ECL3004
EU INTERNAL MARKET LAW

The European Law Students' Association

MALTA

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EU Internal Market
Notes

The Single Market

The Central Issues

The single market is central to the EU and is still its principal economic rationale. The realisation of a single market in economic terms necessarily raises issues about the inter-relationships of the economic and social dimensions of EU policy.

Economic Integration: Forms & Techniques

Forms of Economic Integration

It is of utmost importance to understand the nature of a common market and how it differs from other forms of economic integration. As held by *D Swann* in his book '*The Economics of the Common Market'*: "***economic integration can take various forms and these can be ranged in a spectrum in which the degree of involvement of participating economies, one with another, becomes greater and greater***".

Part Three of the TFEU contains the fundamental principles for the establishment of a **customs union** and a **common market.** It goes on to set out the four freedoms:

1. **Freedom of Goods -** ensure that goods move freely, and those most favoured by the consumers will be most successful, irrelevant to the area of origin.
2. **Freedom of Workers -** labour in some areas may be valued more highly than in others. The value of labours can only be maximised within the EU if workers can move to the areas in which they are most valued.
3. **Freedom of Services**
4. **Freedom of Capital**

The basic economic aim is the optimal allocation of resources for the EU, which is facilitated by allowing factors of production to move to the area where they are mostly valued.

Techniques of Economic Integration

There are two principal techniques:

1. **EU Law can prohibit national rules that hinder cross-border trade,** because they discriminate against goods or labour, etc, from other MS, or because they render market access more difficult.
2. **The creation of a single market also requires positive integration**. Barriers of integration may flow from diversity in national rules on different matters i.e. health. These may only be overcome through harmonisation through an EU directive. This is attained through **Articles 114** and **115 of the TFEU,** and other sector-specific Treaty Articles.

Pre-1986: Limits

The most important legislative contribution was the harmonisation of laws. **Article 115 TFEU** now holds that: ***without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the EP and the Economic and Social Committee, issue directives for the approximation of such laws, regulations, or administrative provisions of the MS as directly affect the establishment or functioning of the Internal Market***".

The problem here is with the unanimity requirement. Technical developments used to mean the the Commission was fighting a lost battle.

The judicial contribution can be seen through the **ECJ,** with specific reference to **Article 258 TFEU** and **direct effect**, in the way it interpreted the Treaty to promote the Single Market. One of the landmark judgements is that of **Cassis de Dijon.**
Even though, there was still much to be done by the early 1980s and the Single Market integration appeared to be no closer. However, in a very important meeting, the seeds of the Single European Act (SEA) were sown. In 1985 the European Council called on the Commission to draw up a detailed programme with a specific timetable for achieving a single market by 1992. The Commission, under the leadership of Jacques Delors, responded.

Single European Act: The Economic and Politics of Integration
The Economic Dimension: The Commission's White Paper
The White Paper set out to establish the *essential and legal consequences* of commitment to a single market. The Commission held that the Community had lost its momentum *partly through recession, partly through lack of confidence and vision,* but it said that the mood has now changed: **time for talk has now paused. The time for action has come. That is what the White Paper is about.**

The Paper made reference to a chosen strategy, and it is evident that the Commission was going to take into account the underlying reasons for the existence of barriers to trade, and recognises the essential equivalence of MS' legislative objectives in the protection of health and safety, and of the environment. Its harmonisation approach is based on different principles:

- One has to see what is essential to harmonise, and what may be left to the mute; recognition of national regulations and standards.

- Legislative harmonisation will in future be restricted to laying down essential health and safety requirements which will be obligatory in all MS. Conformity with this will entitle a product to free movement.

- Harmonisation of industrial standards by the elaboration of European standards will be promoted to the maximum extent, but the absence of European standards should not be allowed to be used as a barrier to free movement.

The Political Dimension: The Politics of Integration
Authors **Sandholtz** & **Zysman** rejected explanations based on neofunctionalist integration theories and on the domestic politics of the MS, although they admitted that elements of these theories were relevant even under the own explanations. They argued that the success of the 1992 initiative should instead be viewed *in terms of elite bargain formulated in response to international structural change and the Commission's policy entrepreneurship*. There were three factors in this regard:

i. The Domestic Political Context
ii. The Commission's initiative
iii. The Role of the Business Elite

However, **Moravcsik** held different views. He disagreed with the previous thesis, and agreed that he reform was due to inter-state bargains between Britain, France, and Germany. This was made possible by the convergence of European Economic Policy preferences in the early 1980s, combined with the bargaining leverage which France and Germany used against Britain by threatening a two-track Europe, with Britain in the slow lane.

There is no need to specifically decide between the two theories put forward, and one can easily argue that there were two connected conditions for the success of the SEA:

1. The legislative reform to facilitate the passage of measure designed to complete the internal market.

2. The new approach to harmonisation which would expedite the process of breaking down the technical barriers to intra-community trade.

The Internal Market: Legislative Reform and the SEA
The SEA was signed in 1986 and entered into force in 1987. The Act contained procedures aimed at facilitating legislation to complete the IM. The SEA introduced two major legislative innovations for the Single Market Project. They are now found in **Article 26** & **Article 114 TFEU.**

Article 26: the Obligation Stated
The content of the obligation is contained within Article 26(1) TFEU which holds: ***"the Union shall adopt measures with the aim of establishing or ensuring the functioning of the IM, in accordance with the provisions of the Treaty".***

Article 26(2) defines the Internal Market and states that: ***"the IM shall compromise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties".*** Attainment of an area without internal frontiers can be judged by whether border controls exits on the free movement. However, such attainment of the internal market is not a once-and-for-all, static objective, since technological developments pose new challenges for the internal market ideal, as do external economic factors.

One might argue that Article 26 may have ***legal effects against the EU itself,*** and this owing to the fact of its mandatory wording. The possibility of using **Article 265 TFEU** in the event of Commission/Council inaction would demand on whether the criteria for such actions were met. This would not be easy, because it would need to be shown that the measures that it is claimed should have been enacted were defined with sufficient specificity for them to be identified individually, and adopted as per **Article 266 TFEU**. This will not be so where the relevant institutions possess discretionary power, with consequential policy options, the content of which cannot be identified with precision.

Article 26 may possibly also have ***legal consequences for the MS.*** This could mean that an individual might argue that MS' rules which constituted a barrier to teh completion of the IM should not be applied if incompatible with Article 26, given that this article fulfilled the conditions for direct effect.

Article 27: the Obligation Qualified
This Article qualifies the former. It requires the Commission, when drawing proposals in pursuant to Article 26, to take into account the extent of the effort that certain economies showing different in development will have to sustain during the period of establishment of the IM, and it may propose appropriate provisions. If the provisions take the form of derogations, they must be temporary and cause the least possible disturbance to the functioning of the Common Market.

Article 114(1): Facilitating the passage of harmonisation measures
A major problem in enacting harmonisation measures was the unanimity requirement under what is now **Article 155 TFEE**, which gives general power to pass directives for the approximation of laws of the MS that affect age establishment of the IM. The SEA provided in what is now **Article 114 TFEU** a general legislative power, making to Article 115, without the unanimity requirement.

So whereas Article 115 authorises only the passage of directives, Article 114 empowers enactment of measures, which includes directives but also covers regulations, which are made by the ordinary legislative procedure as seen in **Germany v Council (C-359/92*)***.

Article 114: A Residual Provision
The article only operates ***save where otherwise provided in this Treaty.*** This means that other, more specific Treaty provisions, such as **Articles 43, 50, and 53 TFEU,** should be used for measures designed to attain the IM where they fall within the subject matter areas of those Articles. This can generate boundary-dispute problems about the correct legal basis for EU legislation.

The general test propounded by the ECJ for the resolution of such boundary disputes was that regard should be had to the nature, aim, and content of the act in question as seen in a multiple of caselaw, one of which being **EP v Council (C-271/74 1996).** Where these factors indicated that the measure was concerned with more than one area of the Treaty, then it might be necessary to salsify the legal requirement if two Treaty Articles. Boundary disputes are less likely to occur now, since the ordinary legislative procedure, the successor to the co-decision procedure, is applicable to many Treaty Articles.

Article 114: the Limits
The ECJ, in the **Tobacco Advertising Case,** held that this Article has its limits. The ECJ struck down a directive to harmonise a law relating to advertising of tobacco products. It concluded that the measures must be intended to improve the conditions for the establishment and functioning of the IM.

The ECJ is willing to accept Article 114 as the legal basis for the enacted measure, as seen in the aforementioned case and **R v Secretary of State for Health (C-210/03)** & **ex p Swedish Match (2004)**.

Reference can again be made to the **Tobacco Case,** where the ECJ upheld the validity of a revised Directive on tobacco advertising, which included prohibitions on advertising in the press and radio. The Court concluded that this measure could be validly adopted under Article 114, since there were disparities between the relevant national laws on advertising and sponsorship of tobacco products which could affect competition and inter-state trade.

Article 114(2)-(10): Qualifications to Article 114(1)
The remainder of the article qualifies what is found in the first subsection. **Article 114(2)** encapsulates an exception, by providing that the first sub article shall not apply to fiscal provisions, to those relating to the free movement of persons, or to those relating to the rights and interested of employed persons because of their sensitive nature.

Article 114(3) instructs the Commission, when proposing measures under the first sub article re to health, safety, environmental protection, and consumer protection, to take as a base a high level of protection, taking into account any new development based on scientific facts.

Article 114(4)-(9) have received most critical attention and are very often described as being complex. **Article 114(5), (7),** and **(8)** were new provisions put forward by the Treaty of Amsterdam, whereas other paragraphs modified pre-existing provisions.

Any assessment of Article 114(4)–(9) must take into account political and legal issues. In ***political terms*** many of the more dramatic fears about the impact of **Article 114(4)** have not been borne out. Concerns that Member States would routinely seek to invoke the Article to prevent the application of harmonisation measures have proven unfounded. In ***legal terms,*** the MS concerns which can trigger this same article are finite: the matters covered by Article 36 TFEU, plus the environment and working environment. This article was further limited through the Treaty of Amsterdam.

Article 114(5) deals with the situation where the MS seeks to ***introduce a new national measure*** after the adoption of a harmonisation directive. The MS concerns which can tigger this article are more limited: there must be new scientific evidence and there must be a problem specific to that state as seen in **Netherlands v Commission (Case T-234/04 2007).**
The two aforementioned subsections are exceptions that derogate from the principles of the Treaty and are therefore restrictedly construed by the Commission and ECJ.

Additionally, the Commission's power of scrutiny has been reinforced by **Article 114(6).** This article now speaks of the commission ***approving or rejecting national provisions,*** and not merely confirming them. The State is also obliged to explain the reasons for maintaining the national provisions.

The process under Article 114 is not wholly adversarial. The seventh and eighth subsections are distend to facilitate a negotiated solution to the problem.

Article 114(10) is the final qualification which provides that harmonisation measures may include safeguard clauses authorising MS to take provisional measure subject to Union control procedures. Recourse to Article 36 is normally precluded when EU harmonisation measures have been enacted.

The IM: the new legislative approach to marketing of products and harmonisation
The Rationale for the New Approach
The completion of the single market was dependent on **the reform of the legislative procedure to facilitate legislation to complete the internal market** and there **also had to be anew approach to harmonisation to make it easier to secure the passage of these measures.**

One has to keep in mind the traditional legislative techniques had disadvantages as maintained by **Pelkmans.** They were slow, and generated excess uniformity. There was failure to develop links between harmonisation and standardisation, thereby leading to inconsistencies and wastage of time. These shortcomings were recognised by the Commission in the White Paper, hence the need for a new approach.

The Elements of the New Approach
There was to be mutual recognition through the **Cassis de Dijon** principles. National Rules that did not come within a mandatary requirement would be invalid; legislative harmonisation was to be restricted to laying down health and safety standards; and there would be promotion of European Standardisation.

Provision of Information: National Rules that might impede Free Movement
MS are obliged to provide information by **Directive 83/139**, now overtaken by **Directive 93/34** which ***lays down a procedure for the provision of information in the field of technical standers and regulations.*** This measure obliges a state to inform the Commission before it adopts legally binding regulations setting a technical specification, except where it transposes a European or International standard. The Commission goes on to notify other State, and adoption of national measure is delayed for a minimum of three months, in order that amendments can be considered.

A year's delay can result if Commission decides to press ahead with a harmonisation directive on the issue. The Directive was given added force by the ECJ's decision in the **CIA Case.** A national measure which has not been notified in accordance with the Directive could not be relied on.

Provision of Information: Obstacles to Free Movement and Serious Trade Disruption
Regulation 2679/98 requires MS that have relevant information concerning obstacles to the Free Movement of Goods that can lead to serious trade disruption and loss to individuals, and which

requires immediate action to prevent an continuation, to notify the Commission. The MS has an obligation to take all necessary and proportionate action to ensure free movement of goods.

Mutual Recognition: Normative Dimension
This is the core of the ECJs and Commission's strategy. **Schmidt,** amongst others, holds that mutual recognition entails a governance strategy and embodies a choice as to how to achieve market integration. This integration might be further by according primary to host state control, subject to non-discrimination. Member States open their borders to goods from elsewhere, provided that the importers meet the standards of the host country, with the obligation not to discriminate.

A second strategy is harmonisation at the EU level, overcoming national regulatory sovereignty. Politics remain the mode of setting the regulatory regime, but the politics now take place at supranational level rather than in national level.

Thirdly, a product ;awfully manufactured in a MS should be capable of being sold in any other MS. the underlying assumption is that MS' regulations address ***alternative solutions to the same underlying problems.*** MS no longer retain control over the regulatory regime in their own countries. The host state must prima facie accept the goods lawfully marketed according to the regulatory requirements of the home state, which requires national governments to trust the regulatory regime of the other MS.

The aforementioned is still tempered with public interest defences as per Article 36 TFEU, and by the mandatary requirements recognised in the Cassis judgement. Harmonisation efforts are concentrated on measures that are still lawful.

Mutual Recognition: Practical Dimension
This has been central to EU market integration. **Pelkmans** has pointed to the practical difficulties realising this ideal, mostly because the judicial elaboration of mutual recognition in the **Cassis** judgement lacks visibility for many traders, especially small and medium-sized enterprises, with the consequence that they adapt their products to the requirements of host states, even though they are not required to do so under EU Law.

The Commission noticed the aforementioned, and made proposals to improve with reference to increased monitoring of mutual recognition by the said Commission, complemented by measures t improve awareness of mutual recognition by producers of goods and services. MS should deal with requests concerning mutual recognition within. Reasonable period of time, and should include a mutual recognition clause in national legislation.

Mutual Recognition: Control over MS Derogation
Commission resorted to hard law to improve the efficiency of mutual recognition, by imposing tighter controls over MS' derogation from free movement. **Decision 3052/95** imposed an obligation on a MS to notify the Commission where it looks steps to prevent lawfully produced goods in another MS from being placed on the market. This did not work and was replaced in 2008.

A MS that decides to prevent/hinder free movement of goods lawfully marketed in another MS on grounds listed under Art. 36 TFEU, or because of the Cassis Mandatary Requirements, must give written notice to the importer, who has twenty days in which to proffer comments contesting the decision. The MS makes a final decision based on the comments, giving reasons for its decision which must be open to challenge before National Courts.

The MS are also obliged to establish ***Product Contact Points*** which provide information to importers as to the technical rules applicable to particular types of product, and information about the principle of mutual recognition in that MS.

New Approach: Harmonisation

The new approach of harmonisation is used where national rules survive scrutiny of Article 36 TFEU and the mandatary requirements. Where this is so, harmonisation is limited to laying down essential health and safety requirements.

European Standardisation is central to the new approach of harmonisation because as held by **Pelkmans,** it reduces barriers to intra-EU trade and increases the competitiveness of European Industry. The principal bodies are the **European Committee for Standardisation,** the **European Committee for Electrotechnical Standardisation,** and the **European Telecommunications Standards Institute.** These ***ensure that standardisation processes take place in parallel with harmonisation at Council level and are based on essential requirements.***

Compliance with a mandated standard means that the product is premed safe under the General Product Liability Directive, and that it can, subject to some qualifications, circulate freely within the EU. Such standards are published in the Official Journal.

It is important to note that a directive passed pursuant to the new approach establishes in general terms the health and safety requirements that the goods must meet. The setting of standards helps manufacturers to prove conformity to these essential requirements, and to allow inspection to test for conformity with them.

This new approach to harmonisation has considerable advantages:

- Directives can be drafted more easily since they are less detailed.
- The excessive 'Euro-uniformity' of the traditional approach is avoided by combining stipulated safety objectives with flexibility as to the standards through which this compliance can be achieved.
- The need for unanimity is obviated through Article 114.
- Harmonisation and standardisation are related.
- More EU directives can be made, and hence the gap between EU harmonisation and the volume of national technical regulations can be reduced.
- Incentives for Member States' implementation of directives have been increased through judicial doctrine such as state liability in damage

New Approach to Harmonisation: 2008 Reforms

The basic principle is that EU harmonisation legislation is restricted to setting out the essential requirements determining the level of such protection, subject to the caveat that where recourse to essential requirements is not possible or not appropriate, in view of the objective of ensure adequate protection of consumers, public health and the environment, or other aspects of public interest protection, detailed specifications may then be set out in the harmonisation legislation.

Harmonisation: Minimum and Maximum

The EU has choices when it enacts harmonisation legislation. It may pass legislation that sets ***minimum standards, which do not preclude MS from setting more exciting standards.*** Minimum Harmonisation enables MS to maintain more stringent regulatory standards than those prescribed by EU standards, provided that these are compatible with the Treaty.

The EU can alternatively pass ***maximal legislation that covers the entire area, which would entail an exhaustive regulation of the given field.*** The Commission favours the latter type of harmonisation, at least in areas such as consumer policy.

Whether the harmonisation measure is intended to preclude any national measures that differs from the EU directive may be a contentious issue. In **Ratti,** the ECJ had to decide whether Directive 73/173 on the packaging and labelling of dangerous substances precluded a state from prescribing ***obligations and limitations which are more precise than, or at all events different from, those set out in the directive.*** The Italian rules required that more information should be attached to the packing than that specified in the Directive. ***The Court held that the Directive was intended to prevent the state from laying down stricter rules of its own***.

It may, by way of contrast, be apparent that the directive only partially regulates the area. In **Grunert,** a French producers of food preservative containing lactic and citric acid was prosecuted for selling the preservative for use in the making of certain pork meats. French Law prohibited such use unless authorised by national authorities, and the acids used were not on the national list. Directives 64/54 and 70/357 did, however, list the two acids as among those that could be used to protect food against deterioration. This was Grunert's defence. The Directives went on to provide that, subject to certain conditions, they were not to affect provisions of national law specifying the foodstuffs to which the preservatives listed could be added**. The ECJ decided therefore that the Member States had discretion as to the foodstuffs to which listed preservatives could be added.**

The Internal Market: Tensions & Concerns
Consumer Interest and Commercial Power
One concern is whether consumer interests are sufficiently protected in the process of attaining a single market. Many national rules that impede intra-EU trade are signed to protect consumers, as recognised under Article 36 TFEU and the Cassis Judgement. The problem is whether the directives adequately balance consumer and manufacturing interests. As **Russell**, the Secretary-General of ANEC, astutely observed, 'access may be important. But access without influence is meaningless'.

There are also concerns vis-a-vis regulations about product safety and the like are made at national level. Tensions resulting from the imbalance in power between consumer and commercial interests are not created because harmonisation measures are passed at EU rather than national level. They are endemic in most Western-style market economies. Whether consumer interests fare better in the regulatory process at national or EU level will depend on the relative capacities of commercial and consumer interests to influence the legislative process within the EU and the nation state, and the relative costs involved in operating within these differing polities.

The Single Market, Market Freedom, and Structural Balance
A second tension inherent in the single market project is between an EU Free Market and its impact on the weaker economies of the Union. The SEA addressed this problem through **Article 27 TFEU.**

Fulfilment of the single market project can regenerate macro-economic and social tensions between rich, poor, and middle-class economies within the EU. A market-driven national economic policy will often create regional problems within a particular country, with area of high unemployment and relative poverty. It is not therefore surprising that a vigorous EU policy of increased

competitiveness and breaking down trade barriers will produce similar tensions, albeit on a larger scale. **Articles 174–178 TFEU** provide the foundation for structural policies to address this problem. The balance between the single market and structural intervention will, however, always be problematic.

The Challenge to Positive Integration
Majone argues that the real costs of regulations vis-a-vis harmonisation are borne by those who have to comply with them, and not by those who make them. This means that budgetary constrains have limited impact on the regulators, with the consequences that the ***volume, detail, and complexity of Community regulations are often out of proportion with the benefits that they may reasonably be expected to produce.*** MS often enjoy a comparative advantage in devising regulations in areas such as telecommunications, consumer protection, and environmental protection because they are not tied to the lowest common denominator approach that often limits EU regulatory provisions, and because MS have superior implementation mechanisms to the EU.

Politics, Economics, and the Single Markey Enterprise
Conceptions of market freedom are not value-free. This phrase and the appropriate limits to free markets are contestable. These are key issues that divide political parties. There is sound economic evidence that removing barriers to intra-EU trade will bring economic benefits. However, there is room for different opinions about the scope of protective EU measures, even among those of differing political persuasions who are committed to the European ideal.

The politicisation which accompanies market integration has been noted by commentators, such as **Pelkmans** and **Weiler**, who state that an internal-market strategy that cuts deeply into the regulatory environment, severely limiting the options available to Member States, cannot pretend to be entirely apolitical.

N.B. The continuing relevance of this issue was starkly exemplified by the French negative vote in the referendum on the Constitutional Treaty, a result, in part, of the perception that the EU was too dominated by market considerations, thereby endangering traditional French social values.

The IM: Reconceptualisation
The single market project did not come to an end in 1992, and there was a continuing flow of internal market legislation post 1992. ***There were many reports focusing on attainment of the IM in the economic sense of the term.*** Reference can be made to the 2003 programme; **Making Most of the IM,** in which issues and management of the single market were tackled. In 2006, there was a study names as the **Impact and Effectiveness of the Single Market** which dealt with a multitude of topics such as economic gains from the IM. These themes were all included in the **Single Market Action Plan**. Four goals were developed and endorsed in 1997:
1. Making rules more effective
2. Dealing with market distortion
3. Removing sectoral obstacles to market integration
4. Delivering a single market for all citizens.

A broader conception of the internal market is however also to me found in a number of the papers from the Commission and the EP. The internal market is conceptualised in more holistic terms, to include not only economic integration, but also consumer safety, social rights, labour policy, and the environment. This material is therefore of relevance for the concerns voiced in the previous section.

The Lisbon European Council constituted another important stage in the reconfiguration of the internal market agenda. The meeting in March 2000 focused on employment, economic reform, and

social cohesion. It set a '**new**' strategic goal: ***the Union was to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.*** Completion of the IM was one way of achieving this strategy, and modernisation of the European Social Model through an active welfare state was another. This was important in ensuring that the ***emergence of this new economy does not compound the existing social problems of unemployment, social exclusion, and poverty.***

The principal Commission reports concerning the internal market in 2000 developed the ideas of the European Council. The **2000 Review of the IM Strategy** took the strategic remit of the Lisbon European Council as its starting point. The internal market should be made economically effective, but it should also foster job creation, social cohesion, and safety.

In ***economic terms,*** a properly functioning internal market was the key to prosperity for EU citizens. In ***social terms,*** the internal market was seen as the guarantee of rights to safe, high-quality products.

The willingness to consider the IM is to be welcomed. The Treaty does not preclude taking account of non-market values, such as heart and safety, even with IM legislation, provided that the initial economic hurdle is met.

There are containing tensions between the economic and social dimensions of the IM. Therefore, the priorities in the 2003-1006 **Internal Market Strategy** were heavily economic in nature. It is also the case that the balance between the economic and social dimensions of the Lisbon Strategy has altered over time. While both remain part of the Strategy, the economic focus has often predominated, although the French rejection of the Constitutional Treaty because it was too economic in its orientation led to some renewed emphasis on the social dimension, albeit still within a 'tight' economic frame.

The Monti Report is premised on the need for initiatives that will generate a stronger single market, foster consensus about the single market project, and deliver the single market ideal. The Report contains a valuable analysis of the economic challenges facing the single market project, recognises the tensions between the economic and social dimensions of the single market, and seeks to address them.

Free Movement of Goods: Duties, Charges, and Taxes

Central Issues

Freedom of Movement of goods can be impended in many ways. The most obvious form of protectionism will occur through custom duties or charges which have an equivalent effect, with the object of rendering foreign goods more expensive than their domestic counterparts. A state may also attempt to benefit domestic goods by taxes that discriminate against imports.

A state may seek to preserve advantages for its own goods by imposing quotas or measures which have an equivalent effect on imports, thereby reducing the quantum of important products.

The abolition of customs duties and charges having an equivalent effect is central to the idea of a customs union and a single market. On the words of the Commission, ***the Customs Union is a foundation of the EU and essential to the functioning of the single marker, with the implication that the (twenty seven)* customs administration of the EU must act as though they were one.***

The ECJ looks to the effect of the duty, and not its purpose, and has given a broad reading to ***charges having equivalent effect*** to customs duty. It has only allowed limited exception to Articles 28-30, and any breach will be unlawful per se.

The prohibition of taxes that discriminate against imports is equally central to the single market ideal. Customs duties apply when goods cross the border, and are caught by Articles 28-30 TFEU. A state may discriminate against imports through differential taxes once the goods are in its country.

Articles 28-30: Duties and Charges
Article 28(1): "the Union shall compromise a customs union which shall cover all trade in goods and which shall involve the prohibition between MS of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries".

The old Article 12 EEC prohibited the imposition of new customs duties and charges equivalent thereto, while the old Article 13 EEC obliged the MS to abolish existing duties within the transnational period, in accordance with Articles 13-15 EEC. The passage of time has rendered the distinction between new and existing duties redundant.

Article 30 TFEU now relates to any customs duties and charges equivalent thereto, whether concerning imports or exports, with no distinction being drawn as to when such duties were imposed: **"customs duties on imports and exports and charges having equivalent effect shall be prohibited between MS. this prohibition shall also apply to customs duties of a fiscal nature"**.

Duties and Charges: Effect not Purpose
The Court made it clear from the outset that the application of Article 30 TFEU depends upon the effect of the duty or charge, and not on its purpose.

Commission v Italy (Case 7/68 of 1968)(The Arts Treasure Case) - Italy is a country rich in cultural heritage and imposed a custom duties on goods of cultural heritage exiting Italy. The reason was to protect the Italian Cultural Heritage, however, the Court rejected this argument. The Commission took an enforcement action against Italy as per Article 2 TFEU which relates to prohibition of Customs Duties.

When a tax is caught by Article 30 TFEU as a duty or charge that is of equivalent effect then it is in effect per se unlawful. Thus, attempts by Italy to argue that its tax could be defended on the basis of what is now Article 36 TFEU was rejected by the Court, since this can only be used as a defence vis-a-vis quantitative restrictions which are caught by Article 34 TFEU. It cannot validate fiscal measures that are prohibited under Article 30.

The ECJ reaffirmed its emphasis on effect rather than purpose in other cases. It also made it clear that the Treaty provisions can be applicable even if the state measure was not designed with protectionism in mind. In the **Diamantarbeiders Case,** the Court considered the legality of a Belgian Law requiring 0.33% of the value of imported diamonds to be paid into a social fund for workers in the industry. The fact that the purpose of the fund was neither to raise money for the exchequer nor to protect the domestic industry did not save the charge in question. It was sufficient that the charge was imposed on goods because they had crossed a border.

Charges having an Equivalent Effect: General Principles
Article 30 TFEU does not only prohibit customs duties but also **charges having an equivalent effect (ECC).** It is deigned to catch all protectionist measures that create a similar barrier to trade to customs duties *stricto sensu*. The term is interpreted extensively by the ECJ.

Commission v Italy (Case 24/68 of 1969) - Italy imposed a levy on goods which were exported to other MS with the purpose of collecting statistical material for use in discerning patterns. The Court reiterated its holding that customs duties were profited irrespective of the purpose for which the duties were imposed, and irrespective of the destination of the revenues which were collected. Moreover, the extension on the prohibition of customs duties to CEE is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency.

This clear message was repeated in **Diamantarbeiders.** The ECJ reiterated the broad definition of a CEE and made it clear that this would bite whether those affected by the charge were all Community citizens, those from the importing states or only the nationals from the state that was reusable for passing the measure under scrutiny.

The ECJ's strident approach was unsurprising given the centrality of abolishing custom duties and CEEs to the very notion of a single market. The abolition of such measures goes to the very heart of this ideal. It was a necessary first step in the attainment of market integration. The eradication of customs duties and the like was vital if the broader aims of the common market were to be fulfilled. It is clear that a charge which is imposed not on a product as such, but on a necessary activity in connection with the product, can be caught by Articles 10 and 110 TFEU.

CEE: Inspections and the Exchange Exception
A common defence is that the charge imposed on imported goods is justified because it is merely payment for a service which the state has rendered to the importer, and that therefore it should not be regarded as a CEE. The Court has been willing to accept this argument in principle. It has, however, been equally alert to the fact that a state might present a charge in this way when in reality it was seek-ing to impede imports, or in circumstances where there was no commercial exchange at all. The Court has therefore closely scrutinised such claims from states and has not readily accepted them.

Commission v Italy (Case 24/68) - the Italian Government argued that the charge should be seen as the consideration for the statistical information which it collected. The Government contended that this information ***affords importers a better competitive position in the Italian market while exporters enjoy a similar advantage abroad,*** and that therefore the charge should be viewed as consideration for a service rendered, as a quid pro quo, and not as a CEE. However, the Court was unconvinced and held that such information was beneficial to the whole economy and to the administrative authorities.

Even when the charge is more directly related to some action taken by the state with respect to specific imported goods, the Court has been reluctant to accept that the charge can be characterised as consideration for a service rendered.

This is also apparent in the **Bresciani Case.** The Italian authorities imposed a charge for the compulsory veterinary and public-health inspections which were carried out on important raw cowhides. This judgement indicates clearly the ECJ's reluctance to accede to arguments that will take pecuniary charges outside the Treaty. Firstly, the fact that the charge was propionate to the quantity of imported goods made no difference, since Article 30 TFEU prohibited any charge imposed by reason of the fact that goods caused a frontier. The Court went on by saying that the cost of inspections to maintain public health should be borne by the general public. The ECJ's conclusion was, however, designed to limit the ambit of any exceptions to what are now Articles 28–30 TFEU.

CEE: Inspections and Fulfilment of Mandatory Legal Requirements
Where EU legislation permits an inspection to be undertaken by a state, the national authorities cannot recover any fees charges from the traders as seen **Commission v Belgium (1984).** The Court has, however, accepted that a charge imposed by a state will escape the prohibition contained in Articles 28-30 TFEU when it is levied to cover the cost of a **mandatary** inspection required by the EU Law as evident in **IFG v Freistaat Bayern (1984).**

Recovery of Unlawful Charges
The general principle is that a MS must repay charges that have been unlawfully levied as per **Amministrazione delle Finanze dello Stato v San Giorgio (1999).** The procedural conditions for such repayment may be less favourable than those applying in actions between private individuals, provided that they do not make recovery impossible or excessively difficult. There is, however, an exception to this general rule for circumstances in which the trader has passed on the loss to customers, since reimbursement could lead to the trader being unjustly enriched. This very exception may itself be qualified where the trader can, nonetheless, show that it has suffered loss. The burden of proving that the duties have not been passed on to others cannot however be placed on the taxpayer.

The Customs Union: The Broader Perspective
The consequence of the breaking down of customs barrier between MS is that once goods are in the EU they move freely. The corollary is that ***the ring fence around the single market is only as strong as its weakest link,*** and there is no second chance to impose limits on goods coming from a third country.

The EU has a strong interest in combating fraud. The fact that there is in effect only ever one customs barrier for goods to enter the EU also has implications for the battle against organised crime, counterfeit goods, and the like. It is clear that customs have a role to play in the fight against terrorism.

This has led to a number of ***organisational initiatives*** designed to meet these new challenges. There is no EU customs service. The EU works through and with the customs authorities in the MS.

Articles 100-113: Discriminatory Tax Provisions
Article 110: "No MS shall impose, directly or indirectly, on the products of other MS any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no MS shall impose on the products of other MS any internal taxation of such a nature as to afford indirect protection to other products".

The Purpose of Article 110
The aim is ***to prevent the objectives of Articles 28-30 from being undermined by discriminatory internal taxation.*** The article has been recognised by the ECJ, which demands complete neutrality of internal taxation as regards domestic and imported products evident in **Gabriel Bergandi v Directur Général des Impôts (1988).**

Article 110(1): Direct Discrimination
This Articles does not stipulate that a MS must adopt any particular regime of internal taxation. It requires only that whatever system is chosen should be applied without discrimination to similar imported products.

In **Commission v Italy (21/79)** the Italian Government charged lower taxes on regenerated oil than an ordinary oil. The policy was motivated by ecological considerations, but imported regenerated oil did not benefit from the same advantage. Italy argued that it was not possible to determine

whether imported oil was regenerated or not. This argument was rejected by the ECJ, which held that it was for the importers to show their oil came within the relevant category, subject to reasonable standards of proof, and that a certificate from the state of export could be used to identify the nature of the oil. Similarly, in **Hansen,** the ECJ insisted that a German rule making tax relief available to spirits made from fruit by small businesses and collective farms must be equally applicable to spirits in the same category coming from anywhere else in the EU.

In **Commission v Ireland (55/79),** although the tax applied to all goods irrespective of origin, domestic producers were treated more leniently as regards to payment, being allowed a number of weeks before payment was actually demanded, whereas importers had to pay the duty directly on importation.

Article 110(1): Indirect Discrimination
There may well be tax rules that do not explicitly differentiate between the tax liability of goods based on country of origin, but which nonetheless place a greater burden on commodities coming from another MS. the RCJ has emphasised that a tax system will be compatible with Article 110 only if ***it excludes any possibility of imported products being taxed more heavily than similar domestic goods.***

Humblot Case (112/84) - French law imposed an annual car tax. The criterion for the amount of tax to be paid was the power rating of the car. Below a 16CV rating the tax increase gradually to a maximum of 1.1k francs. For cars above 16CV, in power there was a flat rate of 5k francs. There was no French car which was rated above 16CV, and thus, the higher charge was borne only be those who has imported cars. Humblot was charged 5k francs on a 36CV imported vehicle, and argued that this tax violated what is now Article 110.

This case provides a good example of the ECJ's determination to catch indirect discrimination. Such tax provisions can still distort the competitive process in the car markets. The French authorities duly revised the tax rules in the light of the Courts's, decision, but the new scheme was challenged and found in breach of Community Law. This was because although the new scheme was less discriminatory than that considered, it was still the case that the tax rate increased sharply above 16CV. This new tax system was considered in **Fedlain.**

Article 110: National Autonomy and Fiscal Choices
While direct discrimination on grounds on nationality cannot be justified, tax rules of a MS that tend nonetheless to favour national procedures may be saved if there is some sort of objective justification. This idea is relevant to other articles, for example, those on the free movement of goods, free movement of workers, and equal treatment. In this way, such Treaty Articles are prevented from becoming too harsh or draconian in their application. This was exemplified in the **Chemical Case (140-79).**

Italy taxed synthetic ethyl more highly than ethyl alcohol obtained from fermentation, even though the products could be used interchangeably. Italy was not a major producer of synthetic products. The object was to favour the manufacture of ethyl alcohol from agricultural products, and to restrain the processing into alcohol of ethylene, a petroleum derivative, in order to reserve that raw material for more important economic uses.

The Court predicates its acceptance of the Italian policy on the basis that it does not result in any discrimination, whether direct or indirect. Notwithstanding this, the ECJ's reasoning bears testimony to its willingness to accept objective justifications where the national policy is acceptable from the EU's perspective, even if this benefits domestic traders more than imports.

In **Commission v France (196/85)**, the Commission alleged a French rule which taxed sweet wines produced in a traditional manner at a lower rate than liquor wines was contrary to what is now Article 110 TFEU. The Court disagreed by maintaining that there was no direct discrimination on grounds of origin or nationality, hence there was an objective justification.

In the **Outokumpu Oy Case,** the ECJ held that it was legitimate for a MS to tax the same or similar product differentially, provided that this was done on the basis of an objective criteria, such as the nature of the raw materials used or the production process employed.

It is also possible for differential tax rates on cars, the **Humblot Case** notwithstanding, to escape the prohibition of Article 100. This could be so if the differential rates were to encourage the use of more environmentally friendly models, provided they did not discriminate against imports.

The relationship between Article 110(1) and (2)
The first subsection prohibits the imposition of internal taxes on products from other MS in excess of those levied on similar domestic products. The dividing line between the first and second subsections may be problematic, since it can be contestable whether goods are deemed similar or not.

Article 110(2) is designed to catch national tax provisions that apply unequal tax ratings to goods that may not be strictly similar, but which may nonetheless be in competition with each other. The object is to prevent these differential tax rates from affording indirect protection to the domestic goods i.e. wine & beer. Economists terms this relationship ***cross-elasticity of demand.***

Reference can be made to **Commission v France (168-/78)** in which France had higher tax rates for spirits based on grain, such whisky, rum, gin, and vodka, than those based on wine/fruit such as cognac, calvados, and armagnac. France produced very little of the former, but was a major producer of fruit-based spirits. The Commission brought an action via what is now Article 258 TFEU alleging that the French tax regime violated what is now Article 110.

Article 110(1) and (2): The Determination of Similarity
If products are similar, Article 110(1) would apply. If they are not then the tax rules may still be caught by Article 110(2). In **Fink-Frucht GmbH v Hauptzollamt München-Landsbergerstrasse,** the ECJ held that products would be regarded as similar if they came within the same classification. However, in some cases the ECJ condemned the tax without too detailed an analysis of whether this was because of Article 110(1) or (2). This approach is particularly apparent in the early 'spirits cases' such as **Commission v Denmark (1980).**

The reason the ECJ did not trouble unduly whether the condemnation should be based on Article 110(1) or (2) is apparent in the case of **Commission v France (168/78).** These early *spirit* cases demonstrate that the Court will not be overly concerned whether a cased is characterised as relating to the first or second sub-article, if the nature of the products renders such classifications difficult and if the Court feels that the tax should be condemned because the goods are in competition and the tax is protective.

However, later Courts have been more careful to determine whether the analysis such proceed under Article 110(1) or (2), as exemplified in the **John Walker Case.** The issue was whether liqueur fruit wine was similar to whisky for the purposes of Article 110(1). The ECJ analysed the objective characteristics of the products, their alcohol content and method of manufacture, and consumer perceptions of the products. It decided that the goods were not similar, since they did not possess the same alcohol content, nor was the process of manufacture the same.

Article 110(2): Determination of Protective Effect
The Commission brought an enforcement action against the UK, in **Commission v UK (170/78),** for discriminatory taxation of wine with respect to beer i.e. the UK levied an excise tax on certain wines roughly five times that levied on beer. This was more difficult than the aforementioned cases, because there was undoubtedly a greater difference wine and beer than between two spirits. It is for this reason that the ECJ initially declined to rule that the UK provisions were in breach of Article 110, and required further information on the nature of the competitive relationship between the two products. The case sheds interesting light on the methodology used when adjudicating on Article 110(2).

The Court's judgement proceeds in two stages:
1. The ECJ is concerned to establish that there is some competitive relationship between the two products a to render Article 110(2) applicable at all. In this case, the Court rightly accepted that the meaningful comparison was between beer and the cheaper of the wine in the market.
2. The Court then considered whether the tax system was protective of beer. It was willing to apply varying criteria suggested by the parties to decide whether a protective effect had been established or not. It was difficult to contest the conclusion that the UK tax was indeed discriminatory.

The existence of harmonisation will not preclude the application of Article 110 where it is only minimum harmonisation. In **Socridis,** Community legislation was held to require only that MS imposed a minimum duty of beer. It did not preclude the application of Article 110 to determine whether a taste was being protectionist in its treatment of beer as opposed to wine.

Taxation: the Broader legal perspective
Tax issues can be judged for compliance with other Treaty provisions concerning free movement. This is significant because while the approach under Article 110 is discrimination-based, the case law on free movement has moved beyond this to catch national rules that impede trade even if they are not discriminatory.

While case-law is not entirely clear, the ECJ has been cautious about applying the full force of its law on free movement to national fiscal rules, although commentators such as ***J Snell,*** remain divided as to the best interpretation of this jurisprudence.

Taxation: the Broader Political Perspective
Taxation can be **direct** or **indirect**. The paradigm of direct taxation is income tax; the paradigm of indirect taxation is a tax on sales. The EU does not exercise any general control over direct taxation. This is regarded as central to national sovereignty. EU law will be relevant only to prevent cross-border discrimination, interference with free movement, and the like, although some tax matters have been dealt with through Articles 114 and 115 TFEU, where the conditions laid down therein have been satisfied.

EU has much greater impact of indirect taxation, and is now striving for a more coherent tax policy. In the context of indirect taxation, this is manifest in proposed improvements to the regimes governing VAT, excise duty, and the like. In the context of indirect and direct taxation, there is the growing realisation of the extent to which national tax policy can impact on other policies, over which the EU does have competence. These include employment, the environment, economic and monetary union, health, and consumer protection.

The Boundary Between Articles 28-30 & 110-113
The general principle is that the two sets of Articles are mutually exclusive. They both concern imposition of fiscal charges by the state. ***Articles 28 to 30 bite on those duties or charges levied as a result of goods crossing a border. Articles 110-113, by contrast, are designed to catch fiscal policy which is internal to the state.*** They prevent discrimination against goods once they have entered a particular MS.

Which set of Treaty Articles is applicable is of importance since the result can be significant for the legal test that is applied as se in the **Cooperative Co-futta Srl Case.** If a state fiscal measure is caught by Article 30 TFEU then it will be unlawful. This reflects the importance of breaking down trade barriers. If, by way of contrast, a fiscal measure falls within Article 110 TFEU then the obligation on the state is different. The taxation levels set by the state are not unlawful under the Treaty, and thus the inquiry will be whether the tax discriminates against the importer under Article 110(1), or has a protective effect under Article 110(2).

There are three situations in which the aforementioned is more difficult:
1. **Levies Imposed on Importers**
Such a case would normally be decided on the basis of Article 30, and the levy would be deemed to be a CEE. The state would be condemned unless it could show that the levy was consideration for a a service given to the importer, or that it was imposed pursuant to mandatary requirements of EU Law. Attempts to argue that they levy should be instead considered under Article 110 have not been successful as seen in **Bresciani.**

In exceptional circumstances the Court may, however, decide that although a charge/levy is taken at the border is not to be characterised as a CEE under Article 30, but as tax, the legality of which will be tested under Article 110 as seen in **Denkavit.**

2. **Imports Taxed but not made by the State of Import**
One might have thought that the ECJ would posse Article 30 vis-a-vis characterisation, since there are no similar domestic goods. However, this will not always be so as seen in the **Co-Frutta Case.** This was a case which arose from the imposition by Italy of a consumption tax on bananas, even though no such tax was levied on other fruit produced in Italy. The action was brought by a banana importer via Article 267 TFEU to test the legality of the tax. The Court considered whether this should be viewed as a CEE under Article 30, or as a tax under Article 110.

The ECJ's reasoning makes good sense. If any charge imposed by a state on a product which it did not make at all, or only in negligible quantities, were to be classified as a CEE under Article 30 then the charge would be automatically unlawful, and the importing state could not tax goods which it did not produce itself, since any such tax would be condemned under Article 30.

3. **Selective Tax Refund**
The position appears to be as follows: if the money from a tax flows into the nation exchequer and is then used for the benefit of a particular domestic industry, this could be challenged as State Aid.

Classification problems as between Articles 30 and 110 arise when the money that has been refunded can be linked to what has been levied pursuant to a specific test. The correct classification will depend upon whether the refund or other benefit to the national producers wholly or partially offsets the tax.

Barents identifies three conditions for a charge to be considered under Article 30 then under Article 110: ***firstly, the charge must be destined exclusively for financing activities which very largely benefit the taxed domestic product; secondly, there must exist identity between the taxed product***

and the domestic product benefiting from the charge; and thirdly, the charges imposed on the domestic product must be completely compensated.

The aforementioned is exemplified by **Scharbatke.** There was a challenge to mandatory contributions levied in Germany when slaughtered animals were presented for inspection. The contribution was applied under the same conditions to national and imported products, and the money was assigned to a marketing fund for agricultural, forestry, and food products. The ECJ held that the mandatory contribution constituted a parafiscal charge. Where the resulting revenue benefited solely national products, so that the advantages accruing *wholly* offset the charge imposed on the products, then the charge would be regarded as a CEE within Article 30. If the advantages which accrued only *partially* offset the charges imposed on national products, then the charge might constitute discriminatory internal taxation under Article 110.

Free Movement of Goods: Quantitative Restrictions

Article 34 is the central provisions and states that: ***quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between MS.*** **Article 35** contains similar provisions relating to exports, while **Article 36** provides an exception for certain cases in which a state is allowed to place restrictions on the movement of goods. The objective of these provisions is to prevent MS from engaging in the aforementioned strategies.

The interpretation of such articles has been important in achieving a single market integration. The Court has given a broad interpretation to the phrase ***measures having equivalent effect,*** and has construed the idea of discrimination broadly to capture both **direct & indirect discrimination.**

The ECJ also held that Article 34 can be applied in instances of non-discrimination i.e. **Cassis De Dijon.**

There are six central issues to this area:

1. The ECJ's jurisprudence led to difficult issues about where this branch of EU Law stops, especially vis-a-vis the idea of Article 34 and its applicability.

2. There is a problem concerning relationship between negative and positive integration.

3. There is a tension between EU integration and national regulatory autonomy.

4. The choice between a discrimination approach and a rule of recognition approach of the kind introduced by **Cassis** is important for this reason: the former approach vests control in the host state, normally the country into which the firm is trying to import. The '*Cassis* approach' reverses the onus: the host state must accept the regulatory provisions of the home state, subject to the exceptions discussed below.

5. This topic exemplifies the interconnection between the judicial and legislative initiatives for attaining the EU's objectives.

6. EU Courts also maintained tight control over the application of Article 36, which is concerned with defence against a prima facie breach of Article 34. The ECJ has interpreted Article 36 strictly to ensure that discriminatory restrictions on the free movement of goods are not easily justified.

Directive 70/50 & Dassonville
Article 34 will catch quantitative restrictions and MEQR i.e. measure equivalent to a quantitive restrictions. It can apply to EU measures as seen in the **Criminal Proceedings against Keiffer and Thrill,** as well as those adopted by MS.

This notion was defined broadly in the **Geddo Case** to mean ***measures which amount to total or partial restraint of, according to the circumstances, imports, exports, or goods in transit.*** MEQRs are more difficult to define.

Directive 70/50 was only applicable during the Community's transitional period, but it continues to furnish some idea of the scope of MEQRs. The list of MEQRs is found under **Article 2:**

1. Minimum and Maximum prices for imported products

2. Less favourable proves for imported products

3. Lowering the value of the imported product which differ from those for domestic products

4. Conditions in respect of packaging, composition, identification, size, and weight, which only apply to imported goods or which are different and more difficult to satisfy than in the case of cosmetic goods

5. The giving of a preference to the purchase of domestic goods as opposed to imports, or otherwise hindering the purchase of imports

6. Prescribing stocking requirements which are different from and more difficult to satisfy than those which apply to domestic goods

7. Making it mandatary for importers of goods to have an agent in the territory of the importing state

It should be noted that the Commission was always thinking of the potential reach of Article 34 to indistinctly applicable rules, since **Article 3** of the Directive regulates such rules to some degree.

The interpretation of MEQRs can be spoken of in relation to **Dassonville.**

The aforementioned is a criminal case from Belgium. EU Law is important in all fields of law. Dassonville was the trader. This is a preliminary reference from a Belgian Criminal Court. A prosecution happened in Belgium, because the defendant breached a local trading rule. The domestic court sent a question to Luxembourg.

There was a trading law stating that when one imports whiskey, the alcoholic drink had to include a label of origin. For this whiskey to be admitted, it had to be accompanied with a certificate of origin, in this case, from Scotland. This EU Law was not in breach of EU Law. However, during this period, Scotland was not an EU Member State, and thus, the whiskey was imported from a third party middleman in France. Whiskey travelled from Scotland, from France, to Belgium. French Law did not require certificate of origin, so whiskey was imported into France with full compliance to its legislation. The problem was that French law did not require the certificate, but Belgian Law required it, yet there was no room for creating trade between France and Belgium. Both created their own rules, and fell foul though Belgian Legislation.

Article 34 is very clear, however, the requirement of needing a certificate did create an obstacle. The situation was problematic because the individual laws were not in agreement, leading to the

defendant's prosecution. The Belgian Court asked the Court of Justice whether Article 34 should be interpreted in such a way as means that any laws in any MS that could make it more difficult to trade would be deemed in breach of Article 34.

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Two aspects of the ECJ's reasoning should be noted. First, it is clear that the crucial element in proving an MEQR is its effect: a ***discriminatory intent*** is not required. The ECJ takes a broad view of measures that hinder the free flow of goods, and the definition does not even require that the rules actually discriminate between domestic and imported goods. *Dassonville* thus sowed the seeds which bore fruit in *Cassis de Dijon*, where the ECJ decided that Article 34 could apply to rules which were not discriminatory.

Secondly, the ECJ indicates that reasonable restraints may not be caught by Article 34. This is the origin of what became known as the 'rule of reason'.

In the Dassonville Case, the difference in the law was creating an obstacle - an equivalent to a measure to a quantitive restriction. The Belgian Law was found to be in breach of Article 34, and had to be set aside. Once the goods were in free circulation within the EU, any trading law creating obstacles is in breach of Article 34.

Discriminatory Barriers to Trade
Article 34 can bite if the national rule favours domestic goods over imports, even oil the case, on its facts, is confined to products and parties from one MS. The same article can apply to a national measure preventing important from one to another part of the MS.

Import and Export Restrictions
The ECJ has always been harsh on discriminatory import or export restrictions, thus caught under Article 34. This is exemplified by **Commission v Italy (Case 154/85)** in which the ECJ held that procedures and data requirements for the registration of imported cars, making their registration linger, complicated, and more costly than that of domestic vehicles were prohibited by Article 34. Moreover, in **Bouhelier,** a French rule which imposed quality checks on watches for export, but not on those intended for the domestic market, was in breach of Article 35.

Promotion or Favouring of Domestic Products
Article 34 prohibits action by a state that promotes or favours domestic products to the detriment of competing imports. This can occur in many ways.

The most obvious is where a *state engaged in a campaign to promote the purchase of domestic as opposed to imported goods*. Reference can be made to **Commission v Ireland (Case 249/81),** in which the Irish Government sought to promote sale of Irish goods, the object being to achieve a switch of 3% in consumer spending from imports to domestic products. It adopted a number of measures to do so, such as the organisation of a publicity campaign by the Irish Goods Council in favour of Irish products, designed to encourage consumers to buy Irish products.

The Commission brought an action under Article 258, alleging that such campaign was an MEQR. Ireland argued that it had never adopted measures for the purpose of Article 34, and that any financial aid given to the Irish Goods Council should be judged in light of Articles 107 and 108. The members of such Council were appointed by an Irish Minister and its activities were funded in proportion of about six to one by the Irish Government and the private industry, respectively. The

ECJ held that the Irish Government was reasonable under the Treaty for the activities of the Council even though the campaign was run by a private company.

This exemplifies the general strategy under Article 34. It looks to substance and not to form.

A second type of case caught by this article us where *a state has rules on the origin-marking of certain goods*.

In **Commission v UK (Case 207/83),** the Commission brought an action under Article 258 arguing that the UK legislation which retried that certain goods should not be sold in retail markets unless they ere marked with their country of origin was in breach of Article 34, as an MEQR. The Uk argued that the legislation applied equally to imported and domestic products, and that this information was of important to consumers since they regraded origins an indication of the quality of the goods. MS legislation which contains rules on origin-marking will normally only be acceptable if the origin implies a certain quality in the goods, that they were made from certain materials or by a particular form of manufacturing, or where the origin is indicative of a special place in the folklore or tradition of the region in question.

The third type of case: *public procurement cannot be structured so as to favour domestic producers*.

In **Commission v Ireland (Case 45/87),** the Dundalk Council put out to tend a contract for water supply. One of the contract classes was that tenderers had to submit bits based on the use of certain pipes which complied with a particular Irish standard. One of the bids was based on the use of a piping which had not been certified by the Irish authorities, but which complied with international standards. The Council refused to consider it for this reason, thus, Commission argued that there was a breach of Article 34.

A fourth type of case is where *the discrimination in favour of domestic goods is evident in administrative practise,* as exemplified by **Commission v France (Case 21/84).** French Law discriminated against imported postal franking machines. The law was changed, but a British company claimed that, notwithstanding this, the French authorities repeatedly refused to approve its machines. The ECJ held that general administrative discrimination against imports could be caught by Article 34. The discrimination could, for example, take the form of delay in replying to applications for approval, or refusing approval on the grounds of various alleged technical faults that were inaccurate.

Price Fixing
A state cannot treat imported goods less favourably in law or fact than domestic products through price-fixing regulations. Reference can be made to **Fachverband der Buch-und Medienwirtschaft v LIBRO Handelsgesellschaft mbH** in which Austrian Law provided in effect that an importer of books could not fix a price below the retail price fixed or recommended by the publisher for the state of publication.

Measures which make Imports more difficult or costly
There are numerous ways in which a MS can render it more difficult for importers to break into that market, as exemplified by the **Schloh Case.** Schloh bought a car in Germany and obtained from a Ford dealer in Belgium a certificate of conformity with vehicle types in Belgium. Under Belgian Law, he was required to submit his car to two roadworthiness test, for which fees were charged. He challenged the tests, arguing that they were an MEQR. The ECJ held that the Belgian rule was contrary to Article 34, save in relation to cars which were already on the road, provided that in this type of case the rules were applied in a non-discriminatory manner.

National Measures v Private Action
The issue of what constitutes a state entity has to be addressed. In the **Buy Irish Case** it was seen that the ECJ rejected the argument that the Irish Goods Council was a private body and therefore immune from Article 34. The Irish Government's involvement with funding the organisation and appointment of its members rendered it public for these purposes, while in the **Apple and Pear Development Council Case** the existence of a statutory obligation on fruit growers to pay certain levies to the Council sufficed to render the body public for these purposes. Institutions concerned with trade regulation may come within the definition of the state for these purposes even if they are nominally private, provided that they receive a measure of state support or 'underpinning'.

Article 34 can also apply against the state even though private parties have taken the main role in restricting the free movements of goods, as exemplified by **Commission v France (Case 265/95).**

Indistinctly Applicable Rules: Cassis de Dijon
Foundations
The removal of discriminatory trade barriers is a necessary, but not sufficient, condition for single market integration. There are many rules that do not discriminate between goods dependent on origin, but which nevertheless create barriers to trade between MS.

Cassis is a fruit speciality in Dijon. The legal problem in this case was a German Law. The Cassis de Dijon is known for its 15% of alcoholic content. It is produced according to French Law and is classified as a fruit liquor. There is no EU Law establishing or defining what this is. However, German Law said that a liquor to be classified as such had to have 25% of alcoholic content. Again, as per the previous case, there is conflict between the community law, non of which were illegal prima facie.

The problem arose because an importer tried to sell the French Liquor in Germany. The moment this liquor was sold, the problem popped out because of the percentage. This meant that the drink could not be sold as a fruit liquor in Germany. This meant that if one is a German consumer looking for liquors, the Cassis de Dijon would not have been found.

All trading rules enacted by the MS which are capable of being directly or indirectly a barrier trade is in breach of what is now Article 34 TFEU. An obstacle was evidently created. German Law should be in breach of the Treaty.

When there was the Preliminary Reference from the German Court, the problem was that the domestic authorities, even supported by the Commission, were saying that this was a consumer habit. The argument was that German Consumers considered that a liquor would have 25% alcoholic content.

In the Cassis Case, the Court conclude that there are other ways of ensuring the aforementioned, pinpointing fact that the alcoholic content is different from the standard without banning the product. The outcome of this case was similar to that of the Dassonville Case, in fact, it can be said that the ***Dassonville judgement was developed further***.

It *affirmed* paragraph 5 of *Dassonville*: what is now Article 34 could apply to national rules that did not discriminate against imported products, but which inhibited trade because they were different from the trade rules applicable in the country of origin. The fundamental assumption was that when goods had been lawfully marketed in one Member State, they should be admitted into any other state without restriction, unless the state of import could successfully invoke one of the mandatory requirements. The **principle of mutual recognition was encapsulated.**

Moreover, in the absence of harmonisation, reasonable measures could be taken by a state to prevent unfair trade practices. The Court came up with was is known as the mandatory requirements. If the justification is objective, the MEQR is not caught up by Article 34. The Court gave us examples of four mandatary requirements:
(1) Effectiveness of Fiscal Supervision
(2) The Protection of Public Health
(3) The Fairness of the Consumer Transaction
(4) The Defence of the Consumer

The reasoning in Cassis is significant as the result. The ECJ began by affirming the right of the states to regulate all matters that had not yet been the subject of Community harmonisation. However, what began by an assertion of states' rights was transformed into a conclusion that required the state to justify the indistinctly applicable rules under the rule of reason.

Application: Post-Cassis Jurisprudence
In **Deserbais** an importer of Edam cheese from Germany into France was prosecuted for unlawful use of a trade name. In Germany such cheese could be lawfully produced with a fat content of approximately 34%, whereas in France this was restricted to 40%. The importer relied on Article 34 by way of defence to the criminal prosecution. The ECJ held, in accord with *Cassis*, that the French rule was incompatible with this Article, and could not be saved by the mandatory requirements.

The same result was reached in the case of **Gilli and Andres** where importers of apple vinegar from Germany into Italy were prosecuted for fraud because they had sold vinegar in Italy which was not made from the fermentation of wine. The rule hampered Community trade and did not benefit from the mandatory requirements, since proper labelling could alert consumers to the nature of the product, thereby avoiding consumer confusion.

The same approach was apparent in **Rau,** which was concerned with national rules on packaging rather than content. Belgian law required all margarine to be marketed in cube-shaped packages, irrespective of where it had been made, but it was clearly more difficult for non-Belgian manufacturers to comply without incurring cost increases. The ECJ held that Article 34 was applicable, and that the Belgian rule could not be justified on the basis of consumer protection, since any consumer confusion could be avoided by clear labelling.

Indistinctly Applicable Measures: Article 35
This prohibits quantitive restrictions and MEQRs in relation to exports in the same manner as does Article 34 in relation to imports. However, ***whereas Article 34 will apply to discriminatory provisions and also to indistinctly applicable measures, Article 35 will, it seems, apply only if there is discrimination.*** The rational for making the former article applicable to measures which do not discriminate is that they impose a dual burden on the importer, which will have to satisfy the relevant rules in its own state and also the state of import.

This will not normally be so in relation to Article 35 as seen in **Groenveld.** Dutch legislation prohibited all manufacturers of meat products from having in stock or processing horse-meat. The purpose was to safeguard the export of meat products to countries that prohibited the marketing of horseflesh. It was impossible to detect the presence of horse-meat within other meat products, and therefore the ban was designed to prevent its use by preventing meat processors from having such horse-meat in stock at all. The sale of horsemeat was not actually forbidden in the Netherlands.

Nonetheless the Court held that the Dutch rule did not infringe what is now Article 35. The Article was aimed at national measures which had as their specific object or effect the restriction of exports, so as to provide a particular advantage for national production at the expense of the trade of other

Member States. This was not the case here, said the Court, since the prohibition applied to the production of goods of a certain kind without drawing a distinction depending on whether such goods were intended for the national market or for export.

It is clear from **Gysbrechts** that the ECJ is willing to find a breach of Article 35 even where the rule applies to all traders if it has a greater effect on exports than on domestic traders. In this case, Belgian law prohibited a supplier in a distant selling contract from requiring that the consumer provide his payment card number, even though the supplier undertook not to use it to collect payment before expiry of the period in which the consumer could return the goods. The ECJ cited *Groenveld* for the proposition that Article 35 caught national measures which treated differently the domestic and export trade of a Member State so as to provide an advantage for the domestic market at the expense of trade of other MS. It concluded that even if the prohibition was applicable to all traders active in the national territory, its actual effect was nonetheless greater on goods leaving the market of the exporting MS and thus caught by Article 35. It held moreover that although consumer protection could constitute a justification, the challenged rule was disproportionate.

Indistinctly Applicable Measures: Limits of Article 34

Cassis signalled the ECJ's willingness to extend Article 34 to catch indistinctly applicable rules. The difficulty is that all rules that concern trade, directly or indirectly, could be said to affect the free movement of goods in various ways. Thus, as ***Weatherill and Beaumont*** note, it could be said that rules requiring the owner of a firearm to have a licence, or spending limits imposed on government departments, reduce the sales opportunities for imported products.

However, a distinction can be noted between **dual-burden & equal burden rules.** Cassis is concerned with the former: State A imposes rules on the content of goods. These are applied to goods imported from State B, even though such goods have already complied with the trade rules in State B. Cassis prevents state A from imposing its rules in such instances unless they can be saved by the mandatory requirements.

On the other hand, the latter are those applying to all goods, irrespective of origin, which regulate trade in some manner. They are not designed to be protectionist.

In some cases the ECJ held that rules which do not relate to the *characteristics* of the goods and did not impose a dual burden on the importer, but concerned only the conditions on which all goods were *sold,* were outside Article 34. In **Oebel,** the Court held that a rule which prohibited the delivery of bakery products to consumers and retailers, but not wholesalers, at night was not caught, since it applied in the same way to all producers wherever they were established.

However, in other cases such as **Cinéthequé,** the Court held that Article 34 applied to rules that were not dissimilar to those in the preceding paragraph. In this case, the ECJ held that the French Law could however be justified, since it sought to encourage the creation of film irrespective of their origin. This same approach is evident in the **Sunday Trading Cases.**

The first case in this saga i.e. **Torfaen BC v B&Q plc,** dealt with the prohibition by Local Council of stores opening on Sunday. The argument was that the fact that one opens on Sunday would mean that the store would make more money. Knowing the fact, generally, and knowing the difference between the types of burden, one can easily determine would this would mean.

The prohibition is not discriminatory vis-a-vis imported and exported goods. Moreover, it would create an equal burden. Most probably, one would argue that Article 34 would not apply. However, a new theory was adopted considering that the shop breaching the local prohibition had mainly exported goods. Thus, although the rules apply to imports and exports, the impact on the goods

would be that the relevant store would end of selling less imported goods on Sunday, thus, making reference to barriers to trade.

The rule was prima facie caught by Article 34, but it could escape prohibition if there was some objective justification and the effects of the rule were proportionate, the latter issue to be determined by national courts.

The post-Torfaen case law simply made things easier for national courts by providing guidance on proportionality. The ECJ's case law provided academics with much material concerning the proper boundaries of Article 34. Some saw little wrong with the ECJ's approach in Cinéthèque and Torfaen. Others were less happy with the Court's approach as seen through ***Steiner.***

Moreover, ***White*** distinguished between the characteristics of goods and selling arrangements, a theme picked up by the ECJ in **Keck.**

Indistinctly & Distinctly Applicable Rules: Keck & Selling Arrangements
Selling Arrangements
In **Keck,** K&M were prosecuted in the French Courts for selling goods at a price was was lower than their actual purchase price, contrary to French Law of 1963 as amended in 1986. The law did not ban sales at a loss by the manufacturer, K&M claimed that the French Law was contrary to Community law concerning the Free Movement of Goods.

Keck was a supermarket in France, and the products in question related to tea and coffee. Keck could purchase this product in bulk from Germany and at a very cheap price. The problem was that a French law established a minimum selling price. This minimum selling price is termed as an *anti-dumping procedure*. Action was taken for selling below the minimum selling price.

Keck lawyers made the same argument as in the first Sunday Trading Saga judgement. Again, the French law is not discriminatory and caused an equal burden as it applies on the price of the product i.e. there was no extra costs on the importer and the purpose was not to regulate trade.

So it is up to the ECJ to decide whether to uphold the burden test, the Trading Saga Test, or a new test. The Court developed a new test. The new interpretation of Article 34 has to do with a selling arrangement, which is about a law which deals about with how a product is old and not about the product itself. The Court is saying that if the law deals with the selling arrangement, then that it is not considered as a breach of Article 34.

The ECJ's desire to exclude selling arrangement from Article 34's ambit is apparent from later case law. In **Tankstation,** the Court held that national rules that provided for the compulsory closing of petrol stations were not caught by Article 34. The ECJ concluded that the same rules related to selling arrangements applied equally to all traders. The same conclusion was reached in **Punto Casa** and **Semeraro.**

Static and Dynamic Selling Arrangements
The problem arises in ambiguity about the meaning of the term ***selling arrangements.*** This could connote only wheat may be termed as **static selling arrangements:** rules relating to the hours at what shops may open, the length of time for which people may work, or the type of premises in which certain goods may be sold. **Dynamic selling arrangements** include the ways in which a manufacture chooses to *market this specific product,* through a certain form of advertising, free offers, and the like.

The objection to taking the latter out of Article 34 is that they may relate more closely to the definition of the product itself. Non-static selling arrangements can form an integral aspect of the goods, in much the same way as do rules relating to composition, labelling, or presentation.

It is clear from **Keck** that the Court regarded some such rules as selling arrangements, and hence as outside Article 34. Thus, it admitted that a rule prohibiting sales at a loss deprived traders of a method of sales promotion, and hence reduced the volume of sales, and yet treated this rule as a selling arrangement that was outside of Article 34.

Two Qualifications

1. Rules concerning Sales Characterised as Relating to the Product

It is open to the ECJ to characterise rules which affect selling as part of the product itself, and hence within the ambit of Article 34 as exemplified in **Familiaspress** which was an Austrian Newspaper Publisher which sought to restrain a German publisher from publishing in Austria a magazine containing crossword puzzles for which the winning reader would receive prizes. Austrian legislation prohibited publishers from including such prizes. Austria argued that its legislation was not caught by Article 34 since the national law related to a method of sales promotion, and according to Keck was therefore outside of such article.

2. Differential Impact in Law or Fact

The ruling in keck is subject to a second qualification:even if a national regulation is categorised as being about selling, it will still be caught by Article 34 if it has a differential impact, in law or fact, for domestic traders and importers. This was exemplified in a multitude of cases.

For example in **Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB**, it was argued that a Swedish ban on tv advertising directed at children under 12 and a ban on commercials for skincare products was in breach of Article 34, and hence could not be applied in relation to advertising broadcast from another MS. The ECH characterised the Swedish Law as one concerning selling arrangements.

In **De Agostini** and **Gourmet** the advertising ban was total. However the ECJ has also brought cases which impeded market access within Article 34. In **Franzen** Swedish law required a licence for those, including importers, engaged in the making of alcohol, or in wholesaling. This was held to infringe Article 34 since it imposed additional costs on importers and because most licences had been issued to Swedish traders. In **Heimdienst** the ECJ showed that it was willing to consider the proviso to paragraph 16 of **Keck** in relation to a selling arrangement that impeded, rather than prevented, access to the market.

Indistinctly and Distinctly Applicable Rules: Product Use

The distinction drawn between selling arrangements and product characterises generated further questions as to how cases concerned with the ‘use’ of products should be regarded. This issue has arisen in two major cases.

Commission v Italy (C-110/05) - Italy prohibited motorcycles and mopeds from towing trailers, even those specifically designed for use with such vehicles. The Commission argued that this constituted a breach of Article 34. The ECJ held that the Italian rule fell with this article, but concluded that it could be justified on grounds of public safety. The Court returned to the issue in **Åklagaren v Percy Mickelsson and Joakim Roos.**

The ECJ considered whether Article 30 should be interpreted as precluding national regulations which prohibited the use of personal watercraft on waters other than designated waterways. The

ECJ accepted that the national rule could be justified for the protection of the environment, provided that certain conditions were met.

The Current Law: Summary
It is clear from the formulation used by the ECJ in the two cases on product use that Article 34 covers three types of national rules:
1. Those that discriminate
2. Those that impose product requirements
3. Those that hinder or inhibit market access

National rules concerning sales are not regarded *per se* as inhibiting market access and are only caught insofar as they apply differentially in law or fact to the marketing of domestic products and those from other Member States.

The differences of view between commentators as to the current state of the positive law are ultimately explicable according to how one regards the interrelationship between the three types of case covered by Article 34. There are two possible 'readings' of the current law:
1. Market Access as the overarching principle - discrimination and product requirements are simply the principal examples of national rules that inhibit market access, without thereby precluding the possibility that there may be other cases that can have the same effect.
2. Market Access as a residual category - discrimination and product requirements are the primary categories of case that fall within Article 34, with market access simply being used as the criterion to capture other cases that do not fall within the first two.

Assessment
The two vies as to the reading of the current law are reflected in contrasting normative assessment of what Article 34 ought to cover.

Market Access as Overarching Principle
The Argument
This is evident in **Keck**, but it was argued that this placed too much emphasis o factual and legal equality at the expense of market access. The approach was to deny that rules relating to selling arrangements came within Article 34, provided that such rules did not discriminate in law or fact between traders from different Member States.

It was argued that this ignored the importance of market access: trading rules could be formally equal in the preceding sense, and still operate so as to inhibit market access. In so far as this may be so, it would, therefore, be misguided to exclude them from Article 34.

Reference can be made to **Leclerc-Siplec,** a case which concerned a prohibition on television advertising imposed by French law on the distribution sector, the purpose being to protect the regional press by forcing the sector to advertise through that medium. Adv. General Jacobs felt that advertising could play an important part in breaking down barriers to inter-state trade, and was therefore concerned that it should always fall outside Article 34. His starting point was that all undertakings engaged in legitimate economic activity should have unfettered access to the market. The ECJ, however, declined to follow the Advocate General and applied *Keck* to the case.

The approach by the AG influenced the ECJ in its later jurisprudence. It has been willing to cinder market access more seriously, by considering whether the selling rule could have the same factual impact for the importer.

Reference can also be made to the academic argument in favour of market access which was reinforced by ***Barnard.***

Meaning and Application
Market Access can be viewed from the perspective of both producer and consumer. For the producer, free movement facilitates sales of goods into different national markets, with the primary objective of challenging existing producers in the country of import. Market access is a means to an end, the end being to maximise sales for the individual producer, and to enhance optimal allocation of resources in the EU. From the consumer's perspective, free movement increases choice.

The market-access approach is normally thought to apply to dynamic selling arrangements. There is a reluctance to apply the reasoning to static selling arrangement i.e. shop hours.

The success of the producer in penetrating new markets may be affected by limitations on where and when goods can be sold as by contrasts on marketing. However, there were cases such as **Semeraro** in which this argument was unsuccessfully made.

It may be argued that restriction on where and when goods can be sold would not have a direct and substantial impact on market access. This is contingent on the factual circumstances of the particular case and cannot be seen as an *a priori* position. Additionally, it is also difficult to maintain a rigid distinction between rules going to access and those that merely affect the volume of sales.

A court may have to take into account the range of goods affected, the existence or not of alternative selling arrangements, and the nature of the restriction itself. This is not an easy task of the ECJ. It may be even for difficult for the national courts, although the ECJ may provide guidance, as in **Agostini,** or it may go further and state that there has been an impediment to market access as in **Gourmet International.**

Market Access as a Slogan
The Argument
There are some commentators who are sceptical as to whether the concept of market access can or should be regarded as the overarching principle for free movement of goods, or more generally for law of free movement.

Snell argues that if the concern is in reality that imported goods are affected more than domestic products then one should simply speak in terms of factual, legal, or indirect discrimination, or differential impact, the conclusion being that the concept of market access adds little, if anything to such analysis. All limits to economic freedom have more or less significant effects on market access, which depend ultimately on their impact on profits, with the consequence that if ***'the law were to prohibit each and every hindrance to market access, it would as a matter of logic have to ban all rules limiting the commercial freedom of traders'.***

He maintains that the concept of market access might also collapse into anti-protectionism. Measures that impeded new entrants to a market necessarily protect established operators, which usually means domestic actors, the conclusion being that all impediments to market access ***can be portrayed as a weapon in the fight against protectionism.***

Market Access: Form & Substance
It is common for judges and commentators to seek the background principle that explicates the more detailed rules that apply within any body of law. The background principle embodies the value or values that the more particular doctrinal rules are designed to effectuate and serves as a reference

point when deciding whether there should be incremental extension of those doctrinal rules. The relationship between the background value and the doctrine is symbiotic, in the sense that the former will inform the latter, but doctrinal development may also lead to re-evaluation of the background value or values.

One can argue that all mention of market access as an overarching principle vis-a-vis free movement of goods be dropped, and excise is given from jurisprudence. Here reference can be made to discrimination, differential impact, or anti-protectionism. It is questionable whether this would be preferable for many reasons.

1. If discrimination or differential impact were to be regarded as the background value, this invites the further inquiry as to why one is concerned with such matters.
2. It is not self-evident that casting the background value or principle in terms of, for example, anti-protectionism is preferable to market access. The core doctrinal component within free movement of goods is indeed discrimination, direct and indirect.
3. There are problems about the application of market access test, as one has already seen.

Defences to Discriminatory Measures: Article 36

If trade rules are found to be discriminatory, they can be saved through Article 36. Discriminatory rules will be scrutinised to ensure that the defence pleaded is warranted. They must also pass the test of proportionality. The burden of proof lies with the MS.

Public Morality

In **Henn and Darby,** the ECJ was willing to accept that a UK ban on the import of pornography could justified under Article 36, although domestic law did not ban the possession of such material. The ECJ concluded that the purpose was to restrain pornography, and that there was no lawful trade in such goods within the UK. However, a different result was reached in **Conegate.**

In the aforementioned case, Conegate imported life-size inflatable dolls from Germany into the UK. The invoice for dolls claimed that they were for window displays, but the customs officials were unconvinced, particularly because the dolls were described as 'love love dolls'. The goods were seized, and magistrates ordered them to be forfeit. Conegate argued that this was in breach of Article 34. The National Court asked whether a prohibition on imports could be justified even though the state did not ban the manufacture or marketing of the same goods within the national territory. The ECJ repeated the reasoning from *Henn and Darby* that it was for each MS to decide upon the nature of public morality for its own territory.

The UK's defence failed. The distinction between the two cases lies in the ECJ's evaluation whether banned imported goods were being treated more harshly than similar domestic goods. In the former case, the ECJ was willing to find that UK Law restrained pronography sufficiently to enable it to conclude that there was no lawful trade in such goods within the UK. In the latter case, the ECJ reached the opposite conclusion. It is clear that ***while MS are free to determine public morality applicable within their territory, they cannot place markedly stricter burdens on goods coming from outside than those applied to equivalent domestic goods.***

Public Policy

The ECJ has resisted attempts to interpret this too broadly. The Court has sometimes rejected arguments that this term can embrace consumer protection. ***A public policy justification must be made in its own terms and cannot be used as a means to advance what amount to a separate ground for defence.*** It is for this reason that few cases contain detailed examination of a public policy argument. The issue was dealt with in **Centre Leclerc.**

French Legislation imposed minimum retail prices for fuel flex primarily on the basis of French refinery prices and costs. The Court found that this constituted an MEQR within Article 34, since imports could not benefit fully from lower cost prices in the country of origin. The Government sought to justify its action on the basis, *inter alia,* of public policy under Article 36. It argued that in absence of the pricing rules, there would be civil disturbances, blockades, and violence. Both the AG and the ECJ rejected the argument, although reasoning was different. The former rejected the argument on principle, while the latter appeared to accept that it could be pleaded under Article 36, while rejecting it on the facts.

Public Security
In the **Campus Oil Ltd Case,** Irish Law required importers of petrol into Ireland o buy 35% of their requirements from a state-owned refinery at prices fixed by the Irish Government. This rule was held to constitute an MEQR. In defence, Ireland relied on public policy and security under Article 36. It argued that it was vital for Ireland to maintain its own oil refining capacity. The challenged rule was the means of ensuring that its refinery products could be marketed. The ECJ held that recourse to Article 36 would not be possible if there were Community rules proving the necessary protection for oil supplies. Certain Community measures existed, but they were not comprehensive. While this argument was accepted, the circumstances to which it will be applicable are limited.

N.B. *MS can take measures relating to matronal security vis-a-vis Article 346-348 TFEU*

Protection of Health and Life of Humans, Animals, or Plants
Health Protection as Real Purpose or Disguised Trade Restriction
The ECJ will determine whether protection of public health is the MS' real purpose or whether the measure was deigned to protect domestic producers. This is exemplified in **Commission v UK (Case 40/82).** The UK banned poultry meat imports from most MS, on the ground of public health protection because of a disease. The ECJ held that this ban was motivated by commercial reasons.

The Determination of Public Health Claims
A public health claim should be sustainable where there is no perfect consensus on the scientific or medical impact of particular substances. This approach is exemplified in the **Sandoz** decision. Authorities in Holland refused to allow the sale of muesli bars that contained added vitamins because the vitamins were dangerous to public health. The muesli bars were readily available in Germany and Belgium. It was accepted that vitamins could be beneficial to health, bit it was also acknowledged that excessive consumption could be harmful to health. Scientific evidence was not certain regards the point at which consumption became excessive, particularly because vitamins consumed in one source of foods might be added to those eaten from a different food source. There had been some Community legislation which touched on the general issue of food additives.

This approach was finely tuned. ***It will decide whether the public health claim is sustainable in principle.*** If there is uncertainty about medical implication it will, in the absence of harmonisation measures, be for the MS to decide upon the degree of protection. This has to be subject to the principle of proportionality.

Health Checks and Double Checks
A MS may not ban imports, but it may subject them to checks, even though the goods were checked at the state of origin.

The early approach in **Denkavit** was to urge national authorities to cooperate to avoid a dual-burden. National authorities had a duty to ascertain whether the documents from the state of export raised a presumption that the goods complied with the demands of the importing state. The Court

admitted that a second set of checks in the state of import might be lawful, provided that the requirements were necessary and proportionate.

The Court's later case law exhibits a healthy scepticism regarding whether a second set of controls is really required. The is evident in **Commission v UK (124/81).** The ECJ held that the UK's concerns about the product could be met by less restrictive means than the import ban and marketing system has instituted. The Court said that the UK could lay down requirements that imported milk had to meet, and could demand certificates from the authorities of the exporting state. If such certificates were produced then it would be for the authorities within the importing state to ascertain whether these certificates raised a presumption that the imported goods complied with the demands of domestic legislation. The ECJ concluded that the conditions for such a presumption existed in this case. This similar unwillingness was seen in **Biologische Producten.**

Other Grounds for Validating Discriminatory Measures
The ECJ has extended Article 34 to indistinctly applicable rules, and created defences that overlap with, but are not identical to, those found under Article 36. The salient issue is whether justification for discriminatory rules is limited to specific matters listed in Article 36, or whether a rule that is discriminatory might also be defended on one of the grounds listed in *Cassis*.

The traditional view was that a MS could not justify a discriminatory measure on grounds other than under Article 36. It was questionable whether **Commission v Belgium (Case 2-90)** was an exception to this proposition. The Commission challenged a Belgian regional decree which banned importation of waste into that area. The decree could be seen as discriminatory, since it did not cover disposal of locally produced waste. Notwithstanding this, the Court allowed environmental protection to be taken into account when considering the legality of the regional decree. The case could, therefore, be seen as allowing justifications to be pleaded that are not found in Article 36. However, the ECJ held that the decree was not discriminatory, notwithstanding appearances to the contrary.

The relationship between Article 36 and the exceptions to Cassis is complicated because the dividing line between cases involving indirect discrimination and indistinctly applicable rules can be a fine one.

This is exemplified in **Commission v Austria (Case 320/03),** which concerned an Austrian rule banning lorries in excess of a certain weight from using certain roads in order to protect the environment and air quality. The AG acknowledged that it was open to question whether the rule should be regarded as indirectly discriminatory or indistinctly applicable, and accepted that this could have implications for whether protection of the environment could be pleaded by way of defence. The ECJ implicitly assumed that the Austrian rule was indistinctly applicable and that therefore protection of the environment could constitute an objective justification.

Moreover, Article 36 and its exhaustive nature was questioned in **PreuseenElektra.** It was argued that there could be good reasons for allowing environmental protection to be pleased as a justification, even in cases of direct discrimination. There was also an argument for a relaxation in the distinction between the justifications that could be pleaded under Article 36 and the rule of reason exceptions to *Cassis*. The ECJ did not, as Advocate General Jacobs suggested, give general guidance on the relationship between Article 36 and the exceptions to *Cassis*. It did however allow the national measure to be justified on environmental grounds.

More recently, the ECJ was more open to allow environmental protection to be pleased as a defence without too close an inquiry as to under what article it should fall.

Relationship between Harmonisation and Article 36
EU harmonisation measures may make recourse to Article 36 inadmissible. This is so where the EU measure is intended to totally harmonise the area. MS action is therefore pre-empted. In **Moormann,** the ECJ held that the existence of harmonisation measures for poultry health inspections meant that the state could no longer use Article 36 to legitimise national rules on the matter,

However, not all EU measures intend to totally harmonise an area. The objective will be ***minimum harmonisation.*** It will be for the ECJ to decide whether the harmonisation measures covers the whole field of whether it leaves room for national regulatory initiatives. In case on minimum harmonisation, ***MS are permitted to maintain and often to introduce more stringent regulatory standards than those prescribed by Community legislation, for the purposes of advancing a particular social or welfare interest, and provided that such additional requirements are compatible with the Treaty.***

In **De Agostini,** it was held that Community directives on 'Television without Frontiers' only partially harmonised the relevant law. They did not preclude national rules to control television advertising to protect consumers.

In the case of exhaustive harmonisation, ***any national measure relating thereto must be assessed in the light of the harmonising measure rather than Treaty provisions.***

The ECJ will ensure that such national regulations are proportionate and do not constitute a means of arbitrary discrimination.

Defences to Indistinctly Applicable Rules: The Mandatory Requirements
The Rationale
Many rules that regulate trade are also capable of restricting trade, yet some serve objectively justifiable purposes. The list of mandatory requirements in Cassis is sometimes referred to the **rule of reason,** drawing upon the earlier hint in Dassonville that, in the absence of EU measures, reasonable trade rules would be accepted in certain circumstances.

The Relationship between the Mandatary Requirements and Article 36
The traditional view has been that the Cassis Mandatory Requirements and Justifications under Article 36 are separate. The former could be used with rules which were not discriminatory. The ECJ's willingness to create a broader category of justifications for indistinctly applicable rules is explicable because discriminatory rules strike at the very heart of the EU, and hence any possible justifications should be narrowly confined. The distinction between Article 36 and the mandatory requirements in *Cassis* has, however, come under increasing strain in recent years for three reasons:
1. There has been discussion about whether the list under Article 36 should be exhaustive
2. The distinction has become less tenable because of the difficulty of distinguishing between cases involving indirect discrimination and indistinctly applicable rules.
3. The reasoning in **Keck** has contributed to confusion in this respect. Selling arrangements are outside Article 34 provided that they apply to all traders in the national territory, and they affect in the same manner, in law and fact, the marketing of domestic and imported products. If this is proven then Article 34 is applicable, subject to possible justifications raised by the state.

Consumer Protection
Commission v Germany (178/84) - German Law prohibited the marketing of beer which was lawfully manufactured in another MS unless it complied with its Beer duty Act of 1952. Under this law only drinks which complied with the Act would be sold as *beer.* This meant that the term could be used only in relation to those drinks which were made from barley, hops, yeast, and water. The

German Government argued that the reservation of this term to beverages made from these substances was necessary to protect the courser because of association. It also argued that its legislation was not protectionist in aim, in that any harder who made beer from such ingredients could market freely in Germany. The ECJ cited from Cassis and Dassonville and found that the German rule constituted an impediment to trade and then considered whether the rule was necessary to protect consumers. ***The ECJ therefore held the German law to be in breach of Article 34.***

The ECJ has often rejected justifications based on consumer protection by stating that adequate labelling requirements can achieve the national objective with less impact on intra-EU trade. However, even labelling requirements may not escape Article 34. In **Fietje,** the ECJ held that the obligation to use a certain name on a label could make it more difficult to market goods coming from MS, and would have to justified on the ground of consumer protection.

Fairness of Commercial Transactions
There is an overlap between consumer protection and the fairness of commercial transactions. This particular mandatory requirement has been used to justify national rules that seek to prevent unfair marketing practices, such as the selling of imported goods that are imitations of familiar domestic goods. It seems, however, that in order to be justified on this ground the national rule must not prohibit the marketing of goods which have been made according to fair and traditional practices in state A merely because they are similar to goods which have been made in state B.

Public Health
The tradition view was that only indistinctly applicable rules could take advantage of the mandatary requirements. However, the ECJ has not been too concerned about whether it treats a justification with Article 36 or within the list of mandatary requirements, provided that the justification comes within both lists.

Other Mandatary Requirements
The list provided in Cassis is not exhaustive, as is evident from the fact that the ECJ stated that the mandatory requirements included ***in particular*** those mentioned. This has been confirmed by later cases. It can, in the absence of harmonisation measures, include the protection of the environment as seen in **PreussenElektra.**

Environmental Protection is not the only new addition to this catalogue. In **Familiapress,** the ECJ recognised pluralism of the press as a value that could legitimate a national measure that was in breach of Article 34. The offering of prizes for games in magazines could drive out smaller papers which could not afford to make such offers. In **Cinétheque,** the ECJ was willing to recognise that the fostering of certain forms of art could constitute a justifiable objective under EU law. Reference can also be made to road safety. Finally, it is clear from **Schmidberger** that the protection of fundamental human rights can be relevant as justification of an indistinctly applicable measure.

Mandatary Requirements and Harmonisation
An EU harmonisation may render it impossible for a state to rely on a mandatory requirement. Whether it has this effect will depend upon whether the measure is directed at total or only a minimum harmonisation.

Free Movement of Goods and Cassis: the Broader Perspective
The Commission's Response to Cassis
The judgment in *Cassis* rendered indistinctly applicable rules which impeded trade incompatible with Article 34 unless they could be saved by a mandatory requirement. This was so even in the absence of relevant harmonisation provisions. *Cassis* therefore fostered single market integration, and obviated the need for many harmonisation provisions.

However, the ECJ's jurisprudence cannot be viewed in isolation. It had an impact upon how the other Community institutions perceived their role. The Commission was not slow to respond to the Court's initiative. It published a Communication setting out its interpretation of the *Cassis* decision, and its legislative role in this area. There are two important principles.

1. **Mutual Recognition**

Goods lawfully marketed in one Member State should, in principle, be admitted to the market of any other state. This leads to competition among rules, or regulatory competition (***best rules***). A producer will normally have to comply with the national rules of only one state for its goods to move freely in the EU. Firms are then able to choose between different national regulations. Consumers can choose between the products that comply with those rules.

2. **Commission's Enforcement and Legislative strategy for Trade Rules post-Cassis**

This would tackle trade rules that were ***inadmissible*** in the light of Cassis, by using powers under Article 258 against MS. The harmonisation process would be directed towards those trade rules that were ***admissible*** under the Cassis test. The case caused the Commission to re-orient its legislative programme, and concentrate on national rules that were still valid under the Court's case-law.

Problems with realising the Cassis Strategy

Mutual Recognition is the core of the ECJ's and Commission's strategy. The assumption is that this generally works well, even though the matter is not that straightforward. A Commission Paper maintained that this was not always efficient, subsequently proposing changes for improvement. There should be increased monitoring of mutual recognition by the Commission, complemented by measures to improve awareness of mutual recognition by producers of goods and services. Member States should deal with requests concerning mutual recognition within a reasonable time, and should include mutual recognition clauses in national legislation.

Today, legislation has been enacted to enhance free movement and mutual recognition. A procedure for the exchange of information on national measures derogating from the principle of free movement of goods within the Community was adopted. This was later replaced by **Regulation 764/2008** which should be viewed in tandem with **Directive 98/34** on the provision of information on technical standards and regulations. This measure, known as the **Mutual Information or Transparency Directive**, ***imposes an obligation on a state to inform the Commission before it adopts any legally binding regulation setting a technical specification.***

Legislative intervention to secure free movement and mutual recognition has been complemented by judicial initiatives, more especially the obligation to insert mutual recognition clauses in legsailtion, which derives from **Foie Gras.** The French imposed requirements on the composition of *foie gras*. The Commission argued that the French Decree containing the requirements for *foie gras* must also contain a mutual recognition clause in the legislation itself, permitting preparations for *foie gras* that had been lawfully marketed in another Member State to be marketed in France. The ECJ agreed.

Problems arising from the Cassis Strategy

Adjudication by the ECJ pursuant to Cassis resulted in **negative integration:** ***trade rules would be incompatible with Article 34 unless they could be saved by a mandatary requirement.***

Rule-Making would be used for national rules that survived because of the mandatary requirements, and therefore still posed a problem for market integration. This resulted in **positive integration:** ***there would be EU rules which would bind all states.***

There are four problems with this strategy:

1. This is dependent on agreement as to the outcome of the adjudicative process. If the challenged rule failed the *Cassis* test then it would have to be removed from national law. This conclusion was fine, provided that one agreed with it. The result was less satisfactory if one felt that the trade rule should have been saved by a mandatory requirement.
2. This relates to the balancing exercise performed pursuant to article 36 and the mandatary requirements. The ECJ has to adjudicate on the balance between market integration and the attainment of other societal goals when deciding on the legitimacy of such defences.
3. This concerns the balance between market integration and the protective function played by national rules. EU legislative initiatives may be required to ensure that the protective function of certain trade rules is not lost sight of in the desire to enhance single market integration.
4. This concerns the allocation of regulatory competence between the EU and the MS. the interpretation of Article 34 serves to define the sphere of regulatory competence left to the MS, and the extent to which EU harmonisation is required.

Free Movement of Capital and Economic and Monetary Union

Free Movement of Capital
The Original Treaty Provisions
While Articles 67 to 73 EEC contained provisions on the free movement of capital, they were less peremptory than those applicable to the free movement of goods, workers, services, and establishment. Thus while Article 67(1) EEC imposed an obligation to abolish progressively restrictions on capital movements during the transitional period, this was only to the extent necessary to ensure the proper functioning of the economic market. This theme was eventually carried to Article 71, which required MS to endeavour to avoid the introduction of new exchange restrictions on capital movements.

The Current Provisions: the Basic Principle
The Treaty of Maastricht completely revised the provisions on free movement of capital, with effect from 1994. Today Article 63 TFEU maintains that all restrictions on the movement of capital between MS and between MS and third countries shall be prohibited. All restrictions on payment between MS and MS and third countries shall be prohibited. In **Sanz de Lera**, thus article was held to have ***direct effect***. The Court held that ***it laid sown a clear and unconditional prohibition for which no implementing measure was required.*** The existence of MS discretion to take all measures necessary to prevent infringement of national law and regulations contained within Article 65(1)(b) did not prevent Article 63 from having direct effect, because the exercise of discretion was subject to judicial review.

The Treaty provisions do not define movement of capital, but the ECJ held that reference can be made to the non-executive list in **Directive 88/361.** It is up to the ECJ with help of the Directive to establish whether a measures constitutes a restriction on capital movement. In the **Westdeutsche Landesbank Case**, a national prohibition on the creation of a mortgage in a foreign currency was prohibited by Article 63. Moreover share dealings and golden shares also fall within the remit of Article 63 as evident in **Commission v Portugal (8th July 2010).**

While direct taxation remains within the MS' competence, they must exercise this consistently with EU Law and avoid discrimination on grounds of nationality as in **Commission v Portugal (2002)**. Article 63 also safeguards measures which may not be discriminatory but still impede capital movements.

Article 63 gives the impression that capital movements within the Eu, and between MS and non-member countries, are treated the same. This is not so, since other Treaty Articles qualify the application of Article 63 to non-member countries. Article 64(1) in effect allows lawful restrictions on capital movements which existed in 1993 to remain in being, and Article 64(2) only requires the Council to endeavour to achieve free movement with non-member countries to the greatest extent possible. The Council is also empowered through Article 66 to take safeguard measures in exceptional circumstances where capital movements to or from non-member countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union. Such measures cannot also longer than six months, and can be taken only where strictly necessary.

The Current Provisions: the Exceptions

Article 65(1)(a) concerns taxation and constitutes one of the main exceptions to Article 63. It holds that ***the provisions of Article 63 shall be without prejudice to the right of MS to apply the relevant provisions of their tax law which distinguish between taxpayers whoa re not in the sae situation with regard to the place where their capital is invested.***

The former article aforementioned expressly made subject to Article 65(3), which stipulates that the measures taken must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments. The ECJ will make comparisons and analyse alleged discrimination. A difference in treatment has to be objectively justified.

In **Verkooijen,** it was held that a national provisions making the grant exemption from income tax on dividends paid to shareholders conditions on the company having its seat in the Netherlands was contrary to EU Law. The Court rejected the defence that the rule was justified to encourage investment in the Netherlands.

Article 65(1)(b) provides that ***the provisions of Article 63 shall be without prejudice to the right of MS to take all measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of finical institutions, or to lay down procedures for the declaration of capital movement for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or security.***

This is also subject to Article 63 meaning that restrictions cannot constitute a means of arbitrary discrimination. Article 65(1)(b) is divided in two:

1. This covers the whole of the Article apart from the reference to public policy and public security. The ECJ will analyse carefully before accepting this defence. In **Commission v Belgium** it held that a national rule forbidding Belgian Residents from subscribing to security of loans on the Eurobond market was caught by Article 63. Reference was made to the importance of having proportionality and a direct link, non of which were evident in this case.
2. The second part covers public policy and public security. The ECJ draws on its jurisprudence from other freedom when interpreting these terms. The MS has the burden of proof and justification must be justified in terms of national public interest of a kind referred to in Article 65(1) or by grounds of overriding public interest. In **Scientology International,** the ECJ held that a national law requiring pre-authorisation for capital investments that threatened public policy or security could come within Article 65(1)(b). However, this threat would have to be specially detailed out to fall under such article.

Article 65(2) states that ***the provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible to the Treaty.*** This Article is also made subject to Article 63. These restrictions include the exception in the case of official activities contained in Article 51.

Articles 143 & 144 contain a different type of qualification from Article 63. These cease to operate from the third stage of EMU, except for states with derogations, and deal with balance-of-payment crises.

EMU & the European Monetary System: Early Attempts
In 1969 the Heads of State resolved that a plan should be drawn up in relation to the EMU. A committee concluded that EMU would entail either the total convertibility of the Community currencies, free from fluctuations in exchange rates, or that preferably such currencies would be replaced by a single Community currency. The report recognised that EMU would entail the centralisation of monetary policy, and that there would have to be some Community system for national central banks. Process was halted as a result of changed economic circumstances.

The Werner Report was premised on the assumption of fixed exchange rates, and this was undermined by developments in the early 1970s. European currencies began to float and there was an urgent ned to prevent them from floating too far apart. This was catalyst for the 'snake' initiation, which established ***the principle that the difference between exchange rates of two MS should not be greater than 2.25%.***

A more general attempt to engender monetary stability occurred in 1978 by the establishment of the **European Monetary System.** The EMS instituted the **Exchange Rate Mechanisms & the European Currency Unit.** The ECU rate was determine against a basket of currencies of the MS and the ERM operated by setting for each participating state a currency rate against the ECU. ***Any participant country would not allow its exchange rate to fluctuate by more than 2.25 per cent above or below these bilateral central rates, with an exceptional band of 6 per cent***. When a currency reached its bilateral limits against another currency, intervention was required by the relevant central banks to redress the matter.

The normal workings of the ERM were thrown into disarray by the currency crises of 1992 and 1993. Currency dealers speculated that certain weaker currencies could not be sustained within the relatively narrow bands of the ERM. Central banks sought to preserve the integrity of the ERM, but could not ultimately resist market pressures. The lira and the pound were suspended from the ERM. While the ERM was preserved, its primary rationale was undermined.

Economic and Monetary Union: the Three Stages
A. Stage One and the Delors Report
While the SEA contained no commitment to the EMU, it stated that in 1972 the Heads of State approved the objective of progressing towards EMU. This was the catalyst for bringing back the issue into the agenda.

Stage One was the completion of the IM, closer economic convergence, and the membership of all states of the ERM. This did not require new Treaty powers. In Stage Two, a European System of Central Banks would be crated to ordinate national monetary policies and formulate a common monetary policy for the Community. Stage Three would see the locking of exchange rates and a single currency managed by the ESCB. This was to be independent and have price stability as a primary goal.

The Delors Report also recognised that there would have to be a central control over fiscal policy, since otherwise the action of a particular state could have deleterious consequences for inflation or interest rates in all states.

B. Stage Two and the Treaty on European Union

The Maastricht Treaty laid the foundations for progress towards EMU, and stipulated that the second stage should begin beginning 1994. It contained three kinds of provisions:

1. Article 4(1) EC stipulated that the activities of the MS and the Community should include ***the adoption of an economic policy based on the close coordination of MS' economic policies, on the internal market, and on the definition of the common objectives, connoted in accordance with the principle of an open market economic with free competition.*** Article 4(2) EC provided that the ***activities of the states and the community should include irrevocable fixing of exchange rates leading to a single currency, the ECU, and the definition of a single monetary and exchange-rate policy.***

2. The connection between economic and monetary policy was correctly perceived by the Werner and Delors Reports. Monetary union is not plausible without some measure of centralised control over fiscal policy, and in particular over budgetary matters. This was the rationale for Articles 98–104 EC, which gave the EC some control over Member States' economic policies.

3. A European Monetary Institute was established which helped to pave way for Stage Three of the EMU. It had to specific the regulatory, organisational, and logistical framework necessary for the ESCB to perform its tasks in the third stage. MS had to ensure that their central bank was independent, and were instructed to treat their exchange rate policy as a matter of common interest.

C. Stage Three and the Legal Framework

This had to start not later than January 1999. The Commission and the EMI had to report to the Council on the progress made by the states towards the EMU. These reports would examine the ***extent to which the states had made their central banks independent, and whether the convergence criteria had been met. Meeting these criteria was a condition precedent for a state to adopt the single currency***.

There were four criteria set out under Article 121(1), and fleshed out in a Protocol.

The exchange rates of the participating countries were irrevocably set, and the Euro became a currency in its own right, notwithstanding those who doubted whether some states really would meet the convergence criteria, given the high debts levels in Italy and Belgium. The UK negotiated an opt-out Protocol.

EMU: Economic Foundations

The Case for EMU

It is argued that EMU will foster economic growth and engender greater price stability through low inflation. This is based on a number of factors:

- **Saving of Transaction Costs**: removal of exchange-rate conversion costs
- **Link between the Single Market and the Single Currency**: ***"one market, one money".*** It is possible to have a single market without a single currency, but it was argued that the single market would work better with a single currency than without.
- **Protection against the costs associated with large exchange-rate changes and competitive devaluation** which would distort the single market by unpredictable shifts of advantage between countries unrelated to fundamentals. Currency fluctuations could slow economic growth by creating uncertainty for business, which was not conducive to investment.
- **Foster growth by lowering interest rates and stimulating investment**: countries would mo longer have to raise their interest rates above German levels in order to stop their currencies from falling in relation to the Deutschmark.

- **Stable Prices and Low Inflation**: savers gains from low inflation, since their money retains its purchasing power for longer. Inflation makes it more difficult to maintain long-term business plans, and redistributes income in an arbitrary manner.

The Case against EMU
Cases against EMU can be divided into two:
1. **Contigent Disapproval**
MS were not ready for EMU, since they could not meet the convergence criteria, except by creative accounting that threw the whole enterprise into disrepute.

2. **Outright Rejection**
This was more complex and could be further split into three:
i. Political
It was argued by some that a single currency was a major step towards a European super state. There would no longer be any point in having parliamentary debates on matters such as inflation, interest rates, and unemployment, since power over such matters would be taken from national polities and given to the ECB. This would, so it was said, exacerbate problems of democratic deficit within the EU, given that the demise of national parliamentary power over such matters would not be offset by any meaningful control through the European Parliament.

ii. Symbolic
In this aspect, a national currency was felt by some to be part of the very idea of nationhood, very well captured by Johnson.

iii. Economic
It was argued that a single currency would lead to a variety of undesirable consequences. Prices would increase because business would take advantage of the change. It could also create tensions because economic conditions in MS followed different cycles, and hence removing the possibility of exchange rate fluctuation eliminated a significant mechanism for economic adjustment between states.

EMU: Economics, Politics, and the Law
It is easily apparent that the debates about EMU are only in part economic. The economic dimension shades into the political, and these often manifest themselves in legal form.

EMU: Monetary Union and the ECB
Article 119 TFEU is the lead provision.

ECB and ESCB
The ECB together with Central Banks adopting the Euro, have the primary responsibility for monetary policy. The ECB has a legal personality. The independence of the ECB is enshrined in **Article 130 TFEU,** which stipulates that ***the ECB shall not take instructions from EU institutions, MS, or any other body,*** further affirmed by Article 282(3) TFEU. The decision making structure reflects the aforementioned:

The President of the Council and a member of the Commission may participate in meetings of the ECB's Governing Council, but they do not have the right to vote. The ECB has the power to make regulations and take decisions. It is also empowered to make recommendations and deliver opinions. The ECB is entitled, subject to certain conditions, to impose fines or periodic penalty payments on undertakings for failure to comply with obligations contained in its regulations and decisions.

The start of the Third EMU stage saw the establishment of the Economic and Financial Committee, which had a number of tasks i.e. delivering opinions to the Council or Commission, examining the situation regarding free movement of capital.

Monetary Policy
The objectives are set out in **Article 127 TFEU.** The primary objective is ***to maintain price stability.*** The ESCB is to act in accordance with the Principe of an open market economic with free competition, and in compliance with principles under Article 119.

Basic Tasks of the ESCB:
- Define and implement the EU's monetary policy
- Conduct foreign exchange operations
- Hold and manage the official foreign reserves of the MS
- Promote the smooth operation of the payment system

It also has the exclusive right to authorise the issue of banknotes within the EU. The ESCB also contributes to the smooth conduct of policies pursued by other competent authorities relating to the prudential supervision of credit institutions and the stability of the finical system.

Policy Issues: Central Bank Independence
The degree of independence possessed by national central banks varies. ***Gormley and de Haan*** identified five criteria that shape the division of responsibilities between the National Government and their Central Banks:
1. Ultimate objective of monetary policy, which in many countries is price stability.
2. Specification of inflation targets.
3. Degree of independence possessed by the bank and the juridical basis on which this rests.
4. The extent to which the government can override the central bank's view.
5. Appointment of bank officials, and the extent to which government has discretion over this matter.

When judged by this criteria, the ECB has a high degree of independence as enshrined in Articles 130 and 282(2). The Treaty establishes the first and second objectives of the ESCB. T**he Treaty has nonetheless accorded a constitutional status to the ESCB and ECB**. This degree of independence was influenced by German desires to have an ECB which mirrored closely the powers and status of the Bundesbank.

There is not one way to structure a central bank, even given acceptance of indolence as an ideal. Numerous factors can influence the prices degree of independence accorded to such an institution.

EMU: Coordination of Economic Policy
Such coordination has been especially important in the light of monetary union. It is clear that the economic health of individual MS' economics can have a marked impact on the valuation of the Euro, and this is the broad rationale for coordination. There are two forms of coordination embodied in the Treaty.

Multilateral and Surveillance Procedure
MS are to regard their economic policies as a matter of common concern, and are to coordinate them in the Council. The Council acting on Commission's recommendation formulates a draft for the broad guidelines of the economic policies of the MS and the EU, and reports this to the EC which discusses the guidelines. It is for the Council on the basis of report from the Commission to monitor economic developments in the MS.

The Treaty provisions have been contemplated by the Stability and Growth Pact. The Regulation provides rules covering the content, submission, examination, and monitoring of the stability and convergence programmes so as to prevent at an early stage the occurrence of excessive government deficit, and to promote the surveillance and coordination of economic policies.

Excessive Deficit Procedure
MS are under an obligation to avoid excessive deficits. The Commission monitors the budgetary situation and government debt in the MS to identity gross euros. The Commission must examine compliance with budget discipline on the basis of two criteria:

1. Whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, this being 3 per cent, unless either the ratio has declined substantially and continuously and reached a level that comes close to the reference value, or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value.
2. Whether the ratio of government debt to gross domestic product exceeds such a reference value, this being 60 per cent, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

Where the Council decides that an excessive deficit exists, it shall adopt recommendation addressed to the MS concerned with a view to brining that situation to an end within a given period. The general rule is that these recommendations are not made public, but where the Council establishes that the MS has taken no effective action within the requisite period then the Council may make the recommendations public.

The Treaty contains provisions specifying what should happen if the Member State fails to put into practice the recommendations of the Council. If this occurs the Council can decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation, and to submit reports to the Council so that it can examine the adjustment efforts of that Member State. If MS fails to comply, there are different measures:

- MS to publish additional information before issuing bonds and securities.
- Require MS to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has been corrected.
- Impose fines of an appropriate size.

Free Movement of Workers

Article 45: Direct Effect
Article 45 holds that Freedom of Movement for Workers shall be secured within the Union. The Court has repeatedly emphasised the central importance of the twin principles of ***freedom of movement and non-discrimination on grounds of nationality.*** Article 45 represents the general principle in Article 18 TFEU relating to prohibition of discrimination on grounds of nationality.

In **Walrave & Koch,** it was held that Article 45 would even apply where the work was done outside of the Community, so ling as the legal relationship of employment was entered within the Community. This was extended in **Boukhalfa**: the Article applied to the employment of a MS national which was entered into and performed in a non-member country where the national resided.

In **Bosman,** the Court held that provisions of Article 45 are not just of ***vertical direct effect.*** The **Angonese Case** went further and indicated that the Article is also ***horizontally*** applicable to the

action of individuals who do not have the power to make rules regulating gainful employment, such a single employer who refuses to employ someone on grounds of nationality. This is a difference between the free movement of goods: ***Article 34 applies only to State measures, and not to those adopted by private actors.***

Article 45: Worker and the scope of Protection
Article 46 TFEU provides for the EP and Council to adopt secondary legislation to bring about the freedoms set out in Article 45. A range of directives and regulations were adopted under this provisions to ***govern the conditions of entry, residence, and treatment of EU workers and their families.*** Many of these were consolidated by **Directive 2004/38** on the free movement and residence of EU citizens and their families.

The aforementioned replaced Directives 64/221 and 68/360. It also amended Regulation 1612/68, which fleshed out the equal-treatment principle and specified many of the substantive rights and entitlements of workers and their families. It also replaced Directive 1251/70.

A major innovation of the 2004 Directive was the introduction of ***the right of perminanalt residence for EU nationals and their families after five tears of continuous legal residence in another MS.*** This was significant because a fundamental issue which was not immediately apparent hitherto was whether 'workers of the MS' in Article 45(2) covered only nationals of MS, or whether it included non-EU nationals resident and working within the EU. Regulation 1612/68, restricted its application to workers who were nationals of the MS, and that was the interpretation adopted by the ECJ.

Definition of a Worker: An EU Concept
The Court insisted from the outset that the definition of a 'worker' was a matter for EU Law, not national law. The issue arose early in the **Hoekstra Case,** in the context of the interpretation of a Council social security regulation. In requiring the term worker to be a Union concept, the Courts was also ***claiming ultimate authority to define its meaning and scope.*** Reference can be made to **Federico Mancini**: the ECJ conferred on itself a **hermeneutic monopoly** to counteract possible unilateral restrictions of the application of the rules on freedom of movement by the different MS. thus, the Court held that a spouse can be employed by the other spouse as a worker, and hat Article 45 can be relied upon by the employer, or by a relevant third party, rather than only by the employee.

Any person who pursues employment activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is treated as a worker.

For an economic activity to qualify as employment under Article 45, rather than self-employment under Article 49 TFEU, there must be a **relationship of subordination.** However, there is also no single EU concept of worker since it varies according to the EU Law context in which it arises.

Definition of Worker: Minimum Income and Working-Time Requirements
A number of cases concerned he interplay between the economic aspect of free movement, and determined by the level of remuneration, and the social aspect underlying free movement policy.

The issue arose in **Levin,** in the context of part-timers. There are a number of important aspects to this judgement. The ECJ begins by reaffirming that such rules are to be interpreted broadly. The freedom to take up employment is ***important as a right for the worker to raise his or her standard of living***. This is even if the worker does not reach the minimum level of subsistence in a particular state.

Moreover, it was held that the purpose or motive of the worker is immaterial, once he or she is pursuing or wishing to pursue a genuine and effective economic activity. The ECJ has consistently adopted this kind of response to allegations of 'abuse of rights' in the area of free movement.

One can note what Advocate General Slynn had acknowledged: he emphasised that the exclusion of part-time work from the protection of Article 45 would exclude not only women, the elderly, and disabled who, for personal reasons, might wish only to work part time, but also women and men who would prefer to work full time but were obliged to accept part-time work. This case ***clarified that part-timers are covered by free movement, and that it did not matter if workers chose to supplement their income from private sources.***

In **Kempf,** the issue was taken a step further. A German National who was living and working in the Netherlands was refused a residence permit. The Dutch and Danish governments argued that work providing an income below the minimum means of subsistence in the host state could not be regarded as genuine and effective work if the person doing the work claimed social assistance from *public* funds. However, the Court disagreed by saying that when a genuine part-time workweek sought to supplement earning below the subsistence level, it was ***irrelevant whether those supplementary means are derived from property or from the employment of a member of his family, as was the case in Levin, or whether, as in this instance, they are obtained from finical assistance drawn from the public funds of a MS in which he resides.***

A similarly inclusive reading of the term 'worker' is evident in may cases where the economic dimension of the activity was in question. The Court has ruled that the practise of sports falls within EU Law in so far as it constitutes an economic activity, although the composition of the national teams could be a question of purely sporting and not economic interest (**Bosman Case).**

Genuine and Effective Work - in **Lawrie-Blum,** the Court was asked to rule on the compatibility of German measures restricting access for non-nationals to the preparatory service stage which was necessary for qualification as a secondary school teacher. The Court ruled that a trainee teacher qualified as a worker since, during the period of preparation, three conditions would be fulfilled:

1. She would perform services of economic value
2. Under the direction of the relevant school
3. Would receive a measure of remuneration back

The fact that she was paid less than a regular teacher was irrelevant, for the same reasons in Levin and Kempf.

In **Steymann,** the ECJ pushed the concept of remuneration a little further. The fact that the were might be seen as being unpaid did not mean that it was not effective economic activity. Steymann provided services of value to the religious community which would otherwise have to be performed by someone else, and in return for which his material needs were satisfied.

Definition of Worker: Purpose of Employment

The general rule is that the purpose of employment will not be relevant in determining whether the person is a worker given that it is genuine and not marginal. There are, however, some cases where account of the purpose has been taken.

In **Bettray,** the Court ruled on the application of Article 45 to someone who was undertaking therapeutic work as part of a drug-rehabilitation programme under Dutch social employment law. The aim of the programme was to reintegrate people who were temporarily incapacitated into the workforce. They would be paid a certain amount, and treated, insofar as possible, in accordance with normal conditions of paid employment. The Court began by noting that a job was being carried

out under supervision and in return for remuneration, and that the low pay from public funds and the low productivity of the worker would not in themselves prevent the application of Article 45. However, unlike in its judgment in *Levin* where the reason for undertaking work was said not to be relevant to its genuineness, the ECJ examined the purpose of the work performed. Clearly the purpose for undertaking the work was crucial to the ECJ's decision.

The fact that the main or sole purpose of the work was to rehabilitate the person, and to find work suited to their capabilities, rather than to meet a genuine economic need, as was the case in *Steymann*, resulted in a ruling against Bettray. This case is open to criticism.

In **Trojani,** however, where a French national worked in Belgium in a reintegration programme run by the Salvation Army, the ECJ seemed to distinguish *Bettray* on the ground that the applicant in that case had apparently been unable for an indefinite period, on account of his drug addiction, to work under normal conditions. Thus although the ECJ left it ultimately to the national court to decide whether his employment was real and genuine, it made clear that the fact that social reintegration was the main purpose of the employment would not itself disqualify the employment from being considered as such. Instead, the crucial factor was whether the services '***are capable of being regarded as forming part of the normal labour market***'.

In **Brown,** the Court took into account the purpose. Although someone who engaged in genuine and effective work before leaving to begin a course of study will be considered to be a worker under Article 45, the fact that the work was undertaken to prepare for the course, rather than to prepare for an adoption would mean that not all of the advantages provided for worker within EU Law may be claimed.

Brown was a dual national relying on his French nationality in the UK, who had worked for nine months for a company in Scotland as a form of 'pre-university industrial training', before beginning an electrical engineering degree at Cambridge University. The Court ruled that although he was a 'worker', since he satisfied the three criteria in *Lawrie-Blum*, he was not entitled to all the social advantages, in this case a maintenance grant, which would normally be open to workers. This was because his employment was merely 'ancillary' to his desired course of study.

In **Ninni-Oraschi,** the ECJ reiterated the importance of objective factors such as hours worker over subjective factors such as motive, and dismissed as irrelevant the argument that the applicant had 'abused' EC rights in order to gain the status of worker.

Definition of Worker: the Job-Seeker

In **Royer,** the Court referred to the right ***to look for or pursue an occupation.*** The issue was addressed directly in **Antonissen,** where the Court held that those actively seeking for a job do not have the full status of worker, but are nonetheless covered under Article 45. In the latter case, the Article was examined and its purpose was identified: ***to ensure the free movement of workers.*** The Court concluded that a literal interpretation would hinder that purpose.

If nationals could move to another Member State only when they already held an offer of employment, the number of people who could move would be small, and many workers who could seek and find employment on arrival in a Member State would be prevented from so doing. A particularly interesting feature of *Antonissen* was the ***ECJ's statement that the rights expressly enumerated in Article 45 are not exhaustive***.

However, the ECJ was clear that the status of an EU national who is job-seeking is not the same as the national actually employed. Member States retain the power to expel a job-seeker who does not have prospects of finding work after a reasonable period of time, without needing to invoke Article

45(3). Moreover, there may be provisions, such as unemployment insurance, that cannot be used by someone who has never participated in the employment market.

This was seen in **Lebon,** where the Court ruled that social and tax advantages guaranteed to workers under EU law, in particular by Article 7(2) of Regulation 1612/68, were not available to those moving in search of work.

Collins Case - the Court confirmed the distinction between fully-fledged workers who can benefit from all provisions of Regulation 1612/68 concerning social advantages and equality of treatment with national workers, and job-seekers who, although covered by Article 45, can benefit only from the provisions of Regulation 1612/68 governing access to employment.

This was confirmed in **Ioannidis,** in which the Court ruled that a Greek national seeking his first employment in Belgium was entitled in principle to a tideover allowance intended specifically to facilitate the transition from education to the employment market, and that a national eligibility condition requiring applicants to have completed their secondary education in Belgium was contrary to Article 45.

Scope of Protection: New Member States
The right to move as per Article 45 was qualified in relation to the 2004 enlargement when ten Central and East European states joined. The EU, however, admitted new MS and denied them the immediate right to benefit from one of the four fundamental freedoms. A transitional regime for the free movement of workers from the new states was introduced, delaying the full implementation of their rights of free movement for up to seven years. This transnational regime ended in 2011, while that for Bulgaria and Romania ended in 2013.

Article 45: Discrimination, Market Access, and Justification
Rules directly discrimination on grounds of nationality will be caught under Article 45, as well as indirect discrimination and impediments to market access which do not depend on showing of unequal impact.

Direct Discrimination
In proceedings brought by the Commission against France for failing to repeal provisions of the French Maritime Code, which had required a certain proportion of the crew of a ship to be of French nationality, the Court ruled that Article 45 was '***directly applicable in the legal system of every Member State***' and would render inapplicable all contrary national law. Further, a state can be held in breach of Article 45 where the discrimination is practised by any public body, including public universities.

Indirect Discrimination
This is also prohibited by Article 45 so that a condition of eligibility for a benefit which is more easily satisfied by national than by non-national workers is likely to fall foul of the Treaty. The ECJ has relaxed the requirements for proof of indirect discrimination. In **O'Flynn,** it was held that in order for indirect discrimination to be established, it was not necessary to prove that a national measure in practice affected a higher proportion of foreign workers, but merely that the measure was 'intrinsically liable' to affect migrant workers more than nationals.

A common example is where benefit are made conditional, in law or fact, on residence, place-of-origin, place-of-education requirements that can be easily satisfied by nationals that non-nationals.

In **Ugliola,** an Italian worker in Germany challenged a German law under which a worker's security of employment was protected by having periods of military service taken into account in calculating

the length of employment. However, this applied only to those who done their military service in the Bundeswehr, although the nationality of the worker was irrelevant. Thus, Court concluded that such law created an unjustifiable restriction by '***indirectly introducing discrimination in favour of their own nationals alone***', since the requirement that the service be done in the Bundeswehr would clearly be satisfied by a far greater number of nationals than non-nationals.

In **Sotgiu,** the German Post Office increased the separation allowance paid to workers employed away from their place of residence within Germany, but did not pay the increase to workers (whatever their nationality) whose residence at the time of their initial employment was abroad, and this was held by the ECJ to be contrary to the Treaty.

In **Zaurstrassen,** the Court held that national rules under which the joint assessment to tax of spouses was conditional on their both being resident on the national territory were incompatible with Article 45.

A further form of indirect discrimination is a language requirement for certain posts, aimed at having an effect on non-nationals. However, there is an exception to this as per **Article 3(1) of Regulation 1612/68** which allows for the imposition of ***'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled***'. Here, the proportionality plays an important role as seen in the **Groener Case,** which concerned a part-time Dutch art teacher rejection in Ireland because she did not pass an oral examination in the Irish language.

Obstacles to Access to the Employment Market

Bosman Case - the transfer system developed by national and transnational football associations was found in breach of Article 45. The system required a football club, which sought to engage a player whose contract with another club had come to an end, to pay money to the latter club. Bosman, who had been employed by a Belgian football club, was effectively prevented from securing employment with a French club. The fact that the transfer system applied equally to players moving from one club to another within a Member State as to players moving between states, and that a player's nationality was entirely irrelevant, did not prevent the system from falling foul of Article 45.

In the absence of any sufficiently convincing public-interest justification for the rule, it was found by the ECJ to be contrary to Article 45. The fact that there was no discrimination was irrelevant: ***the existence of an obstacle to the access of workers from one Member State to employment in another Member State was enough to attract the application of Article 45***.

Non-discriminatory rules which nonetheless impeded the access of workers to the employment market of another state, whether imposed by the state of origin or destination, were caught by Article 45.

In **Terhoeve,** the Court held that provisions concerning the payment of social contributions, which could preclude or deter a national of a Member State from leaving his country of origin in order to exercise his free-movement rights constituted an obstacle to that freedom even if they applied without regard to the nationality of the workers concerned.

In **Van Lent,** the Court condemned national rules which prohibited workers domiciled in one particular state from using a vehicle registered in another MS, on the basis that these rules might preclude workers from exercising their right to free movement or might impeded access to employment between states.

In **Weigel,** the ECJ ruled that the negative tax consequences for an individual who moves to work from one Member State to another will not necessarily be contrary to Article 45, even if it is likely to deter the worker from exercising rights of free movement, if it does not place that individual under any greater disadvantage than those already resident and subject to the same tax.

Internal Situations
Article 45 does not prohibit discrimination in a so-called 'wholly internal situation'. This is referred to as 'reverse discrimination' since ***its effect is frequently that national workers cannot claim rights in their own MS which workers who are nationals of other MS could claim there.*** In **Saunders,** the Court held that since there was 'no factor connecting' the defendant 'to any of the situations envisaged by Community law', she could not rely on Article 45 to challenge an order which effectively excluded her from part of her own national territory.

A worker will be able to use Article 45 against his or her own state where the worker has been employed and resided in another State as seen in **De Groot.** Such a worker may claim that he or she has been discriminated against in relation to, for example, social security contributions or taxation, when returning to work in his or her own MS.

Objective Justification
In **Schumacker,** the Court ruled that indirect discrimination based on the residence of a worker, whereby an EU national employed but not resident in a particular Member State could not benefit from personal tax allowances, could in certain circumstances be justified. This was because of the likely difference in position between workers from other Member States and resident workers, but such indirect discrimination could not be justified where, for example, the non-resident worker could not benefit from personal allowances in the Member State of residence either. The ECJ undertakes close scrutiny of claims that restrictions are justified.

In **Rockler,** the Court rejected arguments based on the supposed financial burden on the national social security scheme, ruling that justification based on purely economic grounds could not be accepted, and that the justification put forward was not proportionate.

Article 45(4): the Public-Service Exemption
The ECJ's approach to the limits clause in Article 45(4), which provides that Article 45 ***shall not apply to employment in the public service has been restrictive.*** It has endeavoured to ensure that the scope of the exception do not go further than what is necessary to fulfil its aim.

The case law provides a good examples of the contrast between a kind of original intent interpretation argued for by the MS and the less rooted purposive interpretation employed by the Court. The battle over the scope of the public-service exception has been hard fought. An explanation for this was offered by Mancini, who ***attributed it to 'the widespread view that the functioning of the public service is an exercise of full-State sovereignty***'.

The meaning determined by the Court, not the MS
In **Sotgiu,** the Court made it clear that, and not the MS, it would define the scope of the exception. The MS cannot deem a particular post to be in the public service by the name or designation they give to that post, or by the mere fact that the terms of the post are regulated by public law. Moreover, it is irrelevant, according to the ECJ, whether the state's rules governing nationality as a necessary condition for entry to any post in the public service have constitutional status, in view of the need for *unity and efficacy of EU Law.*

The ECJ's Test for Public Service

In **Commission v Belgium (1980)**, the Belgian Government, supported by the UK, German, and French Governments, argued that Article 45(4) differed from Article 51 TFEU. The latter provides a similar derogation in the context of freedom of establishment and freedom to provide services, when an activity involves the 'exercise of official authority'. This difference, according to the Belgian Government, was deliberately reflected in the wording of each.

Article 51 specifically mentions the exercise of official authority, which implies a *functional* concept, whereas Article 45(4) refers to 'employment in the public service', which is an *institutional* concept. On the latter definition, what is important is the institution within which the worker is employed, rather than the nature of the work itself. The ECJ did not accept this argument.

A state cannot bring certain activities, for example of an economic or social kind, within the Treaty derogation simply by including them in the scope of public law and taking responsibility for their performance. The ECJ held that the aim of the Treaty provision was to permit Member States to reserve for nationals those posts which would require a specific bond of allegiance and mutuality of rights and duties between state and employee.

The Description of the posts:

1. They must involve participation in the exercise of powers conferred by public law

2. They must entail duties designed to safeguard the general interests of the state

These two are cumulative, rather than alternative. A post will benefit from the derogation only if it involves both of the aforementioned.

Application of the ECJ Test

In the **Belgium Case** aforementioned, the ECJ ruled that it did not have enough information to identify which of the specified posts fell outside the Treaty derogation. It invited Belgium and the Commission to re-examine and resolve the issue in the light of its judgment, and to report any solution to the ECJ. When they failed to agree on certain of the posts, the case came back to the ECJ two years later. The Court ruled that, with the exception of a limited number of posts, including certain supervisory posts, night watchman, and architect with the municipality of Brussels, none of the other posts satisfied the criteria for the application of the public-service exception.

The Court has, in other cases, maintained that the Article 45(4) exception could be validly used only if the rights under powers conferred by public law, for example the exercise of police powers in the event of danger on board, are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities.

Unfortunately, there is no secondary legislation which attempts to clarify the concept. The Commission once proposed draft legislation to clarify the derogation, but its proposal was opposed by those who thought that the Member States might take advantage of detailed legislation to undermine the established case law, and also that such legislation could ossify the process of creating a 'citizens' Europe. In 1988, the Commission published a Journal on the scope of Article 45(4) providing some guidance.

Discriminatory Conditions of Employment within the Public Service are Prohibited

From **Sotgiu,** it is clear that Article 45(4) cannot be used to justify discriminatory conditions for employment within the public service. The Treaty derogation must be confined to restricting the admission of non-nationals into the public service, and does not permit discrimination in conditions once they are admitted. If they are deemed sufficiently loyal to the state to be admitted to such employment, there can be no grounds for paying them less on account of their nationality.

Directive 2004/38: Right of Entry and Residence of Workers & their Families
Formal Requirements for Workers
This initial aim was to facilitate freedom of movement and the abolition of restrictions on employed persons, in part by clarifying the formal requirements relating to the right of entry and residence of non-nationals.

It is held that the Directive aims to facilitate the exercise of the primary and individual right to move and reside freely within Member States that is conferred directly on Union citizens by the Treaty, and that it aims in particular to strengthen that right.

Article 6 of the Directive gives an initial ***right of entry and residence for up to three months to all EU citizens and their families without any conditions other than presentation of an ID card or passport.***

Article 8 of the Directive provides that ***workers and their families may be required to register with the host state authorities, and upon presentation of a valid passport or ID card and confirmation of employment (and, in the case of family members, a document attesting to the existence of the relevant family relationship, dependency, etc), to receive a certification of registration as evidence of their underlying right of residence.***

Family Members who are not EU nationals are to be used with a residence card under **Articles 9 & 10.**

As per **Article 4,** MS are required to grant citizens and their families the right to leave their territory to go and work in other Member States, simply on producing an identity card or passport of at least five years' validity, which their Member State must provide for them and which will be valid throughout the EU and any necessary transit countries between Member States.

Article 5 establishes the right to enter another Member State: all that is required is a valid identity card or passport and a visa requirement is impermissible, except for certain third-country nationals. The conditions under which a visa can be imposed for family members who are third-country nationals have been tightened up by Article 5(2); they are to be issued free of charge and as soon as possible, and those holding a valid residence card issued by a Member State under Article 9 are exempt from the requirement.

The States still hold the right to impose proportionate and non-discriminatory penalties for non-satisfaction of the formal requirements. Where the EU national or family Member does not have the necessary documents or visas, the MS shall give reasonable opportunity to obtain such documents, to have them brought to them, or to prove their right to movement and residence by other means.

In **Akrich,** there was some confusion because a non-EU National spouse who was not lawfully resident in a Member State, who had, for example, entered unlawfully, could not avail of rights of movement and residence under EU law. This could not reconcile with **MRAX.** The ECJ has now departed from the former.

The **Metock Case** reveals tensions between the imperatives of free movement and MS' desire to exercise first access control on the entry of non-nationals, even where they are family members of an EU National.

Job-Seekers and the Unemployed
Article 7(3) of the Directive governs the position of former workers who, Althing having ceased from work, nevertheless retain some of the rights of workers for themselves and their families.

It provides that EU citizens who are no longer workers shall retain the status of worker where they are temporarily unable to work as the result of an illness or accident; or where they are involuntarily unemployed after having been employed for more than one year and having registered with the employment office as jobseekers.

Where involuntary unemployment follows employment of less than one year, the Directive provides that the status of worker is to be retained for at least six months, if the person registers as a job-seeker.

Article 7 provides that a worker who embarks on vocational training may retain the status of a worker, but that in cases here the worker has voluntarily given up employment retention of this status is conditional upon the training being related to the previous employment.

The Directive does not otherwise deal with voluntary unemployment, and so the assumption may reasonably be made that a person will not retain the status of worker if they become voluntarily unemployed unless they are pursuing related vocational training.

The Right of Permanent Residence
The Directive introduced ***the right of permanent residence for EU citizens and their families, including non-nationals, who have resided lawfully for a continuous period of five years in the host state.***

Articles 6-18 indicate the conditions under which EU citizens may enjoy this right, which clearly covers EU workers and their families. **Article 16(3)** makes provision for temporary absences and **Article 16(4)** provides that the right of permanent residence may be lost only through absences of more than two consecutive years.

Article 17 details the shorter qualifying period for workers and their families in the event of retirement, incapacity, or death, and **Article 18** concerns the right of permanent residence of family members of EU nationals, including workers, who have satisfied the five-year legal residence requirement.

Articles 19-21 deal with administrative formalities. A document certifying permanent residence is to be issued as soon as possible to EU nationals who have verified their duration of residence. Non-EU national family members of workers who enjoy a derivative right of permanent residence are to be given a 'permanent residence card', which is to be automatically renewed every ten years, and the validity of the card will not be affected by absences of less than two consecutive years.

Conditions for Exercise of the Right to Residence
Articles 22-26 regulate under which the right of residence is to be enjoyed. It is to cover the whole of the territory, and includes the right of equal treatment with nationals of the host state within the scope of the Treaty, subject to such exceptions as are provided for by the Treaty or in secondary law.

Regulation 1612/68: Substantive Rights and Social Advantages
The Regulation
Article 45 confers positive, substantive rights of freedom of movement and equality of treatment on EU worker. These are fleshed out by secondary legislations, in particular Regulation 1612/68 (this has been proposed for codification by the Commission).

The approach has been similar to that of other free movement legislation, in ruling that the legislation protects and facilitates the exercise of the primary rights conferred by the Treaty, rather than creating rights itself.

There are three titles within Part I of the Regulation:
1. Eligibility for Employment
2. Equality of Treatment within Employment
3. Workers' Families

Part II contains detailed provisions which require cooperation amongst the relevant employment agencies of the MS, and between the MS' agencies, the Commission, the European Co-ordination Office, on application for employment and the clearance of vacancies. Part III established an Advisory Committee and a Technical Committee to ensure close cooperation concerning free movement of workers and employment.

Part I has been the subject of most comment and litigation. **Article 1** sets out the tight of MS nationals to take up employment in another MS under the same conditions as its nationals, **Article 2** prohibits discrimination against such workers or employees in concluding or performing contracts of employment. **Articles 3 & 4** prohibit certain directly or indirectly administrative practises i.e. reserving a quota of posts for national workers and restricting advertising or applications for nationals of other MS, but with an exception of genuine linguistic requirements. **Article 5** guarantees the same assistance from employment offices to non-nationals as well as to nationals, and **Article 6** prohibits discriminatory vocational or medical criteria for recruitment and appointment. **Article 7** fleshes out Article 45(2) of the Treaty by providing for the same social and tax advantages for nationals and non-nationals, for equal access to vocational training, and declares void any discriminatory provisions of collective or individual employment agreements. **Article 8** provides for equality of trade-union rights with nationals, and **Article 9** for the same access to all rights and benefits in matters of housing.

Article 10 includes family members who have a right to install themselves with a worker employed in another MS i.e. spouse, descendants either under 21 or dependent, dependent relatives in the ascending line of the worker and spouse, and a partner with whom an EU citizen has a registered partnership under the national legislation of a Member State, if the host Member State treats registered partnerships as equivalent to marriage, including their children and dependent direct relatives.

Article 11 of the Regulation has been superseded by **Article 23 of the Directive** which grants this right to all family members covered by the Directive, whatever their nationality. **Article 24** provides a new explicit equal treatment guarantee for all EU nationals and their family members who enjoy the right of residence, which clearly includes workers and their families. **Article 12 of the Regulation**, which has been updated in part to reflect ECJ case law on the subject, provides for equal access for the children of a resident worker to the state's educational courses.

Article 7(2) of Regulation 1612/68

Initially, in **Michel S,** the Court read the Article in a limited way, ruling that it concerned only benefits connected with employment. Shortly after, the ECJ departed from this restrictive interpretation and started to include all social and tax advantages, whether or not attached to the contract of employment, that it applied not just to workers but also the family members of a deceased worker, and that although the Article only refers to advantages for poker, it covers any advantage to a family member which provides an indirect advantage to the worker. This allowed for equality.

In **Reina,** an interest-free childbirth loan granted under German Law to German nationals in order to stimulate the birth rate of the population was held to be a social advantage within Article 7(2). An Italian couple in Germany, one of whom was a worker, must be eligible for the loan, despite the argument made by the defendant bank that, being principally a matter of demographic policy, such a discretionary loan fell within the area of political rights linked to nationality. The Court however

ruled that the loan was a social advantage since its main aim was to alleviate the financial burden on low-income families, even if was also a part of national demographic policy.

The limits to the rights which may be claimed under article 7(2) were addressed in the **Even Case,** concerning preferential retirement-pension treatment given in Belgium to nationals who were in receipt of a WWII service invalidity pension granted by an Allied nation.

Similarly, in **De Vos,** the Court ruled that the statutory obligation on an employer to continue paying pension insurance contributions on behalf of workers who were absent on military service was not a 'social advantage' to the worker within Article 7(2), since it was an advantage provided by the state as partial compensation for the obligation to perform military service, rather than an advantage granted to workers by virtue of the fact of their residence in the MS.

One con contrast the aforementioned to **Ugliola.** The difference between the benefit which the employer was required to provide in *Ugliola* and that in *de Vos* is rather difficult to discern, since each was concerned with ensuring that workers who were away on military service would not be disadvantaged as a result. However, the ECJ seemed to treat the obligation to protect a worker's seniority and security of tenure as a condition of employment imposed by the state on employers in *Ugliola*, whereas the obligation on employers to continue paying pension contributions in *de Vos* was treated as part of the state's mechanism for compensating those undergoing military service rather than as being linked to the employment contract.

Article 7(3) of the Regulation and Education Rights for Workers
This Article provides that EU workers shall ***by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.*** This has been held to confer equal rights of access for non-national workers to all the advantages, grants, and facilities available to nationals.

In **Lair,** it was restricted interpreted that universities were not 'vocational schools' since the concept of a vocational school referred 'exclusively to institutions which provide only instruction either alternating with or closely linked to an occupational activity, particularly during apprenticeship'.

The Court imposed other limits on the ability of workers to invoke Article 7(2) by ruling that, although they did not have to be in the employment relationship just before or during the course of study, and although a fixed minimum period of employment could not be required by a state, there must be some continuity or link between the previous work and the studies in question. The one exception permitted was where a worker involuntarily became unemployed and was 'obliged by conditions on the job market to undertake occupational retraining in another field of activity'.

In **Brown** it was made clear that not only must there be a link between the previous employment and studies, but the employment must not be ancillary to the main purpose of pursuing a course of study. In **Ninni-Orasche,** the ECJ rules that the conduct of a person who took up short-term employment as a waitress only several years after entering the host MS, and who shortly after finishing that employment obtained a diploma entitling her to enrol at university in that state, was irrelevant to her status as worker or to the question whether the work was 'ancillary'.

Article 35 is a novel exception in the Directive permitted MS to refuse or withdraw rights under the Directive in case of ***abuse of rights and fraud.***

Article 12 of the Regulation: Educational Rights for Children
This article provides that ***the children of a MS national, who is or has been employed in the territory of another MS, shall be admitted to courses of general education, apprenticeship and***

vocation training under the same conditions as the nationals of the State, if the children reside in such territory. MS are to encouraged steps allowing such children to follow the courses under the best conditions.

Casagrande - the ECJ ruled that Article 12 applied not just to admission to courses but also to any 'general measures intended to facilitate educational attendance', including an educational grant. Thus Article 12 places the children of EU workers residing in a Member State in the same position as the children of nationals of that state so far as education is concerned, which means that they have more generous educational rights than their EU worker-parents.

Gaal - the Court ruled that the term children in Article 12 was wide than that in Article 10, so that Article 12 conferred education rights on children who were over 21 and non-dependent, even though they were not covered by Article 10.

In **Moritz**, the Court held that Article 12 covers the child's right to educational assistance even where the working parents have returned to their state of nationality.

In **Baumbast and R,** it was declared that the fact that the parents of the children concerned had meanwhile divorced, the fact that only one parent was a citizen of the Union and that parent had since ceased to be a migrant worker in the host Member State, and the fact that the children were not themselves citizens of the Union were all irrelevant to the enjoyment of the rights under Article 12.

Rights of Families as Parasitic on the Workers' Rights
In **Lebon,** the Court ruled that once the child of a worker reached the age of 21 and was no longer dependent on the worker, benefits to that child could not be construed as an advantage to the worker.

In **Reed,** it was held that the possibility for a migrant worker to have his unmarried companion reside with him could constitute a social advantage under Article 7(2), where the host MS treated stable companions as akin to spouses. This was so even though Reed's companion would not have been covered by Article 10 of the Regulation at the time, since it covered only marital spouses.

In **Diatta,** the ECJ has indicated that, even where the spouses were separated or where a decree nisi of divorce had been granted, the non-working spouse did not lose the right of residence while the marriage was still formally in existence and had not actually been dissolved.

In **Baumbast,** it was ruled that a non-EU national spouse could, even after divorce, continue residing in the host Member State under EU law where the children, whether or not they had EU nationality, were exercising their educational rights under Article 12 of the Regulation and the divorced spouse was their primary carer.

In **Eind,** the ECJ held that a citizen is less likely to travel if he believes that he will not be able to return later to his home country with his family. This is so even if the members of the EU citizen's family included a third country national who did not have a right to reside in his home country when he initially left, and it was not material in this respect that the EU national returning home did not intend to engage in economic activity.

Article 13(2) provides that the right of residence will not be lost where:
(i) the marriage or registered partnership has lasted at least three years including one year in the host Member State; or
(ii) where the spouse who is not an EU national retains custody of the EU citizen's children; or

(iii) where it is warranted by particularly difficult circumstances such as the applicant having been a victim of domestic violence during the marriage/partnership; or
(iv) where the non-EU national spouse or partner has the right of access to a minor child and where the court has ruled that such access must be in the host Member State, for as long as required.

Article 13 provides that such family members will retain right of residence on an exclusively personal basis, and that if they are to go on to qualify for the right go permanent residence they miss show that they are workers or self-employed, or have sufficient resources to avoid becoming a burden on the host state.

Family Members in an Internal Situation
In **Saunders,** the ECJ ruled that a national could not rely on Article 45 in his or her own Member State to challenge a restriction on freedom of movement, since there was no factor connecting the situation with Union law.

In **Morson and Jhanjan,** it was held that two Dutch nationals working in the Netherlands cold not bring their Surinamese parents into the country to reside with them. Had they been nationals of another MS, they would have been entitled under Article 2 of the Directive. However, since they were nationals in their own State who has never exercise the right to freedom of movement within the community, they had no rights under Community Law. This was also confirmed in **Uecker and Jacquet.**

In **Singh,** the situation was different. An Indian national had married a British national, and had travelled with her to Germany where they had both worked for some years before returning to the UK. The UK argued that the British spouse's right to re-enter the UK derived from national law and not from EU law. However, the ECJ clearly considered that the period of working activity in another Member State made all the difference, and enabled Singh now to claim rights as the spouse of a Community worker.

The Court subsequently confirmed this stance in **Akrich**, in which it rejected the suggestion that there was any 'abuse of rights' involved where a couple moved on a temporary basis to work in another Member State in order to avoid the 'internal situation' problem and to acquire rights for a non-EU national in the spouse's Member State of origin.

Directive 2004/38: Public Policy, Security, and Health Restrictions
Three Levels of Protection
Articles 27 to 33 of the Directive govern the restrictions on the right of entry and residence which MS may impose on grounds of public policy, security, or health. There are three levels of protection:
1. A General Level of Protection for all individuals covered by EU law
2. An Enhanced Level of Protection for individuals who have already gained the right of permanent residence on the territory of a MS
3. A Super-Enhanced Level of Protection for Minors or for those who have resided for ten years in the Host State

Article 27: General Principles
Article 27(2) begins by setting out the general principles governing the exercise of the exceptions, specifying that all measures adopted on grounds of public policy or security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Exceptions cannot be invoked to serve economic ends, and that past criminal convictions are not in themselves grounds for taking such measures.

In **Santillo,** this provision was interpreted to mean that such convictions may be relied on as a basis for expulsion only where the past conviction in some way provides evidence of a present threat, and that the threat must be assessed by the Member State at the time of the decision ordering expulsion.

Personal conduct of the individual must represent a 'genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society'. It further stipulates, following ECJ case law, that general preventative measures, or justifications isolated from the particular facts of the case, are unacceptable.

Calfa indicates that automatic expulsion for commission of a particular offence, without any consideration of whether any specific threat was posed by the individual in question, is prohibited.

Article 27(3) sets a time limit after entry into the host Member State for the latter to seek, and for the Member State of origin to provide, information on an EU national's police record, and stipulates that such information shall not be sought on a routine basis. Article 27(4) provides that upon expulsion, the Member State of origin must re-admit the person in question.

Article 28: Expulsion
This is a case in which MS may expel EU nationals or their family members on public policy or security grounds. In **Van Duyn,** the ECJ ruled that a Member State need not criminalise an organisation the activities of which it considers to be socially harmful, in this case the Church of Scientology, in order to justify taking restrictive action against non-national members of the organisation on grounds of public policy and security. The case was controversial because it appeared to enable a state to take repressive measures against an EU migrant for conduct that did not give rise to any restriction against nationals of the host state.

Later cases emphasised the need for some kind of comparability, if not exactly equality, in the treatment of nationals and non-nationals as far as such alleged threats to public policy and security were concerned. In **Adoui and Cornuaille,** the ECJ ruled that a Member State may not expel a national of another Member State from its territory or refuse entry by reason of conduct, in this case suspected prostitution, which, when attributable to its own nationals, did not give rise to measures intended to combat such conduct.

In **Olazabal,** the ECJ ruled that it was not necessary for identical measures to be taken against nationals and non-nationals, and that a territorial restriction could be imposed on an EU migrant worker in circumstances in which it could not be imposed on a national. It however also ruled that a Member State could not adopt measures against a national of another Member State by reason of conduct which, when engaged in by nationals of the first Member State, did not give rise to punitive measures or other genuine and effective measures to combat that conduct.

Member States must, before making an expulsion decision on public policy or security grounds, 'take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.

Article 28(2) sets out the enhanced level of protection for EU citizens and their families who have gained the right of permanent residence, by providing that they may be expelled only for 'serious grounds' of public policy or security. This requirement of 'serious grounds' is additional to the general requirement for all persons established in Article 27(2) that the personal conduct of an individual subject to expulsion must constitute a 'sufficiently serious threat affecting one of the fundamental interests of society'. Article 28(3) provides for an even more stringent level of protection for a minor or an EU citizen and their family who have resided in the host state for the

previous ten years, stipulating that an expulsion decision can be taken only 'on imperative grounds of public security'.

Article 29: Public Health
Article 29(1) governs the public health requirement by specifying that the only diseases justifying measures restricting freedom of movement are diseases with epidemic potential as defined by the relevant instruments of the WTO, and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

Article 29(2) sets a three-month period following arrival in the host state, after which diseases occurring cannot constitute grounds for expulsion.

Article 29(3) introduces a new provision, apparently in order to combat the practice in some Member States of carrying out medical examinations on beneficiaries of the right to residence, which stipulates that in cases where there are 'serious indications that it is necessary, Member States may, within 3 months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1'. Article 29(3) further stipulates that such medical examinations may not be required as a matter of routine.

Article 30: Notification of Decisions
Article 30(1) incorporates the ruling in **Adoui and Cournaille,** to provide that they must be notified in such a way that the people addressed can comprehend its content and implications. Article 30(2) provides that the persons concerned are entitled to full and precise information about the grounds on which their case is based, unless it is contrary to public security to do so. Article 30(3) requires the notification to provide the person with information on how to appeal, the relevant administrative authority or court to which the appeal should be made, the time limit for appeal, and the time limit allowed for the person to leave the territory of the state. It specifies that, save in cases of urgency, the time allowed is not to be less than one month from the date of notification.

Article 31: Procedural Safeguards
Article 31(1) provides for access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of an adverse decision taken on grounds of public policy, public security, or public health.

Article 31(2) is new and provides, subject to three specific exceptions, for automatic suspension of enforcement of an adverse measure until such time as a decision is taken on a person's application for an interim order to suspend the measure's enforcement.

Article 31(3) holds that the judicial or administrative redress procedures must review not only the legality of the decision, but also the facts on which it is based, with a view to ensuring its proportionality in light of considerations including the human-rights criteria listed in Article 28(1).

Article 31(4) provides that Member States may exclude an individual from their territory pending the redress procedure, but that they may not prevent such an individual from submitting his or her defence in person, except where such appearance may cause serious public policy or security difficulties or where the appeal concerns denial of entry to the territory.

Articles 32-33: Duration of Exclusion Orders and Expulsion
Article 32 provides that where someone has been validly excluded on public policy or security grounds they may apply to have the exclusion order lifted after a reasonable period, and no later than three years from the enforcement of the final exclusion order, by arguing that there has been a

material change in the circumstances justifying their exclusion. States must decide on such applications for re-admission within six months, but the applicants have no right of entry to the territory while the application is being considered.

Article 33(1) directly governs MS' penal policies and criminal law powers, stipulating that expulsion orders may not be issued by the host state as a penalty, or as a legal consequence of a custodial sentence, other than in circumstances which fulfil the conditions set out in Articles 27–29, viz that the person's conduct constitutes a sufficiently serious threat etc.

Finally, Article 33(2) provides that if an expulsion order is enforced more than two years after it was issued, the state must check that the person concerned is still a genuine threat to public policy or security and must assess whether there has been any material change in circumstances since the original order was issued.

Freedom of Establishment and to Provide Services

Differences and Commonalities between the Free Movement of Persons, Services, and Establishment

Comparing the Treaty Chapters

There are several points of similarity between the various chapters on the free movement of persons and services, including also now the Treaty provisions on EU citizenship. ***Advocate General Mayras*** in **Van Binsbergen** pointed out that the principle of equal treatment on grounds of nationality underpinned the Treaty provisions on workers, services, and establishment alike.

The overlap between workers and temporary service providers (Art. 56) can be seen in a aseries of cases concerning so-called 'posted workers' in which the ECJ has distinguished the two by ruling that '***workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work***'.

The similarities between establishment and services are evident when considering at what stage a self-employed person providing regular services into or within a Member State may be considered to be sufficiently connected with that state to be established, rather than merely providing services, there.

In **Gebhard,** it was stated that the crucial features of establishment are the ***stable and continuous basis*** on which the economic to professional activity is carried on, and the fact that there is an established professional base within the host MS. For the provision of services, the temporary nature of the activity is to be determined by its ***periodicity, continuity and regularity,*** and the providers of services will not be deemed to be established simply by virtue of the fact that they equip themselves with some form of infrastructure in the host MS.

The gradual extension of EU rules to cover genuinely non-discriminatory restrictions on establishment and services has reached increasingly into sensitive areas of national social and economic policy, often with a deregulatory emphasis, and that many controversies have arisen as a result.

Are the Freedoms horizontally applicable?
In the field of services, the ECJ ruled in the early case of **Walrave and Koch** that the Treaty rules applied not only '***to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services***'. However, even after the **Angonese Case,** it remained unclear whether the Treaty provisions on establishment and services were equally fully horizontally applicable, in the sense of imposing legal obligations on all individuals and not just on powerful, self-regulating collective actors such as sporting organisations, which possess powers akin to public law.

Through the **Laval** and **Viking judgements,** it was clearly stated that the horizontal applicability of the Treaty provisions on establishment and services is not confined to entities exercising a regulatory task or having quasi-legislative powers. However, it is not entirely clear from the judgments just how far the horizontal applicability of the Treaty rules to 'private parties' extends, and in particular whether there is some threshold requirement as regards the scope, impact, or collective nature of private power before the Treaty rules apply.

The Official Authority Exception
Article 51 TFEU, extended by Article 62 TFEU, states that ***the provisions on the chapter of freedom of establishment shall not apply so far as any given MS is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.*** Adv General Mayras defined official authority as implying ***the power of enjoying the prerogatives outside the general law, privileges of official power, and powers of coercion over citizens.***

The wording of Article 51 refers to those 'activities' which are connected with the use of official power, rather than to professions or vocations within which official authority might, under certain circumstances, be exercised.

In **Reyners**, the ECJ was asked whether the whole of the legal profession of *avocat* was exempt from the Treaty rules. The Court considered that it was possible to exclude a whole profession on the basis of Article 51 'only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non nationals of functions appertaining to official authority'. If, however, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole, the exception allowed by Article 51 will not apply.

The Court has continued to interpret the official-authority exception narrowly in response to Member States' attempts to invoke it for a wide range of professions.

The Public Policy, Security, and Health Exceptions
Article 52 (establishment) and Article 62 (services) provide that the provisions of those chapter ***shall not prejudice the applicability of provisions laid down by law, regulation, or administrative action providing for special treatment for foreign nationals on ground of public policy, security, or public health.***

The general principle of EU Law articulated by the ECJ include the principles of non-discrimination and of proportionality, which also govern the justification of public-interest-based restrictions on freedom of movement which have been judicially developed alongside the Treaty derogations. Further, the ECJ has ruled that Article 52 does not permit a Member State to exclude an entire economic sector from the application of the principles on freedom of establishment and services

Legislation Governing Entry, Residence, and Expulsion
The provisions of the earlier legislation governing self-employed persons, Directive 73/148, which regulated rights of 'abode' and rights of temporary residence for the duration of the services, have been replaced with the simple right of residence for self-employed persons in Article 7(a) of Directive 2004/38. Moreover, even where a self-employed person is no longer engaged in economic activity, the right of residence as an EU citizen continues unless that person has, through lack of sufficient resources, become an unreasonable burden on the host state.

The Right of Establishment
This is dealt with under **Article 49 TFEU.** Paragraph one requires the ***abolition of restrictions on freedom of primary and secondary establishments,*** whereas the second paragraph ***provides for the right to pursue self-employed activities on an equal footing with the nationals of the MS of establishment.*** The reference to capital acknowledges that there is a separate chapter on free movement of capital, subject to a different and more gradual regime of liberalisation.

Article 49 on its face appears to give rights only to persons in a MS other than the MS of their nationality. It appears to prohibit discrimination, and to imply that its requirements are satisfied if the person exercising such right is treated as a national.

However, it has been given a broader meaning. First, nationals may rely on the article against their own state, and it also prohibits any unjustified obstacles to freedom of establishment.

Article 53 TFEU requires the EP and Council to issue directive, acting in accordance with ordinary legislative procedure, for the mutual recognition of diplomas and other qualifications, and **Article 54** places companies in the same position as natural persons for the purpose of the application of this chapter of the Treaty.

The Effect of Article 49
In **Reyners,** the ECJ ruled that Article 49 was directly effective, despite the fact that the conditions for direct effect set out for Van Gend en Loos were not arguably met, and despite Council's failure to adopt the necessary implementing legislation envisaged by the Treaty provisions. Such legislation had not yet been adopted at that time, partly on account of the slow progress of legislation in the Council in the aftermath of the Luxembourg Accords, and party on account of the opposition within MS to the process of opening the professions, and in particular the legal profession, to non-nationals.

Reyners, a Dutch national who had obtained his legal education in Belgium, was refused admission to the Belgian Bar solely because he lacked Belgian nationality. The ECJ ruled that, despite the Treaty requirement that directives should be adopted, Article 49 laid down a precise result which was to be achieved by the end of the transitional period, namely the requirement of non-discrimination on grounds of nationality. The fulfilment of this result had to be made easier by, but was not made dependent on, the implementation of a programme of progressive measures.

Thus he could invoke Article 49 directly. The ECJ acknowledged, however, that the directives had 'not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment'.

However, even before the relevant secondary legislation had begun to be adopted, it was argued to the ECJ that where a national restriction was based not on nationality but on the adequacy of qualifications, Article 49 could be relied on by an EU national seeking to practise a profession in another Member State.

In **Thieffry,** a Belgian national who obtained a doctorate in law in Belgium and practised in Brussels subsequently obtained French university recognition of his qualifications as equivalent to a degree in French law, and a certificate of aptitude for the profession of *avocat*. He was refused admission to the training stage as an advocate at the Paris Bar on the ground that he lacked a degree in French law. According to the ECJ, since he had already obtained what was recognised in France, for both professional and academic purposes, to be an equivalent qualification, and had satisfied the necessary practical training requirements, the state authorities were not justified in refusing to admit Thieffry to the Bar solely on the ground that he did not possess a French qualification, despite the absence of EU directives in the field.

In **Vlassopoulou,** a Greek national who obtained a Greek Law degree and had practised German law for several years in Germany applied for admission to the Bar there. Her authorisation to practise was rejected on the ground that she lacked the necessary qualifications because she had not passed the relevant German examinations. The ECJ began by ruling that even the non-discriminatory application of national qualification requirements could hinder the exercise of freedom of establishment. Thus the national authorities must consider any education and training received by the holder of the diploma or certificate, and must compare the knowledge and skills acquired with those required by the domestic qualification. This case highlights the extent to which the effectiveness of the case was bolstered by the Court following **Reyners**.

A MS could no longer simply refuse someone entry to a profession or to practise a trade solely because he or she lacked domestic qualification, even where there was as yet no domestic recognition of the equivalence of the foreign qualification.

The Scope of Article 49
Non-Discriminatory Restrictions
The wording of the article emphasises the requirement of equal treatment of nationals and non-nationals. In **Fearon,** the Court appeared to suggest that in the absence of discrimination, rules which restricted the right of establishment would not violate Article 49. However, this is no longer the case.

In **Klopp,** a German lawyer who was refused admission to the Paris Bar on the sole ground that he already maintained an office as a lawyer in another Member State successfully challenged the rule under Article 49, even though the rule applied equally to nationals and non-nationals alike. The ECJ ruled that Article 49 specifically guarantees the freedom to set up more than one place of work in the EU and there were less restrictive ways, given modern transport and telecommunications, of ensuring that lawyers maintain sufficient contact with their clients and the judicial authorities, and obeyed the rules of the profession.

In **Wolf,** the Court ruled that certain indistinctly applicable national rules on social-security exemptions for the self-employed were impermissible, because they constituted an unjustified impediment to the pursuit of occupational activities in more than one Member State, even though the rules contained no direct or indirect discrimination on grounds of nationality.

The **Gedhard Case,** gave the clearest indication of the broad interpretation of Article 49. It declared that the same principle underpin all of the four freedoms. This case concerned a German national against whom disciplinary proceedings were brought by the Milan Bar Council for pursuing a professional activity as a lawyer in Italy on a permanent basis. He had set up his chambers using the title *avvocato*, although he had not been admitted as a member of the Milan Bar and although his training, qualifications and experience had not formally been recognised in Italy.

There is no mention of any requirement of discrimination. Instead, any rule which is liable to hinder or make less attractive the exercise of the 'fundamental' freedom of establishment (or any of the other fundamental freedoms) may violate the Treaty unless it is justified by an imperative requirement and applied in a proportionate and non-discriminatory manner.

In **Commission v Spain**, the former had argued that the legislation in practice favoured typically smaller Spanish establishments and harmed operators from other Member States, who preferred larger establishments. The Court, however, following the Opinion of Advocate General Sharpston, found that the Commission had not demonstrated that the legislation had an indirectly discriminatory effect. Nonetheless, since Article 49 TFEU prohibits even non-discriminatory measures that hinder the exercise of the freedom of establishment, for example by affecting access to the market, the legislation still had to satisfy the requirements of proportionality, which it failed to do in several respects. The strict scrutiny applied by the ECJ to what was agreed to be non-discriminatory Spanish legislation here clearly illustrates the powerfully liberalising approach adopted by the Court to the economic freedoms of the Treaty.

Reverse Discrimination and Wholly Internal Situations: when can nationals rely on Article 49 on their own MS?

In the first place, a Member State is clearly obliged under both Article 49 and Directive 2004/38 not to restrict its own nationals who wish to *leave* the territory in order to set up an establishment in another Member State.

Secondly, it is obvious that nationals who wish to establish themselves within their own Member State may be disadvantaged if the qualifications they have obtained in another Member State are not recognised by their own state. In **Knoors,** where a Dutch national sought to practise as a plumber in the Netherlands, having obtained training and experience in Belgium, the Dutch government argued that a national could not rely in his own Member State on Article 49 to gain recognition for qualifications obtained, since he might be seeking to evade the application of legitimate national provisions. This argument was rejected by the Court. However, concerns expressed by the Government about a possible of evasion or abuse have been raised.

A national who has obtained a qualification in another Member State and has returned to practise in his or her Member State of origin will probably be covered by the terms of Directive 2005/36 on the recognition of professional qualifications. Further, even where Directive 2005/36 does not cover the facts of the situation, it now seems that the principles in **Heylens** and **Vlassopoulou** will be applied even when the applicant is a national of the host state.

This was evident in **Koller,** in which n Austrian national, after obtaining a law degree in Austria, went to Spain and, after taking additional courses and examinations, had his degree declared equivalent to the Spanish 'Licenciado en Derecho' authorising him to use the title '*abogado*'. When he later applied for admission to the aptitude test for the profession of lawyer in Austria, his request was refused on the ground that in Spain, unlike in Austria, practical experience was not required in order to pursue the profession of a lawyer. The Court held that he could not be refused of the option of taking an aptitude test solely on the ground that he had not completed the period of practical experience required by the 'host' state. On the contrary, the ECJ took the view that the very purpose of the aptitude test was 'to ensure that the applicant is capable of exercising the regulated profession in that Member State'.

Conversely, nationals who have never exercised the freedom to move within the EU will have no EU law claim against their state. This gives rise to the curious phenomenon of 'reverse discrimination' whereby nationals of a Member State find themselves disadvantaged by comparison with other EU nationals within the same Member State. In the **Belgian Social Security case**, the

Flemish Government, a federated entity of the Belgian state, had enacted a scheme of care insurance that was available only to those working and residing in either the Dutch-speaking region or the bilingual region of Brussels-Capital. The ECJ insisted that any EU national working in either of these two regions must be eligible for the scheme, regardless of where in Belgium they resided, with the exception of Belgian nationals living in the French or German-speaking region who had never exercised their freedom to move. The Court ruled that EU law 'clearly cannot be applied to such purely internal situations'.

In **Werner,** the Court indicated that even if a national was resident in a Member State other than that of his nationality, so long as he maintained his place of establishment and professional practice in his own Member State, he could not rely on Article 49 to challenge tax provisions of his own state which favoured residents over non-residents.

However, in **Asscher,** a Dutch national residing in Belgium who was a director of companies *both* in Belgium and in the Netherlands, and who, on account of his non-resident status and the level of his earnings outside the Netherlands, was subject within the Netherlands to a considerably higher rate of tax than residents of that state, was entitled to invoke Article 49 against his own Member State. The ECJ ruled this was not an 'internal' situation because his exercise of his Treaty rights of establishment and his dual economic activities in Belgium and the Netherlands had resulted in this unfavourable tax situation.

Are restrictions on Social Benefits contrary to Article 49?
The denial of tax advantage to companies whose primary establishment or registered office is not within the state may also infringe Article 49. Such measures, although they may not directly regulate or curb the right of establishment, nevertheless are deemed to be disadvantages for those exercising such Treaty rights.

The Establishment of Companies
This is dealt with Article 54 of the TFEU which states that ***companies or forms formed in accordance with the law of a MS and having their registered office, central administration or principal base of business within the Union shall, for the purposes this Chapter, be treated in the same way as natural persons who are nationals of MS.***

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

When is a company established in a MS?
It is clear that so long as a company is formed in accordance with the law of a MS and has its registered office there and its principal place of business somewhere in the EU, it will be established in the first MS within the meaning of the Treaty.

In **Sergers** it was held that the aforementioned will hold even if the company conducted no business of any kind in that MS, but instead conducted its business through one of the various forms of secondary establishment, such as a subsidiary, branch, or agency in another MS.

In the **Centros Case,** it was ruled that a company was lawfully established in the UK even though it had never traded there. In **Insurance Services Case,** the Court held that even an office managed for a company by an independent person on a permanent basis would amount to establishment in that Member State.

Court-Led liberalisation in the absence of EU Harmonisation

While Governments are not governed by Directive 2004/38 on citizens, governing the right of natural persons to leave their Member State, the Court held in the **Daily Mail Judgement,** that the companies enjoy similar rights under the Treaty. This judgement also declared that the Treaty provisions on freedom of establishment did not give companies an unfettered right to move their registered offices or their central management and control to another Member State, whilst retaining an establishment in the first Member State. On the contrary, the Court ruled that the Member State from which the company wishes to move its registered office or central place of administration is entitled to subject the company to certain conditions.

The general question underlying **Daily Mail**, ie, to what extent a company can rely on Article 49 TFEU when it seeks to set up various forms of establishment in more than one Member State which have different systems of corporate regulation, given the continued absence of EU harmonixation, was revisited just over ten years later in **Centros**. This time the restriction was imposed not by the state in which the company had its primary establishment (which was again the UK), but by the state in which the company sought to conduct business through a secondary establishment, which in this case was Denmark.

The ECJ ruled that, far from constituting an *abuse* of Article 49, the deliberate choice of a Member State with lenient legislative requirements concerning incorporation in order to enjoy the right of secondary establishment more freely in a Member State with stricter incorporation requirements was simply an exercise of the rights inherent in the notion of freedom of establishment.

Centros was followed by the **Uberseering** and **Inspire Art** ruling which confirmed and extended the former's approach. Uberseering was a company **i**ncorporated in the Netherlands under Dutch law, where it had its registered office. It then sought to transfer its centre of administration to Germany, and its entire share capital was bought by German shareholders.

Unlike the position of the UK in the *Daily Mail* case, the Netherlands did not seek to prevent the company from transferring its administration, or to deny the validity of its continued incorporation under Dutch law. German law, however, would not recognise the legal capacity of a company incorporated in the Netherlands, thus prohibiting it from appearing before the German courts. German law followed the 'company seat principle' rather than the 'incorporation principle' as the relevant factor of connection for a company, and since Überseering had moved its real seat from the Netherlands to Germany, German law would not recognise the company's legal capacity unless it re-incorporated again under German law.

Überseering establishes that, despite the lack of harmonisation of the laws governing the connecting factor for incorporation, a company which is legitimately incorporated in one Member State and which moves its centre of administration to another state cannot in those circumstances be denied recognition of its legal personality by the latter. Although objectives such as enhancing legal certainty, protecting creditors and minority investors, and legitimate fiscal requirements could in principle justify rules restricting the freedom of establishment, the German rule in *Überseering* amounted to an outright denial of freedom of establishment and was held to be disproportionate.

The two aforementioned cases did not overturn **Daily Mail,** but they seemed to limit its impact and scope. The 2008 ruling of **Cartesio** came as a surprise. Cartesio, a company formed under Hungarian law, wished to transfer its seat to Italy. However, Hungarian law did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law. The national court considered that while *Daily Mail* seemed to indicate that Articles 49 and 54 TFEU do not include the right for a company to transfer its central administration to another Member State while retaining its legal personality and nationality of origin, later case law

rendered the situation unclear. The Court declared that companies were creatures of national law which only existed by virtue of the national legislation which determined their incorporation and functioning.

Cartesio's confirmation of the *Daily Mail* ruling and its underlying premise was unexpected after the series of robust rulings, from *Centros* to *Inspire Art*, which had introduced a mutual recognition principle into the law on freedom of establishment. While those cases insist that a Member State must recognise the legitimacy of a company's incorporation (and primary establishment) under the law of another Member State and should not impose unnecessary restrictions on the right of secondary establishment, the ECJ in *Cartesio* on the other hand has affirmed that the basic rules as to what is necessary for incorporation in the first place remain, in the absence of EU harmonisation, for the Member State of incorporation to decide.

Restrictions on the freedom of Establishment of Companies: Direct Taxation Rules

The compatibility with EU law of tax rules which distinguish between resident and non-resident companies and subsidiaries has generated large caselaw. In **Commission v France**, the Court drew an analogy between the location of the registered office of a company and the place of residence of a natural person. According to the Court ***it is their corporate seat . . . that serves as the connecting factor with the legal system of a Member State, like nationality in the case of natural persons***.

It ruled that discrimination in tax laws against branches or agencies in a Member State by taxing them on the same basis as companies the registered offices of which are in that state yet not giving them the same tax advantages as such companies was an infringement of Article 49. Neither the lack of harmonisation of the tax laws of the different Member States nor the risk of tax avoidance by companies could justify the restriction.

Nevertheless, the ECJ has accepted that a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law. In **Futura,** it was permissible for a MS to impose conditions as regards the keeping of accounts and the location where losses were incurred on a non-resident company, which had a branch but not a main establishment in the state, for the purposes of assessing liability to tax and allowable losses.

In **X Holding BV,** the Court held that legislation preventing a parent company from forming a single tax entity with its subsidiaries in other MS, while it could do so with resident subsidiaries, was justified by the need to safeguard the allocation of power to impose taxes between MS.

The Court has ruled that while states may in appropriate circumstances treat resident companies differently from non-resident companies, and resident companies with non-resident subsidiaries differently from resident companies with resident subsidiaries, and foreign-sourced dividends differently from domestic-sourced dividends, as far as direct taxation rules are concerned, this is always subject to the requirement of demonstrating reasonable and proportionate justification. While the Court has accepted that goals such as preventing tax avoidance or preventing companies from benefiting twice from rules governing tax relief may be legitimate objectives, it has continued to apply strict scrutiny to the national laws which claim to be necessitated by such objectives i.e. **Marks & Spencer Case, Cadbury Schweppes Case.**

Restrictions of the Freedom of Establishment of Companies: Vessel Registration Requirements

In **Commission v Ireland,** it was held contrary to Article 49 to require nationals of other Member States who owned a vessel registered in Ireland to establish a company in Ireland.

In **Factortame,** the ECJ condemned several residency and nationality requirements for the registration of fishing vessels, but permitted a Member State to stipulate as a requirement for registration that a vessel must be managed and its operations directed and controlled from within that Member State.

The most important case in the **Viking Case,** in which the Court ruled that the collective action constituted a restriction on Viking's exercise of its right to freedom of establishment in Estonia by making it less attractive or pointless to re-flag there, and that it was for the national court to determine whether the collective action might be justified as a proportionate and necessary means of protecting the rights of workers.

Free Movement of Services

Freedom to provide services under Article 56 TFEU entails the ***carrying out of an economic activity for a temporary period in a MS which either the provider or the recipient of the service is not established.***

According to the **Insurance Services Case**, if a person or an undertaking maintains a *permanent* economic base in a Member State, even if only through an office, it cannot avail itself of the right to provide services in that state but will be governed by the law on freedom of establishment. However, in **Gebhard,** the ECJ acknowledged that the provisions of services did not necessarily cease to be temporary simply because the provider might to equip himself with the necessary infrastructure, for example an office or chambers, to perform those services. ***The relevant criterion is not the mere existence of an office in a Member State, but rather the temporary or permanent nature of the economic activities carried on there.***

This may prove to be difficult to prove in many cases especially when certain services take a long time i.e. constructions. The Court has held that the fact that services are provided over an extended period, even over several years, does not mean that Article 56 is inapplicable.

The ECJ has also ruled that people who direct most or all of their services at the territory of a particular Member State, but maintain their place of establishment outside that state in order to evade its professional rules (the abuse/evasion theory), may in certain circumstances be treated as being established within the Member State, and thus covered not by Article 56 on services but by Article 49 on establishment instead. Cases dealing with this are extremely rare.

Article 56 TFEU

This Article holds that ***within the framework of the provisions set out below, restriction on freedom to provide services within the Union shall be prohibited in respect of nationals of MS who are established in another MS other than that of the person for whom the services are intended. The EP and Council, acting in accordance with the ordinary legislative procedure, may extend provisions of the Chapter to nationals of a third country who provide services and who established within the Union.***

This indicates that in order to benefit from the right to provide services, the person in question, natural or legal, must already have a place of establishment within the EU and, if a natural person, must possess the nationality of a Member State. Without that economic foothold within the EU, there is no right under EU law for a company or a EU national established *outside* the EU to provide temporary services *within* the EU.

A permanent economic base must first be established within a Member State, and from that base the person may provide temporary services in other Member States.

Article 57 TFEU
This Article holds that ***services shall be considered to be services within the meaning of the treaties where they are normally provided for remuneration, in so far that they are not governed by the provisions relating to freedom of movement for goods, capital, and persons. Services shall in particular include:***
a. ***Activities of an industrial character***
b. ***Activities of a commercial character***
c. ***Activities of craftsmen***
d. ***Activities of the professions***
Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the MS whee the service is provided, under the same conditions as are imposed by that State on its own nationals.

This specifies that the provisions on free movement of services will apply only in so far as a particular restriction is not covered by the provisions on free movement of goods, persons, or capital. **Article 58** also excludes transport services from the chapter on services since transport is dealt with elsewhere in the Treaty, and provides that banking and insurance services connected with capital movements are to be dealt with in line with the Treaty provisions on movement of capital.

The effect of Article 56
The activity related to services in usually pursued on a temporary basis in a MS, unlike on a paramagnet one as in establishment.

The **Van Binsbergen** dealt with Article 56 TFEU and direct effect. The Court held that despite the Reyners ruling, Articles 56 and 57 should not be found to have direct effect, and that the only satisfactory solution was the adoption of directives as provided for by the Treaty. The Court identified two reasons for the Treaty provisions on the adoption of directives:
1. To abolish restrictions
2. Facilitate the freedom to provide services

The Court also maintained that where the restriction was straightforward on the ground of nationality or place of establishment, it considered that no directive was necessary and provisions of Article 56 could be relied upon directly.

The scope of Article 56
The Need for an Inter-Alia State Element
Again, this Article is not applicable when it comes to wholly internal situations where the relevant elements of an activity are confined within a single MS.

In **Koestler,** concerning a bank in France carrying out certain stock-exchange orders and account transactions for a customer established in France, the ECJ ruled that although both the provider and the recipient of services were established in the same Member State, there was a provision of services within the meaning of Article 57 because the customer moved, before the contractual relationship with the bank was terminated, to establish himself in Germany.

In **Deliege,** in which a Belgian sportswoman had challenged the selection rules of the Belgian Judo Federation, the ECJ rejected the argument that this was a wholly internal situation, relying on the fact that 'a degree of extraneity may derive in particular from the fact that an athlete participates in a competition in a Member State other than that in which he is established'.

Moroever, in certain sectors such as public procurement, where harmonising legislation has been adopted, the legislation is made applicable even to wholly internal situations.

The Freedom to Receive Services
In **Luisi and Carbone,** the Court confirmed that the Treaty covers the situation of receipts as well as providers of services and ruled that the freedom for the recipient to move was the necessary corollary of the freedom for the provider.

In **Cowan,** the Court found that the refusal, under a French criminal compensation scheme, to compensate a British tourist who had been attacked while in Paris constituted a restriction within the meaning of Article 56, without specifying exactly what service he had received.

The Commercial Nature of the Services
The Court has held that remunerated services do not lose their economic nature either because the provider is a non-profit-making enterprise, or because of an 'element of chance' inherent in the return, or because of the recreational or sporting nature of the services.

In **Deligie,** the Court minted that ***the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes foes not in itself mean that those members do not engage in economic activities.***

In **Bond van Adverteerders,** the Court specified that the remuneration does not have to come from the recipient of the services, so long as there is remuneration from some party.

There is an issue when it comes to remuneration for a service provided by the State. In **Humbel,** the Court held that it did not fall within the scope of the Treaty rules on services. However, in **Wirth** it was declared that although most institutions of higher education were financed from public funds, those which sought to make a profit and were financed mainly from private funds, for example by students or their parents, could constitute providers of services within Articles 56 and 57. This was confirmed by **Schwarz.**

The distinction between publicly and privately remunerated services on which theses cases are based is a difficult one, and the applicability of the Humbel reasoning was narrowed, as seen in cases concerning cross-border health.

In **Kohll,** the ECJ ruled that treatment provided by an orthodontist established in a different Member State from the applicant amounted to a service provided for remuneration, and that the requirement of prior authorisation from the home state's social security institution before the cost would be reimbursed constituted an unjustified restriction on the freedom to receive cross-border services. This, like other cases such as **Inizan,** demonstrates the potentially disruptive effects on national welfare systems of the decision to bring essential and publicly organised services within the scope of the Treaty's free movement provisions.

In **Geraets-Smits/Peerbooms**, the two applicants were insured for their medical costs under a Dutch social insurance scheme for people whose income is below a certain level. Some of the funding in the scheme was derived from individual premiums, some from the state, and some from subsidisation by other private insurance funds.

Both applicants received medical treatment abroad without prior authorisation from the fund, apparently because of the restrictive conditions for authorisation which entailed that:
(i) the treatment must be regarded as 'normal in the professional circles concerned' and

(ii) the treatment must be 'necessary', in the sense that adequate care could not be provided without undue delay by a care provider in the home state.

The Court began by reaffirming that Member States retain the power to organise their social security systems, subject to compliance with the rules of EU law. The Court went on to consider the argument made by several governments, citing *Humbel*, that hospital services did not constitute an economic activity when provided free of charge under a sickness insurance scheme.

The fact that the hospital treatment was financed directly by the sickness insurance funds on the basis of agreements and pre-set fee scales did not remove such treatment from the ambit of Article 57.

Watts concerned the UK's tax-funded NHS and not the kind of insurance-based health care systems at issue in the previous cases. The referring court asked the ECJ whether Article 56 was applicable to the situation in which the applicant had travelled to another state for medical care and was now seeking reimbursement, despite the fact that the NHS had no fund out of which to pay for health care received in another state, and despite the fact that it had no obligation to pay for private health care obtained *within* the UK.

The ECJ's answer was that Article 56 applied where a patient received medical services in a hospital environment for consideration in a Member State other than the state of residence ***regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates.*** However, the Court refused to be drawn on the question whether the provision of health care services by the NHS within the UK amounted to the provision of a commercial service.

A more cautious approach was undertaken in **Commission v Spain.** This did not concern people who travel abroad in order to receive medical treatment, but rather those who travel for other reasons such as travel or education, and the need for medical care arises unexpectedly during their stay. The Court held that the Spanish legislation limiting the level of cover, in such circumstances, to that applicable in the state where the treatment was administered did not amount to a restriction of the freedom to provide services.

Distinguishing the case from **Vanbraekel**, where it had ruled that a similar limit on the level of cover would constitute a restriction on the free movement of services where a person had gone abroad specifically to receive scheduled medical treatment, the ECJ ruled that the potential interference with free movement in a case involving unscheduled medical care was too 'uncertain and indirect' to constitute a restriction on the Treaty freedom.

Despite this, the upshot of the Court's rulings remains that Articles 56–57 TFEU apply to any service, however important a public service it may be, which is 'provided for remuneration'.

Can Illegal Activities constitute Services within Articles 56 & 57?

Several cases, including a recent stream of rulings on the subject of lotteries and gambling, have raised the question of illegal or 'immoral' services in relation to activities which are lawful in certain states but not in others. Clearly if a person established in a Member State in which a particular activity is lawful wishes to provide services in another Member State in which it is not lawful, the second state may have good reasons for restricting the provision of that service. An initial question is whether such activities, on the legality of which the Member States do not agree, can constitute 'services' at all within EU law.

In **Koestler,** the ECJ ruled that Germany's refusal to allow a French bank which had provided services for a German national, including a stock-exchange transaction which was treated as an illegal wagering contract in Germany but not in France, to recover from that client was not contrary to Article 56 if the same refusal would apply to banks established in Germany.

In **Grogan,** the Court considered whether the provision of abortion was a service within the meaning of the Treaty, in order to determine whether the restriction in one Member State on information about the provision of abortion in another state was contrary to Article 56. The Court ruled that it was not for the Court ***to substitute its assessment for that of the legislature in those Member States where the activities are practised legally.***

Less clear is whether a MS restrict the access of its citizens to services in another MS, where those services are prohibited or restricted within the regulating State. In **Schindler,** the defendants were acting as agents on behalf of a German public lottery, seeking to promote that lottery within the UK, and they were charged with an offence under the UK lotteries legislation. Several MS argued that lotteries were not economic activities, but the Court ruled that lotteries were services provided for remuneration, the price of the lottery ticket, and that, although hey were closely regulated in some MS, they were not prohibited in any. ***Although the morality of lotteries is questionable, they could not be regarded as activities whose harmful nature causes them to be prohibited in all MS and whose position under Community Law may be likened to that of activities involving illegal products***.

In the case of gambling, the Court ruled that ***the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities***.

In **Jany,** the ECJ ruled that the relevant provisions of the EU's Association Agreement with Poland on freedom of establishment and services were to have the same meaning and scope as those under the EU Treaties so that ***the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration***.

In **Josemans,** the Court came to a different conclusion as regards the provision of services relating to the marketing of cannabis by so-called marijuana cafes in the Netherlands. The marketing of cannabis in the Netherlands was prohibited but tolerated by law, yet the Court ruled that Article 56 TFEU could not be relied on to challenge municipal legislation which limited access to such cafés to residents only. With regard to the provision of catering services for food and drink in such coffee shops, the Court ruled that although the legislation restricted the free movement of services, this was justified by the need to combat drug tourism.

The result of these rulings appears to be that provided it is lawful in some Member States, and perhaps even in just one state, a remunerated activity constitutes a service within the meaning of Articles 56–57 TFEU. Nevertheless, Member States remain free to regulate and restrict such services, so long as they do so proportionately and without arbitrary discrimination on grounds of nationality or place of establishment.

Are Restrictions on Social Benefits contrary to Article 56?

In the **Italian Housing Case,** the ECJ ruled that a nationality requirement for access to reduced-rate mortgage loans and to social housing was contrary to Article 49 TFEU on freedom of establishment, but the Italian Government argued that access to publicly built housing could not possibly be relevant to the exercise of the right to provide services, which was precisely the right to provide services without having to have a place of residence in that state.

In **Cowan,** a British tourist in France was refused state compensation for victims of violent crime which was available to nationals and to residents. The ECJ cited the general prohibition on discrimination 'within the scope of application of this Treaty' in Article 18 TFEU, and referred to its ruling in **Luisi and Carbone** to the effect that tourists were covered by Article 56 as recipients of services.

Although the state compensation is publicly funded, it is not (following Humbel) the compensation which constitutes the commercial service being provided. Instead the relevant services in these cases, although not specifically identified by the ECJ, must be other services such as hotels, restaurants, etc for which the recipients, as tourists, provide remuneration. If, whilst in the course of a temporary stay in a Member State in order to avail themselves of remunerated services of this nature, such tourists are denied equal treatment in matters such as compensation for assault and entry fees to museums they may be able to invoke Article 56.

Justifying Restrictions on the Free Movement of Services
General Requirements
The ECJ has developed a justificatory test for workers, services, and establishment alike which is similar to the **Cassis de Dijon** ***rule of reason*** in the free movement of goods context. Although in the area of goods these open-ended exceptions have generally been referred to as 'mandatory requirements', in the field of services the term '***imperative requirements'*** or the generic term 'objective justification' is more often used.

The origins come from **Van Binsergen.** The ECJ maintained that although the imposition of a residence requirement would probably be excessive in the case as a way of ensuring ***observance of professional rules of conduct connected with the administration of justice and with respect for professional ethics,*** it might not always be so. The test for justification laid down by the Court in this case contains several conditions which must be satisfied if a restriction on the freedom to provide services is to be compatible with Article 56:

1. The restriction must be adopted in ours of a legitimate public interest compatible with EU aims. An economic aim might not necessarily be legitimate. In **Finalarte** the ECJ ruled that the aim of a measure is something to be determined objectively by the national court, although the ECJ retains the ultimate role of pronouncing on the legitimacy of the aim.
2. The restriction must be equally applicable to persons established within the state, and must be applied without discrimination.
3. The restriction imposed on the provider of services must be proportionate to the need to observe the legitimate rules in question. The proportionality test entails examining whether the rule is 'suitable' or 'appropriate' in achieving its aim, and although the ECJ has not consistently applied this part of the proportionality test in all cases, whether that aim could be satisfied by other, less restrictive means. Although the proportionality test in principle is for the national court to apply, the ECJ frequently indicates which requirements or restrictions may be disproportionate in the context of the preliminary reference procedure, or more directly in the context of infringement proceedings under Article 258 TFEU, such as the series of insurance services cases.
4. There is the requirement that the restrictive measures should also respect fundamental rights as seen in the **Carpenter Case.**

There are three main lines of caselaw which show how the Court dels with claims that a restriction on the free movement of services is justified:

1. **Posted Workers**

These concern the provision of manpower on a temporary basis by a service provider from another Member State, and is governed in part by the Posted Workers Directive. The case law establishes that preserving the interests of the workforce and ensuring good relations on the labour market are

legitimate aims for host Member States to pursue. A host Member State can, in principle, apply its own labour legislation to employees, including non-EU national employees, of a company providing temporary services. Here, the principle of proportionality still applies. In all cases, a claim by the host state that legislative restrictions are intended for the protection of the posted workers must be carefully scrutinised.

Laval came shortly after the **Viking Ruling.** The Court ruled that industrial action in the form of a blockade by Swedish labour unions against a Latvian company which, due to its considerably lower labour costs, won a construction contract to carry out temporary work in Sweden, where the industrial action was aimed at forcing the company to sign a collective agreement in Sweden containing wage conditions and other terms of employment, was unjustified under Article 56 TFEU. This ruling was based on the Directive, under which Sweden could have chosen to impose a legislative minimum wage requirement on the Latvian company, or to declare relevant collective agreements to be universally applicable.

However, Sweden's labour relations system was designed to be decentralised, entrusting management and labour with the task of setting wage rates through collective negotiations. Further, in the construction sector it required negotiation to take place on a case-by-case basis at the place of work, taking account of the specific qualifications and tasks of the employees concerned.

The Court in this case did not leave it to the national court to apply the proportionality test, but ruled the collective action to be unjustified.

2. **Cross-Border access to Health Care**

In **Decker** and **Kohll,** the Court rejected the argument that the financial balance of the social security scheme would be upset, given that the expenses incurred were to be reimbursed at exactly the same rate as that applicable in the home state.

In **Leichte,** the conditions imposed for reimbursement of accommodation and other expenses associated with obtaining a spa health cure in another Member State were deemed to be excessive and thus unjustified.

In **Geraets-Smits,** the Court concluded that the requirement of prior authorisation, subject to the conditions of the necessity and 'normality' of the treatment obtained, might be justified in the interests of maintaining a balanced medical and hospital service open to all, or of preventing the risk of the social security system's financial balance being seriously undermined, or for essential public health reasons under Article 52 TFEU. However, the two conditions had to be applied fairly in a non-discriminatory manner.

3. **Direct Taxation Rules**

In cases such as **Danner, Gerritse,** and **FKP,** the ECJ ruled that restrictive tax rules may be justified on grounds such as prevention of fraud or tax avoidance, effective fiscal supervision, and the effective collection of taxes, or on social grounds, but it has regularly rejected the argument on the facts of the case. Further, the Court has indicated clearly that objectives such as the prevention of the erosion of the tax revenue base, or compensation for the low level of tax paid in the company's state of establishment do not constitute legitimate aims.

The ECJ has also rejected attempts to justify national restrictions where the goals allegedly pursued by such measures were already satisfied by the existence of EU legislation. Conversely, the Court has also indicated that in the absence of coordination of Member States' regulations on a given issue, a national rule will not be deemed to be disproportionate simply because it is stricter than rules applicable in other Member States.

Are non-discrimination restrictions covered by Article 56?
Over the years, it can be seen that genuinely non-discriminatory obstacles are likely to fall within Article 56 and subjected to the objective justification test. While many of the early cases appeared to involve measures which imposed a heavier burden or a dual burden and thus could have been described as indirectly discriminatory, there were also cases involving rules which did not burden established providers of services any less than non-established providers, and yet which were found to be incompatible with Article 56. Again, reference is made to impediment of free movement or a restriction on access to the market of another MS.

Reference can be made to the case of **Sager.** The case concerned German legislation which reserved activities relating to the maintenance of industrial property rights to patent agents. The UK Government argued that in the absence of discrimination, a restriction on the provision of services would not breach Article 56. It was held that any almost any national law which regulates the domestic markets even in pursuance of important national policies is potentially subject to rigorous scrutiny by the ECJ for justification.

In **Gebhard,** it was suggested that the same rules were applicable to all freedoms and that discrimination is not necessary for a restrictive measure to constitute an impediment to freedom of movement under the Treaty, and this has since been repeated in several cases concerning services.

So, any national rules, whether discriminatory or not, which may impede inter-state trade and mobility by affecting the access of goods, persons, or services from one national market to another is in principle caught by EU law and must be justified by the regulating state.

General Legislation to Facilitate Establishment and Services: Recognition of Professional Qualifications
The recognition of qualifications is an important matter for the free movement of services, workers, and establishment alike, and there has been a great deal of litigation before the ECJ on this issue. However, in tandem with the developing case law of the ECJ, there has also been an active legislative programme on recognition of qualifications for many years. The EU has moved gradually towards a comprehensive mutual-recognition approach, culminating in the adoption of an umbrella **Directive 2005/36** consolidating the prior legislation on the recognition of professional qualifications.

The Initial Sectoral Harmonisation/Coordination Approach
Initially, this approach focused on specific sectors of economic or professional life, with a view to reaching agreement between all Member States on the minimum standard of training and education needed for a qualification in that field.

Introduction of Mutual Recognition Approach
It was not easy to gain agreement vis-a-vis the aforementioned. In 1974, the Council expressed the wish that future work on mutual recognition be based on '***flexible and qualitative criteri***a', and that directives '***should resort as little as possible to the prescription of detailed training requirements***'.

The 1984 Summit of the European Council marked the bingeing of a new approach's and the first mutual recognition Directive was adopted five years later, providing for a ***general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years duration.***

It indeed to apply to all regulated professions for which university-level training of at least three years was required and which was not covered by a specific directive. Secondly, recognition was to be based on the principle of mutual trust, without prior coordination of the preparatory educational

and training courses for the various professions in question. ***The basic principle was that a host MS may not refuse entry to a regulated professional to national of a MS who holds the qualifications necessary for exercise of that profession in another MS.***

Thirdly, recognition was granted to the 'end product', ie to fully qualified professionals, including any professional training required in addition to their university diplomas. Fourthly, where there were major differences in education and training, or in the structure of a profession, in different states, the Directive provided for compensation mechanisms in the form either of an adaptation period or an aptitude test.

This still had disadvantages: it does not provide an automatic guarantee to people holding specified qualifications that they will be accepted to practise in any Member State, but merely provides them with a starting point. States remain free, where either the content of the education or training received is inadequate or the structure of the profession it represents is different, to impose the additional requirement of an aptitude test or an adaptation period.

Still, this has become the dominant approach, and even the sectors in which harmonisation-type directives were adopted have been affected by this approach, most recently under the terms of Directive 2005/36. T

The basic thrust of **Directive 89/48** was that if an EU national wished to pursue a regulated profession in any MS, the competent authorities in the Member State could not refuse permission on the ground of inadequate qualifications if the person satisfied certain conditions:

i. The person had pushed the equivalent of a three-year higher education course in the EU
ii. The person had completed the professional training in order to be qualified to take up the regulated profession in question

If the qualifications were adequate, then permission to practise should be given. If the duration of the person's training and education was however at least one year less than that required in the host state, the Directive permitted Member States to require certain evidence of professional experience. If, on the other hand, the matters covered by the person's education and training differed substantially from those covered by the host-state qualification, or if the host-state profession comprised specific regulated activities which were not within the profession regulated in the Member State where the qualification was obtained, the Member State was permitted to require the completion of an adaptation period or that an aptitude test be taken

This was followed by **Directive 92/51** which covered one-year post-secondary courses, qualifying the holder to take up a regulated profession. After, **Directive 99/42** replaced the series of earlier transitional and other sectoral directives using a mutual-recognition approach based on periods of consecutive experience and possession of skills, rather than the possession of formal qualifications or diplomas.

The first two directives were amended by Directive 2001/19/EC. The SLIM Directive simplified the coordination procedure under the general directives and introduced a range of other changes, including extension to the general system of the concept of 'regulated education and training', requiring host states to examine professional experience gained, incorporating some of the ECJ's case law on third-country diplomas, and specifying procedural rights.

Directive 2005/36 on the Recognition of Professional Qualifications

This maintained the same approach and principles as the mutual recognition legislation. The aim was to maintain the guarantees afforded by each of the prior recognition systems, and at the same time '***to create a single, consistent legal framework based on further liberalisation of the***

provision of services, more automatic recognition of qualifications, and greater flexibility in the procedures for updating the Directive'.

The Directive comatose three innovations:

1. Title II establishes a more liberalised regime counting detailed procedures and stricter deadlines for decision making, or the temporary provision of services under the provider's original professional title.
2. The part of Title III on establishment dealing with the former general mutual recognition regime introduces the notion of 'common platforms', defined in Article 15 as a set of criteria which make it possible to compensate for the widest range of substantial differences which have been identified between the training requirements in at least two-thirds of the Member States including all the Member States which regulate that profession.
3. Title V provides for close collaboration between the competent administrative authorities of home and host states, involving confidential exchanges of information including in relation to disciplinary action taken or criminal sanctions imposed

There are two other relevant developments in the field of recognition of qualifications:

1. **Decision 2241/2004**

This introduced a set of European instruments to be used by individuals to describe their qualifications and competences.

2. **European Qualifications Directive**

This is intended to act as '***a translation device and neutral reference point for comparing qualifications across different education and training systems and to strengthen co-operation and mutual trust between the relevant stakeholder***'.

Situations not covered by the Legislation

Unfortunately, there are still likely to be cases and circumstances in which the legislation does not provide a decisive answer. Examples may include the situation of a person seeking to pursue a profession which is unregulated in the host state and other cases which are not covered by the secondary legislation.

In this case, the basic principles outlines in **Vlassopoulou** and **Heylens** apply: Article 49 TFEU imposes a requirement on Member State authorities to examine the knowledge and qualifications already recognised or acquired by the person concerned in another Member State, and to give adequate reasons for the non-recognition of any qualification held, as well as access to a judicial remedy.

Finally, it should be noted that 'wholly internal situations' are not covered by the Directive, in the sense that the applicant must be seeking to practise in a host state other than the state in which that person's qualification was obtained.

General Legislation to facilitate Establishment and Services: the Services Directive

Directive 2006/123 on services in the internal market was adopted. This covers both temporary service provision as well as freedom of establishment. There are thee questions to answer:

1. Why was a *general* directive on the liberalisation of service-provision in the EU considered to be necessary, so long after the General Programme of the 1960s and more than a decade after the Single Market programme of the 1990s?
2. Why was the 'country-of-origin' principle which was central to the original proposal for the Directive so controversial?
3. What are the main significant features of the Services Directive following the removal of the country-of-origin principle by the European Parliament's amendments?

In its final form, the Directive accomplished a certain amount of useful administrative simplification and cooperation with a view to reducing obstacles to the free movement of services and establishment.

Articles 5–8 of the Services Directive deal with procedural simplification, the setting-up of 'points of single contact', the right to information, and electronic procedures.

Articles 9–15 deal with freedom of establishment, covering authorisation procedures, and indicating which requirements are prohibited and which are subject to evaluation. Many of these are based directly on ECJ case law, in some cases with more specific detail.

When it comes to temporary service provision, however, we have seen that the retreat from the country-of-origin principle in the Services Directive has resulted in a complicated but arguably weakly deregulatory set of provisions in **Articles 16–18**. **Articles 19–21** then govern the rights of recipients of services.

Articles 22–27 cover a range of detailed provisions on the 'quality of services' (covering issues such as availability of information, commercial communications, liability insurance and dispute-settlement), **Articles 28–36** deal with administrative cooperation (covering issues such as supervision, safety alerts, reputational information, and mutual assistance), and Articles 37–43 contain a range of provisions intended to further the aims of the Directive.

The scope of the directive is not comprehensive. It is negatively defined by a series of exclusions of particular kinds of services from its coverage, many of which were again a consequence of parliamentary amendments to the initial draft legislation.

Apart from the exclusion of sectors already covered by legislation such as financial services, e-communication, and transport, **Articles 1–3** contain: a range of exclusions: for example non-economic services of general interest, social services, health care, private security services; explanations of the areas which the Directive 'does not affect' or 'does not concern'; and indications of how it should interact with overlapping legislation such as that on mutual recognition of qualifications.