where the ECJ refers to prior case law in certain types of cases. Additionally, a case can be decided within an Opinion from the advocate general. The reduction in time to secure a preliminary ruling was also in part due to the increase in the number of ECJ judges as a result of enlargement.

Limiting the National Courts empowered to make a reference
In practical terms, it has been common for cases raising important points of EU Law to come from lower level national courts. To limit the ability to refer would result in cases being fought to the apex of national judicial systems merely to seek ECJ reference. The ability to refer by any national court is also a safeguard against the possibility that the court of final resort may be 'conservative or recalcitrant' and hence reluctant to refer.

In conceptual terms, the ability of any national court to refer has emphasised the penetration of EU Law to all points of the national legal system. Even if references were limited to Courts of last resort, lower courts would still have the ability to apply existing EU Precedent. The fact that any national court can refer, however, emphasises that an individual can rely on directly effective EU rights at any point in the national legal system.

This reform would allow the ECJ 'to concentrate wholly upon questions which are fundamental from the point of view of the uniformity and development of Community law'. Moreover, the Due Report suggested that national courts of final resort should be obliged to refer only questions which are 'sufficiently important for Community law', and where there is still 'reasonable doubt' after examination by lower courts. The idea also received tentative support from the Association of the Councils of State.

However, there are two problems:
1. First, 'national courts and tribunals might well refrain from referring questions to the Court of Justice, in order to avoid the risk of their references being rejected for lack of interest'.
2. Secondly, those who favour this approach commonly point to the USA where the Supreme Court will decide the cases it is willing to hear. The crucial difference is that the US is an appellate system, and the EU is a referral system.

The National Court proposes and Answer to the Question
The national court could include in its reference a proposed reply to the question which are proposed. The advantages were said to be that it would lessen the adverse effect of the filtering mechanism o the cooperation between the national court and the court of justice, while the proposed reply could at the same time serve as the basis for deciding which questions need to be answered by the Court of Justice and which can be answered in the terms indicated. This idea had been incorporated in the guidance given to the national courts, which states that **the referring court may, if it considers itself able, briefly state its view on the answer to be given to the questions referred for the preliminary ruling.**

However, most national courts are not socialists in the EU. It is one thing for the national court to identify a question that is necessary for the resolution of the case. It is another thing to be able to answer it. Higher level national courts may be able to furnish some answer to the question posed.

Towards an Appellate System
A more radical variant of the system would be to alter the preliminary ruling procedure so that national courts which are bound to refer questions to the Court of Justice would be required, before making reference, to give judgement in cases raising questions concerning the interpretation of Community Law. It would be then open to any party to the proceedings to request the national court to forward its judgement to the Court of Justice and make a reference for a ruling on those points of Community Law in respect of which that party contests the validity of the judgement given. This would give the Court of Justice the opportunity of assessing, at the filleting stage, whether it needed to give its own ruling on the interpretation of Community Law arrived at in the contested judgement.

Creation of Decentralised Judicial Bodies
This would ease the ECJ's burden and bring legal redress physically closer to citizens, who could obtain a preliminary ruling without the necessity of travelling to Luxembourg. The question here would ask whether this would jeopardise the uniformity of EU Law.

General Court to have Jurisdiction to give Preliminary Rulings
The possibility of transferring the jurisdiction in question to the General Court has been canvassed positively, albeit cautiously, in the Court's paper. However, the Due Report was opposed to such change, with exceptions to some particulate areas. The General Court is empowered to hear preliminary rulings in specific areas laid down by the Statute of the Court of Justice. Where the General Court believes that the case requires a decision of principle, likely to affect the unity or consistency of EU law, it may refer the case to the ECJ. Exceptionally, rulings by the General Court can be subject to review by the ECJ.

There has, however, been no move as yet to activate the power given in order to assign preliminary rulings in certain areas to the general court. This is in part because it is difficult to decide on the nature of such areas. It might be more

desirable to give such Court jurisdiction over all preliminary rulings, subject ti the dual mechanism under Article 267(3) for shifting the case to the ECJ.

General Principles of EU Law & Human Rights

General principles of law are found in all legal systems, and are there to help and supplement where written primary sources fail to provide an answer. The development of general principles has taken place over a number of years within the Member States of the EU.

The ECJ developed a doctrine that rules of the Community may be derived from such general principles in accordance with treaties and legislation. This means that the ECJ has a creative role: it has used the development of general principles vis-a-vis EC Treaty articles to invoke the former as the legal foundation of a number of its judgements.

The ECJ is one of the main sources of the development within the EU Legal System. The main contributions are arguably the developments in the areas of direct effect and supremacy. Even so, the third major contribution was the introduction of the general principles of law in the corpus of EU Law which proved to be of significant importance.

Importance of Principles
These principles are important for multiple reasons, the first being is that the can serve as an aid to interpretation; EU Law must be interpreted in a way as not to conflict with these general principles. Moreover, general principles can be invoked by Member States or even individuals to challenge Community actions i.e. Articles 263, 267, 270, and 277 TFEU.

General Principles may be invoked as a means of challenging action by a Member State, whether in the form of an administrative act, where the action is performed in the context of a right or obligation arising from Community Law.

Case law in this area shows that the Union is steadily expanding the rights of individuals beyond the economic rights which were found in the original treaty, and is continually forging greater links with the individual.

Fundamental Principles
General principles cannot be confused with fundamental principles established in the original treaty i.e. freedom of movement. Although there might be an overlap, the general principles of law refer to the unwritten rules of EU Law which were developed by the Courts.

The Introduction
The legal basis of the incorporation of the general principles rested on three articles:
1. Article 220 EC: now **Article 19 TEU**

This states that the ECJ shall ensure that in its interpretation and application of the Treaty, the law is observed.

"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed"

In the absence of any indication as to the scope or content of the general principles, **Steiner** notes that is has been left to the ECJ to put 'flesh on the bones' provided by the treaty.

2. Article 230 EC: now **Article 263 TFEU**
This gives the ECJ power to review the legality of Community Acts.

"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"

It shall have jurisdiction in actions brought by a Member State, the EP, the Council, or the Commission on the 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.

3. Article 288(2) EC: now **Article 340 TFEU**
This article governs Community Liability.

"The contractual liability of the Union shall be governed by the law applicable to the contract in question"

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

One reason for the creation of such principles was evident through the case of **International Handelsgesellschaft** where the German Courts were faced with a conflict between an EC Regulation and provisions of the German Constitution, particularly, the principle of proportionality. The German asserted supremacy of German Constitutional Law over EC Law, but the ECJ asserted the EC's supremacy while pointing out that respect for fundament rights was in any case part of EC Law. If this has not been the case, there would have been a conflict with the Constitutions of almost all Member States, jeopardising the Union's stability.

Development of General Principles
The ECJ's first recognition of Fundamental Human Rights came prior the aforementioned case, and was really introduced in Community Law through **Stauder v City of Ulm**. The applicant was claiming entitlement to cheap butter provided under a Community scheme to person in receipt of welfare benefit. He was required under German law to indicate his name and address on the coupon which he had to present to obtain the butter.

The claimant challenged the law on the basis that his fundamental right was being breached. The German court referred the matter to the ECJ, and the latter held that, on a proper interpretation, the Community measure did not require the recipient's name to appear on the coupon. This interpretation, the ECJ held, "**contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of law and protected by the Court.**" It is clear that the ECJ here accepted the concept as a general principle of EC law.

In the **Handelsgesellschaft,** the Court went further and asserted that respect for fundamental rights forms an integral part of the general principles of law protected by Court. It is important to note that in this case EC Law was compared to principles of International Law and not National Law. A failure to differentiate between general principles of international law which the Community legal order respects and national law proper could erode the doctrine of Community Law supremacy vis-a-vis National Law.

In **Hoechst v Commission**, in the context of a claim based on the fundamental right to the individuality of the home, the Court, following a comprehensive review by Advocate-General Mischo of the laws of all the Member States on this question, distinguishing between this right as applied to the 'private dwelling of physical persons', which was common to all Member States, and which would by implication be protected as part of Community law; and the protection offered to commercial premises against intervention by public authorities, which was subject to 'significant differences' in different Member States. In the latter cases the only common protection, provided under various forms, was protection from against arbitrary or disproportionate intervention on the part of public authorities.

This means that where certain rights are protecting to differing degrees and in different ways in member States, the ECJ will look at some underlying principles to uphold as part of EU Law. The importance is that the substance of a right is not infringed.

An exception is noted in **Society for the Protection of the Unborn Child v Grogan**, which concerned the officer's of a students' union who provided information in Ireland about the availability of legal abortion in the UK. The claimant brought an action claiming that the student's union was breaching the Irish constitution. The officer's defence was based on the freedom to provide services within the community and the freedom of expression, contained in the European Convention on Human Rights which also forms part of Community law as a

general principle. The ECJ held that the officers could not rely on either the provisions on freedom to provide services or on general principles of law.

Role of International Human Right Treaties
While the **Stauder** Case confirmed that fundamental rights exist in EC Law, and the **Handelsgesellschaft** Case identified the constitutions of the Member States as primary sources of these rights, in **Nold v Commission,** the ECJ went a step further since it held that it would not hesitate to annul an EC rule which goes against fundamental rights. Secondly, it pointed towards international treaties as a new source of fundamental rights or, on the words of the Courts: "**international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law**".

The reason for such inclusion of international treaties as part of EU Law are clearly the same as those upholding fundamental constitutional rights: it is the certain way to guarantee the avoidance of conflict.

The most important international treaty is the **European Convention for the Protection of Human Rights and Fundamental Freedoms,** to which all Member States are signatories. In **R v Kirk,** in the context of criminal proceedings, the principle of non-retroactivity of penal measures was applied in favoured of the defendant who was accused of fishing in the British waters.

The list of other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles has grown to include many other treaties such as the **UN Convention on the Rights of the Child** and **European Social Charter.**

Relationship between Different Legal Systems protecting Human Rights
Article 6 TEU inter alia

1. **The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties**
2. **The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.**
3. **Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union law**

Relation with International Law

The **Kadi Case,** concerned Union measures implementing UN resolutions on economic sanctions. The ECJ accepted that the EU and its Member States were subject to international obligations, however, it held that this does not change the allocation of the EU's powers. It continued to say that there is a distinction between international obligations and the effect of Community norms, and the fact that the Community measures might arise from international obligations does not affect the fact that the Inion must comply with Human Rights, as recognised by the EU. In such case, one can argue that the ECJ took a stronger stance than the European Court of Human Rights.

The Rules of Administrative Justice

Proportionality

This principle requires that the means used to achieve a particular end must be appropriate and that which is necessary to achieve such end. The test puts the burden on an administrative authority to justify its actions and make sure to have reasonable considerations to its actions.

This affects the economy of the internal market and has an extensive application within the Community. Reference can be made to Article 5 TEU which holds that the limits of the Union's competences are governed by the principle of conferral, and the use of competences are governed by the principles of subsidiarity and proportionality.

In **Germany v Council (C280/93),** which involved a banana regime dispute, the ECJ held that where an institution has significant discretion in implementing a policy, the ECJ may only intervene if the "**measure is manifestly inappropriate having regard to the objectives which the competent institutions is seeking to pursue".**

This principle was also invoked in the Handelsgesellschaft Case, where it was maintained that: "**a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure**".

In the case of **Watson (118/75),** the proportionality principle was invoked in the sphere of the free movement of persons. Watson was claiming the right of residence in Italy; the Italian authorities sought to make use of a particular EC derogation to expel Watson from Italy on the basis that she had failed to follow the correct procedures to regularise her stay in Italy. The ECJ held that while states were entitled to impose penalties for non-compliance; yet, these must not be disproportionate, and they must never provide ground for deportation.

Similarly, in **Wijsenbeek** (C378/97), the ECJ held that states were entitled to check documentation of the Community's national moving from one Member State to another, however, any penalties for non-proper documentation had to be

proportionate. In this case, imprisonment for failure to carry a passport was not considered to be proportionate.

One can also point out proportionality in terms of legislations having different nature. The breach of a secondary legislation could not be punished as severely as a breach of a primary legislation.

Legal Certainty
This was invoked in **Defrenne v Sabena.** The principle, being one of the widest generality, has been applied in more specific terms, and to encompass, the principle of legitimate expectations, the principle of non-retroactivity, and the principle of res judicata.

Legitimate Expectations
This was derived from German Law, and means the Community measure must not violate the legitimate expectations of the parties concerned. This is what a reasonable person would expect to in his own affairs.

In the case of **Germany v Council (C280/93),** the ECJ held that no trader ma have a legitimate expectation that a particular Community regime would never be changed.

Non-Retroactivity
A measure cannot take effect before it is published. Retrospective application will only be permitted in exceptional circumstances and when it is not breaching the individuals' legitimate expectations. Retroactivity is permitted when the change will improve the individuals' position.

In **R v Kirk,** this concept was successfully invoked concerning the retroactivity of penal provision brought into effect by an EC Regulation.

An important pronouncement was in the **Sabena Case No.2** where the ECJ stated that, given the exceptional circumstances, "important considerations of legal certainty" required that its ruling on direct effects of what is now Article 157 TFEU should not apply retrospectively. The Court sought to limit the claims concerning wages to those who had already instituted proceedings to that effect. This may be seen as a denial of justice but this case was clearly an exception. Barring the exceptional Defrenne v Sabena, the ECJ would probably state the law as it always was and thus the judgement would have a retroactive effect.

The ECJ has a powerful role to play here; where its judgement may have serious consequences as regards the past, it may direct the application to future cases. There may be undesirable consequences either way and it is up to the Court to attempt to limit damages, both to the individuals and to the Community itself.

Res Judicata
This principle is accepted in both common law and civil law, and operates to respect the binding force of a final judgement once the time limit for the final appeal expires. This has also been recognised by the European Court of Human Rights in many cases such as in **Brumarescu v Romania.**

In the case of **Kobler,** the Court held that: "**the importance of the principle of res judicata cannot be disputed. However, in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question"**.

The CJEU holds that a national court is not always obliged to review and set aside a final decision that infringes community law. It holds that provided the rules of equivalence and effectiveness are respected, national courts did not have to disregard procedural rules that enshrined this principle, even, if by doing so, it may cause the end of an infringement of Community law caused by a ruling inconsistent with Community Law.

Procedural Rights
Some of these were also considered essential by the ECJ that they were declared to also constitute general principles of EU Law.

Right to a Fair Hearing
This right was considered as a general principle in Transocean Marine Paint Association v Commission (17/74). Advocate General Warner examined the various legal systems of Member States and went on to show that the notion of **audi alteram partem** is, in one way or another, also present in most other Member States.

The Court adhered to Warner's opinion when it stated that "**a person whose interests are perceptibly affected by the decision taken by a public authority must be given the opportunity to make his point of view known.**" This was considered by the Court to be a general rule of Community law. This principle was later referred to by the ECJ as "**the rights of the defence**" and today also covers rights such as that of legal representation and that of non-self-incrimination in criminal proceedings.

One has to also mentioned the principle of the **equality of arms** which presupposes that both the plaintiff and defendant have equal knowledge on any files used in the proceedings. The Right to a Fair Hearing encompasses the principles of equality before the law, reasonable time-limits, and others of a like nature.

The Duty to Give Reasons
In **UNICTEF v Haylens,** the defendant was accused of working with a French Football Team without the necessary qualifications, however, he held that he had an equivalent certificate issued from Belgium. Such certificate was refused from acknowledgement, without any reasons. The ECJ held that decisions capable of producing legal effects had to be corroborated by reasons.

The Right to Due Process
In **Johnston v Chief Constable of the Royal Ulster Constabulary**, the police had ordered their full timers to carry full weaponry due to the turbulent times in Ireland. As heavy armoury could impede movement, they decided not to renew the contracts of police women. This was discrimination on ground of sex which goes against the directive which provides for equal treatment of employment for men and women. The ECJ held that EC law provided that persons who considered themselves wronged had the right to pursue their claims by judicial proceedings after possible recourse to the competent authority.

The Right to Protection Against Self-Incrimination
In **Orem** and **Solvay** the Court held that this right applied only in criminal proceedings. In the commercial sphere, one could not raise this right to resist a demand for information.

Equality
General Principles of Law can be divided into three:
1. **Principles of Administrative Legality and Due Process**
2. **Economic Pillars of the Internal Market**
3. **Fundamental Rights**

However, the principle of equality straddles all categories.

A number or provisions in the Treaties manifest this very important principle: indeed the EU treaties expressly prohibit discrimination of any sort; for example, **Article 18 TFEU** expressly prohibits discrimination on the grounds of nationality; **Article 157 TFEU** provides that men and women should receive equal pay for equal work; **Article 159 TFEU** provides that the EU will do its utmost to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In the case of Airola v Commission (21/74), it was a Member State's internal law rule which was discriminatory. In this case, Italian law provided that, on marrying an Italian man, a foreign woman acquires Italian nationality ipso iure, and even if this was contrary to her intention. Nonetheless, a foreign man marrying an Italian woman was not bound by the same rule. Due to this, the plaintiff lost an expatriation allowance which was not payable if the official acquired nationality of the country where she worked. Here EC law had given effect to a discriminatory national law provision, but the ECJ declared that EC law cannot take account of nationality acquired involuntarily under such a provision.

However, a general principle of equality is wider in scope than the above mentioned provisions and other similar provisions. There must be no distinctions between different groups within the Community. The European Court has deal with questions of equality and discrimination as follows:

In the **Skimmed-Milk Powder Case,** the Community sought to reduce the surplus of skimmed-milk powder in the EC by compelling animal feed producers to include it in their animal feeds instead of soya, which is much less expensive. This measure would have greatly advantaged the skimmed-milk powder producers, the dairy-farmers, but would have harmed all livestock breeders. It was the ECJ's view that a measure which discriminates between different categories of farmers could not stand, due to the general principle of equality.

Subsidiarity
This principles was given a meaning by Pope Pius XI: "**it is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies**".

Unlike the aforementioned principles, this principle is not a creation of the ECJ but is a written provision which was introduced by the Maastricht Agreement, which is now **Article 5 TEU *inter alia.***

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Effectiveness
This is not generally recognised as a general principle of EU Law, unless it is equated with the idea of effective judicial protection. Nonetheless, this principle is ubiquitous and has had a significant effect on the development of Union law. In fact, it was the principle of effectiveness which was one of the main arguments used to develop the doctrine of supremacy and direct effect such as in the cases of Van Gend en Loos and Costa, state liability as in Francovich and other such landmark judgements.

Reference can be made to Article 19 TEU inter alia: "the Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

One of the specific principles of these principles is that of editing the interpretation of EU Law. National Courts have a duty to interpret EU Law itself. In the **Sturgeon Case,** the ECJ held that EC legislation must be interpreted in a way which does not affect its validity and must be interpreted in light of higher principles of EU Law, such as equality.

General Principles applied to National Legislation
General Principles of Law, incorporated by the ECJ as part of Union Law, also affect certain acts of the Member States. Basically, these fall within three categories:

1. **When EC rights are enforced within national courts**

The ECJ always held that, in enforcing Community rights, national courts must respect procedural rights guaranteed in international law. This notion applies only to rights derived from EU Law.

2. **When the rules of a Member State are in derogation from a fundamental principle of EU Law**

Most treaty rules provide for some derogation to protect public interests, however, these must be narrowly construed. When Member States do derogate, their rules may be reviewed in light of general principles, because the question of whether the derogation is within permitted limits is one of Community Law.

3. **When the Member State is acting as an agent of the Community in implementing Community Law**

When Member States implement Union Rules they must not infringe the fundamental rights recognised by the Union.

Human Rights in the EU
Although the idea was to create a community whose legal order was founded on the values of respect for human dignity, yet, to this day, the EU has not yet acceded to the ECHR.

This is not to say that human rights, including general principles of law do not feature in the EU. Article 6(3) of the Maastricht Treaty provided that fundamental rights as under the ECHR and National Constitutions, shall constitute general principles of the Union's Law. Article 6 TEU affirmed this. Additionally, Article 6(2) now mandates that the EU accede to the ECHR.

However, for some time the Court resisted including them as party of the EU's legal order. In **Stop v High Authority,** the applicant asked to annul a decision of the High Authority on the basis that it was incompatible with German Law. The Court held the High Authority was only required to apply Community Law, and is not competent to apply the national law of the MS. Moreover, the Court held that it was only: "**required to ensure that in the interpretation and application of the treaty, and of rules laid down for the implementation thereof, the law is observed but it is not normally required to rule on provisions of national law".** In this case it was held that the High Authority was not competent to examine and

motivate its reasons on the basis that when a MS adopted a decision, this infringed principles of national constitutional law of MS.

However, the tide started to turn in 1969. In **Stauder** in determining whether the implementation of an EU provision concerning a butter subsidy scheme was violating human dignity as protected by the national constitution, the Court held that general principles of EU Law contained Fundamental Human Rights and such "**were protected by the Court**".

Moroever, Handelsgesellschaft made it amply clear that although inspired by the constitutional traditions to the Member States yet the Court was aiming towards an autonomous set of general principles of EU Law. In **Nold,** it was held that: "**fundamental rights are an integral part of the general principles of law the observance of which the Court ensures. In safeguarding these rights the Court is bound to draw inspiration from the constitutional traditions common to the MS and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the constitutions of these states**".

A minimalist reading of Handelsgesellschaft can lead one to conclude that only rights arising from traditions common to MS can constitute general principles. This approach creates a problem because it is not possible for the Court to adopt each and every right protected by all the Member States because some rights may be protected in varying degreed and there can also be instances where a particular right is in conflict with another.

Whenever some rights are protected in varying degrees, the Court will loo for common ground and does its utmost to ensure that the particular right protected by a Member State is not infringed in substance.

Invoking a General Principle of Law
Article 2 TEU provides that the EU is inter alia founded on the value for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.

Moreover, Article 6(3) TEU goes as follows: "**Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".**

This article gives effect and codifies the Court's case law with regard the inclusion of general principles of law, and reflects the Court's scarce reference to other international human rights treaties apart from the ECHR. The Court has only referred to other international instruments, mostly in cases relating to protection of children's rights, refugee rights, and labour rights.

General Principles are now part of treaties and any individual seeking to invoke them can rely to specific provisions of the law. However, since Article 6(3) specifically omits other international treaties save for the ECHR, it is entirely possible, although remotely, that there can be an instance where a specific issue could not be recognised as a fundamental right but would still constitute a general principle of law in a particular Member State.

The Charter of Fundamental Human Rights
In 1996 the Court delivered an opinion stating that the EU Treaties did not wonder competence on the EU to accede to the ECHR. Eventually, Member States agreed to create their own documents known as the Charter of Fundamental Human Rights which achieved full effect in 2009.

The Status and Scope
Following the Lisbon Treaty, the Charter enjoys an equal status to that of the EU Treaties. The Charter guarantees the freedoms and principles set out in the Charter and divests provisions binding legal force.

Initially, a number of Member States opted out of the Charter due to various reasons, mostly based on social and economic rights.

It should be recalled that the Charter was inspired from general principles of EU Law that in turn were inspired by the ECHR; hence the Charter largely mirrors the legal order which had already existed until the Charter.

This Charter contains both ‘rights’ and ‘principles’. Article 52(3) and (4) provides that whenever the Charter cites fundamental rights, then, these shall be interpreted according to the ECHR, albeit that nothing shall prevent the CJEU from providing a greater extent of protection. On the other hand, Article 53(5) implies that ‘principles’ cited in the Charter can only be enforceable once they have been implemented by legislative and/or executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of MS when they are implementing Union law. However, the Charter does not explain which are the principles and which are the rights, and this creates uncertainty.

Invoking a Charter
The provisions of the Charter can be invoked against the institutions and bodes of the EU and against Member States only when they are implementing EU Law in the case of the former, the issue is straightforward. However, an academic issue arose in case of the latter because Article 51 expressly states that the Charter is only binding when they are implementing EU Law.

The previous case law of the court referred to the “scope of application of EU Law”. The question is whether this should be construed to mean that the Charter has intentionally restricted the level of protection, but the answer is debatable. In the **Fransson Case,** the Swedish tax authorities fined Fransson for allegedly submitting erroneous information with an intent to defraud the authorities. Fransson claimed that the criminal proceedings violated the double jeopardy

principle found in Article 50 of the Charter. The regional court referred the matter for a preliminary ruling questioning whether the Charter applied in this case since the criminal fines imposed on Fransson were not EU acts. The Court affirmed that Article 51 had to be interpreted as a continuation of the Court's previous case law. Hence, although the criminal fines and proceedings were part of the domestic law, yet, these had followed a VAT investigation, which was initiated based on an EU Directive; therefore the criminal proceedings were also protected by the Charter because Sweden was deemed to be implementing an EU law.

European Convention on Human Rights
Before the Charter obtained binding status, the Court mainly referred to the ECHR, however, this was changed recently going on the show that the CJEU, even in the area of fundamental rights, is amazing to "remain the final and authoritative arbiter of their meaning and impact within the EU".

This is not to say that the ECHR does not feature in the EU, especially since it has been a source of inspiration for the CJEU, and the Treaties which specifically make reference to fundamental rights as a main source of law. Moreover, in the preamble of the Charter it is written that it is being affirmed that the EU values the ECHR. In addition, Article 53 makes a direct reference to the ECHR. Hence, in many aspects and to a great degree the ECHR and the Charter are complementary and mutually reinforcing.

Invoking the ECHR
For a long time it was perceived to be, impossible to challenge legislative acts of the EU based on human rights challenges. In the **Booker Aquaculture Ltd Case,** the Court rules that "fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights".

However, this was overturned in the Kadi Cases, which concerned a number of human rights issues concerning Kadi whose name was included in a suspected terrorists black list. As a direct consequence, he had his assets and bank accounts frozen. This was done based on an EU Regulation pursuant of a Resolution of the Security Council of the United Nations. He claimed that inter alia his right to a fair hearing and his enjoyment of property had been violated.

The Court held that EU law must "**ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community**." Subsequently, in Kadi II the Court annulled the Regulation and made it amply clear that human rights such as the rights of defence and the procedures relating to evidence cannot be derogated from.

Invoking a Provision of a National Constitution
The relation between the national constitution of the Member States and EU law is a tricky business because there is the principle of supremacy of EU Law and Article 6(3) TEU.

If an individual wishes to challenge an act of the EU institutions of bodies or agencies on the basis that it goes against a provision of a National Constitution he must first ascertain what relation there is, if any, between the particular measure and EU law. If the particular EU measure also goes against a general principle of EU law then, the individual can refer to this. If the measure at hand does not go against a general principle of EU law and does not go contrary to the Treaties both in scope and in application; then, it is quite difficult for an action to be successful.

However, in the case of **Society for the Protection of the Unborn Child v Grogan,** the Court accepted the arguments put forward by the government of the MS that the action in question violated a provision of their constitution. It is entirely possible that the Court could use this logic to accept a claim by an individual based on the provision of the national constitution.

Article 263: Direct Action for Annulment

The EU develops policy through regulations, directives, and decisions. Any developed legal system must have a mechanism for testing the legality of such measures. The principal Treaty provision is Article 263 TFEU. Five conditions must be satisfied for an act to be challenged:

1. The relevant body must be amenable to judicial review
2. The act has to be of a kind which is open to challenge
3. The institution or person making the challenge must have standing to do so
4. There must be illegality as per Article 263(2)
5. The challenge must be brought within the time-limit as per article 263(6)

Article 263(1): Bodies subject to Review

Article 263(1) covers acts of the Council and Commission, including legislative acts, and acts of the European Central Bank, other than recommendations and opinions. It also covers acts of the European Parliament, the European Council and EU bodies, offices, or agencies intended to produce legal effects against third parties.

Articles 263(1): Acts Subject to Review

This article allows the Court to review the legality of acts, other than recommendations and opinions, taken by those listed under the first subsection. This clearly covers regulations, decisions, and directives, which are listed in Article 288 TFEU. The ECJ has, however, held that this list is not exhaustive, and that other acts which are *sui generis* can also be reviewed, provided that they have binding force or produce legal effects.

The test as to whether an act is reviewable is one of substance, and not of form, and this was evident in the **IBM Case of 1981**. Moreover, the challenges measure must be final and not preparatory. In the mentioned case, the letter was merely the initiation of the competition procedure, a preparatory step leading to the real decision at a later stage. The statement of objections did not, in itself, alter IBM's legal position, although it might indicate that it was in danger of being fined later.

Non-Existent Acts

The general principle is that a reviewable act will have legal effect until it is set aside by the ECJ or the General Court, and the challenge must be brought within the time limit specified in Article 263(6). The exception is where acts are tainted by particularly serious illegality, and are deemed to be 'non-existent'. Three consequences flow from the ascription of this label:

1. The normal time limits for challenge do not apply, since the act cannot be cloaked with legality by the passage of time
2. Such acts do not have any provisional legal effects
3. Non-existent acts are not actually susceptible to annulment, because there is no 'act' to annul.

A judicial finding that an act is non-existent will have the same effect in practice as if it has been annulled.

Limitations on Review

1. Area of Freedom, Security, and Justice

The normal principles of judicial review to this area, subject to the caveat that the ECJ cannot review the validity or proportionality of operations by the police or law enforcement agencies, or the exercise of responsibilities of Member States with regard to the maintenance of law and order, and the safeguarding of internal security.

2. Common Foreign and Security Policy

The general principle is that the Union Courts have no jurisdiction over CFSP acts. This is subject to two exceptions. First, the ECJ has jurisdiction to monitor compliance with Article 40 TEU, which provides in essence that exercise of power under the CFSP shall not encroach on competences under the TFEU, and vice versa. Secondly, the Courts can also rule on proceedings, brought in accordance with Article 263(4) TFEU, to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU, which is concerned with the CFSP.

Article 263(2) and (3): Standing for Privileged and Quasi-Privileged Applicants

Article 263(2) states that the action may be brought by a Member State, the European Parliament, the Council, or the Commission. It appears from this that these applicants are always allowed to bring an action, even where the decision is addressed to some other person or body. EU Law does not oblige a Member State to bring an action under Article 263 or 265 TFEU for the benefit of one of its citizens, although EU Law does not preclude national law from containing such obligation.

The European Parliament, after a considerable amount of time, gained the status of a privileged applicant. The Court of Auditors, the European Central Bank, and the Committee or the Regions are covered by Article 263(3) TFEU, so that they have standing only to defend their own prerogatives.

The European Council s included in the bodies amenable to review, but is not listed among either the privileged or quasi-privileged applicants who are entitled to seek judicial review. The European Council is accorded the right to bring an action for failure to act under Article 265 TFEU, which makes the position under Article 263 TFEU look all the more odd. The ECJ in the past interpreted the predecessor to Article 263 TFEU so as to enable the European Parliament to defend its prerogatives, justifying this on the ground that it was necessary to safeguard the institutional balance under the Treaty. It could draw on this precedent and afford the European Council claimant status, at the very least as a quasi-privileged applicant.

Bodies, Offices, and Agencies also suffer from the infirmity of being defendants without any separate recognition as applicants. These bodies, offices, or agencies might seek to bring an action as a non- privileged applicant. Most agencies have legal personality and could therefore count as legal persons for the purposes of

Article 263(4) TFEU. They would however then have to satisfy the criteria in that Article, including the test for standing.

Article 263(4): Standing for Non-Privileged Applicants
This provisions allows a natural or legal person to bring an action in three types of cases:
1. The addressee of a decision can challenge it before the ECJ or General Court
2. The act is of direct and individual concern to the natural or legal person, the assumption being that the person is not the immediate addressee of the act
3. Where there is a regulatory act which does not entail implementing measures, the claimant must show direct concern but not individual concern

Direct Concern
An applicant must show that the act was of direct concern if it is to be accorded standing. The general principle is that a measure of direct concern where it directly affects the legal situation of the applicant and leaves no discretion to the addresses of the measure, who are entrusted with its implementation. The implementation must be automatic and result from EU rules without the application of other intermediate rules. It can be difficult to determine whether there is some autonomous exercise of will between the original decision and the implementation.

Individual Concern: Legal Acts under the Lisbon Treaty
Applicants must prove individual concern in relation to an act addressed to another person, unless it is a regulatory act that does not entail implementing measures.

Article 230(4) EC was the predecessor to Article 263(4) TFEU, but the wording was subtly different. Article 230(4) stated that a decision addressed to another person might be of individual concern to the applicant, and that an act in the form of a regulation might in reality be a decision that was of direct and individual concern to the applicant. It therefore contained an invitation to look behind the form of the measure to its substance, in the sense that the ECJ or CFI could decide that a measure in the form of a regulation was in reality a decision that was of direct and individual concern.

The Article, as it stands today, contains nothing equivalent to this, and the structure of the provisions on legal acts renders this more difficult because the test for a legislative act is formalistic, not substantive, in nature.

Still, an applicant might contend that although a regulation was a legislative act because it was made in accordance with a legislative procedure, it was nonetheless of direct and individual concern. The very fact that the definition of a legislative act is formalistic might assist the applicant in this respect, but it is nonetheless likely to face an uphill task in proving individual concern, given the meaning of this term explained below, and given also the label ‘legislative act’ attached to such measures. To take another example, an applicant might contend that a delegated act in the form of a regulation was of direct and individual concern to it.

Individual Concern: Plaumann and Decisions
Applicants must prove individual concern in relation to acts addressed to another unless such act is regulatory and does not entail implementing measures. A case of significant relevant is the **Plaumann Case,** in which the German Government requested the Commission to authorise it to suspend the collection of duties on clementines imported from non-member countries. The Commission refused the request, and addressed its answer to the German Government. The applicant was an importer of clementines, who contested the legality of the Commission's decision.

The Plaumann Test is still the leading authority for cases where individual concern is to be proven. It is important to dwell on the test and its application so as to understand why it is difficult for private applicants to succeed.

The test stipulates that applicants can only be individually concerned by a decision addressed to another if they are in some way differentiated from all other persons, and by reason of these distinguishing features singled out in the same way as the initial addressee. There can however be more than one applicant who is individually concerned. In the aforementioned case, the applicant failed because it practised a commercial activity that could be carried on by any person at any time.

The Plaumann Test effectively prevented virtually all direct actions by private parties to challenge decisions addressed by others, except where the challenged decision had retrospective impact. The ECJ and CFI reiterated the *Plaumann* test for individual concern and applied it in the same manner as in *Plaumann* itself. Many of the cases concerned challenges to decisions made under the Common Agricultural Policy. The EU Courts however applied the test in other areas.

One has to also mentioned open categories and closed categories. The former is regarded as one where the membership is not fixed at the time of the decision, while the latter is one which is fixed. In the Plaumann Case, the applicant was a member of an open category and this has no individual concern.

The Plaumann test is based on the assumption that some people have attributes that distinguish them from others, and that they possess these attributes when the contested decision is made.

Individual Concern: Plaumann, Regulations, and Directives
An applicant may also claim to be individually concerned by a legal act that takes the form of a regulation or a directive.

There were initially two tests in case law: the close category test and the abstract terminology test. The latter was stricter then the former and became the test generally applied by the Court. A prime example of this test used was in the **Calpak Case.**

The Abstract Terminology Test placed those who challenged an act in the form of a regulation in a difficult position. The purpose of allowing such challenge was, as

the ECJ recognized in Calpak, to prevent the Community institutions from immunising matters from attack by the form of their classification. This was the rationale for permitting a challenge when the regulation was in reality a decision, which was of direct and individual concern to the applicant. This required, as acknowledged in Calpak, the Court to look behind the form of the measure in order to determine whether in substance it really was a regulation or not.

A regulation would be accepted as a true regulation if, as stated in *Calpak*, it applied to '**objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner**'. However, it was always possible to draft norms in this manner, and thus to immunise them from attack, more especially as the Court made clear that knowledge of the number or identity of those affected would not prevent the norm from being regarded as a true regulation.

If a regulation was found to be a **true regulation** on the basis of the aforementioned test, then the Court would conclude that the applicant was not individually concerned. The Union Courts modified this and became willing to admit that a regulation might still be true, but to accept that it might still be of individual concern to an applicant.

Reference can be made to the Codorniu Case, in which the applicant challenged a regulation which stipulated that the term 'cremant' should be reserved for sparkling wine of a particular quality. Notwithstanding the aforementioned, the applicant still had to show individual concern in accordance with the Plaumann Test. Applicants were denied standing because the ECJ and CFI applied the Plaumann test in the same manner as in Plaumann itself. The fact that the applicant operated a trade which could be engaged in by any other person served to deny individual concern.

If the applicant cannot take advantage of the exception laid down in the fourth sub article for regulatory acts where individual concern is not required, the difficulties of showing such concern in relation to regulations and directives in the post-Lisbon world may be greater.

Individual Concern: Anti-Dumping, Competition, and State Aid
The ECJ has been more liberal in according standing in certain areas, such as those mentioned in this title. The relevant Treaty Articles and regulations had a marked impact on judicial decisions, since the procedure in these areas explicitly or implicitly envisaged a role for the individual complainant, who could alert the Commission to the breach of EU law. The EU interest in these areas was moreover relatively clear, and the Union Courts were therefore receptive to arguments that, for example, a state had infringed EU law by illegal state aid.

Anti Dumping
The EU passes these regulations to prevent those outside the Union from selling goods within the Union at a too low price. Whether a firm is dumping may be controversial.

The first type of firm which initiated the complaint about dumping, as exemplified in the **Timex Case,** where the company that initiated the complaint was unhappy with the resultant regulation because it felt that the anti-dumping duty was too low. The ECJ held that as the principal complainant and a leading watch maker in the EU it had standing to contest the level of duty imposed.

The second type is the producer of the product that is subject to the anti-dumping duty. In the **Allied Corporation Case,** the ECJ confirmed that the procedures and exporters charged with dumping could also be regarded as individually concerned.

The third category dealt with the importer of the product against which the anti-dumping city has been imposed. Some such applications were rejected on the ground that the importer could challenge the measure indirectly under what is now Article 267 TFEU in an action against the national agency which collected the duty.

Competition
A second area in which the ECJ has been more liberal in according standing is competition policy, regulated by Articles 101 and 102 TFEU. A Member State, or any natural or legal person who claimed to have a legitimate interest, could make an application to the Commission, putting forward evidence of a breach of what are now Articles 101 and 102 TFEU.

State Aid
Similar considerations are apparent in the case law on state aids. The provision of such aid is regulated by Articles 107 to 109 TFEU to prevent competition from being distorted by a firm receiving assistance from its government, thereby giving it an unfair advantage against competitors. The Commission decides whether the aid is compatible with the Treaty, and addresses a decision to the state, which can challenge it under Article 263 TFEU.

Individual Concern: Reform and the Courts
Article 263(4) TFEU amended Article 230(4) EC by providing that individual concern is not required in relation to regulatory acts that do not entail implementing measures.

The ECJ defended its restrictive jurisprudence on the ground that the Treaty provided a comprehensive mechanism for legal protection: applicants who did not have standing for a direct action under Article 263 could test the legality of the measure indirectly through Article 267 TFEU. However, Advocate General Jacobs suggested that standing should be accorded where the contested measure had a substantial adverse effect on the applicant.

However, the Court declined to follow the lead of Advocate General Jacobs. In **Jego-Quere,** the ECJ followed the **UPA** reasoning. It acknowledged the right to effective judicial protection, but held once again that the Treaty established a complete system of legal protection through the combination of Articles 263 and 267. It was for the Member States to ensure that individuals should be able to

challenge Union measures at national level, even where no implementing measures were involved.

The problem revolved around the fact that such interpretation was sometimes seen as being in breach of Article 6 of the ECHR.

The premise underlying the ECJ's decisions in the two aforementioned cases us that the Treaty provided for a complete regime of legal protection in terms of access to Court, but there are some difficulties as with regard to this hypotheses.

1. The ECJ ignored the Advocate General's analysis of the difficulties faced by the individuals who seek to use Article 267 since such an article is a reference system, thus the applicant must convince the national court that reference is needed.
2. The ECJ exhorted national courts, in accordance with Article 4(3) TFEU, to interpret national l procedural rules so as to enable applicants to challenge EU norms of general application before the national courts. This strategy is however of limited utility.
3. Indirect Challenge via Article 267 has undesirable consequences for the division of competences between the ECJ and the GC.
4. The ECJ's reasoning in UPA with regard Article 263 is also problematic. It held that the boundaries of legitimate Treaty interpretation constrained any modification to the traditional case law on direct challenge. The right to effective judicial protection could influence the application of individual concern, but could not, said the ECJ, set aside that condition, which could only be done via a Treaty amendment.
5. A legal system may have impressive principles of judicial review, but these will be of scant comfort to those who cannot access the system because the standing rules are unduly narrow.

Individual Concern: Reform and the Lisbon Treaty

The framers of the Lisbon Treaty amended the rules on standing: individual concern is not required in relation to a regulatory act that is of direct concern and does not entail implementing measures.

Here, the meaning of two terms are signifiant:

1. **Regulatory Act**

Legislative Acts are those enacted by a legislative procedure, and can take form of a regulation, decision, or directive. A legislative act can delegate power to the Commission to adopt a non-legislative act, which can take again the same form, although it is generally a regulation. There are delegated acts. There is also s separate category of implementing acts.

The term 'regulatory act' does not fit easily with the Lisbon classification of legal acts. It could be construed broadly to cover any legally binding act, whether legislative, delegated, or implementing, provided that it does not entail implementing measures.

It could be interpreted more narrowly to cover any legislative, delegated, or implementing act, provided that it takes the form of a regulation or decision that does not entail implementing measures.

It could cover only delegated and implementing acts in the form of regulations or decisions, which do not entail implementing measures, or only delegated acts subject to the same condition. The construction that best fits the intent of those who devised the Constitutional Treaty would be the last, which is the narrowest: **it would only apply to delegated acts in the form of regulations or decisions that are of direct concern and do not entail implementing measures.**

However, if Article 263(4) is to alleviate the pre-existing difficulties for non-privileged applicants it will have to be interpreted to cover any legislative, delegated, or implementing act that does not entail implementing measures. This would in practice exclude directives in the form of legislative, delegated, or implementing acts, since directives do require implementing measures. It remains to be seen whether the ECJ is willing to interpret the new provision in this manner.

One must note that where the exception in Article 263(4) TFEU does not apply an applicant will still need to show individual concern as that term has been interpreted in *Plaumann* and subsequent cases. This means that direct challenge in such cases will continue to be extremely difficult. Applicants will have to proceed indirectly via Article 267 TFEU and the Lisbon reforms have done nothing to address the difficulties with this method of challenge identified by Advocate General Jacobs in the *UPA* case.

2. **Implementing Measure**

The novel aspect of Article 263(4) whereby individual concern is not required applies to a regulatory act that is of direct concern and does not entail implementing measures. The most basic understanding would be as follows.

Regulations are directly applicable: once they are made by the EU they apply within the Member States without the need for transformation or adoption into national law. In that sense regulations do not 'entail' any measure to implement them into the national legal order. The same is true for the great majority of decisions, whether they are classic individualised decisions addressed to a particular person, or whether they are decisions of a more generic nature that are concerned with inter-institutional relations. Directives, by way of contrast, specify the ends to be achieved but leave the Member States with the choice of form and methods of implementation. Directives in that sense entail implementing measures.

Individual Concern: Reform and the Charter

Article 41 of the EU Charter of Fundamental Rights enshrines the right to good administration. Article 41(2) sets out certain more specific rights that are included in this right. Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that Article. Standing rules are not explicitly mentioned in either Article.

It would be open to the Courts to read these provisions as the basis for expanding the existing standing rules, but they are unlikely to do so, given their restrictive interpretation in case law.

There is nonetheless an uneasy tension between the Charter rights and the standing rules for direct actions. The Charter accords individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by EU law will normally not be able to meet the requirements of individual concern.

Enforcement Actions

We have already seen that it is vital for the success of the union that Member States comply with their obligations under the treaties. Member States are subject to the 'principle of sincere cooperation' whereby the union and the Member States 'shall in full mutual respect assist each other in carrying out the tasks which flow from the treaties' (Article 4(3) TEU).

There is a danger that this obligation would be ineffective where there is no mechanism by which Member States that infringe Union law could be pursued. Indeed, the Commission would find it more difficult to fulfil one of its main objectives, which is to ensure compliance with the treaty obligations – Article 17(1) TEU), if it did not have strong tools to support it in its task.

The TFEU provides for various enforcement mechanisms involving judicial proceedings against the Member States, which are brought either by the Commission or by a Member State. Article 258 TFEU establishes the general enforcement procedure, giving the Commission broad power to bring enforcement proceedings against Member States which it considers to be in breach of their obligations under EU law.

Originally infringement proceedings resulted in a declaration by the CJ of a failure on the part of a Member State to fulfil its obligations under union law. **Article 260 TFEU now provides for the imposition of financial penalties in two sets of circumstances:**

1. Where a Member State has not complied with the judgement of the CJ following infringement proceedings (Article 260(2) TFEU)
2. Where a Member State has failed to notify the Commission of measures transposing a directive into national law.

The Commission had issued a communication on the implementation of Article 260 TFEU. This is not to say that Union Law cannot be enforced by individuals. They have the right albeit limited to bring proceedings under article 263 and 265 TFEU for annulment of acts of the union's institutions, bodies, offices, agencies and the European Central Bank, and to bring proceedings against such entities for failure to act when required to do so under the treaties.

Moreover individuals can bring proceedings before national courts and tribunals to enforce the Union Law rights. Such proceedings may result in a reference for a preliminary ruling under Article 267 TFEU.

The Principle Mechanism provided by the Treaties to pursue infringement of Union Law by Member States is the Direct Action before the Court under Article 258 which reads as follows:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union

Moreover, Article 258 applies to Treaties, and may include breaches of the Union's international agreements.

A second procedure in similar terms provides for action by a member state under Article 259 TFEU against another member state for failure to fulfil its obligations under the Treaties.

The Commission is also empowered to bring a Member State directly before the Court of Justice under three different Articles:
1. Article 108 TFEU - Infringement of Union Rules on State Aid Provisions
2. Article 114 TFEU - Improper Use of Delegation of Peers
3. Article 248 TFEU - Measures taken by member States to protect the essential security interests or to prevent serious internal disturbances

Development of Enforcement Procedures
Article 258 was not developed as a punitive measure, and in fact, until the Maastricht Treaty no sanction was provided against Member States which were found to be in breach of their obligations. They were only **required to take the necessary measures to comply with the judgement of the Court (Art. 260 TFEU).**

Although there is no mention as to time-limits, the Court has held in **Commission v Italy (69/86),** that implementation of a judgement must be taken immediately, and must be completed in the shortest time possible.

Where a Member State failed to comply with its obligations, the Commission could only seek to enforce its judgement by further proceedings before the Court.

While only a few actions were taken at the start of the Union, the number increased exponentially in the 80s. As a consequence, Article 228 EC, the relevant provision at the time, was amended through the Maastricht Treaty to allow for the imposition of fines and penalties to those which had failed to comply with a judgement against them. This is now Article 258 TFEU.

The Purpose of Enforcement Actions can said to be threefold:
1. It seeks to ensure compliance by Member States with their Union obligations
2. It provides a valuable non-contentious procedure for the resolution of dispute between the Commission and Member State over EU Law matters (approx. 1/3 of all Art. 258 proceedings are settled at the preliminary informal stage)

3. Where cases do not reach the Court of Justice, they serve to clarify the law for the benefit of the Member States in their generality

It is no doubt on account of the latter function that the Court has held that even if a state complied with its obligations prior to the hearing before the Court, the Commission is entitled to judgment not entitled to show existence of 'legal judgment'.

It is the general interest on the Union to obtain a declaration of any failure to fulfil obligations under the Treaties in order to clarify the law and thereby the extent of the obligations of the Member States, because this may assist other Member States in ensuring that they comply with EU Law.

Liability of Member States
Member States have an obligation to comply with the Treaties. The responsibility of the state is engaged **whatever the organ of the state whose action or inaction constitutes a failure, even if it concerns an institution which is constitutionally independent.** A Member State is therefore responsible for violations of the Treaties by its autonomous regions.

The Commission, on the basis of the **Lyckeshog Case,** which conceded the obligation on the Court of Final Resort of Member States to refer question for preliminary ruling to the ECJ, and the fact that the Swedish Supreme Court referred very few questions, send a reasoned opinion to Sweden. In the **Kobler Case,** the Court found that the state was liable for failure on the part of the judiciary to ensure compliance with EU Law.

Failure
A State's failure may be in respect of any binding obligation arising from EU Law. This would cover obligations arising from the Treaties and the general principles of Union law from international agreements entered into by the Union and third countries where the obligation lies within the sphere of Union competence: from Union regulations, directives and decisions 'failure can include any **wrongful act or omission ranging from failure to notify an implementation measure, to partial implementation, to faulty implementation, to non-implementation of EU law, or simply maintaining in force national laws or practices incompatible with EU law.**

The Commission has brought actions in the case of mine breaches of obligations when this seemed to be part of a consistent practice and will also bring actions where the breach is caused by a general administrative practice.

Commission v Ireland (C494/01) - separate individual breaches could together constitute a general and persistent breach.
Commission v France (C265/95) - failure to fulfil an obligation may also arise in circumstances where the state has failed to take action to prevent other bodies

from breaching EU Law i.e. failure can include the Member State's positive obligations.

Procedure
The Commission becomes aware of a breach of obligations in a variety of ways:
- From its own enquiries
- From public complaints
- From complaints from interest parties
- From other institutions or bodies i.e. EP or Ombudsman

The sensitive nature of Article 258 is reflected in the way the procedure stages are laid down.

The initial stage, between the Commission and the Member State, are designed to achieve an amicable solution. If this fails, the next step would be the commencement of judicial proceedings before the ECJ.

The procedure excludes the involvement of third parties, even if they are affected by the noncompliance or have brought the matter to the attention of the Commission. To maintain the involvement of the third parties in the infringement process, the Commission issued a **Communication on Relations with Complainants** (COM(2002) 141) setting out how it will conduct its relationship with complainants. The complainant though does not have a right to require that the Commission should bring an action against a MS: this decision lies within the Commission's discretion.

After registration and assessment, the Commission decides how to handle a complaint. It can start infringement proceedings or proofed more informally through an **EU pilot scheme**, which is designed to resolve the issue without the need of infringement proceedings.

Pilot is an online database which shares information on the details of a case with the relevant parties. The Commission sends a query to the Government of the Member State who is in alleged non-compliance. A response is required within ten weeks, followed by another ten weeks in which the Commission can consider the Member State's position.

If the response is unsatisfactory, it may start infringement proceedings. The average time taken by each Member State in 2015 to respond to a query was seventy days, and in this same year, seventy-five percent of the complaints were resolved by such pilot scheme.

The settlements of complaints on a National Level has been assisted by **SOLVIT,** a service provided by national administrators. Each Member State has a SOLVIT Centre which helps citizens who encounter difficulties in other member states where public authorities do not correctly apply EU legislation. The SOLVIT centre in the member state of residence of the citizen sends the citizen's complaint to the

SOLVIT centre in the member state whose authorities are allegedly at fault in their application of EU law, which will follow up with the relevant public authority.

SOLVIT acts as a filter enabling the speedy resolution of complaints at the most appropriate level, thus leaving more complex issues to be resolved by the European Commission.

Informal Proceedings
The Commission begins proceedings informally with a notification to the State to which such State is required to respond. Many of such cases are resolved at this stage.

Infringement sometimes happens unexpectedly, often because it is not clear what is required of a Member State. In other cases, the Commission may have misunderstood the position of the State's national law. The Commission has broad discretion in terms of the cases it chooses to bring forward, and even to conclude them. The Court does not concern itself with the motive of the Commission, nor what its objectives might be in doing so.

Where cases are not formed at this stage, the Commission starts the Formal Proceedings.

Formal Proceedings
The first stage of this procedure is the **Formal Notice.** The Commission opens its proceedings by a notice which sets out the reasons why it believes that a Member State has not fulfilled its obligations and invites other Member States to submit its observations.

So that a Member State has full opportunity to put its case, the Commission must first inform the state of its ground of complaint. The complaint need not by fully reasoned, but the state must be informed of all charges which may be raised in the action.

Commission v Italy (31/69) - the Commission alleged that Italy was in breach of EU Law obligations in failing to pay certain export rebates to its famers, required under EU Regulations. In opening the proceedings, the Commission charged Italy with breaches up to 1967, but failed to mention a number of breaches following this date. When the matter came before the court, the court refused to consider the later breaches. The court said that the member states must be given an adequate and realistic opportunity to make observations on the alleged breach of treaty obligations.

In deciding whether a state has had an opportunity, the Court may take into account communications made by the Commission in the informal stage. The Commission must send the letter or formal notice which is identified as relating to Article 258 proceedings. It thus seems that an informal letter sent under a different provision of EU law will not suffice.

The Reasoned Opinion
Following the submission of the state's observation to the Commission, so assuming that the case is not settled at this stage, the Commission issues a reasoned opinion which **will record the infringement and require the state to take action to end it, normally within a specified time limit.**

Although it cannot introduce issue not mentioned in the formal notice, it is not necessary that such notice and the reasoned opinion be exactly the same.

In particular, the Commission may limit the scope of the inquiry as evident in **Commission v Italy (C279/94).** Although the opinion must be remanded it need not set out the Commission's case in full. The **reasoned opinion** need only contain a coherent statement of the reasons which had convinced the Commission that the Italian Government had failed to fulfil its obligations.

Challenging a Reasoned Opinion
In **Commission v Germany (C191/95),** Germany challenged the admissibility of Article 258 proceedings on a number of grounds. The first of these related to the Commission's decision to issue the reasoned opinion on the breach of the principle of collegiality. Germany argued that the commissioners themselves at the time did not have all the facts to enable them to make such a decision and furthermore they had not seen the draft reasoned opinion. The ECJ maintained that the decision to issue a reasoned opinion could not be described as a measure of administration or management and could not be delegated by the Commissioners themselves to their officers. Nonetheless, this does not mean that the Commissioners have to agree on the wording of the reasoned opinion, it is sufficient if they have the information on which the decision to send the reasoned opinion is based.

A reasoned opinion is merely in the proceedings and not a binding act capable of annulment under Article 263 TFEU.

While the defending State may choose to impugn the Commission's opinion in proceedings, where the Member State complies with the opinion, a third party, possibly adversely affected by the Commissioner's opinion, has no equivalent right.

Time-Limits
While there are no time-limits in respect of stages leading up to the reasoned opinion, thereby giving both parties time for negotiations, the **Commission will normally impose in its reasoned opinion a time limit for compliance**. A member state will not be deemed in breach of its obligations until that time limit has expired. A member state cannot be relieved of its obligations merely because no time limit has been imposed. The Commission has complete discretion in the matter of time limits subject to the possibility of review by the court. The court may dismiss an action under 258 on the grounds of an inadequate time limit as happened in **Commission v Belgium (293/85).**

In the aforementioned case, an action by the Commission against Belgium for its failure adequately to implement Gravier was dismissed on the grounds that the compliance period of 15 days prescribed by the Commission in its reasoned opinion **did not give Belgium sufficient time** to respond to which complaints, either before or after issuing of its reasoned opinion.

Usually, time-limits are decided by the Courts on a case-by-case basis.

Stage Two: Judicial Stage
If a Member State fails to comply with the reasoned opinion within the time-limit, proceedings move to the final, judicial stage before the Court. The Court will examine the situation as it prevailed when the time limits set in the reasoned opinion expired and will not take into account any subsequent changes.

However, the action taken before the Court must be based on the same grounds as stated in the reasoned opinion and may not introduce new grounds. It is possible ti limit the subject matter of the proceedings, or to rephrase the grounds for complaints as log substance is not changed.

Moreover, if the Member State amends its legislation to comply with EU Law, but does so incompletely, the Commission may withdraw its action in part but continue it with regard to the domestic provisions that are not in compliance.

Again, the initiative rests with the Commission, which 'may bring the matter before the Court of Justice'. No time limits are imposed on the Commission on commencing this stage, however, disposition seems to be qualified by a requirement that the length of the pre-litigation procedure must not have adversely affected the rights of the defense of the member state concerned.

In the reasoned opinion, the Commission is obliged to set out the subject matter of the dispute, the submissions and the brief statement on the grounds on which the application is based. With regard to the latter, it is not enough to simply refer to all the reasons set out in letter of formal notice and the reasoned opinion.

Proceedings before the Court are by way of a full hearing of all facts and issues. Interest Member States, but not individuals, are entitled to intervene in the proceedings. The Commission is entitled to request, and the court to order, interim measures. Applications for interim relief may, however, only be 'made by a party to the case before the court' and where it 'relates' to that case.

The burden of proof in such a scenario is placed on the Commission.

Article 258 is very general in its description of a Member State violation for the purposes of enforcement proceedings. The Commission must simply consider that a state 'has failed to fulfil an obligation under this Treaty'. This may include actions as well as omissions on the part of states, failure to implement directives, breaches of specific Treaty provisions or of other secondary legislation, or of any rule or standard which is an effective part of EU law.

There are many instances in which Member States are parties to a case like this:
- Breach of Obligation of Sincere Cooperation
- Inadequate implementation of EU Law
- Breaches which interfere with EU External Relations
- Systematic and Persistent Breaches
- Action by the Courts of a Member State

Additionally, the most common defences are the following:
- Reciprocity
- Necessity and Force Majeure

The ECJ has regularly rejected pleas of force majeure by Member States and has consistently ruled that a state is responsible for breach 'whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution', or in the case of a fraudulent individual.
- Constitutional Difficulties
- De Facto Compliance
- Domestic Law is in Compliance
- Treaty Derogations

Consequence of a Ruling and of Failure to Comply
If the Court finds that the Member State has failed to fulfil its obligations under the Treaties, the Member State is required to take the necessary measures to comply with the judgment of the ECJ.

Until the Treaty of Maastricht, the only sanction against a state which had failed to comply with the ruling from the court under Article 258 TFEU was a second action under that article for failure to comply with the obligation.

The number of such repeated actions had been steadily increasing. This was serious and could have led to prolonged noncompliance in the face of which little could be done. Although the ECJ had provided individuals with their means of enforcement of their union rights via the principles of direct and indirect effect and state liability under Francovich, these remedies were uncertain and unequal in their application and provided the remedy only in the individual case.

Following its clarification in Brasseur du Pecheur, a remedy under Francovich will only be available in circumstances where the state has 'manifestly and gravely' acted or failed to act in breach of union law. A state will not be liable in damages for excusable failures.

Thus, infringement proceedings remain crucial to ensure compliance with the Treaties, also keeping in mind that other methods of redress may not be as effective.

Penalty Payment for Continuing Failure to Comply
The Maastricht Treaty added a further weapon to the Court's armoury, providing for the imposition of financial penalties in two scenarios:

1. Failure of a Member State to comply with an ECJ Judgment
2. Failure of a Member State to notify measures transposing a directive into national law

Article 260(2): "if the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. **It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.** If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it".

Article 260(3) provides that where a Member State has failed to fulfil its obligation to 'notify measures transposing the directive adopted on the legislative procedure' the Commission may bring proceedings before the Court requesting that it finds an infringement and imposing a financial penalty. There is an obligation to make the payment take effect on the date set by the court in its judgment.

Article 260 is significant because it marks a shift in the enforcement powers of the Union towards Member States. In the first few years after Maastricht, there was no actions involving the imposition of fines. In 1996 and 1997, the first fines were proposed and the first case in which a penalty was imposed was **Commission v Greece (C387/97)**. In this case Greece was found to have failed to comply with an earlier judgment in Article 258 proceedings. The court therefore exercised its powers under 260(2) and imposed a penalty of €20,000 for each day of delay in ensuring compliance with the earlier judgment. Ultimately Greece paid €5.4 million in penalties before it finally complied with the judgment in March 2001.

There is no limit to the level of fines that may be imposed by the courts, although the Commission is required to propose a fine when it commences proceedings. Initially it was not clear as to how the Commission was going to calculate fines and it was only in November 1997 that the Commission published a guidance on calculating the penalty payments.

At the start, the Commission requested periodic penalty payments rather than a lump sum. Consequently, the Commission has changed its practice and will now request a lump sum penalty as well as a periodic payment:
- Lump Sum: to penalise the continuation of the infringement between the dates of the judgment and proceedings under Article 258 and 260
- Penalty Payment: to cover each day of delay under Article 260

This combination could result in the imposition of considerable financial penalties, which may act as a strong deterrent. The ECJ has made it clear that it is not bound by the Commission's guidance, although it regards it as a useful point of reference.

Action by Member States

In addition to enforcement action brought by the Commission, there may be scenarios in which a Member States complains about infringement by another. In such circumstances, if the Commission fails to Act, a Member State can bring infringement proceedings under **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 Commission.
The 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 Commission has not delivered an 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 procedure is very similar to that of Article 258, save that it is initiated by a Member State which, if the Commission fails to deliver a reasoned opinion within three months, it is entitled to bring the matter before the ECJ. In addition, both parties are entitled to state their case and comment on the other's case both orally and in writing.

The issue of a reasoned opinion by the Commission cannot preclude the complainant state from bringing proceedings before the court if it is dissatisfied with the opinion or if it wishes to obtain a final judgment from the Court.

The procedure provided under this article has been rarely used because member states seem cautious about bringing an action under this provision because, since no member state has a perfect record for the implementation of union law, there is a danger that the defendant state might bring a retaliatory action against a complainant state.

Nonetheless, this procedure was used in **Belgium v Spain (C388/95)** concerning the rules regarding the application of the wine determination Rioja. It is interesting to note that the dispute brought in other member states, which intervened in favour of one side or the other, revealed a split in opinion between the main winegrowing States and others. The CJ found in favour of Spain.

In cases of disputes between Member States, the Treaty also provides for a further, voluntary procedure under Article 273. Member States may agree to submit to the ECJ in a dispute relating to the subject matter of the treaty. It is on the basis of this provision that the eurozone states will award jurisdiction to the court in relation to

the fiscal pact being agreed outside the treaty framework and all of the treaty and further.

Special Enforcement Procedures: State Aid, Breach of Art. 114(4) TFEU Procedures and Measures to prevent serious internal disturbances:
These procedures, which apply only within areas specified, operate in 'derogation from the provisions of article 258 and 259'. There are certain essential differences between these procedures and Articles 258 and 259. In the case of article 108(2) TFEU, the Commission, after giving the parties concerned an opportunity to submit their comments, issues a decision requiring the member state concerned to alter or abolish the disputed aid within a specified time limit. If the state concern does not comply with the decision within the prescribed time the Commission or any other interested state may bring the matter to the ECJ.

Since the decision, unlike a reasoned opinion, is a binding act, it may be subject to challenge under Article 263.

Article 348 TFEU provides an accelerated procedure whereby the Commission can, without preliminaries, bring a member state directly before the ECJ if it considers that the state is making improper use of its powers provided under Articles 346 or 347. Under these provisions member states are empowered to take emergency measures to protect essential security interests or in the event of serious internal disturbances, war or threat of war, or for the purposes of maintaining Peace and International Security.

Article 114(9) also provides for an accelerated procedure whereby the Commission or any Member State also bring a State before the court if it considers that a member state has made improper use of the powers of delegation provided for in article 114(4) in deciding to 'maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment, or the working environment', or Article 114(5).

Grounds for Review

Once the Court has decided that a claim is admissible, a case will be decided on merits. Article 263 TFEU provides for grounds for annulment, drawn directly from French Administrative Law:

1. Lack of Competence
2. Infringement of an Essential Procedural Requirement
3. Infringement of the Treaty or any Rule of Law relating to its Application
4. Misuse of Powers

These are not mutually exclusive, and often, more than one ground in cited in a specific case, the applicant must always identify clearly the facts of the case, and the basic legal arguments to it. In particular, the applicant should not rely on catch-all references and documents annexed to an application.

The General Court has held that it is not for the Court to seek out and identify the grounds on which the application is based. However, it is not clear how this statement relates to the idea that the Court can consider an infringement of an essential procedural requirement of its own motion.

It still seems that the principle gained acceptance as in **Laboratories Servier v Commission,** the GC annulled a Commission decision withdrawing marketing authorisation for certain medical products. It did so on its own motion, observing that the lack of competence of an institution that has adopted an act constitutes a ground for annulment for reasons of public policy, which must by raised by the Court.

Lack of Competence
This is the equivalent of the English's doctrine of substantive ultra vires. The institution responsible for adopting the measure in question must have the legal authority to do so. This may derive from the TFEU or from secondary legislation.

Reference can be made to the **ERTA Case**, in which the Commission challenged the Council's power to participate in the shaping of the road transport agreement, since under the Treaty (Article 218 TFEU) it is the Commission which is empowered to negotiate international agreements and the Council whose duty is to conclude them. On the facts, the Court found that the Council had not exceeded its powers.

On a number of occasions, Union Law has been challenged as having been enacted under wing legal basis. The choice of legal basis will be important, as it determines the appropriate procedure to be followed, and the vote required for the adoption of legislation.

The Court allows the institutions some discretion in their choice oflegaml base and their scope for action under that base. In **Germany v Commission (359/90),** it held that Article 114 TFEU, which provides for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishing and functioning of the internal market, was to be

interpreted as **encompassing the Council's power to lay down measures relating to a specific class of products and, if necessary, individual measure concerning those products.** Germany's challenge to Article 9 of the Council Directive 92/59 on product safety, based on what is now Art. 114 TFEU, which empowered he Commission to adopt decisions requiring Member States to take temporary measures in the event of a serious and immediate risk to the health and safety of consumers, failed.

Theory of Implied Powers and Empowering Provisions of a General Nature as per Article 352 TFEU make resort to this ground of review very rare.

Germany v EP and Council (Tobacco Advertising Case I) concerned wrong legal basing off the implementation of an act. A Directive imposing a general ban on tobacco advertising was based on Art.114 TFEU which concerned implementation of measures for the proper functioning of the internal market. The Court held that the Directive was a public health measure and the EU had no competence to implement it in pursuance of Article 114. In **Tobacco Case II,** the Court ruled that the revised Directive which included, with limited exceptions, prohibitions on advertising of tobacco products in the press, radio, and limited sponsorship of tobacco products, which could affect competition and cross-border trade, as legitimately based on Article 114.

A Treaty also authorises the EU institutions to act in **specific areas as provided by the Treaties** under the principle of conferral which is based on Article 5(2) TFEU.

All in all, it is still rarely used, and this is mainly because the Court has interpreted the EU's powers so broadly so that Treaty objectives could be reached and achieved.

The Court is stricter in its approach to questions concerning the allocation of competence between the Union institutions, and as already notes, the ECJ's decisions have protected the procedural right of the European Union.

Infringement of an Essential Procedural Rule
This can be split into three:
1. The right to be heard
2. Consolation and Participation
3. Duty to Give Reasons

This is equivalent to procedural ultra vires under English Law. Institutions, in enacting binding measures, must follow the correct procedures.

Example based on Article 296 TFEU - all secondary legislation must state the reasons on which it is based and must refer to proposals and opinions which were required to be obtained. The Court has held that reasons must not be too vague or inconsistent, they must be coherent, they must mention figures and essential facts

on which they rely. They must be adequate to indicate the conscientiousness of the decision and detailed enough to be scrutinised by the Court.

As seen in **Germany v Commission (C24/62),** a Commission decision was annulled because it was too vague without any facts and figures.

The purpose of the requirement to give reasons is to enable those concerned to defend their rights and to enable the Court to exercise its supervisory jurisdiction. However, the Court will not annul an act for insignificant defect, nor will it annul an act on this ground unless the claimant can prove that, but for this defect, the result would have been different as in **Distillers Co Ltd v Commission.**

Roquette Freres SA v Council - a Council Regulation was annulled on the grounds of the Council's failure to consult Parliament. It was held not to have given Parliament sufficient time to express an opinion on the measure in question. Where no time limit is imposed, it is presumed that Parliament must be given reasonable time within which to express its opinion.

In **Infront**, the letter to the UK Government was signed by a director-general of the Commission who had not consulted the College of Commissioners. This letter was thus annulled for failure to follow proper procedures. These also cover the duty to consult.

With regard the right to be heard, this must be protected in the absence of specific EU Legislation or when such legislation does not take sufficient account of the principle.

In **Transocean v Commission,** it was held that a person whose interest is affected by a public authority's decision must be given an opportunity to submit observations. Moreover, notice should be given and the individual should have reasonable time to respond.

Infringement of the Treaties or of Any Rule of Law relating to its Application
Clearly, when an act is invalid for lack of competence or for an infringement of an essential procedural requirement, this may involve an infringement of Treaties, but it is wider since it extends to any Treaty provision.

In **Adams v Commission Case I,** in an action for non-contractual liability, the Commission was found to have acted in breach of its duty of confidentiality under Article 339 TFEU.

In case of this principle, general principle of EU Law are extremely relevant. In **Royal-Scholten Hoing,** a Union regulation was held invalid for **breach of the principle of equality.** In **Transocean,** a part of a decision was annulled for **breach of the principle of natural justice.** In **August Topfer,** a decision was annulled for a **breach of the principle of legal certainty.**

Although the Court will not set aside legislation for breach of this principle and will except businessmen to anticipate and guard against foreseeable developments, within the bound of normal economic risks, this is a ground of some potential.

It is unlikely that a trader has legitimate expectations which are not accorded within existing Union rules. Thus, it is difficult to argue that a req to pay back illegally granted state aid would be in breach of legitimate expectations. **Opel Austria**: the GC held that the principle of legitimate expectations within the EU was the corollary of the principle of good faith in public international law.

Moreover, the Court's jurisdiction to review the validity of a Union Act could not be limited as regard the grounds on which it could find a measure invalid.

Although not done yet, legislation could in principle be challenged for breach of the principle of subsidiarity, either as general principle or as Article 5 TEU.

Because of the breadth of the concept of 'any rule of law relating to the [Treaty's] application', the acts of the EU institutions are vulnerable to attack on this ground. Thus, the Court has held that where the Union legislature has discretion to act in a complex economic situation, such as the implementation of the Union's agricultural policy, both as regard the nature and scope of the measures to be taken and the finding of basic facts, the Court, in reviewing the exercise of such a power: "**must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion**".

The Court's approach to the Union's liability in damages for legislative measures involving choices of economic policy, which the GC adopts also, reflects a similar concern not to fetter the discretion of the EU institutions when they are implementing EU policy. In this context, the Court may be accused of occasionally going too far to protect the Union institutions.

Misuse of Powers
Stemming from detournement de pouvoir, this is the use of a power for purposes other than for what it was granted. However, this is difficult to prove as it is subjective.

The Court, in **Commission v Parliament (C156/93),** has identified this as "**the adoption by a Union institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case**".

The concept is not confined to abuses of power, nor is it an ulterior or improper motive essential, meaning that all which is required is an improper or illegitimate use of power. Even so, this provision has been narrowly interpreted.

Federation Carbonniere de Belgique - in interpreting the comparable provision of the ECSC Treaty, the Court held that a measure will not be annulled for misuse of power if the improper use had no effect on its substance; nor will it be annulled if the authority had acted from mixed motives, proper and improper, as long as the proper purpose was dominant. It is thus a difficult ground to establish.

As seen in **BEUC v Commission (T37/82),** there is much overlap between all grounds for annulment. The Court rarely examines each one precisely and is often vague as to which ground forms the basis of its decision.

The aforementioned case concerned the Commission's decision not to investigate the agreement between the British Society of Motor Manufacturers and the Japanese government limiting imports of Japanese cars to 11 per cent of total UK sales. This decision was prima facie contrary to Article 101, but was justified by the Commission, inter alia, because the agreement was permitted as a matter of UK policy. The GC annulled the decision simply on the ground that it constituted 'an error of law'. Despite the Court's lack of precision in these matters, it is wise to plead as many grounds as seem applicable.

The grounds apply equally to an examination of the validity of a measure on reference from national Court under Article 267 TFEU, and also apply to an enquiry into the validity of regulations under Article 277 TFEU, and to an application for images under Article 340 TFEU.

Succesful Action
If an annulment under Article 263 was successful, the act will be declared void under Article 264. A measure may be declared void in part only, provided that the offending part can be effectively severed.

Under Article 264(2) TFEU the Court may, following a successful action for annulment, 'state which of the effects of the Regulation which it has declared void shall be considered as definitive'. This has been done in the interests of legal certainty, to avoid upsetting past transactions based on a regulation, a normative act.

In **Ecroyd v Commission t-220/97**, the GC held that should a Court find a measure invalid, it is not enough to repeal that measure, the position of the complainants must also be addressed so that they do not continue to suffer loss.

A successful action for images under Article 340(2) TFEU child arise in these circumstances, as it did in this case.

A slightly different point arose in **Commission v AssiDoman Kraft Products AB**. This case concerned certain fines imposed on a number of undertakings for breach of competition rules. Some of the undertakings appealed against the Commission's decisions, resulting in the partial annulment of the Commission's decision and the reduction of the fines imposed on the appellant undertakings. Several other complaints, which had also been fined but which had not been party

to the appeal, then requested that the Commission reconsider their position in the light of the annulment ruling. The Commission refused, as it argued that the companies involved in the competition proceedings had each been addressed individually and therefore a finding of invalidity as regards a decision addressed to one company did not affect a similar decision addressed to another. The applicant companies sought to challenge before the European Courts on the basis that the Commission was obliged to reconsider its decision by virtue of Article 266 TFEU.

The matter finally came before the ECJ, the General Court having found in the companies' favour. The ruling was overturned, holding that the scope of Article 266 was limited in 2 ways. First, a ruling for annulment could not go further than the applicant requested, and thus the matter tried by the Union courts could relate only to aspects of the decision which affected the applicants. The Court then held that although the operative part of the judgment and its reasoning were binding erga omnes, '[this cannot entail annulment of an act not challenged before the Union judicature but alleged to be vitiated by the same illegality'.

Contractual and Tortious Liability of the Union

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

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

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

Tort is a wrongful act or infringement of a right, other than under contract, leading to legal liability.

Contractual Liability
This is established by Article 340, in which the first sub article states that this shall be governed by the law applicable to the contract in question. This means that choice of law causes prevails, EU Law could be selected, and as per Article 272 TFEU, the Court is to give judgement pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union.

Quasi-Contractual Liability/Restitution
This is not catered for specifically in the Treaty, but Union liability is based on the general principle of unjust enrichment recognised by most of the MS. even so, actions based on unjust enrichment is different from contractual and non-contractual liability.

Restitution is not based upon promise, but rather on unjust enrichment by the defendant. Restitution does not normally require a wrongful act by the defendant. The measure of recovery is determined by the extent of the defendant's unjust enrichment.

Restitution
A common liability in restitution arises from payments to public institutions when they have no right to money. Restitution is important in the legal order of the EU and can arise in two scenarios:
1. Member States has imposed a levy that is illegal under EU Law i.e. Van Send en Loos (national court to prescribe a remedy)

2. Instances where money are paid into EU funds where there is no legal obligation to pay the sum

Where a fine imposed for a breach of the competition rules is annulled, there is an obligation to return the money, alongside any interest as held in the **Corus v Commission Case.**

There are scenarios in which restitution arises in cases where there has been unjust enrichment by an individual against the EU, just as in the **Wollast Case.** The question here is whether there would be liability in restitution in favour of an individual where the EU has been unjustly enriched.

Jurisdiction to award damages under Article 340 TFEU is conferred by Article 256(1) and 268 TFEU. The General Court has jurisdiction over claims under Article 340, subject to the right of appeal before the Court of Justice.

The defendants: usually Union institutions against which the matter giving rise to liability is alleged.

Werhan v Council and Commission - the Commission had proposed a legislation complained of and the Council had enacted it. The Court rejected the Commission's claim that it was the Commission's role to represent the EU in all claims against it regardless of which institution was the subject of the allegation.

Kendrion v Court of Justice - an applicant sought damages from the EU in respect of the General Court's failure to give judgement within a reasonable time in the earlier case of **Kendrion v Commission**. GC as part of the CJEU was a defendant.

Article 340 serves as independent form of action, meaning that an applicant need not successfully annul an act under Article 263 TFEU. The aim is to obtain an award for damages, unlike other aims which are declaratory actions.

Any party may bring an action, but in practice all actions are brought by any natural or legal person. No standing conditions are attached and general time-limits apply i.e. 5 years from the occurrence of the event giving rise to liability. In case of private applicants, there has been limited success in brining such action.

The Meaning: General Principles Common to Laws of the Member States

Lutticke v Commission - Germany introduced a tax on the importation of powdered milk and other dried milk products. The applicants were attempting to persuade the Commission to bring an action under Article 258 TFEU against German government for its alleged infringement of Article 101 TFEU. When the Commission refused by defining its position in a letter addressed to the applicants, they sought to challenge under Articles 263 and 265 TFEU. Because of the rejection, an action was brought under Article 340 for a recuperation of damages for the losses caused to it by the Commission's inaction.

The applicants have to establish three requirements:
1. The wrongful act by the EU institution or by its servant
2. Actual damage suffered by the claimant
3. A link between the first two requirements

Wrongful Act
EU decision-makers have a significant element of discretion. Challenge of a legislative norm and individualised norm contain significant elements of discretion.

The norm may have not been annulled due to limited locus standi. No locus standi for challenging under Article 263 TFEU does not mean that the provision is not intended to protect a person's interest.

The original approach to what constitutes a wrongful act was defined in the **Schoppenstedt Case.**

"In the present case the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action… unless a sufficient flagrant violation of a superior rule of law for the protection of the individual has occurred".

For action under Article 340 to be successful, the applicant had to satisfy three criteria:
1. To show a breach of a superior rule of law
2. The rule of law infringed must be one for the protection of the individual
3. Breach is to be a sufficiently flagrant violation

This test was used to challenge legislative norms, and for administrative acts, liability would arise on the basis of illegality alone.

Adams v Commission - Adams alerted the Commission of violations by his employer Swiss pharma company 'La Roche' of competition law. The Commission disclosed documents to the company, revealing Adams as the informant. Adams was convicted of economic espionage. Commission's negligence gave rise to liability in damages.

1. Superior Rule of Law
There are three different types of norms:
1. Treaty Provisions
2. A Regulation is in Breach of a hierarchically Superior Norm i.e. Parent Regulation
3. Union legislation infringes General Principles of Law

2. The Rule of Law infringed must be one for the protection of the Individual
Here, one has to start of by making reference to **General Principles of Law**. In **Sofrimport v Commission** (C152/88) which concerned the prohibition of import licences for Chilean apples by EU Regulation, the CJEU imposed damages for breach of legitimate expectation of the importers that goods in transit would be protected against the sudden introduction of such measures.

In **CNTA v Commission** (C74/74) - in which regulation abolished compensation for the effect of exchange rate fluctuations on trade in seeds, the CJEU stated that there was a legitimate expectation that the compensation would not be withdrawn in relation to transactions which had already been entered into.

Treaty Articles
Kampffmeyer Cases - maize **i**mporters sought damages in respect of a Commission decision authorising Germany to suspend import licences which had been annulled by the CJEU (in **Toepfer** cases). The Commission failed to investigate fully before adopting the Decision, hence infringing on the rule of law contained in the Regulation, although the interests protected were of general nature and intended to benefit the interests of individual undertakings (importers).

3. Flagrant Violation
This is the account of the degree of harm suffered and the extent to which it is concentrated on a small group of victims, and the extent to which the law has been violated.

The severity of both these requirements has however over time been lessened. Early case law showed that sufficient flagrant violations were restrictively constructed, so it was difficult for the applicant to succeed. This is why in the **Bayerische NHL** cases the CJEU moved to require a 'sufficiently serious breach'. In this case applicant had to show that effect of the breach was serious, and not flagrant.

The Union may not incur responsibility for the damage caused by a legislative act on the sole condition that or has been found illegal or invalid. The EU would not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual occurred.

Reform on the Schoppenstedt Test
The CJEU has taken a less restrictive approach by aligning the criteria for assessing whether the breach is sufficiently serious with that which is laid down in the **Factortame III Case,** on state liability in damages.

Bergaderm v Commission (362/98) - the Commission adopted a Directive to amend another to restrict the use of certain chemicals in cosmetic. Bergaderm was the producer of Bergasol – a product which was contained in the list of the restricted chemicals. It brought an action under Article 340 claiming that the

emending directive had caused significant financial loss which resulted in liquidation. Since the Schoppenstedt applied only to general acts, plaintiff argued that since the Directive exclusively concerned the chemical in question, it must be regarded as an individual administrative act, rather than a general legislative act, so the Schoppenstedt test was not applicable.

In **Bergaderm** C-352/98 and **Antillean** C-390/95, the CJEU held that the crucial factor in determining the applicability of the Schoppenstedt test is the **degree of discretion** that the institution had in relation to the measure in question. This meant that the difference between a general or individual characteristic of a measure is not a decisive criterion. In the former case, the CJEU aligned principles dealing to state liability and EU liability, whole also departing significantly from its original Schoppenstedt approach.

Following this case, the rule of law infringed need not be a superior rule of law, but merely to confer rights on the individual. The test of whether there was a sufficiently serious breach is the degree of discretion enjoyed by the institution in question and not the arbitrariness of the act of the seriousness of the damage.

The New Approach
The right to damage would only arise if:
1. A rule of law intended to confer rights on the individual has been breached
2. The breach was sufficiently serious
3. There was a direct casual link between the breach of the EU and the damage sustained by the applicant

Serious Breach
The criteria indicative of serious breach are aligned with the **Factortame Case III,** on state liability:
- The complexity of the factual situations to be regulated
- The difficulties in the application or interpretation of legal texts
- The margin of discretion available to the EU institution which adopted the act at issue
- Whether infringement and damage cause was intentional or involuntary
- Whether any error of law was excusable or not

The legislative field involves wide discretionary powers. The union will not be liable unless the institution cornered has **manifestly or gravely disregarded the limits of the exercise of its powers** or **manifestly and gravely disregarded the limits on its discretion.**

Only in these cases will the breach be sufficiently serious. Where the EU institutions has a wide discretion, it is very unlikely that a breach will be sufficiently serious.

Case Law on Serious Breaches

My Travel v Commission - the Commission had a wide discretion. The General Court noted on the 'complex' and 'delicate' nature of EU competition policy and the correspondingly 'considerable degree of discretion' exercised by the EU and concluded that the Council and the Commission had not seriously disregarded the limits on this discretion.

Arcelor Mittal v EP and Council - the General Court noted in relation to the EU's environmental policy, the importance of it having a wide discretion: this broad discretion had not been manifestly or gravely disregarded by the Commission.

However, in policy areas where the EU has little to no discretion, any infringement of the rule of law will be regarded as sufficiently serious such as in **Commission v Fresh Marine Company** where the Commission had imposed anti-dumping duties on salmon companies. Since the Commission failed to check its amendment with the applicant, the Commission had exceed the limits of discretion.

Damage caused by EU Servants

Wrongful acts committed in the performance of the perpetrator's official function, subject to some exceptions, are liable for damages. The range of servants' acts for which the EU will accept responsibility is, however, limited.

Sayag v Leduc Case - this case maintains that there are some **exceptions.** An engineer employed by Euratom, Sayag, was driving his private vehicle en route to certain installations. He was taking Leduc, a private firm representative, with him. Following a road accident Leduc got injured and claimed damages against Sayag in the Belgian courts. It was claimed that Sayag, while driving his private car, was performing his duties and an EU servant. However, the Court held that this wrongful act had not been committed in the performance of his duties, because driving a car did not directly accomplish the EU's tasks.

Liability for Acts which are not Wrongful

Lawful legislative measures can also create 'winners and losers', and the legislator has to balance conflicting objectives and interests. In some Member states, losses created by lawful action could sometimes be recovered. EU's liability in damages for acts which are not wrongful has been mooted, but not yet accepted.

The CJEU has discussed some conditions under which no-fault liability could arise if such liability were to exist.

Here, one has to mention the **casual link.** The individual must show the sufficiently direct causation. Test for causation is strict. Causal link will be broken by the MS's action. In case of negligence on behalf of the applicant, the causal link may be broken or the award of damages may be reduced as in the **Grifoni Case.**

In **GAEC,** the EU provided the subsidy to the German beef and veal producers. The French farmers produced statistics to prove damage in respect of these

products, but they failed to show causation because there was evidence that prices for beef and veal decreased due to increase in imports before the said subsidies were granted.

Dumortier Cases - these set of cases demonstrate how difficult it is to prove that the loss was caused by the EU's actions. Here, refunds to maize grits producers were abolished while producers of maize starch (its direct competitors) continued to receive refunds. Maize grits producers sought EU to compensate: (a) loss of refunds, (b) lost sales, (c) the resulting factory closures by two producers and bankruptcy of one. Only damages in respect of the lost refunds were granted. This is essentially because actual damages need to be proved even if it is imminent damage which is foreseeable with sufficient clarity.

Staff Cases - these showed that damages may also be claimed for anxiety and injured feelings by the Union employee wrongfully dismissed or unfairly treated i.e. moral damages.

The Parties
There is no limitation on the number of persons bringing an action, and such action can be brought against the institution which is responsible.

Joint Liability
There can also be instances of joint liability of the EU and Member States. Where EU law requires national implementation, the loss could be in whole or in part as a result of that national measure.

National Courts have power to award damages against national authorities under national law. EU Courts have jurisdiction to award damages caused by EU institutions as per Article 340(2).

Krohn v Commission - the CJEU held that any national cause of action must be exhausted before the action could be brought before the EU courts, provided that the national action could provide an effective means of protection for the claimant's interests.

Time Limits
There is a five year limitation period which runs for the occurrence of the event. The Court has held that the limitation period cannot begin until all requirements for liability have materialised. In damage from legislative acts, time runs from the date when the damaging effects of the measure have arisen, and in damage from administrative acts or omission, when the applicant becomes aware of the act. In disputes arising from individual measures, the limitation period does not begin under damage has actually materialised.

Competition Law - Article 101

The European Competition Law Pillars are three:
1. **Anti-Competitive Agreements -** this deals with cartels and other forms of collusion (Art. 101)
2. **Abuse of Dominance -** this is a prohibition against dominant companies on a particular market abusing of their position
3. **Regulation Mergers/Acquisitions -** this deal with joint ventures i.e. two companies which were competing, but are now joint

Competition Law regulates the **market activity of business to allow for optimum level of competition,** requiring companies to act independently to each other, but subject to the competitive pressure of others.

The main goal is to **increase consumer welfare** manifested by:
- Better competitors in global markets: competition within the Union helps make European companies stronger outside the EU
- Encourages efficiency
- Increases productivity, quality, and choice
- To deliver the choice, and produce better products, business need to be innovative
- Reduces prices i.e. increases consumer benefit

Article 101 TFEU
Anti-Competitive Agreements happen between two or more persons or business and restrict competition so that only the entities involved can profit, such as:

1. Price Fixing
This is when firms agree to sell items at a higher price than they normally would if they were competing against each other.

2. Restricting Supply
This is when firms restrict the quantity of goods or services supplied with the intention of raising prices.

3. Market Sharing
This is when firms agree to operate only within agreed areas in the country.

4. Bid Rigging
This is when business agree, when bidding for a contract, which one will win and at what price

These are all regulated under Article 101(1) and are all **incompatible with the common market.**

Art. 101
1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention,

restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

This article is constituted of three elements:
1. The Legal Element - this involves agreements between undertakings, decisions by associations of undertakings, and concerted practices
2. The Jurisdiction Element - the effect on trade between Member States
3. The Competition Element - where the object or aim is the prevention, restriction, or distortion of competition

The Legal Element

a. The Notion of Undertaking

The Court of Justice has consistently defined undertaking as **"every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed".** Moreover, any activity consisting in offering goods or services on the market is an economic activity.

However, this has three consequences:
1. The status of the entity under national law is not decisive, meaning that, for example, an entity classified as an association or football club under national law may still have to be regarded as an undertaking. The same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity.
2. The application of the competition rules does not depend on whether the entity is set up to generate profit. Non-profit entities can also offer goods and services to the market. Where this is not the case, non-profit entities remain outside the scope of competition rules.
3. The classification of an entity as an undertaking is always relative to a specific activity. An entity which carries both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

Individuals acting as economic actors may constitute an undertaking i.e. opera singer, individual inventor. In contrast, it seems that employees action as such are

not undertakings for the purposes of the competition rules, although the actions of the employee may be attributable to the employer.

Undertaking can also be connected with sporting bodies and committees, or clubs with a commotion to sport. In the **1990 World Cup FIFA Case,** FIFA was found to be an undertaking. Although FIFA is a federation of sports associations which carried out sports activities, it also carried out **economic activities**, for example, conclusion of advertising contracts, exploitation of World Cup emblems and conclusion of television broadcasting contracts.

In the **Wouters Case,** the Court made it clear that members of a bar which offered, for a fee, services in the form of legal assistance carried out an economic activity and so were undertakings for the purposes of the competition rules.

Public bodies or corporations, even bodies which do not have an independent legal personality but which form part of a State's general administration, in so far as they offer goods or services in a given market (even if they involve the supply of public services or if the entity is subject to a public service obligation) are also considered to be undertakings.

Malta Bargains Ltd v Tourism Authority - it was held that the basic test is whether the entity in question is engaged in an activity that is an **economic one involving the offering of goods or services on the market.** The MTA is a public entity which has its functions under Chapter 409 of the Laws of Malta. The MTA does not offer products or services to the market, but carries out its powers according to the law, and is thus, not an undertaking.

This means that, **exercise of public powers is not an undertaking.** An entity may be deemed to act by exercising public power where the activity in question forms part of the **essential functions of the State** or is connected with those functions by its nature, its aim and the rules to which it is subject. It is acting in its capacity as a **public authority rather than an economic operator** i.e. the army, police-force, development of public land by public authorities, and the like.

Activities of a purely social nature are not an undertaking.

Moreover, case law provided a set of criteria under which certain activities with a purely social function are considered non-economic:

- The management under the control of the State of compulsory social security schemes pursuing an exclusively social objective, functioning according to the principle of solidarity offering insurance benefits independently of contributions and of the earning of the insured person.
- The provision of childcare and public education financed as a general rule by the public purse and carrying out a public service task in the social, cultural and educational fields directed towards the population.
- The organisation of public hospitals which are an integral part of a national health service and are almost entirely based on the principle of solidarity, funded

directly from social security contributions and other State resources, and which provide their **services free of charge** to affiliated persons on the basis of universal coverage.

Fenin v Commission - Fenin is an association of undertakings which sells medical goods and equipments used in hospitals. SNS, the organisation managing the Spanish National Health System, were in a dominant position on the Spanish Market for the purchase of medical goods and equipment, that they had abused that position by delaying payment of their debts.

The Court held that it is the activity consisting in offering goods or services that is the characteristic feature of an economic market, rather than the activity of purchasing goods or services. Additionally, the nature of purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounted to an economic activity. In the aforementioned case, the organisations were not engaged in economic activity as they operated according to the principle of solidarity, in that they were funded by social security contributions and provided services free of charge to their members. Accordingly, the purchasing activities which were linked to an activity which was not of an economic nature, must be classified in the same way. Therefore, SNS as a public sector body was not undertakings subject to EU competition law because it purchased goods for use in connection with an activity which is **not economic in nature**, (one which involves no remuneration and is purely social such as provision of health care services under a national social security system.

b. The Concept of an Agreement

In the **Trefilenrope Case,** the General Court declared that: "for there to be an agreement within the meaning of...[Article 101(1) TFEU], it is sufficient for the undertakings in question to have expressed their j**oint intention to conduct themselves in the market in a particular way**". There must be an alignment on the competition parameters available to them.

However, the form is of no importance: it can be a formal contract, signed or unsigned, a non-binding gentleman's agreements, an oral understanding, a protocol reflecting consensus, or even a set of guidelines issues by one undertaking and adhered to by another.

Subsections A to E of Article 101(1) provide a non-exhaustive list of example of agreements covered by Article 101(1). It is primarily aimed at classic cartels, known as **horizontal competition,** but it is also designed to deal with restrictive agreement between manufacturers and retailers, known as **vertical competition,** which affects the availability of goods and services.

Horizontal Competition

A **Cartel** is an arrangement between competing firms where instead of committing, they rely on each others' agreed course of action, which reduces their **incentives to provide new or better products and services at competitive prices.**

Unfortunately, in such a scenario clients end up paying more for less quality, and in fact, cartels are the **most serious infringement of EU Competition Law.** On the words of **Neelie Kroes: "Cartels are the worst obstacle to competition, and I intend to penalise firms that operate them and so jeopardise the very basis of our market economy and harm consumers. I am sending a very clear message to company directors that such practices are unacceptable**".

Most common are:

1. Price Fixing

For example, the Royal Bank of Scotland has been fined £28.6m for breaching competition law after sharing **confidential details about the** pricing of its commercial loans with rival staff at Barclays. This was done either over the phone or during social, client or industry events. This information was used by Barclays staff to set the pricing of its own loans, this suggests that some customers could have been charged more for their borrowing. This is an example of agreement not formally, but a simple agreement conducted socially.

An agreement with a competitor on any term of sale which has an impact on price is almost always illegal under EU competition law. Price-fixing is prohibited in both horizontal and vertical relationships.

Indirect agreements such as sharing confidential information can always constitute as an illegal act, such as the Royal Bank of Scotland Case. There are numerous examples of indirect agreements:

- Compare price lists before publication
- Exchange detailed information on each other's production costs
- Impose minimum prices on different distributors such as shops
- Information on prices, rebates and other price-related information
- Production or distribution costs
- Forecast capacity
- Investment plans

2. Market Sharing

Market sharing occurs when **competitors agree to divide or allocate customers**, **suppliers or territories among themselves** rather than allowing competitive market forces to work and, in turn, this hinders maintenance of EU countries as a single market.

Examples:

- Allocating customers by geographic area
- Dividing contracts by value within an area
- Agreeing not to compete for established customers, produce each other's products or services, nor expand into a competitor's territory.

The UK's Competition and Market Authority has fined two suppliers of specialist healthcare and manufacturing 'cleanroom' laundry services for breaking

competition law by agreeing not to compete for each other's customers in Great Britain. The CMA found that, one party served customers in an area north of a line broadly drawn between London and Anglesey, and the other party served customers south of that line, and each agreed not to compete against the other.

3. **Output Limitation**

Output restrictions may also be thought of as supply or acquisition restrictions. They occur when competitors agree to prevent, restrict or limit the volume or type of particular goods or services available.

The intention of businesses in restricting outputs is to create **scarcity** in order to either increase prices or stop prices from falling. Generally, a cartel needs the support of key market participants to achieve this aim.

Any business may independently decide to reduce output to respond to market demand, but **it is against the law to make an agreement with competitors** to coordinate restricting an output. Output restrictions reduce the available supply of particular goods or services which artificially increases demand for the product and so increases the price.

Bayer Case - Bayer made and sold a range of medicinal products under the brand names ADALAT. The prices of ADALAT in France and Spain were about 40% lower than those charged in the UK. Those price differences led Spanish and French wholesalers to export a large quantity of ADALAT to the UK, inflicting 230 million loss for the British subsidiary of Bayer.

The Bayer Group then changed its supply policy and refused to meet all orders placed by Spanish and French wholesalers to approximately the amounts needed for local use, as a means of preventing parallel exports originating from these two countries. This is an **anti-competitive agreement between Bayer and its Spanish and French wholesalers to limit parallel exports of ADALAT to the UK.**

In 1996, the Commission sanctioned Bayer for operating an export ban, to curb parallel imports of ADALAT to the UK. Even though there was no evidence that the wholesalers had agreed to Bayer's ban, the Commission applied the "contractual framework" criterion to find an agreement. Bayer appealed claiming that there was no agreement and that the conduct was unilateral so Article 101 could not apply. The GC acknowledged that there could be an agreement where one person tacitly acquiesces in practices and measures adopted by another. But that conduct in question could not be viewed as an "agreement" just because the wholesalers continued to trade with Bayer.

The very concept of an agreement rests on a meeting of minds between economic operators. The GC found that it was necessary to demonstrate a concurrence of wills. Moreover, it found that the Commission had failed to demonstrate that:

- Bayer imposed an export ban on the wholesalers
- Wholesalers were asked to accept Bayer's supply scheme;

- Wholesalers were punished by Bayer for exporting Adalat; and
- Bayer monitored the destination of the medicines it supplied its wholesalers with.

Summary:
- There was no 'invitation' on the part of the manufacturer
- Absence of direct or indirect reference to main distribution agreement;
- Undeclared anticompetitive objective and ability to reach such objective autonomously, without the cooperation of distributors; and
- No incentives to comply with the manufacturer's anticompetitive strategy (e.g. existence of a policy of threats and sanctions).
- There was no 'acceptance' on the part of the distributors
- No actual conduct of the distributors demonstrating acceptance (not even - tacit) of the manufacturer's unilateral policy; and
- No discussion with the manufacturer suggesting a mutual awareness of the impact of the measure

The Topps Case
Topps Co Inc produced collectible products such as Pokemon Collectibles. In 2000, there was a huge demand for the Pokemon collectibles, and prices between Member States differed significantly. Families in high-priced countries i.e. Finland had to pay twice as much to get the same stickers in families of a low-priced country i.e. Portugal.

Topps involved its distributors in a strategy designed to prevent wholesalers and retailers in countries where Pokémon products were sold at a comparably high price (e.g. Finland, France) from importing those products from low-priced countries (e.g. Spain, Portugal, Italy). The company initiated and co-ordinated a policy with the overall objective of preventing parallel imports of collectibles in the EU and also actively involved its intermediaries in monitoring the final destination of Pokémon products and tracing parallel imports back to their source. Additionally, it request and received assurances that stock would not be re-exported to other Member States. In some cases where intermediaries did no cooperate, the company threatened to terminate their supply.

Concerted Practice
Like an agreement, concerted practices have been interpreted broadly. Its meaning was first considered in the **Imperial Chemical Industries Case.** The Commission concluded that there was such a practice concerning price increases, and defined them as **a form of coordination between undertakings which, without having reached the stage where an agreement properly called-so has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.**

This is very difficult to prove since there must be a precise and consistent body of evident to justify the finding of a concerted practice.

T-Mobile Netherlands Case - the ECJ ruled that the presumption of a casual connected between a concerted action and conduct on the market can apply even if the concerted action is the result of a single meeting between the undertakings.

The difference between an agreement and a concerted practice has been captured by G. Monti: "**If two competitors enter into a contract to set the same price for their goods, this is an unlawful agreement; If two competitors meet and exchange information about their intended commercial policy, this is a concerted practice only when the parties take this information into consideration into account in devising their future commercial policy".**

Decision of an Association of Undertakings
An association is not defined by the Treaty. The CJEU has construed the concept of association of undertakings extensively: any body which represents the interests of its members is eligible for the qualification as an association of undertakings. The public law status of an association is irrelevant for the purposes of competition law.

As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general. In practice, it covers not only trade associations but also a myriad of bodies with statutory, disciplinary, regulatory, and executive bodies.

A decision must be understood as any initiative which is taken by the association and which has the object or effect of influencing commercial behaviours of its members i.e. resolutions, guidelines, rulings of administrative bodies, statutory rules, or oral exhortation.

The most common kind of decisions with which Article 101(1) is aimed are those of **trade associations** which lay down standards for the activities of its members. Standardisation of pricing or the way in which a service may be supplied may well fall foul of the provisions in Article 101. The body concerned does not, however, have to be engaged in commercial activity to be guilty.

The Court normally holds that a recommendation, even if it has no binding effect, cannot escape Article 101(1) where compliance with the recommendation by the undertaking to which it is addressed has an appreciable influence in the market in question.

Vertical Competition: other Anti-Competitive Agreements
Article 101(1) prohibits **agreements** and **concerted practices** which may affect trade between EU member states and which may have the object or effect of preventing restricting or distorting competition. EU competition law prohibits all forms of restrictive agreement and concerted practices between companies so that Article 101(1) applies to both:
- Horizontal Agreements

- Vertical Agreements i.e. agreements between undertakings at different levels i.e. manufacturer and distributor

The Concept of Effect/Object
An agreement needs to either have as their 'object' or 'effect' the prevention, restriction, or distortion of competition. The **object** of the agreement is to be found by an '**objective assessment of the aims'** of the agreement in question, being unnecessary to investigate the parties' subjective intentions. Where, however, the analysis of the object of the agreement does not reveal an obvious anti-competitive objective it is then necessary to conduct an extensive analysis of its effect on the market.

Alexander Italianer: "Drunk driving is always illegal, because all our experience tells us that it is extremely likely to cause harm. The risk of harm is sufficiently great to warrant an outright prohibition, rather than judging infringements on a case by case analysis".

This means that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.

BIDS Case - essentially, a number of processors agreed to exist the market in return for compensation. The parties argued that the purpose of the agreement was not adversely to affect competition or consumers, but to rationalise the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity. On the facts, the Court held that **it was apparent from the documents before the Court and the information provided that the object of the BIDS arrangements was to change appreciably the structure of the market through a mechanism intended** to encourage the withdrawal of competitors, improve the profitability of the firms on the market by reducing the number of players and eliminating excess production capacity, and that the **means put in place to attain the objective include restrictions whose object is anti-competitive.**

Examples of Vertical Arrangements and Practices:
- Fixing Minimum Resale Prices
- Imposing Export Bans
- Restricting cross-supplies between distributors within a selective distribution system

Roma Medical Aids Ltd Case - the company entered into arrangements with seven UK- wide retailers preventing them from (i) selling Roma-branded mobility scooters online and from (ii) advertising their prices online. The restrictions were not formally set out as contractual clauses but were rather contained in circulars sent by Roma to its retailer network. Roma monitored retailer compliance and threatened retailers with cessation of supplies if they did not comply. For competition law purposes, this constituted an infringing agreement or concerted

practice. Documentary evidence demonstrated that one reason why Roma introduced the Prohibitions was to **incentivise bricks and mortar retailers to stock and sell their products, on the basis that retailers would not face intra-brand competition from the internet and could therefore achieve a higher margin than would otherwise be the case.**

When a restriction does not reveal obvious harm to competition, the next question is whether it restricts competition by **effect.** This is the jurisdictional requirement.

Moreover, only agreements that are capable of affecting trade between EU Countries to an appreciable extent are subject to Article 101. If there is no such effect on inter-state trade, then any competition issues should be a matter only for domestic competition rules.

An agreement concerning exports or imports between member states is an obvious example of an agreement that is likely to affect trade between member states. However, an effect on trade between member states can be found even if all the parties to the agreement are located in one-member state. It is not necessary to show that each restrictive clause (or the participation of any particular party) has an effect on trade between member states; it is sufficient if the agreement, viewed as a whole, has or is likely to have that effect.

The concept of trade is not limited to traditional exchanges of goods and services across borders. It is a wider concept covering all cross border **economic activity**, including establishment.

The Leniency Policy
This policy was created to fight cartels. For cartel infringements, the largest fine imposed on a single company is over 896 million euros, while for a single cartel, the largest fine imposed on all its members is over 1.3 billion euros.

In 2006, the Commission revised its guidelines for setting fines in competition cases. These revised guidelines will often lead to fines for cartels being significantly higher than previously.

The leniency policy offers companies involved in a cartel:
1. Either total immunity from fines
In order to obtain total immunity under the leniency policy, a company which participated in a cartel must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved in the cartel. If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement.

Moreover, the company must also fully cooperate with the Commission throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately.

2. Reduction of fines which the Commission would have otherwise imposed
This is only if they provide evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.

3. Benefits for Commission
This is order to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilises the operation of existing cartels as it seeds distrust and suspicion among cartel members.

Competition Law - Article 102

Article 102 TFEU
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited, in so far as it may affect trade between Member States.

Such abuse may, in particular consist in:

- **(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions**

- **(b) Limiting production, markets or technical development to the prejudice of consumers**

- **(c) Applying dissimilar conditions to equivalent transactions with other trading prices, thereby placing them at a competitive disadvantage**

- **(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts**

The prohibition in Article 102 is fundamentally different from Article 101 in that there is no requirement for there to be an agreement or concerted practice time between the participants in the market. Conduct by a single company may suffice, or even two companies which are 'collectively dominant'.

Another major difference is that, unlike Article 101, **Article 102 does not apply to all companies**. Only companies that are dominant in a relevant market are subject to the higher standards of competitive behaviour. Dominant companies must not abuse their dominant position.

Furthermore, Article 102 is less certain in its area of application than Article 101. A price-fixing agreement entered into between competitors with even modest market shares will be a serious breach of Article 101. It may be relatively easy to prove, and if the evidence is sufficiently clear, there is unlikely to be much defence.

On the other hand, Article 102 will routinely **involve substantial disputes** (and more analytical assessments) regarding the following questions:

- **What is the relevant market?**

In order to ascertain whether a firm is dominant for the purpose of Article 102, complex questions about whether one product is in the same market as another will usually need to be examined in detail.

- **Is the undertaking dominant?**

Once the relevant market has been defined, market shares must be determined, which, again, may be far from easy, depending on the availability of data.

- **Is the conduct complained of an abuse?**

Dominant players are permed to compete actively. The line between permissible and undesirable conditions is uncertain - for e.g. a price reduction following production economies and unlawful predatory pricing may be unclear.

According to Article 102, it may be deemed an abuse of market power when a dominant undertaking makes: **"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage**".

Heathrow Airport Limited Case (2011) - HAL was the owner and operator of Heathrow Airport, as part of which it operates a number of car parks on airport grounds as an 'on-airport' car parking provider. Its trading partner, P&M, offer valet parking services activities in Terminals 1,3, and 5 in competition with HAL.

Market - it was presumed that the upstream market was the "Facilities Market" and that HAL was dominant in it. The Facilities Market is the provision of access to Heathrow's facilities, including its roads and forecourts.

Dissimilar Conditions - the relevant transaction was access to Heathrow facilities for the purpose of conducing meet and greet activities. There would be a dissimilarity between the basis on which HAL and Purple/Meteor have the benefit of the forecourt; Purple and Meteor would operate from the car park for all activities. **HAL** had a permit, for **no payment**. **Purple and Meteor** would have to operate from the car park, for **a charge**.

Material Dissimilarity - there was a charge, which was not insignificant, and the position from which the two services were offered was different. The differences between operating from the forecourt and operating from the car parks was not merely geographical ones with no consequences. They affected the nature of the service, both in real terms and in terms of customer perception.

The Court concluded that if P&M were required to operate from the car-parks, and HAL was left on the forecourts, this would amount to anti-competition. This is because of multiple reasons.

The proposed changes would leave HAL as the **only** meet and greet supplier on the **forecourts**. Being on the forecourt confers very **substantial advantages** to an operator when compared with those who are operating from the car park. Customers prefer it, and such a service contains important elements which the consumer seeks to have when compared with a car park-based service.

The off-airport operators would not be able to compete on quality in the car parks as they would not have the same product to sell. It was not apparent that, in those circumstances, they would be able to compete on price either as it was not clear what the future pricing of the short-stay car parks would be, but in any event they would still be selling a fundamentally different product.

Anti-Competitive Effect on Consumer
In such a scenario, the consumer would not find any competition. The result would be an effective monopoly on the meet and greet service, and a serious risk to competition as far as the consumer was concerned. The customer would only have one product to buy; HAL could charge monopolist prices. Those prices would be higher than the off-airport suppliers' current prices; and the meet and greet customers would have to pay those prices if they want that distinct product.

This would operate to the detriment of the consumer who would be very likely to have to pay significantly higher, and unconstrained, prices for the forecourt meet and greet service.

Dominance
Competitive Pressure from rival firms usually keeps firms honest, preventing them from charging prices which are excessively above costs. Markets on which a firm occupies a dominant position are presumed to be insufficiently competitive. No further restrictions of competition are tolerated.

Without competitive pressure, a dominant firm has market power and thus, would be able to profitably raise prices and restrict output.

It is perfectly legitimate for a firm to hold a dominant position under Article 102, since such article prohibits the abuse of such position, and not the mere holding of that position.

The Courts have shown in case law that, regardless of the reasons why a firm holds a dominant position, it has a special responsibility (which is owed to the market and consumers) not to allow conduct to impair genuine and healthy competition in the common market.

The dominant position under Article 102 does not necessarily refer to a monopoly but also to undertakings with certain degree of market power.

The dominant position in EU Law is described as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers”.

In the Guidance Paper on Article 102, the European Commission started with reference to substantial market power while linking it to the economic definition of substantial market power as the capability of profitably increasing prices above the competitive level for a significant period of time rather than identifying dominance with the ability to prevent effective competition.

Therefore, the test is the market power and the ability to act independently on the market, rather than whether the particular size of the market share exists.

Market Share
Neither the law, nor case law, refers to any threshold above which an undertaking must be considered to be dominant. As in the **Michelin Case,** while market shares are not in themselves determinative of dominance, they are of significant importance.

The Commission makes it clear, in Article 102, that market shares as only a **useful first indication** of the market structure.

Shares which are over 70% are dominant, between 50% and 70% are presumed dominant, while under 40% dominance is unlikely.

Notwithstanding, even above the 50% threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 %) may not be a good proxy for market power.

Extra Factors for Assessment
Competitive Constraints
This is existing market dynamics and the differentiation of products, as well as considering the development of market shares over time.

Expansion or New Entry
Constraints imposed by the threat of expansion of existing competitors and entry by potential competitors, taking into account barriers to entry or expansion, the likely reactions of the allegedly dominant undertakings and other competitors and the risks and costs of failure. Barriers to entry or expansion could be legal (for example, patents, tariffs or quotas) or economic (for example, economies of scale, access to inputs, technologies and established distribution and sales networks). The Commission notes that the dominant undertaking's own conduct could create barriers to entry, for example, where it has made significant investments which entrants or competitors would have to match.

Countervailing Buyer Power
A firm may have substantial Carey share, and a number of other advantages over its competitors, and yet still not have a dominant position if its customers have such power themselves that the undertaking cannot **behave to an appreciable extent independently of its competitors and its customers.** However, if the Commission stated that buyer power may not be enough of a contrast if only a segment of customers are shielded from the market power of the dominant undertaking.

Brand or Customer Loyalty
At one end of the spectrum is the international consumer product brand, registered as a trade mark around the world. Even a brand as strong as "Coca-Cola" has not prevented competitors from entering the market. A more subtle but potentially even stronger factor may be customer loyalty. In the engineering sector, for

example, a customer looking to purchase expensive equipment, which he hopes to keep in service for many years, may be reluctant to order from a new entrant rather than a long-established and reputable concern.

Access to Markets
Another entry barrier may exist if, for example, an allegedly dominant firm is vertically integrated and its distribution operations cannot economically be duplicated. Similarly, the existence of longterm contracts between a supplier and its customers may act as a barrier to entry.

Excess Capacity
This can work in multiple different ways. For example, if A (allegedly dominant) knows that B has excess capacity, this may deter A from seeking to increase its prices since B may bring its excess capacity into production. This, therefore, militates against A being dominant. On the other hand, if A has excess capacity, this may deter B from increasing capacity (or entering the market) since, if B does so, A will bring its excess capacity into operation. This, therefore, militates in favour of A being dominant.

A Precondition - a Relevant Market
In practice, market power can only exist in relation to the supply of acquisition of a particular class of goods or services. Thus, the inquiry under Article 102 begins with an assessment of the market share of the firms concerned, which, in turn, requires the relevant market.

The Necessary Pre-Condition - “For the purposes of Article 102, the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market.”

The relevant market is established by a combination of the market’s two dimensions:
- The relevant **product** market: “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use”.
- The relevant **geographic** market: “comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.

The test involves looking at the narrowest set of products which might plausibly form a market, and asking what would happen if a hypothetical monopolist of that set of products sought to increase the price of the products by a small by significant, permanent amount.

Would customers then switch to the closest available substitute products? If not, that set of products forms the relevant product market. If, on the other hand, customers would switch to other products in the event of such a price increase, the relevant product market includes those other products. The process is continued until no further products are added, as they are not effective substitutes, at which point the relevant product market is identified.

Demand-side Substitution
This is when there is a switch from one product to another in response to a change in the relative price of those product. Even if there are no alternatives to a particular set of products currently available to consumers, the products concerned may still not necessarily constitute a relevant product market. This is because of the possibility of **supply-side substitution.**

If other producers respond to an increase in the price of a set of products by switching existing assets, such as buildings, machinery into the **production or the products whose price has risen**, then this increased level of supply may render any attempted price increase unprofitable, without the need for any demand-side substitution.

Abuse
The Commission has explained that such behaviour is prohibited under competition law because it damages true competition between firms, exploits consumers, and makes it unnecessary for dominant firms to compete with other firms on the merits.

Broadly, the categories of abuse can be grouped into
(i) **exclusionary abuses** (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition such as predatory pricing)
(ii) **exploitative abuses** (where a dominant firm uses its market power to extract rents from consumers such as excessive prices).

The former are by far the most common type of abuse. Dominance, abuse, conduct, and effect can be in different markets. When dealing with the concept of abuse, one must always start with the wording of Article 102 which provides a non-exhaustive list of examples of abuse.

The concept of abuse is objective and conduct may be abusive even in the absence of any intention to exploit customers or exclude competitors. A number of abuses have been based on what can be seen to be a per se approach, without a need to demonstrate their actual effect on competition. Although the concept of abuse has not been defined as such, we can get a good idea by considering how it has been applied by the EU Courts and the Commission.

The Commission's own view on the meaning of the concept of abuse is that the concept refers to **anti-competitive business behaviour of a dominant firm which is intended to maintain or increase its position.**

The Hoffmann-La Roche Case - the Court defined the concept of abuse as an objective concept relating to the behaviour of an undertaking in a dominant position, which is such as the influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

By Nature Abuses

In the **Intel Case,** by nature abuses remain presumptively unlawful, but if a dominant firm submits evidence showing that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive.

Outside the by-nature, **the Commission has to perform a full-fledged effects analysis.** An effects analysis for exclusionary conduct requires proof of at least the following four elements:

1. The dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets. The abusive conduct must create barriers to independent competition.
2. The abusive conduct must cause the anti-competitive effects.
3. The anti-competitive effects must be reasonably likely. If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place.
4. The anti-competitive effects must be sufficiently significant to create or reinforce market power.

Price Abuse Red Flags

- **Excessive Pricing**: charging prices which are unfairly high
- **Predatory Pricing**: setting prices at unfairly low levels with the object of eliminating a competitor
- **Discriminatory Pricing**
- **Fidelity Pricing**: making the prices of goods or services, of the availability of discounts, dependent on retaining all or part of a customer's business
- **Margin Squeeze**: charging a price on the upstream market which, when compared to the price the dominant undertaking charges on the downstream market, does not allow an as-efficient competitor to trade profitably in the downstream market on a lasting basis.

Non-Pricing Abuse Red Flags

- Tying/Bundling
- Refusal to Supply
- Refusal to Supply Goods or Services
- Long Term Agreements
- Inefficiency

- Abusive use of litigation

United Brands Case: Practical Application of the Theory
The case relates to alleged abuses of a dominant position by US Co. United Brands. UBC was the main supplier of bananas in Europe, using mainly the Chiquita brand. UBC forbade its distributors/ripeners to sell bananas that UBC did not supply. Also, it charged a higher price in different Member States, and imposed unfair prices upon customers in Belgo-Luxembourg Economic Union, Denmark, The Netherlands, and Germany. United Brands supplied these bananas unripe and in bulk to distributor/ripeners operating in various EU countries. The distributors would buy them while still green, ripen them using their own facilities and distribute them to retailers across their national markets:

1. The first abuse identified by the Commission was United Brands' restriction on its distributors from reselling its bananas while still green. Since ripe bananas have short shelf lives, the effect of this restriction was to prevent distributors from selling in other countries.
2. The second abuse was the refusal to supply **bananas to Olesen, along-standing distributor in Denmark.** United Brands argued that this refusal was justified by Olesen's decision to promote a rival brand (Dole) to the detriment of the sales of Chiquita bananas.
3. The third abuse was the differential pricing charged by United Brands to distributors in different member states. United Brands argued that the differences were justified because the prices applied to distributors were directly linked to the final market price for bananas in each country.
4. The Court found that this argument provided no justification or discriminatory prices, which were imposed by United Brands, and affected cross-border trade, thus amounting to abuse irrespective of any commercial logic underpinning them.

Relevant Market
The ripening of banana takes place throughout the whole year. Throughout the year production exceeds demand and can satisfy it at any time; no unavoidable seasonal substitution.

The studies of the banana market on the Court's file showed that on the latter market there is no seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits i.e. peaches and table grapes.

As far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second there is only a relative degree of substitutability.

The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick.

As far as prices are concerned studies show that the banana is only affected by falling prices of peaches and table grapes during the summer months and mainly in July and then by an amount not exceeding 20%.

Although it cannot be denied that during these months and some weeks at the end of the year this product is exposed to competition from other fruits, the flexible way in which the volume of imports and their marketing on the relevant geographic market is adjusted means that the conditions of competition are extremely limited and that its price adapts without any serious difficulties to this situation where supplies of fruit are plentiful.

It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of fresh fruit on the market and that even the seasonal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability.

Dominance

The main facts relied on to confirm United Brands' dominant position were:

- United Brands' had control of (or easy access to) all its inputs: it is "vertically integrated to a high degree" (paragraph 70) with effective control over all stages of transport and ripening (paragraph 71, paragraphs 78-86), "owns large plantations" (paragraph 72), "can obtain supplies without any difficulties from independent planters" (paragraph 73) is sufficiently diversified to withstand natural disasters (paragraphs 75-76).

- These capabilities have enabled it to develop Chiquita as a trusted must-have brand, thereby placing distributors and ripeners in a degree of dependency. United Brands had "attained a privileged position by making Chiquita the premier banana brand name on the relevant market with the result that the distributor cannot afford not to offer it to the consumer" (paragraph 93).

- The robustness of United Brands' business has enabled it to withstand competitive attacks by rivals (paragraph 121). Given the inherent challenges of entry into the market (paragraph 122), this means that new entrants "come up against almost insuperable practical and financial obstacles" (paragraph 123).

EU Merger Regulations

This regulation lays down the conditions under which the Commission or the NCAs i.e. National Competent Authorities have jurisdiction over **concentrations.** Generally, concentrations with an EU dimension fail to be investigated by the Commission, whereas those without an EU dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules.

As an exception to the rule, there are referral procedures under which parties can engage in pre-notification contacts with the authorities with a view of relocating jurisdiction with the Commission and the NCAs.

Concentrations falling under the Merger Regulation must in principle be notified to the Commission and generally cannot be implemented unless and until the Commission declares the transaction compatible with the internal market. This is known as a **standstill obligation**.

All EU Member States have national merger controls, with the exception of Luxembourg. Of such control regimes, all require mandatory notification of qualifying transactions to the relevant authorities, and most require suspension of completion pending a clearance decision, with provisions for harsh sanctions in case of default. Moreover, each merger authority works to its won timetable.

Merger Legislation
Merger Control Legislation at EU Level is established in **Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings** (the Merger Regulation) and in Commission Regulation (EC) No 1033/2008 implementing the Merger Regulation (**the Implementing Regulation**).

They have been complemented with many interpretative notices, guidelines and practice rules, such as the **Commission Consolidated Jurisdictional Notice.**

Company Mergers have lost of disadvantages: synergy, growth (horizontal mergers), increase supply-chain power (vertical mergers), improved financing, and increased capabilities.

Some combination may reduce competition in the market, usually by creating or strengthening a dominant position.

Consumers may be harmed by higher priced, reduced choice, or less innovation.

The focus is on the impact of mergers on **future competition** rather than how competition has evolved in the past, whether the benefits of combination outweigh the adverse impact of the combination, if any.

The assessment must take into account of likely future industry changes in oder to assess properly the impact of a particular transaction.

Merger Control involves a **market forecast of how competition will develop in the future.** Factors considered by the Commission include:

- Actual and potential level of competition in the market & extent of barriers to entry into the market
- Degree of countervailing power in the market
- Likelihood that the combined parties would be able to significantly and sustainably increase prices/profit margin
- Extent of effective competition & likely to sustain in a market
- Extent to which substitutes are available or are likely to be available in the market
- Market Share of the persons or enterprise in a combination, individually and as a combination

Commission approves Acquisition of Momondo by Priceline (M.8416)

Priceline is an online travel agents and travel metasearch site i.e. booking.com/ priceline.com, while **Momondo** is primarily active in the operation of metasearch sites, under the brands CheapFlights and Momondo.

The Commission's investigation found that the Companies' metasearch activities are largely geographically complementary in the EEA, as Priceline has limited activities in the Nordic countries, where Momondo has a strong market position. Conversely, in countries like Germany and Austria, Priceline's brands have a stronger market position and Momondo is weaker.

This merged entity would be competing with several other global metasearch operators, such as Skyscanner, Trivago, TripAdvisor, Google (through Google Hotels and Google flights), as well as by operators of smaller, regional or national, metasearch sites.

They entered into a merger agreement and began pre-notification discussions with the Danish NCA. The transaction was notified on 7 February 2014 and approved in May.

In accordance with the Merger Agreement, immediately after its signature, KPMG Denmark gave notice to KPMG Int. to terminate their cooperation agreement with effect from 30 September 2014. The Danish NCA decided that KPMG Denmark's termination of the cooperation agreement constituted a premature implementation of the merger because this was a step to implement their merger before it was approved.

According to the ECJ, a transaction has been implemented when there is a **change in control of the target business**. If a change in control takes place before the transaction is approved, the merging parties have "jumped the gun" on the **prohibition on implementing** the deal and are likely to be subject to a fine.

The ECJ found that the termination of the cooperation agreement did not result in a change in control, despite the effects that the termination may have had on the

market. The termination was likely an ancillary and preparatory measure for the transaction and not its implementation.

Fines which provide incorrect and misleading information: for example, in a case, **Facebook** had allegedly provided the Commission with incorrect information on the acquisition of **WhatsApp**. During the merger process, Facebook claimed it was technically impossible to combine user information from Facebook and WhatsApp automatically. However post-transaction, WhatsApp announced that it would begin sharing user information with its parent company, admitting that personal details such as phone numbers and device information would now be used to target advertisements and improve products on Facebook.

Forms of Concentration
Article 3 of the Merger Regulation states that: "A **concentration** shall be deemed to arise where a change of control on a lasting basis results from: (a) **the merger of two or more previously independent undertakings or parts of undertakings**, or (b) the **acquisition, by one or more persons already controlling at least one undertaking**, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings".

The creation of a joint venture performing on a lasting basis, all the functions of an autonomous economic entity shall constitute a concentration within the meaning of Paragraph 1(b).

Types of Mergers
1. Horizontal Merger
This happens when both companies are in the same-line of business, which means they are usually competitors.

Example: when Disney bought LucasFilm. Both companies were involved in the production of film, TV shows.

2. Vertical Merger
This happens when two companies are in the same line of production, but stage of production is different.

Example: Microsoft bought Nokia to support its software and provide hardware necessary for the smartphone

3. Conglomerate Merger
This happens when the two companies are in totally different line of business. This kind of merger mostly takes place in order to diversify and spread the risks, in case the current business stops yielding adequate returns.

Example: Samsung, the electronics giant also makes military hardware, apartments, ships – it also operates a Korean amusement park.

Concentration
This is when via mergers, at least two previously independent undertakings amalgam into one new undertaking, or one undertaking is absorbed into another.

Forms of Concentration
Acquisitions of (sole/joint) Control - this is when one or more undertakings acquire direct or indirect control of the whole parts of one or more undertakings. This can happen by purchase of securities, assets, by contract, and the like. This is known as change of control i.e. **acquisition of de jure exclusive control.**

The creation of a full-function joint venture is also a concentration. A prime example can be KIA, FIAT, and OPEL all under Cars International. This is **acquisition of de jure joint control.**

The Concept of Control
Control is **the ability to exercise decisive influence over an undertaking.** This gives way to certain rights such as decisive influence on business strategy, appointment of key personnel and management, validation of the annual budget, validation and modification of the business plan, and decisions regarding main investments.

Characteristics of a Decisive Influence
- Holding a majority of voting rights at shareholder meetings and other management bodies
- Acquisition of assets or on a centrical basis i.e. landing spots at the Berlin Airport by EasyJet
- Holding a minority shareholding with veto rights on strategic business decisions (de jure control) or holding a minority shareholding granting the possibility of having a veto on strategic business decisions due to factual elements such the number of other shareholders and/or their low participation (de facto control)
- Economic dependence i.e. long term supply contracts

Microsoft/Yahoo Case - the concept of Concentration (M.5727)
The Commission's decision approving Microsoft's acquisition of Yahoo!'s Search Business (including internet search and search advertising) contains an interesting application of the definition of a concentration under the Merger Regulation.

The two companies entered into a license agreement and a search and advertising services and sales agreement, thus, no acquisition of shares/mergers.

The agreement stated that Microsoft will acquire a 10 year exclusive license to Yahoo!'s core search technologies and will have the right to integrate these technologies into its own web search platform. In addition, Microsoft agreed to hire more than 400 Yahoo employees. Yahoo will exclusively use Microsoft's search engines on Yahoo's sites, even though Yahoo retains the right to design the user experience when presenting internet search results received from Microsoft.

The agreements did not cover any other aspect of the companies' businesses, so each company's web properties and products, email, instant messaging and display advertising would have remained separated.

Given that the business transferred is not incorporated, the Commission needed to investigate whether the agreement gives rise to a concentration, in that the transferred assets constitute a business with a market presence to which a turnover can be attributed, and there is a change of control over these assets on a lasting basis.

Firstly, even though Microsoft would not acquire ownership over Yahoo's search technology, the **Commission considered that a 10-year license is sufficient to be considered as a transfer of assets**, especially since the license is exclusive as to Yahoo, as well, in that Yahoo will not be able to use its technology to operate a separate search business.

Second, the fact that Microsoft will hire **400 Yahoo employees** and that all Yahoo customers will be **migrated to Microsoft further** contribute to the Commission's conclusion that the **agreements constitute a transfer of a business**. Last, the business generates **revenues** which will now accrue to **Microsoft**, given that Yahoo will be contractually obliged to exit the search and advertising markets.

The Commission concluded that as a result, Yahoo is de facto definitively divesting its ability to compete in internet search and search advertising.

Merger Regulation excludes the following categories of transactions from its application:

- Certain acquisitions of securities by banks and other financial institutions on a temporary basis
- Certain acquisitions of assets by a liquidator or other office-holder in the context of insolvency proceedings
- Certain acquisitions by financial holding companies i.e. investment purpose only companies
- Intra-Group restructurings

Th definition of control is very broad. It is sufficient that one party acquires he possibility of **exercising decisive influence over another company** as per **Article 3(2) of the Merger Regulation.**

Decisive influence may arise by the **ownership** of all or part of the company's assets, or of **rights** which confer decisive influence on the **decision-making process by the company.**

Control can be exercised on a de facto or a legal basis, regardless of the size of the shareholding concerned. Additionally, **Sole control** exists where a single shareholder is able to exercise decisive influence over a company, whereas **joint**

control arises where two or more shareholders together are able to exercise decisive influence.

An acquisition of sole control will mean that there is a concentration in the form of a merger, while an acquisition of joint control means that the concentration is in the form of a joint venture.

Legal Basis v De Facto Basis
There are various factors which may be relevant in deciding whether de facto control exists. Therese are some examples which show that there is de facto control:
- A shareholder is highly likely to achieve a majority at shareholders' meetings, or if the remaining shares are widely dispersed
- A minority shareholder has the right to manage the activities of the company and to determine its business policy
- Minority shareholders have strong common interests which would mean that they would not act against each other

The Electrabel Case - in 2008, Electrabel, a Belgian electricity company which is part of the French group, Suez, notified to the Commission a concentration consisting in the acquisition of de facto sole control over Compagnie Nationale du Rhône ("CNR"), the second largest electricity operator in France. One year later, the Commission found that Electrabel had actually acquired de facto sole control over CNR as from 23 December 2003 and it imposed a fine of EUR 20 million on Electrabel.

Under the EU merger control system, a concentration with a Community dimension must be notified to the Commission before its implementation. In addition, such a concentration cannot be implemented both before and after notification until it has been declared compatible with the common market. This latter provision is also referred to as the 'suspension obligation' or 'standstill obligation' which is Article 4(1) of the EU Merger Regulation.

In imposing a significant fine, the Commission sent out a clear message to the effect that violating the standstill obligation is, by its very nature, a serious infringement which undermines the effectiveness of Community provisions on the control of concentrations.

Prior to the acquisition of shares, there were three main shareholder categories: **EDF, CDC, Public Local Entities**.

Shareholding
On December 2003, when Electrabel acquired from EDF a number of shares in CNR, it increased its shareholding to approximately **50%** which effectively resulted in approximately **48% of the voting rights.** The second main shareholder was CDC, which held 29.43% of the shares, and 29.80% of the voting rights. The

remaining was dispersed, since about 20% of the shares and the voting rights were shared between around 200 public local entities.

One has to also analyse the management of CNR. Its Board of Directors comprised two representatives of Electrabel out of three, thereby giving **Electrabel a majority on the Board**. This was facilitated by a shareholder agreement signed by CDC and Electrabel which provided that, inter alia, CDC and Electrabel would vote together when appointing the representatives at the Supervisory Board and at the Board of Directors of CNR. At the time, Electrabel was also the **sole industrial shareholder** of CNR and, as such, had taken over the central role previously held by EDF in the operational management of CNR's power plants and in the marketing of the electricity produced by CNR.

Thus, although Electrabel did not acquire de jure sole control over CNR since, inter alia, it did not acquire a majority of the voting rights of CNR, a minority shareholder can nevertheless acquire sole control on a de facto basis. **The Commission considered that this is especially the case when the acquirer is highly likely to achieve a majority at the shareholders' meetings.**

In accordance with the Commission's decision-making practice, the shareholders' meetings have to be analysed over a period of at least the last three years. On the basis of the attendance rates at the shareholders' meetings of CNR of the preceding years and the fact that the remaining shares of CNR were widely dispersed, Electrabel – with 48% of the voting rights - was assured of a stable majority at the shareholders' meeting of CNR as from December 2003. Moreover, Electrabel had been the sole industrial shareholder of CNR and, as such, had assumed the central role previously held by EDF.

All these elements constitute a body of evidence showing that Electrabel's de facto control over CNR has been easily foreseeable in 2003.

Concept of Joint Control

Joint Control exists when two or more undertakings have the possibility of exercising **decisive influence** over another undertaking: the joint venture. The essential feature of joint control is the **possibility of a deadlock** arising from the power of two or more parent companies to veto proposed strategic decisions, which effectively requires them to reach a common understanding in determining the commercial policy of the joint venture. If this situation does not exist, and instead one parent company can effectively take all the major decisions by itself, **there is no joint control.**

The most straightforward example of joint control is where there are **two participants with equal voting rights in the joint venture**. In this situation, each participant exercises decisive influence over the joint venture, as the consent of both is required for any decisions to be taken.

Joint control **may also arise where the joint venture partners do not enjoy equal shareholdings, but decision-making is by majority voting**. In Alba/Beko/Grundig, for example, all decisions had to be taken by majority voting pursuant to the shareholders agreement of the joint venture's partners. In practice, however, no decision could be taken without agreement between the board representatives of the joint venture's partners. In these circumstances, the Commission found that both parents had the possibility to exercise decisive influence over the joint venture, and so had joint control.

Concentration in Joint Control
In Case No COMP/M.5473 - Fincantieri/ABB/JV , each of the parties held 50% of the shares and voting rights in the joint venture. The SHA did not confer any particular preferential right to either ABB or Fincantier.

In Case No COMP/M.5781 – Total Holdings Europe SAS/ERG SPA/JV, ERG held (51%) and Total Holdings held (49%). Pursuant to the shareholders agreement, each shareholder would appoint respectively 3 members of the Board of Directors where decisions were validly taken with the affirmative vote of at least 4 Directors out of 6. A majority of 5 Directors would be instead required for the adoption of resolutions on reserved matters such as those relating to the approval of the business plan, budget, and the like.

Fully Functioning
As already established, in order to qualify as a **concentration, a joint venture** must perform "on a lasting basis all the functions of an autonomous economic entity" as per Article 3(4) of the Merger Regulation.

A joint venture which satisfies these requirements is referred to as a "full-function" joint venture. This is the case regardless of whether the joint venture is a wholly new operation or whether it is formed from assets that the parents previously owned separately.

According to the **Commission's Consolidated Jurisdictional Notice** (the Notice), a joint venture will be **full-function** if it performs the functions normally carried out by an undertaking operating on the same market in which the joint venture operates.

The Requirements
The joint venture must have **management** dedicated to its day-to-day operations and access to sufficient **resources**: assets, personnel, and financial resources in order to operate its business activity independently. It must have the ability to conduct its **own commercial policy**, have activities that go beyond one specific function for the parents, have no significant purchase or supply agreements between it and its parents which would undermine its independent character; and be of a sufficiently long duration as to bring about a lasting change in the structure of the undertakings concerned.

In **Case M.5173 STM/NXP/JV,** the Joint Venture obtained its raw materials, which represented up to 85% of the manufacturing cost of the product, from the parents. The parents had a first option to supply raw material, as long as it was on competitive market terms. The minimum percentage to be obtained from the parents would be gradually decreased. Notwithstanding, the **JV was in full-function, as it would have its own assembly, testing, sales, marketing and R&D teams and it was common in the sector to source raw materials from specialised manufacturers.**

Austria Asphalt Case (C-248/16) - the question in this case was whether there is a concentration under a merger regulation when there is a change from sole to joint control over an existing undertaking, only if the newly formed joint venture is a full-function.

In 2015, Austria Asphalt and Teerag-Asdag (TA) notified a transaction to the Austrian NCA. **Austria Asphalt intended to acquire 50% of the shares** in an asphalt mix plant from its sole owner, TA. The business of the plant was limited to supplying goods to its current parent company - and, in future, to its two parent companies - and it does not otherwise have any significant presence on the market.

The Austrian Supreme Court had to decide whether the acquisition of joint control over the asphalt plant required notification to the EC. It referred the matter for a preliminary ruling on this point.

<u>The Preliminary Reference</u>
The CJEU found that the wording of Article 3 of the Merger Regulation is unclear on the referred question. Article 3(1)(b) EUMR states that a notifiable concentration arises where an undertaking acquires, on a lasting basis, **"direct or indirect control of the whole or parts of one or more other undertakings"**. Under Article 3(4), the creation of a JV amounts to a concentration if, on a "lasting basis", it performs **"all the functions of an autonomous economic entity".** The Notified Transaction concerns a lasting change in control, seemingly falling under Article 3(1)(b). But it also relates to a JV, making it a notifiable concentration only if it is fully functional (Article 3(4) EUMR).

As such, the Commission's legal service had argued that the present joint venture amounted to a notifiable concentration. However, the CJEU interprets the "creation of a joint venture" of Article 3(4) to mean the **creation of an undertaking controlled jointly by at least two undertakings**, **irrespective of whether the undertaking to be jointly controlled existed prior to its formation**. According to the CJEU, a distinction based on whether or not the entity existed prior to the creation of the JV would lead to an unjustified difference in treatment.

The CJEU held that the creation of a JV, regardless of whether created as a new undertaking or formed from a previously solely-controlled undertaking – **is subject to the Commission's review only if such JV is full-function**. In other words, the

acquisition of a controlling stake by a third party in an existing non-full-function undertaking is not caught by the EU merger control regime.

Beyond the criteria set out by the EU in its notice to determine whether a JV is a full-function, the **EC's decisional practice** provides us with useful guidance for companies to keep in mind when creating a joint venture.

Documentation establishing the JV: such as the agreement, business plans, and the like. In **RSB/Tenex Case,** the Court considered that the agreement clearly showed a lack of full-function character insofar as it was written that the main purpose of the joint venture would be to provide services to one of the parents.

The Joint Venture's Economic Context: the EU Courts have ruled that it is appropriate to take into account the characteristics of the market on which a JV operates in order to assess the degree of autonomy it enjoys in relation to its parent companies.

The JV's access to resources: the EC has made it clear that it is not necessary for a full-function JV to actually own the resources necessary to its operation so long as they are "accessible" to the JV. This may for example take the form of an exclusive access to the parent companies' production units.

Independency from Parents: particular issues may arise where the joint venture is involved in holding real estate property and has principally been established for tax reasons. Such a joint venture will not usually be considered to be full-function as long as its purpose is limited to the acquisition or holding of real estate for its parents, using finances provided by the parents: it will lack an autonomous, long term business activity and will also lack the necessary resources to operate independently.

Commercial Relationship with Parent: in **Siemens/Italtel,** the Commission accepted that all the joint venture's sales would be to a subsidiary of one of its parents for the "foreseeable future": the joint venture was still found to be full-function because the subsidiary was the joint venture's only potential customer, as it had a monopoly on the market for telecommunications infrastructure in Italy.

For there to be a full-function, the joint venture must **be free to determine its own commercial policy in its own interests.** The Commercial Policy of the joint venture must not simply represent the commercial aspirations and needs of the parent companies.

However, the Commission recognises that it is not necessary that the joint venture enjoys full autonomy as regard the adoption of its strategic decisions. If this were the case then no jointly controlled undertaking could ever be considered to be full-function. It is sufficient that the joint venture is autonomous operationally.

Many joint ventures are established for an indefinite period and, as such, will satisfy this requirement. Provisions may be made in the joint venture agreement for

termination upon the occurrence of certain events, such as failure of the joint venture or fundamental disagreement between the parent companies, without affecting the full-functional status of the joint venture.

A joint venture which is established for a fixed period can still be on a lasting basis where the period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned or where there are provisions for the continuation of the joint venture after the expiry of such period.

Therefore, if the Merger Regulation is to apply to a joint venture, three conditions must be satisfied:

1. **There must be an acquisition of joint control by two or more independent undertakings**
2. **The joint venture must perform all the functions of an autonomous economic entity on a lasting basis; in other words, it must be a full-function joint venture**
3. **The joint venture must have an EU dimension**

Community Dimension

All concentrations with a Community dimension, must be notified to the Merger Registry of DG Competition prior to implementation of the concentration and following:

- Conclusion of an Agreement
- Announcement of a Public Bid
- Acquisition of a Controlling Interest

Prior to 1 May 2004, the notif

ication had to be made within one week of the above events. In practice, however, the Commission often granted the parties to submit later than the prescribed one-week period and so it decided to remove such limit from the 2004 Merger Regulation.

To provide greater responsibility, the Merger Regulation now expressly permits notifications to be made where the undertakings can demonstrate a "good faith intention" to conclude an agreement or to make a public bid.

State Aid - Article 107

State Aid is any advantage granted by public authorities through state resources on a selective basis to any organisations that could potentially distort competition and trade in the EU.

Politically, Governments tend to reposed to local concerns by trying to prop up its natural procedures by giving national industries large financial handouts.

The taxpayer is footing the bill for **failing companies.**

In 2016, the Commission held that Ireland is the world's largest tax haven since it gave illegal tax benefits to Apple worth up to €13 billion. In July 2020, the EU General Court ruled in favour of Apple concluding that the Commission "***did not succeed in showing to the requisite legal standard***" that Apple had received tax advantages from Ireland. In 2020, Executive Vice-President Margrethe Vestager said the Commission would appeal the decision before the ECJ as it believes the General Court has made a number of errors of law.

A local example would be Air Malta which gets State Aid, to make up for its loss throughout the years. Moreover, in 2017, the European Commission had approved under EU State Aid Rules, local Maltese plans to pay ElectroGas Malta a total of 1.4 billion in State Aid.

The TFEU contains general prohibitions on state aid: **it is prohibited unless justified by reasons of general economic development.** To ensure that this prohibition is respected, and exemptions are applied equally across the EU, the Commission ensures that State Aids comply with EU Rules.

State Aids Policy Development by the Commission
It is the **initial decision-maker** in this are and thus, **develops the general policy.** Commission's decisions are subject to judicial review. Review is limited to verifying whether the Commission complied with the procedural rules and good administrative practice.

The Commission also has **discretion as to approach to State Aid.** For instance, the EC used to principle of **compensatory justification.** This means that before it approves State Aid, the beneficiary must have contributed over and above the normal play of the market forces, to the attainment of EU objectives set out in the derogations of Article 107(3).

The SA could be designed to **restructure** a company, **rescue** a company or to help it with **operating costs,** and the Commission provides guidelines. The Commission's discretion as to the approach to SA and on modification of SA rules in response to banking and finical crises are also significant.

Article 109 - the Commission is empowered to make **regulations** exempting types of state aid from the prior notification requirement, stipulating that such SA would get automatic approval and shall be regarded as compatible with the IM, so called regulations on 'Block exemptions'.

It also developed policy through individual **decision or informal sectors** i.e. industrial sectors and in relation to regional aid, environmental aid, and deprived areas.

The Commission's discretion can be structured through **guidelines,** but the variety of policy documents employed could be confusing from the end users: detailed rules allow administration to cope with increased workload, reduce Member States' room for manoeuvre for giving out State Aids, facilitate transparency, legal security and credibility which result from strict and consistent enforcement to the benefit of governments and industry, and there would be no need for consent in the Council which is necessary under Article 109 when formal legislation is enacted.

Article 107 - State Aid to Public Undertakings or Private Firms
This is split into three parts:
1. Establishes the general principle that **SA are incompatible with the IM**
2. Provides certain **exemptions for situations where state aid will be deemed to be compatible with the IM**
3. Lists the type of cases where the aid **may deemed to be compatible with the IM**

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

State Aid Criteria
1. An intervention that gives the recipient an advantage on a selective basis
2. An intervention is by the state or through state resources
3. Competition has been or may be distorted
4. The intervention is likely to affect trade between MS

Notion of Undertaking
An EU homogenous concept: an entity engaged in economic activity
Functional Approach: it is not the characteristics of the entities but their activities. This approach allows going beyond the legal status of any entity under national law. For example, EC opened investigation in 2013 into State Aid to Sports Club in the Netherlands and Spain.

An Advantage
When speaking about state aid and its definition, one looks at substance, and not the form. Central to the idea of a state aid is that the measure must confer an advantage in any form whatsoever on the recipient. The recipient of SA gains a financial advantage or economic benefit, directly or indirectly, over its competitors. This advantage is conferred on a selective basis to undertakings by national public authorities.

State Aids can take on different forms: direct subsidiaries, tax exemptions, favourable loan guarantees, preferential terms for public ordering, and the like.

An advantage does not only cover **positive benefits.** In the **Cassa di Risparmio Case,** the Court held that the concept of aid covers not only positive benefits, but also **measures that mitigate the charges that an undertaking would normally bear**.

This therefore includes supply of goods or services at a preferential rate, and a reduction in social security contribution, amongst others.

A general measure of economic policy or a general measure which is open to all undertakings are not covered by the prohibition of Article 107, and thus, do not constitute a SA. Examples include:
- General Taxation Measures
- Employment Legislation
- Aid for General Infrastructure

A measure that places an advantage on the whole range of undertakings will still be classified as a SA, as in the case of general export aid.

In the **Intermills Case,** the Court made it clear that no distinction could be drawn between aid granted in the form of loans and aid granted in the form of a shareholding.

Belgium v Commission Case (C142/87) - tubemeuse is a steel-making company. In the 80s and the 90s the industry across the EC was in deep crisis: steel-making companies were dying their natural death. The State Aid approved in 1982 was unsuccessful, and, in turn, Belgium acquired the remaining stakes. Between 1984 and 1986 Belgium initiated a series of measures designed to increase the capital of Tubemeuse. They notified the Commission but the Government did not wait for the approval as required under what is now Article 108(3).

The Commission then made a decision that these measures constituted unlawful aid and instructed Belgium to recover the sums. Belgian government argued that the measures did not constitute SA but were rather normal reaction of any investor whose initial investment was at risk.

In this case, the relevant criterion in determining whether the measures are SA is **whether the undertaking could have obtained the amounts in question on the capital market.**

There is nothing to suggest any error in the Commission's assessment that Tubemeuse's prospects of profitability were not such as to induce private investors operating under normal market economy conditions to enter the financial transaction in question, that it was unlikely that **Tubemeuse could have obtained the amounts essential for its survival on the capital markets.** When capital is invested by a public investor, there must be some interest in profitability in the long term, otherwise the investment will be aid for the purposes of Article 107(1).

Aid Assistance to Offset Public Service Obligations
In the **Altmark Trans Case,** the Court developed the substantive test for assessing when state funding of public services does go beyond compensation. When assistance is granted to offset public service obligations that are imposed on the beneficiary of the aid, those beneficiaries **do not enjoy a real financial advantage, so the measures are not putting them in a more favourable competitive position**, provided that the four conditions in the Altmark Trans Case are satisfied. Public service compensation would not constitute SA and would not need to be notified if conditions of the Altmark are satisfied.

Four Conditions
1. Companies concentred must actually have public service obligations imposed on them which must be clearly defined.
2. How calculation is calculated must be established in advance in an objective and transparent manner to avoid conferring an economic advantage.
3. Compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account a reasonable profit for discharging those obligations.
4. If public service provider is not chosen pursuant to public procurement procedure, the level of compensation needed must be determined by analysing the costs which a typical well-run undertaking would have incurred in discharging those obligations.

<u>The Definition of State Aid</u>
1. Member State or Through State Resources
This can include regional as well as a central government. It will not suffice that the measure constituting SA was taken by a public undertaking. It has to be shown that the State actually exercised control over the undertaking and was involved in the adoption of the measure.

Van Der Kooy v Commission Cases - Gasunie was a Dutch company under private law, having 50% of the shares held by the State. A decision by the Commission held that the tariffs charged by the company for gas to certain firms in the horticultural industry were preferential and constituted aid. Tariffs were subject to approval by the minister, however, the Dutch State argued that the tariff was not

imposed by it. The Court held that there is **no necessity to draw any distinction between cases where aid is granted directly by the State and where it is granted by public and/or private bodies established or appointed by the State** to administer the aid. Gasunie's tariffs were the result of action by the Dutch State, since the State held 50% of Gasunie's shares and appointed half of the members of supervisory board – the body that has the powers to determine tariffs. Moreover, Gasunie in no way enjoys full autonomy in the fixing of gas tariffs but acts under the control and on the instructions of the public authorities. It is clear that the Gasunie could not fix tariff without taking account of the requirements of the public authorities.

2. Distorts or threatens to Distort Competition

The aid distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

Commission v Italy (C173/73) - the Court considers the position of a company before the receiving of aid, and if it has been improved, Article 107 is applicable. As confirmed in the present case, the Court will dismiss arguments of the MS, that its aid should be excluded on the ground that other MSs made similar payments to national firms.

3. Effect on Trade between MS

The Court usually holds (as in **Philip Morris v Commission**), that if aid **strengthens the financial position of an undertaking** as compared to others within the EU, then trade between States will be affected.

Belgium v Commission (C142/87) - the Court held that the relatively small amount of aid, or the relatively small size of the beneficiary company, does not exclude the possibility that EU trade might be affected.

Altmark Trans Case - the Court held that the fact that aid is given to an undertaking that only provides **local** transport services does not preclude an **effect on the trade between MSs,** since the aid could make it more difficult for competitors form other MSs to enter the market.

It is not necessary for the Commission to prove that trade will be affected, and is therefore only sufficient to show that a trade **might** be affected.

State Aid <u>compatible</u> with Internal Market

This is dealt with under Article 107(2), and a list is provided:

1. Aid having a **social character**, granted to **individual** consumers, provided that such aid is granted **without discrimination** related to the origin of the products concerned.
2. Aid to make good damage caused by a **natural disaster or exceptional circumstances.**
3. Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required

in order to compensate for the economic disadvantages caused by that division.

State Aid which <u>may be</u> deemed Compatible
These instances are established under Article 107(3):

1. Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and of the regions referred to in Art. 349, in view of their structural, economic and social situation;
2. Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.
3. Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
4. Aid to promote culture and heritage conservation where aid does not affect trading conditions and competition in the Union to an extent which is contrary to the common interest.
5. Such other categories of aid as may be specified by decision of the Council on proposal from Commission.

Good Aid: General Block Exemption Regulation
Commission's Regulation introduced in 2008 and revised by Commission Regulation (EU) No 651/2014 of 17 June 2014 - **giving automatic approval for a range of aid measures defined by the Commission.**

Principal categories covered by 2014 Block Exemption: **culture, sports, regional, SMEs, research, development and innovation, environmental training, local infrastructures** (e.g. broadband), **social aid for transport to remote regions, disadvantaged and disabled workers.**

The Old De Minimis Regulation - in 2006, the Commission adopted such regulation between 2007 and 2013. Under this regulation, state financial support of less than €100,000 over a period of 3 years in favour of a given company is deemed to have no substantial effect on competition and trade between Member States, and therefore not to constitute state aid.

Reform by Commission Regulation of 2013
Article 3(2) held that the total amount of de minimis aid granted per Member State to a single undertaking shall not exceed EUR 200 000 over any period of three fiscal years. This regulation also applies to the transport sector and to the processing and marketing of agricultural products. Nevertheless, since many companies in the road transport sector are relatively small, a specific ceiling of €100 000 will apply to this sector. The de minimis rule is limited to transparent types of aid where it is possible to determine the precise amount of aid in advance.

The Reform of the State Aid Regime (SAM)

State Aid Action Plan 2005-2009

In 2005, the Commission instructed a consultation exercise designed to reform the SA regime and dealt with multiple aspects; SA in the instances of market failure, SA for innovative matters, research and development are seen as potentially legitimate where the market failed to provide the necessary incentives to engage in these activities, and new regulations adopted in order to focus on most distorted SA and to streamline procedures.

State Aid Modernisation 2012-2014

This included a vast initiative of reform aimed at modernisation of the legal framework governing SA. The modernisation of SA control has three main objectives:

1. Foster Growth in a strengthened, dynamic, and competitive internal market
2. Focus enforcement on cases with the biggest impact on the internal market
3. Streamlined rules and faster decisions

This also catered for a review of the De Minimis Regualtion, and of the General Block Exemption Regulation with the view to extend the number of aids subject to a simplified control. Moreover, rules were streamlined and the decision-making process was accelerated.

State Modernisation 2020

The Commission launched evaluation of SA Rules in 2019 as a fitness check. A number of the SA rules adopted as part of the 2012 ‘State Aid Modernisation’ initiative have expired by the end of 2020.

Covid-19

The outbreak of the pandemic had a significant economic impact. Several Member States have announced supportive measure for citizens and companies. Some measures may entail SA as within the meaning of Article 107(1). In view of the economic and financial consequences that the COVID-19 outbreak has on undertakings and in order to ensure consistency with the general policy response adopted by the Commission, especially in the period 2020-2021, Regulation (EU) No 651/2014 should be amended accordingly. In particular, undertakings which became undertakings in difficulty as a consequence of the COVID-19 outbreak should remain eligible under Regulation (EU) No 651/2014 for a limited period of time. Likewise, undertakings, which have to temporarily or permanently lay off staff due to the COVID-19 outbreak, should not be deemed to have breached relocation commitments given before 31 December 2019 at the time of receiving regional aid. Those exceptional provisions should apply for a limited period from 1 January 2020 to 30 June 2021. This means that the provisions are no longer in force.

Procedure: Article 108 and 109

Procedural Rules that apply in this area are derived from the Treaty, case-law, and Regulation 659/99.

Article 108
The first subsection holds that the commission shall constantly review existing aids of the Member States. The second subsection holds that the Commission can adopt a decision **abolishing aid** and if the MS does not comply with this decision within the prescribed time, the Commission or any other interested MS may refer the matter to the CJ direct. In exceptional circumstances MSs can ask the Council to declare their aid legal in derogation from the provisions of Art. 107. As per Article 108(3), the Commission has to be informed i.e. notification obligation and mist give its approval for the intended aid. In the scenario, the member state must await a final decision i.e. stand-still clause.

There are however some exceptions to the latter point made; aid covered by block exemptions, de minimis aid not exceeding 200k per undertaking over any period of 3 fiscal years, or aid granted under an aid scheme already authorised by the Commission do not need to await a final decision.

Preliminary Investigation
Each notification triggers an investigation by the Commission. From the time is has received a completed notification, the Commission had two months to decide:
- There is no aid within the meaning of EU rules, and the measure may be implemented
- The aid is compatible with EU Rules because positive effects outweighs distortion of competition
- Serious doubts remain as to the compatibility of the notified measure with EU State aid rules, prompting the Commission to open an in-depth investigation. In this instance, the measure may not be implemented until the investigation is concluded.

Investigation
The Commission is obliged to open a formal investigation under Article 108(2) where it has serious doubts about the aid's compatibility with SA rules, or where it faces procedural difficulties in obtaining the necessary information.

The decision to initiate this procedure is sent to the relevant MS. It summarises the factual and legal bases for the investigation and includes the Commission's preliminary assessment, outlining any doubts as to the measure's compatibility with EU state aid rules. The decision is published in the EU's Official Journal, and MS and interested third parties have one month from the date of publication to submit comments. The MS concerned is in turn invited to comment on observations submitted by interested parties.

The Commission adopts a final decision at the end of the formal investigation. There is no legal deadline to complete an in-depth investigation and its actual length depends on many factors, including the complexity of the case, the quality of the information provided and the level of cooperation from the MS concerned.

This can either be a **positive decision**, a **conditional decision** (the measure is found compatible, but its implementation is subject to the conditions stated in the

decision) or a **negative decision** (The measure is incompatible and cannot be implemented. The Commission, in principle, orders the MS to recover aid that has already been paid out from the beneficiaries. Where the decision is on existing aid, the Commission cannot order the recovery of aid already given, but will prevent the MS from granting future aid).

Unlawful Aid
This aid could be aid granted without prior Commission authorisation. However, the failure to notify does not in itself render implementation of the aid unlawful.

The Commission must examine all information it receives concerning alleged unlawful aid immediately. If there is unlawful aid, as for cases of notified aid, the Commission first opens a preliminary investigation and, if doubts as to the compatibility of the measure persist, subsequently carries out an in-depth investigation. The Commission may use injunctions to obtain information from MSs, suspend the further granting of aid, or impose provisional recovery obligation on the MS.

In case of a final negative decision, recovery of the aid already paid out, with interests, will take place. Additionally, the Commission requires the **MS to recover the aid with interest from the beneficiary** (unless such recovery would be contrary to a general principle of EU law). In this case, the Commission opens a 'recovery case' to enforce the implementation of its decision. If the MS does not comply with the decision in due time, the Commission may refer it directly to the CJ, without initiating an infringement procedure under Art. 258 TFEU.

The aim of recovery is to remove the undue advantage granted to a company and to restore the market to its state before the aforementioned aid was granted. There is a limitation period of ten years for recovery. All decisions and procedural conduct of the Commission are subject to review by the General Court and ultimately by the CJ. Challenges will normally be brought under Art. 263 TFEU (action under Art. 265 is also possible).