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EUROPEAN UNION LAW

The European Law Students' Association

MALTA

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European Union Law

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Introduction to Union Law: Competences of the EU

The traditional principle governing EU Law competence was that the power of the EU emanated from the treaties establishing it. Prior to the Lisbon Treaty, the limits to EU Competence was not so clear-cut, to the point where there was no form of classification distinguishing one competence to another. One of the main principles regulating EU Law power is that of **conferral**. Articles 5(1) and 7(1) of the EC Treaty have now been substituted by Article 5 (2) TFEU, holding the following:

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Prior to the Lisbon Treaty, it was a challenge to control the power shift between Member States and the EU - an issue identified in the Nice Treaty 2000. The reform process, solving the issue of competence, was powered by 4 motives: **clarity, conferral, containment, and consideration.**

Clarity - the concern that the Treaty provisions on competence were unclear and uncollected,
Conferral - the idea that the EU should be vested the powers to exercise acts necessary to fulfil treaty tasks,
Containment - restricting the EU's over-extended powers,
Consideration - the question whether the EU should retain its powers.

This issue is also governed by the principle of subsidiarity, as introduced by the Maastricht treaty, which holds that the EU is only to exercise its powers if it is more effective than if the act was to be done by the Member State.

The Lisbon Treaty way forward

The Lisbon treaty adopted the approach taken by the failed Constitutional Treaty in matters related to EU Competence. Today, the principles of EU Power are contained within the TEU, whereas the substantial competences are enlisted in the TFEU.

Article 4 TEU

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5 TEU
(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Express and Implied Power

Before examining the specific classifications of competences, one must understand the difference between express power and implied power. The treaties may expressly vest the EU with particular powers, but it may also assert that a power is given to the EU implicitly through the treaty provisions. The notion of implied power thus means that the EU may adopt a regulation that seeks to arrive at a destination which is stipulated or governed expressly by the treaties, so long as the means is proportional to the end.

A case that notably depicts the notion of implied power is that of **Case 176/03 Commission v Council**, which involved a Council-enacted decision which required Member States to prescribe criminal penalties for specific environmental offences. The Commission argued that the decision should have been enacted under a Treaty Provision, an argument which was accepted by the ECJ, but which bore no fruit, for it adopted another line of reasoning:

Despite the fact that Criminal Law does not fall under EU Competence, the Community Legislature was not restricted from applying effective, proportionate, and persuasive criminal sanctions in order to combat serious environmental issues.

Thus the imposition of criminal sanctions was permitted, despite criminal law not falling under EU Power, to the extent that it tackled environmental issues contemplated expressly by the treaties.

Categories of Competence - Article 2 TFEU

Article 2 TFEU establishes and defines the different types of EU Competence, namely **exclusive, shared, and supporting, coordinating or supplementary competence**.

Article 2 (1) TFEU - Exclusive Competence

Article 2(1) TFEU

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Therefore with regard to exclusive competence, the Member State has little to no power relating to regulation in the areas enlisted in Article 3 TFEU. The Member State may only adopt regulation in such areas if the power to do so is delegated by the EU, or else in order to implement Union decisions.

Article 2 (2) TFEU - Shared Competence

Article 2(2) TFEU

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Shared competence gives power to the EU and to the Member State in regulating the areas enlisted in Article 4 TFEU. However, the power is not completely shared, for the EU still bares a significant power in this regard, to the the extent that the Member State is only allowed to regulate the area to the extent that the EU has not.

Article 2 (5) - Supporting, Coordinating, or Supplementing Competence

Article 2(5) TFEU

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

Supporting Competence refers to areas in which the Member State has the most power with regards to regulation. The EU may still regulate these areas, only to the extent that the EU can never exceed the Member State competence.

Exclusive Competence: Article 3 TFEU

Exclusive Competence may only be exercised by the EU, with no Member State interference. The list of exclusive EU Competences are provided by Article 3 TFEU:

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) **customs Union;**

(b) the establishing of the competition rules necessary for the functioning of the **internal market;**

(c) **monetary policy** for the Member States whose currency is the euro;

(d) the conservation of **marine biological resources** under the common fisheries policy;

(e) **common commercial policy.**

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

The implications of exclusive competences are stipulated by Article 2 TFEU, which holds that **when Treaties confer on the Union Exclusive Competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union Acts**.

Thus Section 2 TFEU defines exclusive competence, whereas section 3 enlists the areas pertinent thereto. Article 3 (2) importantly vests the EU with the power to conclude international agreement exclusively, with no Member State interference, to the point that the conclusion of such agreement is necessary to allow the Union to exercise its treaty objectives.

We know that the Laeken Declaration sought to limit and **contain** the power of the EU. The short list of areas covered by exclusive competence is testament to such containment goals. Some problems may arise as to the borderlines between the areas of competence - for instance, the establishing and functioning of the **internal market** (an exclusive competence under Article 3(b)) may create conflict and confusion when compared with the **customs Union** (which falls under shared competence).

Steiner and Woods assert that in areas of **exclusive competence**, the principle of **subsidiarity** does not apply. Subsidiarity is established by Article5 (3) TEU:

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

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

International Agreements as an Exclusive Competence

We saw that Article3(2) TFEU vests the EU the exclusive competence to conclude international agreement on condition that the conclusion thereof is done to *enable the EU to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope*. This provision must be read in conjunction with **Article 216 TFEU**.

Article 216 TFEU

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Therefore the exclusive power to conclude international agreements as per Article 3(2) TFEU may only be exercised if the conclusion is done in order to achieve one of the objectives contained within the Treaties. Prior to the Lisbon Treaty, the EU was given express power to conclude international agreements only in certain limited instances. Article 216 may be argued to be broader than the same application prior to Lisbon, and thus even broader than Article3(2) TFEU.

External Competence and exclusivity Pre-Lisbon

Before the Lisbon Treaty, the Community's competence to conclude international agreements was permitted only when it was necessary to effect internal competence, even in the case where there was no express external competence. Therefore the European Communities did not need to refer to any treaty provisions in order to conclude international agreements, so long as it could be proven that the scope thereof was to achieve a community goal. A debate emerged surrounding the question whether this power to conclude third party agreements was to be classified as **shared** or as **exclusive** competence. Cases such as **Kramer** (6/76) held that the competence was shared except in cases where the Member States was jeopardising a treaty objective. It was held by the ECJ that once a Member State action put a Community Objective at risk, then the power to conclude international agreement became **exclusive.**

Opinion 1/94 notably held that the Union's ability to enter into World Trade Organisation Agreements were to be founded upon the **exercising** of internal competence, and not the mere existence.

External Competence and exclusivity Post-Lisbon

Article 3(2) TFEU posits 3 situations in which external competence is exclusive.

1) When the conclusion of an international agreement is provided for by Union Law;
2) Where it is necessary for the Union to effect an internal competence; and
3) Where the conclusion of such agreement alters the common rules or scope of the Union.

With regards to the second branch of permissible exclusive external competence, one must note that the internal power so-effected need not be exclusive, for it may also be shared or supporting.

Shared Competence: Article 4 TFEU

We saw, in Article2(2) TFEU, that shared competence may be exercised by the Member State to the extent that the Union has not. The areas of shared competence are delineated by Section 4 TFEU, which gives the impression that this class of competence is residual.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;
(b) social policy, for the aspects defined in this Treaty;
(c) economic, social and territorial cohesion;
(d) agriculture and fisheries, excluding the conservation of marine biological resources;
(e) environment;
(f) consumer protection;
(g) transport;
(h) trans-European networks;
(i) energy;
(j) area of freedom, security and justice;
(k) common safety concerns in public health matters, for the aspects defined in this Treaty

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Supporting, Coordinating, or Supplementary Action: Article 6 TFEU

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation.

This area of competence pertains to areas in which the EU is allowed to take measures and actions, so long as it does not supersede Member State Competence in the areas. **Under this area of competence, the EU is not permitted to adopt harmonisation measures, by virtue of Article 2 (5) TEU.**

Common Foreign and Security Policy and Defence

The Lisbon treaty had abolished the three pillar structure that founded the Community, in turn leaving special rules and provisions governing competence of CFSP. The separate head of competence is contained in Article 2(4) TFEU, which holds as follows;

> 4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

Decision making in this regard is intergovernmental, leaving most of the powers within the European Council and the Council of Ministers. This area is thus separate from the other areas of competence. Lisbon had also established a position, the High Representative for Foreign Affairs and Security Policy, to co-ordinate this area within the Union. This will be examined in greater detail later.

Wider Treaty Provisions 1 - the Flexibility Clause

> **Article 352**
> **(ex Article 308 TEC)**
>
> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

This provision, a blanket power, has been used as a basis for legislation on matter of regional or social policy, in matters relating to equal treatment, for instance. Following ECJ decisions, the governance of such areas have been incorporated into the TFEU, through amendments. Although this clause is wide, it is limited by the fact that the consent of all Member States in exercising such powers is required unanimously, allowing a single veto to deny the application of the article. The European Parliament holds little power in this regard. Furthermore, Article352 is restricted solely to objectives described within the Treaties.

Wider Treaty Provisions 2 - Harmonisation

Article 115
(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 115 TFEU provides for harmonisation of laws within the EU, in all areas except for areas of Supporting, Coordinating and Supplementary Competence (as stated in Article 2(5) TFEU). Unanimous Council approval is required.

Tobacco Advertising Case
Germany v Parliament and Council

In this case, Germany challenged the legitimacy of an EU Directive which banned advertisement of tobacco products, on the ground that Article 114 and 115 TFEU were to invoked solely to promote, and not to limit, trade. The ECJ upheld this argument, positing three constitutional limits to s 114:

1) EU Law must harmonise laws;
2) A simple disparity or conflict between the laws of different jurisdictions is not sufficient in justifying harmonisation; and
3) EU Law must contribute to eliminate obstacles to treaty objectives.

The EU may resort to **impact assessments**, which may be used both politically and legally to persuade a Member State to abide by EU Directives.

Implied Powers

The ECJ has continuously asserted that the EU may adopt certain powers which are not expressly laid out within the Treaties in order to achieve a Union Goal. This may take 2 approaches; the first being the adopting of a power derived from an express power in order to exercise such express power. The second is wider, encompassing the deriving of a power from express treaty provisions. To this we must add reference to the **ERTA Case**.

ERTA Case
Commission v Council Case 22/70

The ERTA Case contemplated the EU's external powers and the extent to which it could conclude international agreements. The ECJ significantly ruled that Member States lose all form of power and competence to perform acts which distort the EU's scope or objectives. The ECJ thus established **implied external competence**, for it held that even in the shortcoming of express treaty provisions which grant external power, the EU could still extract the competence to conclude international agreements if it resulted in the attaining of an EU objective or to fulfil its internal competences.

Therefore the ERTA Case appeared to suggest that the competence of the Union, in matters of external agreements which fulfilled a common objective, was **exclusive**.

Principles of EU Law

Article 2 TEU establishes the principles governing the European Union. Article 6 then establishes the sources of rights.

Article 2

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

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

More tangibly, there are various principles of EU Law which serve cornerstone to the exercising of its powers, namely that of **supremacy, subsidiarity, and conferral**, among others.

The Principle of Subsidiarity

The principle of subsidiarity was invoked in the Union following the Single European Act, yet it was enshrined in Treaty provisions by virtue of the Maastricht treaty of 1992. This principle is defined under section 5 (3) TEU;

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

Thus the principle of subsidiarity holds that in all areas that are not within exclusive competence, the EU shall not act in the case that the Member State is able to sufficiently achieve the objective of the proposed action itself. Thus a comparative element is introduced, in that one must determine whether the EU is more capable of implementing and achieving the objective than the Member State. This provision often grounds an argument to **contest EU Regulation**, as demonstrated in **R v Secretary of State for Health**. Thus the Member State is free to contest EU Law on the grounds that it would have been more effective for the Member State to tackle the issue, thus rendering an effective use of the Principle of Subsidiarity.

The principle was retained in the Lisbon Treaty, which makes the clear distinction between the **existence** of a competence, and the **use** thereof.
The different principles of EU Law may be described summarily as follows;

The Principle of Conferral controls when the EU is able to act, the Principle of Subsidiarity, controls when the EU is able to act, whereas the Principle of Proportionality controls how the EU should act.

EU Hierarchy of Norms

Before the Lisbon Treaty, the legal acts of the European Community comprised regulations, directives, decisions, and recommendations/opinions. The EC Treaty did NOT establish a formal hierarchy among these acts. However, with the implementation of the Lisbon Treaty, this structure has undergone revision.

Treaties & the Charter

When discussing the hierarchy of norms within the European Union, it is typical to concentrate on legislative, delegated, and implementing acts, and the hierarchy among them. However, it's important to note that the constituent treaties, namely the TEU and the TFEU, occupy the highest position in this hierarchy. Similarly, the Charter of Fundamental Rights holds an equivalent status, as outlined in Art. 6 (1) of the TEU. Any legislative act must be grounded in a specific treaty article, and the Union Courts are responsible for delineating the scope and interpreting these treaty and charter provisions.

General Principles

The next tier in the hierarchy of EU law comprises the general principles of EU Law, positioned below the constituent treaties but above legislative, delegated, and implementing acts. These principles are utilized when interpreting specific treaty provisions. Originating from decisions of the Union Courts, these principles, such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedural justice, have been integrated into the Treaty framework. They serve as the bedrock for judicial review under Articles 263 and 267 of the Treaty on the Functioning of the European Union (TFEU). These principles underpin administrative law and provide the foundation for legal challenges against governmental actions.

Art. 263 (2) TFEU delineates the grounds for judicial review, encompassing lack of competence, infringement of procedural requirements, violation of the Treaties or legal rules governing their application, and misuse of powers. Art. 19 of the TEU mandates the Union Courts to ensure adherence to the law in interpreting and applying the Treaty.

The task of developing principles of judicial review is further facilitated by specific treaty articles, which may reference principles such as non-discrimination.

Artegodan GmbH and Others v. Commission

In this case, the issue of marketing authorisation for obesity control drugs was contested. The Court of First Instance extrapolated from limited treaty references and case law to establish the precautionary principle as a general principle of law.

Legislative Acts

Art. 289 of TFEU establishes that legislative acts are legal acts adopted through a legislative procedure. These acts can be regulations, directives, or decisions. The default procedure for legislative acts is the ordinary legislative procedure, which succeeds the co- decision procedure. However, certain instances require a special legislative procedure.

The key point is that any legal act enacted through either the ordinary or special legislative procedure is considered a legislative act. Conversely, if a legal act is not enacted through a prescribed legislative procedure, it does not qualify as a legislative act, regardless of whether its content appears administrative or legislative in nature.

This formalistic approach leads to two consequences. Firstly, if a legislative procedure is mandated for the enactment of a legal act, it is classified as a legislative act, even if its content seems administrative. Conversely, if the Lisbon Treaty does not stipulate a legislative procedure for a legal act, it does not qualify as a legislative act, even if its content resembles legislative rules.

Secondly, according to this formal approach, only legal acts made in accordance with the ordinary or special legislative procedures defined in Art. 289 (1) and (2) TFEU, including the requirement for a special procedure mandated by the Treaties in specific cases, constitute legislative acts under the Lisbon Treaty.

Delegated Acts

Art. 290 TFEU introduces the category of delegated acts and outlines the conditions and oversight mechanisms governing their enactment. This distinction between delegated and implementing acts aims to differentiate between secondary measures with a legislative nature (delegated acts) and those primarily executive in nature (implementing acts).

Delegated acts are characterised as non-legislative acts of general applicability. However, this characterisation is formal rather than substantive, as they are not made through the ordinary or special legislative procedures. In practice, many delegated acts still possess a legislative character.

The legislative act must specify the objectives, content, scope, and duration of the delegation of power for delegated acts. Additionally, it is mandated that essential objectives remain within the purview of legislative acts and cannot be delegated. Delegated acts are authorised to amend or supplement non-essential elements of legislative acts. Any general measure amending or supplementing a legislative act must be a delegated act under Art. 290, rather than an implementing act under Art. 291.

Delegated acts are subject to controls outlined in Art. 290. Alongside the requirement for legislative acts to define essential features, the European Parliament or the Council retains the authority to revoke the delegation of powers and can veto specific delegated acts.

Implementing Acts

Art. 291 TFEU introduces the category of implementing acts and delineates the conditions for their creation. It is important to note that implementing acts can be enacted based on either a legislative act or a delegated act. Previously, the term "implementation" within Community legislation and official websites encompassed what are now referred to as delegated acts as well as the domain now covered by implementing acts.
Following the Lisbon Treaty, a clear distinction arises between delegated acts and implementing acts. Delegated acts are of general applicability and serve to amend or supplement legislative acts. Implementing acts, on the other hand, typically have general application as specified in Art. 291, which outlines their usage in situations necessitating uniform conditions for implementing legally binding acts.

Incomplete Categorisation

Some acts may not neatly fit into the categories outlined above. For instance, consider a standard administrative decision directed to a specific individual, falling within the definition of a decision as per Art. 288 TFEU. Such an act would NOT qualify as a legislative act if it was not made through a legislative procedure. It also would not be a delegated act, as these can only be enacted based on a legislative act and must have general applicability. Additionally, it would not be an implementing act, as the typical administrative decision directed at an individual is not related to establishing uniform conditions for implementation, as defined in Art. 291.

Supremacy of EU Law

Conflict between national law and EU Law has been a leading issue throughout the development of the Union, with most questions surrounding the prevailing of one over the other. For the Union, the problem was a direct attack on the legal order, while for Member States, the problem was constitutional. The original treaties were silent on the issue. It was only the failed Constitutional Treaty which attempted to tackle the issue for the first time, with official treaty inclusion brought by the Lisbon Treaty. The resolving of supremacy is crucial because without EU Law Supremacy, pivotal principles such as those of Direct and Indirect effect can never materialise. Owing to the lack of treaty provision, the matter was often left in the hands of the ECJ, which developed prevalent case law which is still relevant even today.

The doctrine of EU Law supremacy may be described as the **pediment** to the notions of Direct and Indirect Effect. It is necessary for the EU Regime to be deemed supreme in order to render effective application of Union Law. The doctrine of supremacy, although is not defined under any treaty provision, may be derived and denoted from the following provisions:

- **Article 4(3) TEU**: the Good Faith & Sincere Cooperation Clause
- **Article 258 TFEU**: Commission's enforcement action
- **Article 260 TFEU**: Financial Penalties issued by the Commission
- **Article 267 TFEU**: the Preliminary Reference procedure

Jurisprudential Contribution to the Doctrine of Supremacy

Van Gend en Loos v the Netherlands *- landmark supremacy case*

This landmark judgement established the concept of supremacy for the first time under EU Law. It described the EU as a ***new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields***. The case involved a Dutch Company which challenged the imposition of a **customs duty** on goods imported from Germany. The ECJ ruled that the **new legal order** implied that national Courts could apply EU Law directly without first having to refer to the ECJ, and that EU Law formed part and parcel with domestic law.

Costa v Enel *- limitation to national law sovereignty*

This landmark case involved a conflict between Treaty Provisions and Italian statute law, specifically in relation to the nationalising of an electricity company (the defendant). The Italian Courts declared national law supremacy over EU Law, an argument which was turned down by the ECJ. The Courts of Justice held that the creation of the new EU Legal Order saw a **limitation in national law sovereignty.** The reasoning was that the treaties establish the goals of the Union, and thus in order to achieve these goals effectively, some sort of supremacy of EU Law must be established. This case held that the objectives of the treaties must be adhered to by the Member State to the extent that it must refrain from taking actions which jeopardise the attaining thereof.

Internationale Handelsgesellchaft *- Solange 1 - Constitutional v EU Law*

This case discussed directly the question of supremacy, for it surrounded the conflict between the German Constitution and an EU Regulation. Normally, when domestic law contradicts constitutional law, it is the latter that prevails. The story is different for EU Law, for the ECJ ruled that the **legality of a Union act cannot be impugned in the light of national law, even if constitutional**. The same line of reasoning is seen in ***Costa,*** for the decision held that the Member State is obliged to ensure the effectiveness of Union Law and the relevant Common Objectives, even if it meant setting aside national, even constitutional, law.

Simmenthal Case *- solution to problem of invalidating laws*

The Simmenthal Case saw the ECJ taking a step further. This case adopted the belief that EU Law Supremacy applied even to future acts adopted by Member States. Thus the notion of ***lex posterior derogat priori*** does not apply in the forefront of EU Law. This case also held that Member States were to offer effective protection for rights conferred on individuals by Treaty provisions.

Simmenthal further offered a solution for the National Court reluctance and difficult faced when having to try and declare a national law null and void in order to allow EU Law to prevail. In Simmenthal, the CJ held that the national Court is not expected to invalidate the national law which is found to be conflicting with EU Law, but rather to cease to apply the national law provisions, and apply the EU Law provisions instead. This is a consequence of the surrendered sovereignty exchanged for the EU's Legal Order.

Steiner and Woods state that EU Law supremacy applies not only with regard to Law, but also to **obligations**. Following the **ERTA** judgement, it is clear that Member States do not have any power to contract third-party agreements with states if the contracting thereof effects or alters the common scope or objectives of the Union. This ties into supremacy because the ECJ holds that where these obligations arising from third party agreements are not respected by national law, then that national law must be set aside.
Procedurally, a question arose as to what the judge was supposed to do in the case wherein national law confronted EU Law contradictorily. Should the judge wait for the national provisions to be amended or repealed, or should he instead rule the law null and void? The **Simmenthal** Case provided a solution to this complication, for the ECJ held that in the case of conflict, he must **cease to apply** national law, and apply EU Law instead. Thus the solution is to set national law aside, and not to declare it null and void.

Furthermore in the case of a ***res judicata*** decision, the judge has no obligation to re-open the case and to substitute EU Law with the national law. This is an exception to the unconditional nature of eu primacy, with the scope to preserve legal certainty.

Factortame Case *- ad hoc remedy*

This English case held that the national Court is not only meant to disapply or put aside national law, but it must also be ready to provide a **remedy** which is not issued under national law. It must thus **provide an *ad hoc* solution** in order to apply and preserve EU Law.

Acceptance by the National Courts

The ECJ has very adamantly asserted EU Supremacy over national law. However, in order for supremacy to be effective, it must be received, accepted, and applied by the national Courts. Otherwise, EU Law would never be applied and would otherwise be redundant. The views of each of the Member States differ, depending on the constitutional structure of that state.

Generally, the Member States have accepted EU Law Supremacy over national law, but each with different reasons. A Member State may accept supremacy on the grounds of its own constitutional framework, and other Member States may accept EU Law as if it was a special, exceptional law. Similarly, different Member States may integrate EU Law in different ways. Malta adopts a dualist system, wherein EU Law is only effective if it is integrated into domestic Law. Testament to this doctrine are Chapters 319 and 460 of the Laws of Malta (the EU Convention Act and the EU Act respectively).

The problem arose as to what the National Court was expected to do in the case of a national law which goes against EU Law. Under Maltese Law, when a law is found to be unconstitutional, for instance, the law may be declared unconstitutional by the Court, but it is only until the legislators repeal the law that it may be effectively abrogated from Maltese Law. The solution was established in ***Simmenthal***, which held that the Court may cease to apply the national law and apply EU Law instead, *inter partes*.

Judge Toni Abela in a recent Maltese judgement controversially declared Maltese Constitutional Supremacy over EU Law, indicating resistance to the doctrine of supremacy. This is erroneous, for the judge should have either put national law aside or else resolve the contradiction by applying EU Law directly.

Direct Effect as the cornerstone for Supremacy

It is clear that Supremacy and the principle of direct effect share a complex relationship. **M Douglans** describes the EU's Primacy Model as a **constitutional fundamental of the European Union**, thus governing all relations between Community law and National law. Supremacy is held to be the capability of producing legal effects within national legal systems, independently of direct effect.

The CJEU asserts that if a framework decision was not capable of direct effect, then the national Court is not obliged to set national law aside and apply that framework decision. However, it is expected to interpret national law in conformity with the framework decision - pursuant to the **Von Colson Principle** of indirect effect, which will be tackled later.

Therefore as held by **M Douglan** and as reiterated by CJEU Jurisprudence, **the Member State is not obliged to set aside national law to apply EU Law in cases where the relevant EU Law is not capable of direct effect**.

As held in ***Factortame,*** and even more recently in ***Unibet***, the solution goes beyond the setting aside of national law, for the Court is also expected to issue a remedy, whether *ad hoc* or not, to make good of the discrepancy between national law and EU law.

Declaration 17 on Supremacy

The Constitutional Treaty (which failed to see the light of day) provided that the Constitutional Law of the EU was to prevail and have primacy over any law of the Member States. This provision was excluded from the Lisbon Treaty, with the reason being that this would attack the constitutional elements of national law. The Lisbon Treaty instead provides for a declaration of supremacy, with no particular reference to Constitutionalism.

Thus the TFEU contains, annexed to it, various declarations which bare more political value than legal value. Amongst these declarations lies Declaration 17:

17. Declaration concerning primacy

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): 'Opinion of the Council Legal Service of 22 June 2007 It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

The problem with the declaration is the same problem as that contained in the Constitutional Treaty provision - that there is no reference as to whether EU Law Primacy is in relation to ordinary law or whether it also applies to constitutional law. There is thus a strong sense of ambiguity.

Supremacy post-Lisbon

Earlier CJEU case law concerned the doctrine of supremacy in relation to Community Law. After the enactment of the Maastricht treaty, the question arose as to the extent of the doctrine's applicability in relation to the newly created second and third pillars of the EU the same way it applied to Union Law in general. The Treaties did not provide an answer to these queries, and thus we turn to judicial interpretation.

The argument was primarily revolved around the fact that the second and third pillars were more intergovernmental than the first pillar, and thus it could be deduced that supremacy in regard of the second and third pillars should be less prominent.

Pupino *- duty of loyalty in regards to second and third pillar applied the same way as the first pillar*

In ***Pupino***, the CJ took the stance which purported that *it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under EU Law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions*.

Thus, ***Pupino*** adopts a more extensive interpretation of the notion of Supremacy, even in relation to areas wherein the States enjoy a further command over policies.

Post-Lisbon, the distinction between the pillars have been eradicated, with some particular provisions catering for the CFSP being left separated. The question remains to what extent is the Supremacy of EU Law is complete and entire.

The **Constitutional Treaty** would have included a re-statement of the principle of supremacy, stating that all Union Law would have primacy. The Lisbon Treaty, instead, contains a **Declaration** annexed as **Declaration 17** at the end of the TFEU.

The Binding Nature of EU Law

The manner in which EU law is integrated into national legal systems hinges largely on a Member State's adoption of either a monist or dualist perspective regarding the relationship between international and national law. In monist systems, exemplified by the French legal framework, EU law automatically becomes binding upon ratification, without the necessity for specific incorporation measures.

Conversely, in dualist systems, international law does not have internal binding force until it is formally assimilated through domestic legislation. In the United Kingdom's dualist system, EU law is assimilated through the European Communities Act. Section 2(1) of the this Act stipulates that all rights, powers, liabilities, obligations, and restrictions originating from or established under the Treaties are granted legal effect without the requirement for additional legislative action.

Malta amalgamated itself to the Council of Europe, it became solely bound to obligations asserted by the Council; thus meaning that it was NOT legally bound to the ECHR in 1966. Therefore, this denoted the fact that one could not use the ECHR as an argument in a 1966 Maltese Court. Ultimately, all this boils down to the fact that Malta is a dualist country. In 1987, Malta finally integrated the ECHR into the laws of Malta:

- Cap. 319 of the Laws of Malta – European Convention Act
- Cap. 460 of the Laws of Malta – European Union Act.

The significance of supremacy lies in its acknowledgment and acceptance by national Courts, and currently, the supremacy of EU law is generally acknowledged across Member States.

Direct and Indirect Effect

Chapter 460 makes all of eu law part of domestic law.

The doctrine of direct effect is central to all of EU Law. We have seen that national Courts bare the obligation to ensure full effectiveness of EU Law, without having to refer to the ECJ in order to apply such law. Thus an implication of this direct application is that the individual is able to rely on EU Law before the national Court itself, in a way that ensures legal clarity. To ensure this effect, the ECJ has developed 3 principles which guide EU Law effectiveness, namely those of **direct effect, indirect effect**, and **state liability**.

Taken together, these doctrines seek to ensure that individuals are given the best and widest protection before national Courts. Jurisprudence assert that **directives are never capable of direct effect**, for all intents and purposes except the end goal achieved.

Direct Effect

The ECJ adopted a position whereby individuals are able to enforce EU Law directly before their national Courts. Thus treaty provisions, when satisfying certain conditions, are susceptible to individual application. This concept signified departure from the traditional setting, wherein EU Law applicability depended on the acceptance by Member States in accordance with each state's constitutional principles.

Direct effect thus involves the ability to apply EU Law and Jurisprudence before national Courts.

For a right or treaty provision to be **directly effective**, it must be attributed 3 characteristics;

1) Clarity;
2) Precision; and
3) Unconditionality

Only when a treaty is clear, precise, and unconditional may it be enforced by an individual before a national Court against a Member State (vertical direct effect).

Van Gend en Loos

The forefather case of direct effect has been and remains to be **Van Gend en Loos v the Netherlands**. In this case, a customs duty on goods imported from Germany was challenged by the Dutch company. It was clear that prior to this landmark case, that member sates did not accept the notion of direct effect in relation to the obligations carried by the states upon signing of the treaties. This case thus revolved around the question of whether treaty provisions could be applied in national Courts directly by individuals and companies. The ECJ ruled that **certain EEC treaty provisions could create rights and obligations which are directly enforceable by individuals before national Courts, even in the absence of national legislation which implemented such provisions**.

A new legal order was made upon signing of the Rome treaties, and that individuals were to be considered citizens of the Union with rights that could be invoked before national Courts.

This case also set out one of the most important underlying principles of direct effect - that of **direct applicability**. This term is often used interchangeable with direct effect, despite such interchangeability not being completely truthful to the idea behind them. **Not all treaty provisions are capable of direct applicability**. This is because some provisions are too vague and wide, and thus incomplete, to be capable of direct effect by the individual in national Courts. These provisions often require further implementation into domestic law before they may be enforced. The nature of an Article(whether it is capable of direct applicability or not) is typically established through its construction (i.e, the language, context, and purpose behind it).

The Good Faith Clause

A consequence of direct effect, when used as an argument brought by an individual before a national Court, implied that a Member State has failed to abide by its obligations bound by virtue of the **Good Faith Clause**.

> **4 (3) TEU:** Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 4 (3) TEU thus binds the Member State to EU Law, both with respect to its obligations as well as with respect towards its implementation of legally binding acts. Thus if an individual triggers the principle of Direct Effect, then one may deduce that the Member State against which the claim is raised has failed to take the reasonable measures to ensure fulfilment of Union acts and duties. This would then consequentially bring about an action of **State Liability,** which will be discussed later.

Applicability of Direct Effect

Article 288 TFEU provides a list of Union Acts, and defines which acts bare a legal binding.

> **Article 288**
> **(ex Article 249 TEC)**
>
> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force.

The Article explicitly asserts that **EU Regulations shall be binding in its entirety and directly applicable in all Member States**. Since **Direct Applicability is a precondition for Direct Effect**, then one would imply that only regulations are capable of direct effect.

However, it is incorrect to hold that only regulations are capable of direct effect. Under Article267 (of preliminary rulings), the EU, in its variety of jurisprudence, when interpreting EU Law, has established that direct effect applies also to **treaty provisions, directives, decisions and even to provisions of international agreements to which the EU is a party**.

In fact, **Van Gend en Loos** tackled the nature of a treaty provision with regard to its applicability of direct effect.

Horizontal Direct Effect

The case of **Van Gend en Loos** was one which established *vertical* direct effect (the enforceability of EU Law by an individual against the State). The question then arises as to whether *horizontal* direct effect is possible - namely whether an individual is able to enforce EU Law against another individual. This was answered in the case of ***Defrenne v Sabena.***

Defrenne v Sabena - establishing horizontal direct effect

This case surrounded a treaty provision which ensured equal pay of men and women alike, enforced by Ms Defrenne against Sabena, a Belgian airline company. **The ECJ ruled that the obligation to ensure fair and equal pay applies not only to public authorities, but extends also to all agreements intended to regulate paid labour, as well as to contracts between individuals.**

Conditions for Direct Effect

Van Gend en Loos established that a provision must be **self-executing** in order for it to be capable of direct effect. This is often characterised by three additional elements;

1) It must be clear and precise,
2) It must be unconditional, and
3) It must vest no discretion or power within the State (such as further implementation).

These 3 conditions are especially relevant when considering the Direct Effect of EU Directives, which are not always capable of direct effect. One ought to understand the various EU Legal Instruments capable of being issued by virtue of Article **288 TFEU** in relation to each instruments' capability of direct effect:

Regulations

Regulations are described to be *of general application … binding in its entirety and directly applicable in all Member States*. This is one of the few times in the treaties wherein the term ***directly applicable*** is used. However, even in the case of directives, direct effect is not immediate or automatic. A regulation may be applied **conditionally**, or insufficiently precise, or even which requires further implementation in order for it to become enforceable within the Member State. Conversely, if a regulation requires implementation it may fail the test for direct effect, as established in ***Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna***. In this case, the EU Regulation in question vested discretion in the Member State to define 'farmer', in turn rendering the definition not capable of direct effect.

Furthermore, when a regulation is coupled with an ***implementation deadline***, then that regulation is **not capable of direct effect until the deadline has expired**. Since a regulation is of *general application*, then a provision need not expressly establish the extent of its applicability, but rather it becomes directly applicable if it satisfies the aforementioned conditions (clarity, unconditionality, and the lack of further required implementation).

Regulations, like treaty provisions, are capable both of veritcal as well as horizontal direct effect, as established in ***Munoz v Frumar***. This latter case warrants further explanation simply because it encompasses within it the spirit of direct effect.

Munoz v Frumar

This case revolved around a regulation which laid out the standards by which grapes were to be classified. Munoz brought civil proceedings against Frumar, for the latter was not selling his products in compliance with the regulation. Despite the regulation not expressly conferring rights upon individuals, the ECJ nonetheless held that the scope of the regulation was to keep unsatisfactory products off the market, and so in order for the regulation to be effective, it must allow individuals to horizontally apply and ground their case with the Regulation in order to properly effect the regulation.

Directives

The position of Directives is more complex. **Article 288 TFEU** defines directives as binding ***as to the result to be achieved***. Directives tend to leave, within the Member States, certain discretionary powers, often relating to the form and method used to achieve the Directive's result. They are not described as directly applicable, yet they are still capable of producing direct effects.

The case of ***Grad v Finanzamt Traunstein*** is one which extended the principle of Direct Effect to the obligations imposed by EU Directives.

The case of ***Van Duyn v Home Office*** further confirmed both Directives and Decisions to be capable of direct effect.

In order to determine whether a Directive provision is capable of direct effect, again the test of **clarity, precision, unconditionality, and further implementation** is applied.

When discussing directives and direct effect, it is important to ascertain the clarity of the provision in question. In a particular case, for instance, the plaintiff sought out to apply a particular provision which held that Member States are to implement measures to ensure that waste is disposed of in a way which does not damage the environment. The ECJ ruled that this particular provision was not sufficiently clear enough to be capable of producing direct effect, since it bore no particular method to be adopted by the state.

Like in the case of regulations, if the Directive is coupled with an ***implementation deadline,*** then it can never be capable of direct effect until the Member State has implemented it or until the deadline expires. This was established in ***Pubblico Ministero v Ratti***, wherein a directive was rendered inapplicable since the time limit for implementation had not yet been passed.

Directives and Faulty Implementation

One should note that a Directive may be capable of direct effect even if the Member State took the measures necessary to implement its results into domestic law. This is because a Member State may **incorrectly implement a directive into domestic law**, thus creating a conflict which must be resolved. Under Maltese Law, one may argue that an instance of incorrect directive transposition is evident when understanding the meaning of *trader* under both the Maltese Commercial Code (Article4) as well as under EU Directive 114/2006. This is because the Maltese Commercial Code excludes persons auxiliary to trade from falling under the definition of trader, whereas the EU Directive does not, for it includes **anyone acting in the name of or on behalf of a trader** under the definition of trader. In fact ***Marks and Spencer*** held that even if a Directive was properly implemented by the Member State, the individual is still able to rely on the directive if its effects are not being correctly applied *in practice*. In the case of such incorrect transposition, an EU Directive provision, so long as it is sufficiently clear, precise and unconditional, may still be capable of direct effect, even if already further implemented by the Member State.

The Vesting of Rights by a Directive

Although the notion of Direct Effect does not beg of a requirement of vesting rights, the ECJ often contemplates whether a provision, regulation, or otherwise actually vests any form of enforceable right in a citizen before establishing whether there is capability of direct effect. With regards to Directives, the ECJ often holds that in order for a Directive to be capable of being invoked, the plaintiff must first prove that he can show some particular interest in a directive. This principle was established in the ***Verholen Cases***, wherein the ECJ held that only a person with a direct interest in the application of a directive could invoke its provisions. This case extended this requirement even to third parties who were directly effected by the directive.

In cases such as of **Defrenne v Sabena**, the interest is often clear (the right against discrimination based on sex). Yet there may be some instances wherein it is not always so straightforward.

Again, the finding of a vested right or of interest is not a requirement for direct effect. However, as demonstrated in ***Verholen***, it may serve as a determining factor which may sway the ECJ in a direction favouring the Plaintiff seeking to invoke direct effect.

Directives and Horizontal Direct Effect

Prior to 1993, the ECJ was clear on its position - Directives were not capable of horizontal direct effect. The Court was requested to consider a different position in ***Dori v Recreb SRL,*** albeit unsuccessfully. However, although the Court refused to extend horizontal direct effect to directives, it planned to introduce alternate remedies to cater for situations of breach of directive not by the Member State. This led to the introduction of the principles of **indirect effect** and **state liability**, namely through the famous ***Francovich Case***.

As a general rule, directives are not capable of direct effect by an individual against another individual, but rather they may be applied only against a Member State by an individual. Although there is some uncertainty as to the precise test to be used, it seems that the broad understanding of *public body* is sufficient in establishing whether the effect is vertical or horizontal.

Marshall v Southampton - *Directive cannot impose obligations on a person without further implementation*

This case established that a directive may not be relied upon against an individual, for the simple reason that the treaties state that the binding nature of a directive exists only in relation to *each Member State to which it is addressed*.

"***It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person***"

A directive cannot impose an obligation on an individual without a further requirement of implementation.

Incidental Horizontal Effect

There have been cases in which individuals have sought to apply the principle of direct effects in order to **invalidate the applicability of national law.** The first case that brought this into effect was that of ***CIA Security v Signalson SA***, in which a Belgian Regulation was challenged on the basis that the standards in question were not submitted to the Commission before entering into force, as required by the EU Directive in question. The effect of this incidental direct application would be **horizontal**, since it is brought by an individual against another.

This would run contrary to the general practice, since the case of ***Dori*** had established that Directives are not capable of horizontal direct effect, since the obligation to implement was to be borne by the Member State, and not by any individual.

Decisions, Recommendations and Opinions

Decisions are described in **Article 288** to be binding to whom it is addressed. They may be directed towards Member States or towards individuals. Although they are not described as directly applicable, the cases of **Grad** and of **Van Duyn** have accepted decisions to be capable of direct effect.

With regard to recommendations and opinions, both Article288 TFEU as well as the ECJ make it very clear that there is no room for direct effect. These instruments have no binding force, and thus they cannot be invoked against a Member State or against any individual. The only thing which is binding in relation to recommendations is the fact that they must be considered before deciding disputes submitted in relation to them.

Indirect Effect

Although the ECJ has not admitted to direct effect of directives, it has developed alternative remedies which may be relied on by individuals. The landmark case which introduced the principle of indirect effect was that of ***Von Colson.***

Von Colson

These cases revolved around the Equal Treatment Directive, in which a provision contained within it held that a Member State was to introduce into their legal systems such measures as are necessary to enable all persons, who consider themselves aggrieved by failure to comply, to pursue their claims. The Court referred to what is today **Article 4 (3) TEU**, the previously mentioned good faith clause, which binds Member States to all of EU Law to ensure fulfilment of obligations and of objectives.

4 (3) TEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

This obligation applies to all the authorities of Member States, including the Courts. Therefore, this interpretation holds that although the directive provision is not ***directly effective***, it may still be applied ***indirectly***, by means of interpreting domestic law in accordance of relevant EU Law.

Thus ***Von Colson*** introduces the doctrine of **indirect effect**, which holds that Domestic Law must be interpreted in such a way so as to ensure that the objectives of a directive are met, whether such Domestic Law was enacted before or after said Directive.

Marleasing - The Limits on Indirect Effect

The Marleasing case involved a claimant who sought out to invalidate a contract on the grounds that it lacked cause, which was a valid basis for nullity under Spanish Law. The defendants argued that EU Directive 68/151 bore the purpose to protect the members of a company from the adverse effects of the doctrine of nullity. Within this directive was its Article 11, which provided an exhaustive list of instances wherein nullity may be invoked - and lack of cause was not included. The ECJ reiterated the **Dori** view, that Directives were not capable of horizontal effect. It then, however, referred to the ***Von Colson*** case, affirming that the Member State was bound to interpret national law in such a way as to ensure the objectives of the directives, albeit **not absolutely**.

Marleasing confirmed that indirect effect applies both to pre-dating and to post-dating national law, and by implication also to **national law not intended to implement EU Law**.

Marleasing - *3 Limitations to Indirect Effect*

1) The *contra legum* principle (if domestic law cannot be interpreted in line with EU Law unless it's wording is changed or amended, indirect effect cannot apply)
2) Non-imposition of criminal sanctions (a directive can never be interpreted to impose criminal sanctions)
3) A directive cannot be interpreted to bring retroactive changes.

These constraints share one common concern - that the EU respects general principles of law and the protection of vested rights. One must note that **in order to rely on a directive indirectly, its transposition deadline must have first passed**.

Limitation on Indirect Effect

The obligation on the National Courts to interpret domestic law in such a way so as to ensure the achievement of the objective set out in directives is not absolute. **Marleasing** sought to clarify when the National Courts are obliged to interpret domestic law in such manner through the establishing of limitations, as previously mentioned. However, other judgements have emerged to discuss the limitations of Indirect Effect, all of which emphasise the importance of first ensuring the **transposition deadline** having first passed before applying the doctrine of indirect effect. *As soon as the date by which the directive must have been implemented passes, then the obligation of indirect effect by Article 4 (3) TEU becomes applicable immediately* (***Inter-Environnement Wallonie)***

Wagner Miret v Fondo de Garantira Salaria *- inapplicability of indirect effect - "AS FAR AS POSSIBLE"*

This case asserted that **national law should be interpreted in a way to achieve the objectives of EU Directives only to an extent - as far as possible**. Such national law must be capable of such interpretation without having to change its wording.

Faccini Dori v Recreb SRL - *inapplicability of indirect effect*

This case held that the Member States' Courts are duty bound to try and interpret national law so as to give effect to a directive. If it was not possible to do so without completely distorting the wording of the national legislation, then the appropriate remedy was for the affected individual to seek damages for breach of EU Law

Thus one may argue that indirect application of EU Directives by national Courts cannot be guaranteed, as the ultimate test relies on the ambiguity of that national legislation. If an interpretation may be achieved to achieve a Directive Objective, then the Court is obliged to apply such interpretation, as stipulated in ***Von Colson*** and by **Aritcle 4 (3) TEU**.

Pleiffer and others v Deutsches Rotes Kreuz et *- limitation of indirect effect*

A national Court must do "***whatever lies within its jurisdiction"*** to ensure compliance with EU Directives and with **Article 4(3) TEU.** This case asserted that domestic law, whether enacted earlier to or after a directive, should be interpreted according to EU Law **to an extent** - if the domestic legislation absolutely cannot be interpreted in line with EU law unless its wording is changed, then the plaintiff may file for damages under breach of EU Law.

Arcaro *- further limitations to indirect effect - prohibition on criminal and retroactive sanctioning via indirect effect*

The ECJ held that the "*obligations of the national Court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directives' provisions*"

Therefore the Court has here affirmed that the obligation to interpret domestic law in accordance with EU Law **cannot result in criminal liability, especially in light of the principle of non-retroactivity for criminal sanctions as protected by Article 7 ECHR**.

In the case wherein the obligation arises to interpret national law in a way to achieve EU Directive objectives (I.e when the transposition deadline passes), yet the limitations prevent indirect effect from being effective (i.e the language of the national law prevents such interpretation), then as per ***Wagner Miret***, the individual may seek compensation by **State Liability**.

State Liability

As a logical follow-up to the notion of direct effect, state liability offers the injured individual the remedy of financial compensation in cases wherein the State has deprived the individual of the chance to apply EU Law. State Liability thus offers the incentive to receive financial redress to bring legal action when protecting their rights in the enforcement of EU Law.

The shortcomings of the principles of direct effect and indirect effect (notably in the enforcement of directives, as previously discussed), have led the CJEU to develop a third principle, that of State Liability, in the landmark ***Frankovich*** case.

Francovich v Italy - *Conditions for the right to damages from* ***for non-implementation of directives.***

In this case, the claimants were seeking arrears of wages following employers' insolvency. Their claims against the former employers would have been fruitless, owing to their insolvency, and thus the claimants sought to seek compensation from the state. Their claim was founded on two aspects; the first being the state's alleged breaching of their employers' rights contained on the directive in question, and the second based on the state's failure to implement such directive as required under articles 288 TFEU (which establishes the Union's legal instruments) and Article 4TEU (the effective implementation of EU Law).

With regards to the first claim, the CJ held that the provisions were not sufficiently **clear, precise and unconditional** so as to warrant applicability of indirect effect.

With regards to the second claim, however, the CJ ruled in favour of the claimants, holding the State **obliged to compensate individuals for damage suffered as a result of its failure to implement the directive if certain conditions were satisfied**.

These conditions were primarily that;

1) The directive involved rights conferred on individuals;
2) The content of those rights could be identified on the basis of the provisions of the directive; and
3) There was a nexus between the state's failure to implement and the damage suffered by the persons affected.

The Court reasoned in line with the current Article 4(3) TEU, that "***the Union and Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties",*** and more importantly that "***The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".***

Reference was also made to ***Van Gend en Loos*** and to ***Costa v Enel***, wherein it was held that certain provisions of Union Law are intended to give rise to rights for individuals and that national Courts are obliged to provide effective protection for those rights, as held in ***Simmenthal.***

Thus once the three aforementioned Francovich conditions are satisfied, individuals are able to seek compensation as a result of activities and practices which are inconsistent with EU Directives, by proceeding directly against the state.

In subsequent decisions, the CJ held that the principle of state liability is not confined to a failure to implement directives, but rather that *all domestic acts and omissions, legislative executive and judicial, in breach of Union Law can give rise to liability*. The notable case in this regard is that of ***Factortame***.

Factortame - *extended state liability from directives to all domestic acts and omissions*

In Factortame, the CJ ruled that State Liability is not restricted solely to failure to implement directives, but also that individuals should be able to obtain redress in the event of a State's Direct Infringement of and EU Law Provision, and that it is irrelevant which organ of the State is found to be liable for such breach.

Factortame - *Conditions for the right to damages from state liability* ***in general****.*

In *Factortame*, the CJ supplemented their decision with 3 conditions in which an individual may be vested a right to damages, namely that;

1) The rule of law infringed must be intended to confer rights on individuals;
2) The breach must be "sufficiently serious"
3) There must be a nexus between the breach and the damage suffered.

Factortame also tackles the notion of *effectiveness*, that an EU Legal Instrument must not only be implemented, but implemented properly. Thus national procedural law must not make it substantially difficult to apply EU Law, whether directly or indirectly. Further, the doctrine of effectiveness pertains also to the compensation awarded, in that it must be decided according to the circumstances of the case and to the damage suffered, so as to ensure effective protection of rights.

"Sufficiently serious" is defined in Factortame to encompass the manifest exceeding of the limits of the discretion vested in the Member State's implementation of EU Law, whether the breach is excusable or not, and whether the infringement was intentional or not.

Extension of State Liability

In **Haim** (Haim v Kassenzahnartzlich Vereinigung Nordrhein), it was held that legally independent bodies may also give rise for state liability under Francovich, alongside the State Itself. Furthermore, in ***AGM-COSE MET Srl*** (AGM-COS MET Srly v Suomen Valtio et), the CJ ruled that an individual public official may also be liable for his actions which breach Union Law.

Therefore the notion of State Liability is not restricted solely to the legislator who fails to implement Union Law, but also to executive or judicial independent bodies, public officials, and other independent State bodies.

Naturally, the action should be filed against the State, since such bodies function under the State's auspices, although such argument is shaky owing to the fact that the State cannot control the behaviour of all independent bodies subject thereof.

Kobler v Austria *- expansion to* ***Courts of last instance + intentional fault or serious misconduct.***

The CJ, in *Kobler*, ruled that state liability in international law may arise on the basis of acts by the legislature, executive, and judiciary, and that the same must be true of Union Law. Further, the principle of effectiveness requires that there must be instances when a state will incur liability for actions by its Courts which are in breach of Union Law. **However, the CJ Limits this to instances where Courts are adjudicating at the last instance, and emphasised mandatory reference as stipulated by Article 267 TFEU, to seek interpretation of EU Law.** Thus *Kobler* asserts that state liability may arise in cases of judicial bodies only when adjudicating at its last instance (i.e, with no possibility to appeal).

Furthermore, in *Kobler,* the CJ adds the requirement that for State Liability to arise from a judicial body acting at last instance, the infringement must emanate from ***intentional fault*** or ***serious misconduct***.

Traghetti del Mediterraneo SpA v Italy *- Court of Last Instance manifest infringement of EU Law*

In ***Traghetti***, the CJ held that State Liability should be extended beyond the claim to damage caused by *intentional fault and serious misconduct* (as stated in Kobler), and thus extends the doctrine also to instances of *manifest infringement* of EU Law.

Furthermore, the CJ provided a set of criteria to be considered when assessing whether there was manifest infringement, namely that one must consider the **clarity** and **precision** of the rule infringed, whether the infringement was **intentional**, whether the error of law was **excusable,** and even **the Court's Compliance in opting for a preliminary ruling under Article 267 TFEU.**

Several arguments have been raised to contest state liability emanating from decisions of last instance. For instance, that the principle of *res judicata* might be undermined by imposing liability on the state for such infringement. The Court in *Kobler* countered this argument by asserting that state liability would in no way alter the conclusion of the decided judgement, especially because the parties to the state liability action would be different, and that a finding of liability would not alter the previous decision. Another argument Brough was that the independence of the judiciary may be affected, and the authority of the Court undermined, by the possibility of claiming for damages following a judicial decision.

One should note that the principle of effectiveness dictates not only that EU Law is implemented into national law within any deadlines applicable, but also that ***national procedural rules must not render the exercise of EU Law rights impossible or excessively difficult***.

Emmott v Minister for Social Welfare - *particular circumstances that lead to an unjust result*

In ***Emmott***, the Court asserted that the prescriptive period of the relevant directive right-incurring provision could not begin to lapse until the Directive had been properly implemented. The CJ in turn observed that it must look for evidence that the particular circumstances of the case could or would lead to an unjust result, thus awarding affected individuals rights to damages.

One must note that the claimant must **prove the damage suffered.** The burden of proof thus falls upon him to establish that his claim is founded on true and material damage suffered. The damage must necessarily have been caused by the breach, and thus there is the requirement of **a link of causation**.

General Principles of EU Law

In the early stages of ECJ Case-Law, it was established that national legal systems hold the authority to determine the protection of individuals affected by breaches of EU Law, a concept now termed procedural competence or national procedural responsibility. The CJEU has further refined this notion through the doctrines of equivalence and effectiveness. These doctrines aim to ensure robust legal protection for EU rights, aligning with the fair trial guarantee in Art. 47 of the EU Charter of Fundamental Rights.

Central to this framework are the principles of sincere cooperation and effective legal remedies between the EU and its Member States.

In furtherance, Procedural Protection operates under 3 key principles:

1. National Procedural Autonomy Principle: This grants domestic legal systems the authority to establish procedural rules and Court jurisdictions for enforcing EU Rights.

2. Equivalence Principle: Ensures that conditions imposed for enforcing EU rights are not less favourable than those for similar domestic actions.

3. Effectiveness Principle: Requires that procedural conditions do not unduly hinder the exercise of rights conferred by EU Law, avoiding scenarios where such exercise becomes impractical or excessively difficult.

Equivalence & Practical Possibility

These two stipulations require that the remedies and avenues for legal action available to uphold national law must also be equally accessible for upholding EU Law, ensuring that national regulations and procedures do not render the exercise of EU Law rights practically impossible.

Within the framework of these requirements, early case law established that procedures and remedies for breaches of EU Law primarily fell under the jurisdiction of Member States. In the absence of explicit EU regulations dictating otherwise, states were not obligated to provide remedies beyond what was available under national law. However, this "no new remedies" principle has been nuanced over time. In certain early rulings, particularly concerning the reimbursement of charges imposed in violation of EU Law, the Court emphasised that the right to reimbursement must be accessible under national law, as it directly stemmed from the substantive provisions of EU Law in question.

The ***San Giorgio*** Case

In this case, the Court asserted that the entitlement to reimbursement of charges levied contrary to Community law arises from the rights conferred by Community provisions prohibiting duties similar to customs duties or discriminatory application of internal taxes.

Even in cases related to reimbursement, the Court continued to underscore the primary role of national legal systems in determining the conditions for granting such remedies, as long as they adhered to the principles of equivalence and practical feasibility.

Advocate General Warner highlighted this stance, noting that while it might lead to varying consequences across Member States, the Court's role is not to establish new Community Law where none exists, leaving such matters to the legislative organs of the Community.

Furthermore, despite some notable later cases, such as the ***Unibet Ruling of 2007***, the ECJ has maintained its position that EU Law does not mandate the creation of new national remedies.

In the ***Unibet case***, the Court ruled that Swedish Law did not need to introduce a separate action to challenge the compatibility of national provisions with EU Law, as existing domestic remedies allowed for the indirect questioning of compatibility while still aligning with the twin principles of equivalence and practicality.

Proportionality, Adequacy, & Effective Judicial Protection

Cases have also emerged regarding state responses to breaches of EU Law by individuals. In the ***Sagulo Case***, the Court affirmed that while states retain the right to impose reasonable penalties for violations of administrative requirements pertaining to EU residence permits by migrant workers, these penalties must NOT be disproportionate to the offence and must not hinder the exercise of human rights.

However, Member States are obligated by EU Law to implement effective measures to penalise actions that impact the financial interests of the EU.

Other cases revolve around the adequacy and deterrent effect of national penalties for violations of fundamental EU rules by private entities.

The Von Colson and Kamann Case

In this case, both women argued that they faced gender discrimination. Von Colson, in her application for a prison social worker position in the public sector, and Kamann, in her pursuit of training with a private company. Under German Law, they were only entitled to nominal damages for discrimination. They contended before the national Court that this contravened the Equal Treatment Directive and demanded substantial damages. The national Court sought clarification on whether this constituted an effective remedy. The CJEU ruled that to ensure compensation has a deterrent effect, it must be proportionate to the harm suffered.

Development of the Effectiveness Requirement

In the early stages of caselaw, there was a tension between the principle of national procedural autonomy and the requirement that national remedies ensure the effectiveness of EU rights. However, the ECJ clarified that for effectiveness, any breach of non-discrimination suffices to hold the defendant fully liable.

In the ***Cotter and McDermott Case***, the Court ruled against national authorities denying social welfare benefits to married women, previously granted to married men, violating EU sex discrimination law. Allowing authorities to use domestic law principles against unjust enrichment to deny benefits would let them profit from their unlawful actions, undermining the Directive's effectiveness.

The ECJ issued strong remedial rulings in numerous discrimination cases, strengthening the requirement for effective remedies for EU law breaches and modifying the concept of national procedural autonomy. This led to an expectation for national Courts to creatively choose which national rules to set aside for effective EU Law enforcement, but this also introduced uncertainty.

In the ***Marshall II Case***, the national Court had to set aside two national rules governing remedies to provide an effective remedy for the breach of EU Law. Another case highlighting the tension between the "no new remedies" rule and the principle of effectiveness was ***Factortame I***. Here, the Court prioritised effectiveness over settled UK Law principles, demanding a more drastic approach. The national rule in question absolutely prohibited the grant of a particular remedy. The ECJ tasked the House of Lords with specifying conditions for interim relief but emphasised that a rule prohibiting interim relief absolutely would be unacceptable.

Following these judgments, the Court adopted a more cautious approach. In the case of ***Steenhorst-Neerings***, concerning retrospective payment of disability benefits, the ECJ ruled that the 1-year retroactive payment limit in Dutch law did not operate as an absolute bar on bringing an action but satisfied equivalence and practicality conditions. It served legitimate purposes such as preserving financial balance in social security schemes.

Similarly, in ***Johnson II***, the ECJ justified its deviation from the principle of adequacy of compensation for sex discrimination established in ***Marshall II***. It ruled that the solution adopted in Emmott was justified by the specific circumstances of that case, where a time- bar deprived the applicant of any opportunity to rely on her right to equal treatment under the directive. This case represented a departure from the earlier principle.
The ***Sutton Case*** highlighted that the requirements set by EU Law regarding the availability of national remedies may vary depending on the nature of the right in question and the EU measure breached. Additionally, while EU Law mandates adequate compensation for damages resulting from breaches, placing a ceiling on damages may not always be impermissible. For instance, in cases of sex discrimination in employment access, where the claimant wouldn't have secured the job even without discrimination, limiting damages is acceptable due to the restricted loss suffered.

However, it is crucial to note that under certain circumstances, national law must still provide a specific type of remedy for EU law violations.

In the ***Metallgesellschaft & Hoechst Case***, the Court ruled that it is the national Court's prerogative to categorise an action as either restitution or compensation for damage. Despite restitution not being unfamiliar in English Law, the ECJ dismissed the argument that restitution might not be available, characterising the claim as damage stemming directly from the breach of Art. 49 TFEU.

Balancing Effectiveness & National Procedural Autonomy

In the realm of national remedies for EU rights, the current stance can be succinctly summarised as follows: national Courts are tasked with striking a balanced approach, tailored to each case, that respects both the imperative of effective judicial protection for EU law rights and the legitimacy of national procedural and remedial regulations.

When assessing whether a national rule or principle might impede the exercise of EU law rights, national Courts must carefully consider the demands of effectiveness and equivalence in relation to the purpose and function of the national rule.

Effectiveness

In ***Kuhne and Heitz***, the Court mandated a national administrative body to reconsider a final decision following a national Court ruling based on a misinterpretation of EU law. Furthermore, the ECJ has ruled that EU law can override national ***res iudicata*** rules, particularly in cases where aid found definitively incompatible with EU law must be recovered, emphasising the primacy of binding EU law rulings.

This underscores that ***res iudicata*** principles may need to yield to EU law rulings when conflicting. The ECJ generally deems reasonable national limitation periods compatible with EU requirements unless they compromise the effective protection of EU rights, such as by causing uncertainty or retroactive application. In the ***Manfredi Case***, the Court cautioned against national rules starting limitation periods from the adoption of anti-competitive agreements, deeming it practically impossible to seek compensation for harm, especially with short, unsuspendable limitation periods.

Equivalence

The requirement of equivalence in cases of *res iudicata* is illustrated in instances where the ECJ ruled that if a national Court has the authority to raise certain points of national law sua sponte, it must similarly possess the power to address similar points of EU law. However, the specifics of this requirement and when cases may be considered sufficiently akin to necessitate equivalent treatment remain somewhat unclear. Numerous cases have upheld the acceptability of national time limits that were not the most favourable within the national remedial system but applied equally to EU law-based actions and comparable national law-based actions.

While the ECJ maintains that it is the prerogative of national Courts to determine equivalence, it has intervened frequently to indicate when the application of a remedial rule does not meet this requirement.
In ***Club Hotel Loutraki***, the ECJ found equivalence violated due to discrepancies between domestic compensation actions in public service contract fields governed by EU Law and other domestic compensation actions for unlawful state actor behaviour. This principle of genuine equality in remedies for EU and national law rights is echoed in another aspect of ECJ case law, underscoring the need for parity between national-level and EU-level remedies for enforcing EU rights. Essentially, EU law shouldn't demand superior enforcement from national legal systems than it is willing to provide at the European level.

The EU as an International Entity

Prof. Cremona attributes 5 Roles to the EU as a global actor;

1. A **model for other regions**;
2. A **market player** that promotes its own economic interests;
3. The **exportation of norms and rules** outwards, thus influencing other nations;
4. The **force for stabilisation**; and
5. The **neighbouring** of other states and regions.

The **Lisbon treaty** established a common framework for EU international action based on shared principles, values, and objectives. Further, it led to the development of an EU Diplomatic Corps.

Article 47 of the Lisbon Treaty created, for the first time, a **separate legal personality** attributable to the EU. As a distinct entity, the EU is independently subject to various obligations and rights under international law, including the right to file claims to the International Court of Justice and the right to enjoy diplomatic immunity.

In the early 1960s, prior to the extensive codification of treaty provisions, the EU's external powers were gradually expanded through jurisprudence. At that time, there was skepticism within the CJ regarding the EU's ability to establish a strong international presence. To overcome this, the EU's external powers were implied and derived from its internal powers.

Commission v Council re: European Road Transport Agreement (ERTA) *- third party agreements*

In **ERTA,** the CJ held that the adoption of a particular EU power necessarily vested in the Community the power to enter into an agreement with third parties relating to the subject matter of the regulation in question.

KRAMER

In **KRAMER**, the CJ stated that given the EU Community had internal powers to take measures to the consummation of the biological resources of the sea, the only way to ensure conservation of these resources are to rope in an include other external countries. The sea is common to EU Countries and non-EU Countries, so it necessarily involves the cooperation of other countries.

Implied Competence

The EU may derive competence from the treaty provisions through *implicit interpretation*, in that one may argue that **in order to achieve the treaty objectives, it is necessary to engage in external action**. Thus, one may ascertain implied competence to enter into international agreements when;

1. The **treaties imply** that such international agreement entering is possible;
2. The **entering** is necessary for **attaining the Treaty objectives**; and
3. It is **not necessary** for the EU to have exercised an internal competence before entering into an international agreement.

The **Lisbon Treaty** enshrined these principles under **Article 216 TFEU**:

216 (1). The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

This thus implies that the EU possesses not only external competence to attain particular objectives, but also that internal rules may have a negative impact, allowing Member States to independently enter into unilateral agreements outside the scope of the EU. If the EU has enacted a set of directives in a specific area, it has the authority to engage in international agreements related to those areas.

Having established that the EU is competent to enter into international agreements via implication, the next step is ascertaining the nature of this power - whether it is **exclusive, supporting, shared, or special**.

Case C-600/14

This case held that express powers within the EU encompass 2 main areas: **EU external action and the CFSP**.

Despite the dispersion of relevant provisions across both treaties, the regulations governing EU External action are mainly found under Part 5 of the TFEU, whereas those concerning the CFSP are found under Title 2, Chapter 5 of the TEU.

EU External Action

External Action involves 4 main sub-areas:

1. **Common Commercial Policy;**
2. **Association Partnership Cooperation and Neighbourhood Policy;**
3. **Development, Technical Cooperation and Humanitarian Aid Policy;**
4. **Miscellaneous.**

Common Commercial Policy

The CCP encompasses both unilateral measures taken by the EU, such as anti-dumping tools, and negotiated conventional measures with third countries and international organisations, such as trade agreements. The historical connection between the CCP and the original common market project has influence various developments, with the Commission and the Court striving to expand exclusive EU competence in the early years.

In **Opinion 1/75** the Court defined the CCP's scope broadly, referencing a state's external trade policy. It held that the field evolved progressively through a combination of internal and external measures., without prioritising one over the other.

The Court emphasised the defence of the EU's common interest, the need to prevent distortions of competition, and Member State loyalty to the EU as reasons justifying exclusive competence. However, during the gradual implementation of the CCP, Member States were not precluded from acting, provided their activities were regulated by EU law.

In **Opinion 1/78**, it stressed the multifaceted objectives of commodities agreements, stating that the CCP should not be limited to traditional aspects of external trade. The Court asserted that the Treaty did not hinder the Community from developing a commercial policy aimed at regulating the world market for certain products rather than merely liberalising trade.

Art. 207 of TFEU empowers the EU to engage in negotiations related to the Common Commercial Policy (CCP) – which encompasses areas such as foreign direct investment, public procurement, and more. The motivation behind these trade agreements lies in the facilitation of access for EU businesses to raw materials and other inputs at more favourable prices. By doing so, these agreements aim to enhance the competitiveness of EU businesses in the global market, allowing them to operate more effectively and competitively on the international stage.

> **207. TFEU:** The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Association Partnership Cooperation & Neighbourhood Policy

These areas go beyond trade, and tackle other policies such as human rights. The main types are: association agreements, partnership agreements, and agreements with neighbouring countries.
Association agreements are forged between the EU and nations or entities that share a special relationship, often including former colonies. These agreements also extend to
international organisations aiming to promote free trade within their member countries. Additionally, association agreements encompass arrangements with potential EU members, as exemplified by agreements with Ukraine.

Parallel to association agreements, partnership and cooperation agreements exist, although on a less extensive scale. These agreements typically cover a narrower range of fields and are often established with countries that were once part of the Soviet Union.

Neighbouring country agreements are crafted by the EU to foster positive relationships with neighboring nations, thereby mitigating potential conflicts. These agreements involve collaborative efforts and are distinct from those with immediate prospects of EU accession. Neighbouring agreements involve countries such as Lebanon, Algeria, Syria, among others.

Development, Technical Cooperation & Humanitarian Aid

This is largely governed by **Art. 208 TFEU** , and covers humanitarian aid to less-wealthy countries. Economic conditions are enhanced through the promotion of the Rule of Law, fostering an environment conducive to investments.

Technical cooperation, as outlined in Art. 212 and Art. 213 of the TFEU, is a mechanism akin to development aid but is not limited solely to developing countries. It is often extended to countries experiencing a debt crisis.

Humanitarian aid is governed by Art. 214 of the TFEU, which establishes the European Solidarity Corps. This initiative provides young people with opportunities to participate in and contribute to environmental and health-related activities, fostering solidarity and collaboration.

Other/Miscellaneous

De Burca describes this as the external dimension. Art. 191 of the TFEU explicitly grants the EU the authority to promote measures addressing global issues, including but not limited to climate change. This provision is distinct from Art. 216, which is more general in nature. Art. 191 is more specific and focused, particularly honing in on the EU's capacity to undertake initiatives and policies that address pressing global challenges, with climate change being a notable example.

The Common Foreign and Security Policy (CSFP)

The rules governing the CFSP are outlined in Title V of the TEU. Decision-making within the CFSP remains predominantly intergovernmental, emphasising national governments' involvement over supranational institutions. The European Council and the Council play central roles in decision-making, and the legal instruments employed for CFSP are distinct from those applied in other areas of Union competence.
Art. 2 (4) TEU does NOT explicitly define the type of competence applicable to the CFSP. It does not fit neatly into any existing category. It is not within exclusive competence, as it is not listed in Art. 3 TFEU, and the nature of the CFSP does not align with the concept of exclusive EU competence. It is also not mentioned in the areas subject to supporting, coordinating, or supplementing Member State action as outlined in Art. 6 TFEU. As a result, it seems to fall within the default category of shared competence per Art. 4 TFEU, despite not being explicitly listed in the non-exhaustive enumeration.

However, the reality is that the nature of the CFSP does not fit comfortably within the framework of shared competence. Shared competence typically implies pre-emption of Member State action when the EU exercises powers in the area, which does not align with the CFSP's characteristics. Declarations appended to the Lisbon Treaty further complicate the matter. If the CFSP is considered within shared competence, it underscores the need for a thorough examination of the respective powers of the EU and Member States to clarify the nature of power-sharing in this context.

Articles 258 & 260 - Commission Enforcement Actions

It is vital for the success of the Union that Member States comply with their treaty obligations. Member States are subject to the principle of **sincere cooperation**, as outlined by Article 4(3) TEU, which mandates that Member States are cooperative in the fulfilling of Union Duties. Thus, States are to ensure that they implement Union law correctly and by the due date, to notify the Commission of the implementation thereof and to comply with CJEU Decisions. The Commission would find it much more difficult to fulfil one of its main objectives (to ensure compliance with Treaty objectives) if it did not have strong tools to support it in this task.

Article 258 TFEU
(ex Article 226 TEC)

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

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

Article 258 TFEU is the main provision in this context. Article 258 therefore compels the Commission to deliver a reasoned opinion on a Member's non-fulfilment of a Treaty Obligation, giving the State a set time to submit its observations. If the State does not comply with the Commission's opinion, then the Commission may bring the matter before the CJEU to issue the effective penalties.

Originally, the penalty attached to failure to fulfil obligations on the part of a Member States took the form of the CJ's declaration of non-fulfilment. Today, the penalties are delineated by **Article 260 TFEU.**

Article 260
(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 260 thus establishes the imposition of financial penalties in two particular sets of circumstances:

1. Where a Member State has not complied with judgement of the CJEU following infringement proceedings (260 (2))
2. Where a Member State has failed to notify the Commission of measures transposing a Directive into national law (260 (3)).

This does not mean that Union Law cannot be enforced by individuals, as has been previously discussed, even in the case of directives, for that would put the entire contemplation of Direct Effect to waste. Individuals have capacity to bring redress for grievances by the Union, albeit under limited and restricted conditions, to enforce Union Law under Articles 263 and 265 TFEU. Additionally, an individual can seek enforcement of EU Law through Courts and tribunals under Article 267 TFEU, and may seek compensation in case of State failure to correctly transpose EU Law through the doctrine of State Liability.

In 2010, the Commission has issued a communication providing guidance on the implementation of Article 260 TFEU, which outlines the conditions under which financial penalties may be imposed and which clarifies the procedural elements to the action.

The Enforcement Mechanism

The principal mechanism provided by the treaties to pursue infringements of Union Law by Member States is the direct action before the CJ under Article 258 TFEU. A second procedure provides for actions by a Member State under Article 259 TFEU **against another Member State** for failure to fulfil obligations denoted by the Treaties.

Article 259 TFEU
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Substantive Areas Covered by S. 258 TFEU

Article 258 confines the Commission’s powers to the Treaties. Upon the enactment of the Lisbon Treaty, the Commission was also given the power to scrutinise Member States who have failed to fulfil obligations emanating from the previously coined Third Pillar of the Union, pertaining to judicial cooperation and police powers, except where amendments were made to such pillar following enactment of the Lisbon Treaty.

Development of the enforcement procedure

Article 258 was not designed to carry punitive principles. Until the passing of the Maastricht treaty, no sanction was provided against Member States found to be in breach of their obligations. They were merely asked and required to conform and comply with the Court Judgement, with no time limit being imposed on such compliance. In the case of non-compliance, the Commission could only again ask the Member State to comply. As a result, the Maastricht Treaty brought and introduced changes to create provisions for financial penalties attached to reluctance to comply, what is known today as Article 260 (2) and (3) TFEU.

Purpose of Enforcement Actions

Steiner and Woods posit 3 reasons as to why enforcement actions exist:

1. It seeks to ***ensure compliance*** by Member States with their Union Obligations.
2. It provides a valuable non-contentious ***procedure for the resolution of disputes*** between the Commission and the Member States over matters of Union Law.
3. Where cases reach the CJ, the actions serve as means to ***clarify and interpret Union Law*** correctly and harmoniously.

With regards to the latter judicial interpretation, the Commission tends to prefer to press for the CJ to issue a judgement even if the issue was resolved between the day of the issuing of the Commission's opinion and the day of the CJ judgement, and this is because it serves to clarify Union Law and because it may assist other Member States in fulfilling their Treaty Obligations.

Liability of Member States

The Member State is the defendant of the suit in Commission Enforcement Actions. In ***commission v Belgium,*** the CJ ruled that Member State Liability which gives rise to Commission Sanctioning includes not only acts that go against the Treaties, but also **failures to ac**, including the non-implementation of a directive. This case further held that the state's responsibility is activated *whatever the organ of the state whose action or inaction constitutes a failure, even if it concerns an institution which is constitutionally independent*. Thus the Member State can never bring, as a defence, the independent nature of the judiciary, for the judiciary still constitutes an organ of the state and is still capable of giving rise to liability in the case of incorrect interpretation or application of Union Law.

Meaning of 'failure'

The state's failure may be in respect of any binding obligation arising from Union Law. This would cover obligations arising from the Treaties and the general principles of Union Law from international agreements entered into by the Union and third party countries where the obligation lies within the sphere of Union Competence.

In the case of directives, regulations, and decisions, a failure may be in respect to non-implementation, non-notification of implementation to the Commission, faulty implementation (which would consequently give rise to state liability under the **Francovich Principle**), or even maintaining national laws which are inherently inconsistent or contrary to Union Law.

Procedure of Commission Enforcement Action

The Commission becomes aware of the Member State failure to comply with obligations in a variety of ways, including enquiries, complaints from the public, complaints from interested groups (i.e NGOs consumer groups, etc), or from other Institutions or bodies such as the European Parliament or the Ombudsman. This is the first step of the process - the identification of the breach.

Then, 2 stages come into place: the **Informal Stage** and the **Formal Stage**. The purpose for these stages, in particular the informal stage, is to attempt to resolve the non-compliance and to achieve an amicable solution. If the informal stage does not bear fruit, then the Commission will take the case to the CJ.

The Informal Stage

The initial part of the Commission's Enforcement Action takes the form of an informal proceeding, wherein the Commission issues a notification to the Member State representing concern over alleged failure to abide by its obligations, to which the Member State is consequently required to respond within a time frame set by the same Commission. Sometimes, the case is resolved at this stage, since quite often, infringements occur out of negligence or out of interpretational issues, or due to misunderstanding. The Commission has a broad discretion in terms of the cases it chooses to bring, and when they are deemed to be resolved. The CJ will not be involved with the Commission at this stage, until the Commission is satisfied that a Member State, even after having received their response, persists in its non-compliance with Union Law, at which point the proceedings advance to the formal stage.

The Formal Stage

The formal stage may be split into 2 parts, with the first encompassing the formal notice issued by the Commission and with the second being the proceedings brought before the CJEU.

First Part

The Commission opens proceedings by letters of formal notice, setting out why it believes that the Member State in question has not fulfilled its obligations and inviting the Member State to submit its observations. The Member State has a full opportunity to present its case, to the extent wherein the Commission must first inform the state of its grounds of complaint.

In ***Commission v Italy*** (31/69), the CJ held that the Member State must be given adequate and reasonable time in order to submit its observations. Moreover, the Commission must inform the State of its alleged non-compliance through the form of a **formal notice** which is identified as relating to Article 258 TFEU.

Then, upon the Member State submissions of its observations, the Commission must issue a **reasoned opinion**. This opinion will only be issued if, in the Commission's opinion, the issue is not resolved by means of the initial correspondence, and will include and record the infringement and require the. State to take action to resolve it within a specified time limit. Although it cannot introduce issues not mentioned in the formal notice, the reasoned opinion and the formal notice may be substantially different, since the reasoned opinion may be more limited in scope than the grounds for complaint enlisted under the formal notice.

The reasoned opinion can be **contested**. In ***Commission v Germany*** (191/95), the defendant challenged the admissibility of Article 258 on a number of grounds, with the first being related to the Commission's decision to issue the opinion as being in breach of the principle of collegiality. The argument was that the Commissioners themselves did not have all the facts to enable them to make such a decision. The CJ held that the decision to issue a reasoned opinion could not be described as a measure of administration or management and could not have been delegated to other persons below the Commission. Nevertheless, the Commissioners need not agree with the wording of the reasoned opinion, for it is sufficient if they have the information on which the decision to issue an opinion is based. Thus in this case, it was evident that the CJ was fully ready to delve into the legality of the Reasoned Opinion, suggesting that it would be possible to contest and nullify it. The CJ has reiterated that the reasoned opinion is merely ***a step in the proceedings***, and that it is **not a binding act capable of annulment under Article 263 TFEU**. One must note that the Commission has **no power** to authorise a Member State's **exemption from abiding by Union obligations**, notwithstanding any relevant reason or consideration given by the Member State in its reply as to why there was a failure to comply. This is to the extent that a third party may contest the Member State's non-compliance despite the Commission's attempted exemption, via Article 267 Proceedings in the third party national Courts.

With regards to the **time limits**, both the Commission and the Member State are free to negotiate upon a reasonable time frame through which the State's observations may be submitted. The reasoned opinion will then establish a time limit which the Member State must resolve the issues of non-compliance. The Member State will not be deemed to have breached Union Law until the time period for resolution has lapsed. Where the Commission does not specify a time limit, the Court has held that **reasonable time must be allowed**, as per ***Commission v Italy***.

Second Part

If a Member State fails to comply with the Commission's reasoned opinion within the specified time limit, proceedings move towards the final part of the process, being judicial intervention by the CJ. The Court will examine the situation as it developed, considering also the time limits set and the time frame imposed by the reasoned opinion. Action taken by the Courts must be founded on the same grounds as stated in the reasoned opinion, and thus **no new grounds may be introduced**. It is possible to limit the subject matter of the proceedings or to rephrase the complaints in question, but it is not possible to introduce additional claims.

This part of the proceeding is initiated by the Commission at its discretion, for Article 260 TFEU holds that the Commission ***may*** bring the proceedings before the CJ in the case of persisted non-compliance. If the Commission chooses not to bring such proceedings to the CJ, yet it is still adamantly clear that the Member State enquired about is in breach of Union Law, then it is possible, under Article 259 TFEU, for **another Member State** to bring an action against the non-compliant Member State.

No time limits are imposed on the Commission to bring about the action before the CJEU, however, jurisprudence suggests that there is a requirement that the length of the pre-litigation procedure (i.e up to the reasoned opinion's established time frame) must not adversely affect the rights of defence of the Member State concerned.

Proceedings before the CJ take the form of a full hearing of all the facts and issues. Interested Member States are entitled to intervene in the proceedings, albeit uninvolved.

Burden of Proof

The burden of proof lies on the Commission, since it is the Commission who is alleging a breach of Union Law Compliance, and the burden of proof always lies on he who alleged (*onus propandi incumbit ei qui dicit non ei qui negat*).

Member State Disposable & Commonly Used Defences

1. Reciprocity

The defence of reciprocity is an accepted principle of international law, even entrenched in certain Member State Constitutions, such as that of France. This doctrine holds that one party is relieved of his obligations if the other party breaches his. This doctrine was persistently **rejected by the Courts of Justice** in the context of Commission enforcement actions.

2. Necessity and force majeure

The defence of **necessity** was **rejected** by the Courts in ***Commission v Italy*** (7/61) owing to the fact that the Treaties provide for the procedures to be followed in cases of emergency, thus precluding unilateral Member State action.

Similarly, the defence based on **force majeure,** a defence based on the non-fulfilment owing to **unforeseen circumstances**, was rejected in ***Commission v Italy*** (104/84)**,** not because the defence was not acceptable by the Courts, but because this particular case pertained to a 4 year non-implementation of a Directive. The Court held that **time will erode the validity of this excuse**.

3. Constitutional Issues

Another popular defence which is frequently raised is based on ***constitutional, institutional*** *or* ***administrative difficulties*** within a Member State. The CJ holds that a Member State cannot plead the provisions, practices, or circumstances existing within its legal system in order to justify a failure to comply with Union Obligations. In ***Commission v United Kingdom*** (128/78), the Court rejected the defence that non-compliance owed itself to **political issues**, due to trade Union disputes.

4. De Facto Compliance

Another popular defence is that of de facto compliance, in that although Union Law may not be applied **de jure,** administrative practices ensure that such law is in fact applied, thus blocking out any form of non-compliance. This argument was first brought in ***Commission v France*** (167/73), in an action based on the French Code Maritime. The code provided for certain discriminatory conditions, favouring French nationals over non-French citizens. The Member State argued that the discriminatory provisions were not actually enforced in practice, and thus there is no failure to comply with Union Law. This argument was **rejected by the CJ,** asserting that **the maintaining of national laws contrary to Union law give rise to Member State Liability**.

5. Domestic Law is in Compliance

A variation of the *de facto* defence is that existing domestic law already implements and transposes the objectives and provisions set out by Union Law, and thus there is no requirement to re-implement the law in question. Another argument is that domestic law is adopted to give effect to a rule which is interpreted by the national Courts in the same way that is laid out in the interpretation of the Union Law in question, thus adhering to the principle of indirect effect. This argument is evidently brought frequently in the case of alleged non-implementation of directives. This argument, if proven successfully, **is a valid defence for the Member State in the eyes of the CJEU**. This is evident in ***Commission v Germany*** (29/84), which holds that **provided that the general legal context ensures full application of a directive in a sufficiently clear and precise manner, a Member State will be deemed to have fulfilled its obligations**.

Consequences and Effects of a Ruling

If the Court finds that the Member State has failed to fulfil its obligations under the Treaties, the Member State is *required to take the necessary measures to comply with the judgement of the Court of Justice*, as per **Article 260 TFEU**. Until the Maastricht Treaty, the only penalty issued for non-compliance was a subsequent second ruling declaring the Member State to be persistent in its failure to abide by its obligations. Following amendments brought by the Maastricht Treaty, financial penalties were introduced to serve as punitive penalties for non-compliance with Union Obligations, delineated from Article 260 (2) TFEU;

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

The significance of Article 260 TFEU is that it **marks a shift in the enforcement powers of the Union towards Member States.** For the first few years after the Maastricht Treaty's enactment, there were no actions involving the imposition of fines.

A Member State's failure to comply with its obligations may bring about a claim for state liability, provided that the **Francovich criteria** are all met.

One must note that **there is no limit to the level of fines that may be imposed by the Court**. The Commission is required to propose a fine when it commences proceedings. In November 1997, the commission produced and published guidance on how the penalty payments are calculated.

The fines may be paid through the form of a **lump sum** or **penalty payment**, depending on the most fitting approach to be taken by the Commission according to the circumstances of the case. The CJ has held that the word ***or*** should be understood to refer to a **cumulative** requirement, as opposed to an **alternative** one. The lump sum was intended to reflect the failure of the Member State to comply with the earlier judgement, whereas the penalty payment would act as an incentive to bring the infringement to an end as soon as possible. Therefore, the **lump sum** is intended to penalise the **continuation of the infringement between** the dates of the judgement in the 268 proceedings and of the 260 proceedings, while the **penalty** is sought out to cover **each day of delay after the judgement is delivered** under Article 260.

Article 259 - Action by Member States

Article 259 TFEU
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

In addition to enforcement actions brought by the Commission, there may be situations in which one Member State has reason to complain about an infringement of Union Law by another Member State. In such cases, if the Commission fails to act, then a Member State may bring the action. The action may also be brought in the case that the Commission issues the formal letter to the Member State allegedly violating Union Obligations, to which the Member State replies, and to which the Commission is taking an exceptional approach, suggesting there be some form of exemption from liability. In such cases, the action may be brought by another Member State. The procedure is similar to that of Article 258 TFEU, bar the initiator, who in this case is a Member State as opposed to the European Commission. The action is initiated by a Member State and is directed towards the EU Commission. The Commission must then deliver a reasoned opinion after the States concerned (the reporter, the reported, and any other interested State) has been given the chance to submit its own case and observations. The issuing of the reasoned opinion does not preclude further action by the reporting Member State in the case that it is dissatisfied with the opinion. If the Commission does not issue a reasoned opinion **within 3 months of the date on which the matter was Brough before it**, the reporting Member State is still entitled to bring the matter before the CJEU. The same applies in the case of dissatisfaction of the opinion. This action has been **infrequently used**, since Member States may be riddled with hesitation in reporting another Member State for non-compliance, owing to the risk of direct or indirect retaliation. When Member States are found in conflict and disputer, either may invoke **Article 273**, which provides for a **voluntary procedure** whereby a matter is brought before the CJEU;

Article 273
(ex Article 239 TEC)

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

Exceptions to the Procedures of S.258 and 259

Exceptions to the provisions under Articles 258 and 259 may be derived from **Articles 348 and 114 (9) TFEU**. Article 358 provides for an **accelerated procedure**, enabling the Commission to directly bring a Member State before the ECJ if it deems the state to be improperly utilising its powers. Further, Article 114 (9) provides for another **accelerated procedure**, in which the Commission or any Member State may being a state before the Court if it believes that the state has misused the power of delegation specified in 114 (4).

Article 263: Direct Action for Annulment

Judicial review is one of the procedures available for the controlling of legislation under any legal system. Challenging legislative and administrative acts is a feature characterising every modern democratic country, known for protecting the rule of law and for preventing legislative abuse. Judicial review allows for the consideration of legality behind binding measures, whether the issue pertains to the procedural or the substantive elements of such measure or instrument. Under the TFEU, **Articles 263 and 277 TFEU** are there to provide a gateway which allow for judicial review, allowing for the CJ to delve into the legality of certain acts.

Article 263 TFEU provides for the mechanism to directly challenge the legality of Union Act, whereas **Article 277 TFEU** permits a claim *incidental* to a main action that an act of general application adopted by an institution, body, office, or agency of the Union should not be applicable. Furthermore, Article 277 may be invoked in order to delve into *indirect review*. If a successful **Article 263** action is brought, then **Article 264 (1)** provides that an act in question is to be declared null and void. The CJ may decide that only *part* of a Union Act may be declared void, such as a proviso which may be segregated from the main legal instrument.

Article 263
(ex Article 230 TEC)

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

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. EN C 326/162 Official Journal of the European Union 26.10.2012

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

Article 264
(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

The Lisbon treaty has brought substantial amendments to the wording of this provision, for it now states that any type of Union Act (directives, regulations, or decisions) are all subject to scrutiny by the CJ for the purposes of Article 263. One of the most important changes brought by the Lisbon Treaty pertains to **263 (4)**, which holds that **any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, or against any regulatory act which is of direct concern to them and does not entail implementing measures.** Therefore, so long as the *locus standi* requirements are met, there is no need to satisfy the requirement of individual concern (judicial interest), so long as they may prove direct concern in relation to an act which does not require implementation measures.

Indirect Challenge

Article 277
(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 277 TFEU provides for the indirect challenge procedure, which played a heavy role prior to the Lisbon treaty, for it allowed the challenging of an act by an individual who was previously unable to bring an action, owing to the restricting *locus standi.*

Acts which are susceptible to review under Article 263 TFEU

Commission v Council re: European Road Transport Agreement (ERTA) *- intended to have legal effects*

In this case, the CJ held that ***An action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects***.

The categories susceptible to review under Article 263 are threefold; **legislative acts, regulatory acts, and acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.**

Legislative Acts are defined by **Article 289 TFEU** *as legal acts adopted by legislative procedure.* Thus any act promulgated by means of ordinary legislative procedure, as defined by Article 294, or any act promulgated by means of special legislative procedure, are susceptible to review under Article 263.

Regulatory Acts are not defined in the treaty, to the extent that it was first introduced by the Lisbon Treaty via the enactment of Article 263 TFEU. Jurisprudence seems to define a regulatory act as *any act of general application apart from legislative acts*.

Inuit Tapiriit Kanatami *- defining regulatory act*

"*It must be held that the meaning of regulatory act for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts, but rather a restricted class of acts which are not issued by reason of legislative procedures.".*

Thus any act that is not a legislative act but which is nonetheless legally binding may be construed as a regulatory act. Furthermore, in ***Inuit,*** **"acts"** were held to encompass any act addressed to a natural or legal person and any act whether legislative or regulatory which is of direct and individual concern to them, including acts which require further implementation measures.

Therefore is clear that an act **must produce legal effects via-a-vis third parties** in order for it to be scrutinised and challenged by virtue of **Article 263**.

It is not only legislative acts, namely directives, regulations, and decisions, which are subject to review, but also any act capable of producing acts vis-a-vis third parties, which may be done "by the Council, Parliament, or bodies, offices or agencies of the Union", as of post-Lisbon.

IBM v Commission - *definition of reviewable act*

In IBM v Commission, the CJ defined a reviewable act as "*any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position*.

Prior to Lisbon, besides having to prove the *locus standi* requirements (in that the applicant had direct and individual concern), he must also have to prove that the measure was *a decision taking the form of a regulation*. This latter requirement was abandoned, with other instruments such as the undefined *regulatory act* replacing it.

Max.mobil v Commission *- letters sent by the EU Commission*

In Max.Mobil, the CJ demonstrated the difficulty on examining whether an institution act is capable of scrutiny under Article 263. The case involved a letter issued by the EU Commission concerning the telecommunications market in Austria. The CJ ruled that this letter was of an *informative* nature, thus not being an act capable of producing acts vis-a-vis third parties.

The difficulty arises because other instances involving letters by the Commission were deemed to be capable of review under Article 263, thus leaving a lot of importance on the independent facts of the case in determining susceptibility.

Acts of Parliament

Originally, it was only an act by the Commission or by the Council which were susceptible to judicial review by the CJ. Nonetheless, there were cases which admitted to acts by the Parliament which were also capable of being scrutinised and annulled by the Court, owing to the legal force carried by them in relation to third parties. Such annulments were justified on the grounds that Parliament had acquired various powers and procedures overtime which were capable of affecting legal relationships between subjects. In certain cases, even a declaration by the President of the European Parliament were considered to have a legally binding force, thus being susceptible to review. In other cases, such as ***Le Pen***, the CJ ruled otherwise. The CJ has declared that an Act by Parliament is capable of being reviewed by the CJ not because it *could* give rise to legal effects, but rather because it *did* give rise to legal effects.

Acts by other bodies intended to produce effects vis-a-vis third parties

A third category of acts susceptible to review, as introduced by the Lisbon Treaty, are acts done by other bodies of the Union intended to produce legal effects vis-a-vis third parties. However, an important rule stands that such act emanating from a Union body, office, or agency must be directed towards third parties. An act adopted within the institutional framework of such entities is not reviewable. Thus in ***Commission v Council*** (C-25/94), the CJ ruled that a decision by the COREPER was not deemed to be susceptible to review.

Locus Standi: Who may bring an action for Article 263 TFEU

The question of locus standi is the question on who is entitled to challenge the legality of a particular measure. On one hand, it may be desirable to provide for a *broad* locus standi, to ensure that the legislature is subject to adequate control. Yet on the other hand, it is equally desriable to ensure that someone unconnected to the measure is not in the position to nullify a measure not affecting him.

The locus standi requirements in Article 263 are considered **strict**. The TFEU in this regard classifies applicants into 3 categories; **privileged applicants, semi-privileged applicants, and non-privileged applicants**.

263 (2) It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

263 (3) The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

263 (4) Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Privileged Applicants

Member States, the European Parliament, the Council and the Commission are entitled to challenge ***any*** binding act under Article 263 TFEU. A Member State for the purposes of this Articledoes **not include governments of regions or of autonomous communities**. However, regional authorities may intervene if they have legal personality under their domestic law, as non-privileged applicants, having to satisfy the requirements of direct and individual concern.

Privileged applicants do not need to establish and prove any particular interest in challenging legality of EU Acts.

The changing nature of the Parliament's standing

Currently, the Parliament is considered to be a privileged applicant, alongside the Commission and the Council. The reasoning for this is that in other actions, the Parliament is entitled to the same locus standi as the other institutions.

The CJ, however, has previously ruled that there is no real link between other actions and between Article 263 TFEU, seemingly ruling out the Parliament as having the right to challenge validity of measures adopted by the Commission and Council. Prior to Parliament's inclusion as a privileged applicant, in ***Parliament v Council*** *(Chernobyl)*, the CJ ruled that the Parliament enjoys the same locus standi as the other Institutions in instituting judicial review procedures. The Parliament currently has the power to challenge a Council decision which had allegedly been taken without consultation from the Parliament.The CJ has ruled that in order for the Parliament to bring such challenge, it must do so to the extend that it was **necessary to protect its prerogatives**. In ***Parliament v Council*** *(re aid to Bangladesh)*, the CJ ruled that Parliament could not challenge the Commission's handling of aid to Bangladesh because no prerogative power of Parliament had been infringed.

The Parliament began to enjoy the full status of a privileged applicant upon enforcement of the Nice Treaty in early 2003.

Semi-Privileged Applicants

Article 263 (3) TFEU grants semi-privileged position to the Court of Auditors, the ECB and the Committee of the Regions. The CJ's jurisdiction is confined to reviewing such acts of those institutions that are necessary for the protection of their prerogatives.

Semi-privileged Applicants have standing under Article263 ***for the purpose of protecting their prerogatives***.

Non-Privileged Applicants

All other applicants, be they natural persons or legal persons, are deemed to fall under the classification of non-privileged applicants. Such proceedings commenced by non-privileged applicants are severely restricted in jurisdiction.

Such applicants are only entitled to challenge;

a) **An act addressed to that person, or which is of direct and individual concern to them; and**
b) **A regulatory act which is of direct concern to them and which does not entail further implementing measures.**
c) **An act addressed to another person which is of direct and individual concern to the applicant**

All claims by natural or legal persons are brought before the General Court, with a right of appeal lying within the Court of Justice.

If the act in question is directly addressed to such natural or legal person, then there is often no problem in the proceedings, except for one minor exception. So long as the 2 month time barre is adhered to, there are no problems in such instances.

Where the act is not direct to a legal or natural person, it becomes increasingly difficult to establish a locus standi.

Federolio v Commission *- 3 instances which grant locus standi to non-privileged applicants*

In ***Federolio***, the GC identified 3 situations when an association would be granted locus standi;

1) The Trade association has been expressly granted procedural rights (i.e - ***Ramblers' Association v Awtorita' tal-Artijiet,*** wherein it was held that Environmental NGOs are given automatic *locus standi* to contest public decisions affecting the Environment);
2) It represents the individuals or undertakings which themselves have standing, and
3) The trade association itself is affected (i.e - its rights to negotiate is affected).

Challenging acts addressed to another person for non-privileged applicants

When the act is directed towards the individual or entity, there is no question as to the *locus standi* of that individual or entity. The difficulty arises in cases wherein an individual seeks to challenge and impugn a decision or act directed to another individual or entity, in which case the test of direct and individual concern becomes introduced.

An act addressed to a person other than the plaintiff may be challenged provided **it is of direct and individual concern to him and against a regulatory act which is of direct concern to him and does not entail implementing procedures**.

Direct concern is established by proof of nexus between the act and the damage sustained, so long as no implementation is required by the Member State, for in such a case the individual is affected by the implementation, and not by the measure.

Thus a non-privileged applicant is faced with an additional test - that of direct and individual concern. Here, the burden of proof lies upon the applicant, as held in ***Sniace SA v Commission***. Given the strictness of the Court's accepting of what entails a direct concern, the challenge for an individual to challenge a Union Act is increased.

The CJ had stated that the form of the act is less relevant than the nature of the act vis-a-vis the applicant's interest thereto.

Salamander AG and others v Parliament and Council - *legislative acts as being of direct concern*

In *Salamander AG*, the CJ held that despite the act in question being of a legislative nature, it may still be impugned by an individual who manages to prove that such act is of *direct and individual concern in relation ti him*, thus further emphasising the lack of importance in relation to the form of the act.

Furthermore, in this case, the Court suggested that directives may be impugned by an individual, so long as direct and individual concern is proven.

So long as the measure is of direct concern, the form is irrelevant. It is the substance, and not the label, which is crucial.

The CJ has also held that a measure may be hybrid in nature, i.e that it may be a measure of general application which is in the nature of a decision *for certain designated individuals*, as held in ***International Fruit NV v Commission***.

Plaumann & Co v Commission - *direct and individual concern - closed class as a requirement*

In ***Plaumann***, the CJ declared that persons other than those to whom a decision is addressed are individually concerned only if the decision affects them *by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons*. In this case, the decision in question pertained to customs duty on clementines, addressed to the German government. Plaumann & Co argued that, being large-scale importers of such clementines, that they were of direct and individual concern. Yet the CJ turned down the application, holding that the decision affects all clementine importers, an act of trade which may be carried out by anyone, with no specific set of particular facts being attributed solely against Plaumann & Co.

The ***Plaumann test*** is one which garnered popularity in establishing individual concern. It fails, however, to establish exactly what criteria would entail characteristics peculiarly relevant to the individual or entity bringing such action. Thus the individual must prove not only that he has direct and individual concern, but also that such concern distinguishes him from other persons, in a way which renders him ***particularly affected by the act in question.***

The Plaumann decision has been criticised as being highly and commercially unrealistic, establishing a remarkably high threshold to satisfy. Those entities considered to be monopolies in a particular in their industries gain no advantage in filing for an application to impugn a decision which severely disadvantages them, owing to the fact that technically anyone is able to compete with such monopolies, albeit unsuccessfully.

There may arise a situation, for instance, wherein a decision taken by the Commission results in the banning of Chinese toothbrushes in Malta. If there is only one individual in Malta who imports such Chinese toothbrushes, the Court will not accept his application to impugn the decision, for the importing could be done by anyone, and thus there is no distinguishing characteristic which separates the sole importer from others. Therefore the fact that an individual is the only person being affected by an individual does not entail a particular characteristic which distinguishes him from others, thus establishing direct and individual concern, if it may be proven that there is no preclusion of others from carrying out the same or similar exercises.

Characteristics establishing individual and direct concern

Although there isn't a single transferrable test, there are various common threads that runs through most of the cases in which individual concern has been approved by the CJ.

Acts referable specifically to the applicant's situation

The first common thread is that the act which the applicant seeks to challenge, although addressed to another person, is referable specifically to his situation. The act may either affect him **alone** or else it may affect a **closed class** of individuals, with no one else being capable of entering the field and being affected by the same measure.

The measure may, for instance, be issued in response to a license of tender application, with the decision being effective only in relation to people who have already applied for a particular license, or else to a particular class of licenses applied for within a particular time frame.

The Court tends to accept that an individual has direct concern if a decision affects certain vested rights.

Acts issued as a result of proceedings initiated by the applicant

A situation may arise when an act is not necessarily directed towards the applicant, but rather caused as a result of a proceeding initiated by the applicant. The Court tends to reason that if the proceeding initiated by the applicant required him to prove legitimate interest, then it is only suitable that such applicant is entitled to initiate application of Article 263, in order to preserve his legitimate interest in relation to the act consequential to the initial proceeding. This case often arises when a series of claims or reports done by non-privileged applicants result in the EU issuing an act based on such reporting, in which case the reporters are entitled to a less restrictive proof of locus standi.

Timex Corporation v Council - *protecting legitimate interest - anti-dumping regulation*

In ***Timex***, the Court deemed the entity concerned to be permitted to challenge an anti-dumping regulation, since the company had initiated the complaint which led to the enactment of such regulation.

A regulatory act not entailing implementing measures

An individual or entity is also able to impugn a regulatory act not entailing implementing measures directly affecting them, as per **263 (4)**. However, the provision does not delve into the extent to which implementation is required to render susceptibility to impugning. Certain implementation measures of a minor or preparatory nature such as the collecting of statistical data, must be distinguished from an implementation which would substantially alter the rights of the concerned individuals.

As previously mentioned, with reference to ***Inuit***, a regulatory act may be understood to pertain to acts of a binding force which excludes legislative acts, and which do not require further implementation.

It is not exactly clear as to how the condition of *not requiring implementation* is to be satisfied. In ***T & L Sugars v Commission***, the applicants sought to challenge measures which adversely affect them on the basis that the granting of certificates pursuant to the application of criteria in the regulation in question did not denote an implementing measure. The applicants argued that it is only where a Member State is afforded discretion as to the implementation of an act would it entail an implementing measure. However, the CJ disagreed, holding that the decision of national authorities with regard to granting or denying certificates is to be construed as an implementing procedure, and that in such a case it would be more a case of incorrect implementation as opposed to an act not entailing implementation.

Reasons behind restrictive locus standi for NPAs

UPA v Council *- reason behind restrictive locus standi for non-privileged applications*

"*It is for the Member States, if necessary … to reform the system currently in force"*. Whilst limiting applications under this provision, the Courts have often adverted to other possibilities of alternative remedies, often through reference to Article 267.

According to the CJ, the adequate means to challenge Union Acts by the Member States is through the Preliminary Rulings procedure, this because any binding act may be impugned under Article267. There have in fact been cases wherein entities were unable to establish locus standi under 263, but who have successfully brought a challenge to certain acts under Article267.

The Time Barres

For any act to impugn under Article 263, the action must be brought **within 2 months of the issuing of such Union act, measure, or decision.** The 2 months begin lapsing either upon publication of the measure, or else upon the knowledge by the applicant of such measure, whichever is the earlier. An indirect action to impugn, under Article 277, would not be subject to the 2 month rule. There is, however, an exception. The CJ may refuse an application under 267 on the grounds that the applicant should have brought the claim under Article263, provided that the locus standi was ***unequivocally clear***. Thus the Court holds that Article 267 *should only be denied when the applicant's locus standi under Article 263 is unequivocally clear*. In the ***Eurotunnel case***, the CJ held that an action under 267 was admissible, only because it was not clear whether the applicant would have managed to achieve locus standi under Article 263.

Grounds for Judicial Review under Article 263

Article 263 provides 4 grounds for annulment, drawn **directly from French Administrative Law**;

1) Lack of Competence
2) Infringement of an essential procedural requirement
3) Infringement of the treaty or any rule of law relating to its application
4) Misuse of powers

These categories are neither mutually exclusive, nor are they cumulative. Quite often, more than one ground is cited in a given case. Nonetheless, the applicant must identify clearly the facts and basic legal arguments surrounding the case.

Ground 1: Lack of Competence

This is equivalent to the English Doctrine of *ultra vires*. The institution responsible for adopting the measure in question must have the legal authority to do so. This authority may be derived either from the TFEU or else from other subsidiary legislation. In ***ERTA***, the Commission had challenged the Council's power to participate in the shaping of the road transport agreement, as this power is vested in the Commission as per the relevant TFEU provision.

Germany v European Parliament and Council (Tobacco Advertising) *- annulled directive*

In this case, a directive banning tobacco advertising, identified as a public health measure, was annulled because public health is an area often competently retained by the Member State, and not by the Union.

Often, cases surrounding the ground of lack of competence pertain to questions of **exceeded discretion**. When an Institution or body or agency is vested with discretion in its actions, such discretion is never **unlimited.**

Ground 2: Infringement of an essential procedural requirement

This is tantamount to *procedural ultra vires* under English Common law. Institutions must follow the correct procedural requirements when enacting a measure, even if the substance thereof falls well within the competence of the Union. For instance, Article 296 TFEU requires that all secondary legislation must state the reasons on which it is based (duty to give reasons) and must refer to proposals and opinions which were required to be obtained. Further, the CJ contends that reasons must not be vague and general, but must be **coherent**, **comprehensive**, and **sufficiently detailed**. The Court will not annul an act on the ground of a *minor procedural defect*, nor will it annul an act which would not have been enacted differently had the correct procedures been adhered to. This ground is thus not absolute, for it ultimately depends on the severity of the procedural default***.Roquette Freres v Council*** was a case in which this ground was efficiently applied, since in this case a Council Regulation was invalidated due to the Council's failure to Consult Parliament adequately. The Council did not afford Parliament sufficient time to provide tis opinion on the measure at hand. In the case wherein no time limit is set, it is assumed that reasonable time should be given. The same applies to actions under Article258 TFEU, wherein the Commission, in its reasoned opinion issued following an alleged Member State non-compliance of Union Obligations, in the lack of a specified timeframe within the opinion, is expected to give adequate and reasonable time for the Member State to comply, as per Commission v Italy (31/69). This ground for review may be classified into 3 sections; 1) the **right to be heard**, 2) the **right to participate in your own case**, and 3) the **duty to give reasons**.

Ground 3: Infringement of the treaties or any rule of law relating to their application

When an act is invalid for lack of competence or for an infringement of an essential procedural requirement, this may involve an infringement of the treaties. This ground for annulment is wider, for it encompasses *any treaty provision*, to the extent where in ***Adams v Commission,*** in an action for non-contractual liability, the Commission was found to have breached its **duty of confidentiality** under the relevant Treaty provision.

Even wider is the latter half of the ground, that of an infringement of *any rule of law relating to their application*. In this ground, the general principles of law, are relevant, invoking application of the various principles previously discussed, such as that of conferral, subsidiarity, proportionality, equality, legal certainty, etc. Under this ground, one may also bring arguments pertaining to **legitimate expectations,** a notion not expressly laid out under treaty provisions.

Ground 4: Misuse of power

This notion derives from the French *detournament de pouvoir*, which refers to the use of a pwer for purposes other than those for which it was granted. The power is not contested, but the purpose therefor is. For instance, where powers are granted to aid a particular group (producers) are used to benefit another (distributors), then there is a misuse of powers, as demonstrated in ***Simmenthal,*** wherein the CJ held that;

"The adoption by a Union institution of a measure with the exclusive or main purpose of achieveng an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case" is to be construed as a misuse of power. All that is required for successful impugnment is **an improper or illegitimate use of power**.

In ***Commission v Parliament***, the CJ held that a misuse of powers is ***the adoption by a Union Institution of a measure with the exclusive or main purpose of achieving an end other than stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case***.

Effects & Consequences of a successful 263 Action

If an annulment action under Article 263 is successful, the act will be declared void under Article 264 TFEU.

Article 264
(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 264(2) serves the scope of vesting discretion into the Court as to the extend of nullity, with the intention to allow for the preservation of previous rights and decisions, in order to preserve legal certainty. To this end, the Court may rule **prospectively**, allowing for nullity only in relation to future transactions.

Article 265 - Action for Failure to Act

Article 265 TFEU
(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.

This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Steiner and Woods describe **Article265** as a **mirror to Article263**, in that they both provide for judicial review of Union Institutions. A complete system of judicial review requires not only that Union Institutions, bodies and agencies act lawfully, but also that they act when they have a **duty to do so**.

Thus Article265 caters for **omissions** (i.e, what the Union **failed to do**) as opposed to **illicit commissions** (i.e, what the Union **did incorrectly**).

Reviewable Omissions

The institution's failure to act must, first and foremost, be **an infringement of the treaties**. Since EU legislation is enacted under the treaties, a breach of such legislation would be susceptible to review under **Article265**, in the case of omissions.

Parliament v Council case 13/83

In this case, the Parliament alleged 2 failures by the Council in relation to implement a Union Transport Policy. These failures were primarily;

1. A failure to introduce a common transport policy as required by the then EEC; and
2. A failure to introduce measures to secure freedom to provide transport services.

The CJEU ruled that on the first ground, owing to the lack of sufficient clarity establishing the treaty provision, the action could not succeed. On the second ground, however, the story was different, since there was a clearly established **transposition period** which was **not adhered to**.

Prior to the TEU, an action for failure to act could only be invoked against **Council** or the **Commission**. Today, an action may also be brought against the European Parliament.

One must note that as per **Article265**, last paragraph, **recommendations or opinions** are excluded from review under the action for failure to act.

Locus Standi

Privileged Applicants

The **Member States**, the **European Parliament**, the **European Council**, the **Council of Ministers**, the **Commission**, and the **European Central Bank** are all given automatic locus standi, being classified as privileged applicants under Article 265. These applicants thus enjoy a right to challenge *any failure* on the part of any Union Institution. The action may also be brought against **bodies, offices, and agencies of the Union**, in cases which will be hereunder discussed.

Individuals

In comparisons wit Member States and the Institutions, individuals have a limited locus standi under Article263. Natural or legal persons can only bring an action for failure to act **only where the institutions, bodies, offices or agencies of the Union have failed to address to that persons any act other than a recommendation or an opinion**. Thus only a decision directed to that person may be challenged by the person.

There is no exception to this rule, and thus, unlike in the case of Article263 TFEU, the person, individual or legal, cannot challenge an act directed to another person.

However, the CJ tends to resolve this discrepancy via the same reasoning adopted under 263 TFEU, in that an individual should be granted the right to challenge a decision of direct concern which brings effects vis-a-vis third parties. This is apparent in *Nordgetreide GMBH & Co. KG v Commission***, wherein the Advocate General invoked the unity principle, suggesting that since 263 and 265 TFEU constituted part of a coherent system, an individual should have a right to demand a decision vis-a-vis a third party in which that individual has a direct ad individual concern**.

In ***Bethell v Commission***, this right waas implied when the Court held that the Commission failed to adopt a measure in which the claimant was **legally entitled to claim.**

This test and issue was put to rest in ***T Port GMBH & Co KG vs Council*** *(case 68/95)*, wherein the CJ ruled that an omission of a Union act which was of direct and individual concern could be resolved under **Article 265TFEU,** under the same conditions and requirements to establish locus standi in ordinary actions for annulment for non-privileged applicants.

> ***T Port Case 68/95*** *- consolidation of non-privileged locus standi requirements under 265 and 265*
>
> "It follows that, just as the fourth paragraph of Article 263 allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article265 must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way. The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act."

Most of the cases prior to **T Port GMBH & Co KG** had failed because the claims were often in relation to measures in which the claimant was not entitled to claim, thus proving it extraordinary difficult to resolve failures to act.

Challengeable Acts

An applicant cannot bring proceedings to force a Union institution or any other specified entity to open an inquiry with respect to a third party or to address to them a decision. It is clear that the act demanded must be a substantial decision.

Procedure

Where the applicant has a right to require an institution to act, and the institution is under a duty to act, the applicant must **first call upon the institution to act**. No time limit is imposed within which proceedings must be commenced, but the Courts have held that proceedings must be brought within a reasonable time of the failure to act, as demonstrated in ***Netherlands v Commission***.

Upon the request of the claimant for such institution, body, office, or agency to act, then the institution or entity, as per second paragraph of 265, has **2 months** to **define its position**. If the institution or entity fails to act or to define its position, then the claimant has a further 2 months to bring an action under Article265. These time limits are **strictly enforced**.

'Define its position'

The law is silent on what happens in the case that the Union Institution, body, office, or agency actually defines its position within the 2 month time frame. However, CJ case law has suggested that a definition of position as per 265 TFEU refers to a clear statement or opinion on a matter as expressed by an institution or entity. In the ***Lutticke*** case, the CJ clarified that definition of a position by an institution marks an end of its failure to act. In the case wherein the act is riddled with grievances, then **Article 265 TFEU** becomes applicable.

Effects of an Action

Whether the action is admitted before the Court under 265 or under 263, the consequences are the same. This is delineated from Article 266 TFEU;

> **Article 266 TFEU**
> (ex Article 233 TEC)
>
> The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

Thus the defendant institution is obliged to comply with the judgement of the Court. The institution must take action to rectify its failure as determined by the Court judgement. That being said, the judicial resolution need not necessarily fall in line with the claims and demands of the applicant. Unlike penalties imposed onto Member States by virtue of Article260TFEU, **no further penalty lies against the institutions beyond the judicial intervention**.

Relationship between 263 and 265 TFEU

One must note that despite these 2 provisions and remedies being **complementary** in nature, they are **mutually exclusive** to the same fact. This is derived from the fact that one remedy pertains to a **wrongful action** while the other to an **act of omission**, which is why the two cannot be invoked against the same set of facts, for one excludes the other.

Both actions share the same **grounds of review,** and both actions result in the same **consequences of success**, as stipulated by Article 266 TFEU, in that the institution or entity in question is bound to obey and abide by the Court Decision.

Article 267: Preliminary Reference

In Malta there seems to be a complete lack of understanding about how this procedure works and why it is needed. Our judiciary seems to be scared to apply this procedure. Malta may be argued to be the worst performing Member State in terms of this procedure. Maltese cases suggest that there is no need to refer to a foreign Court to clarify EU disputes. The first mistake is the reference to the ECJ as a *foreign Court*, which is a completely irrational statement to make.

This contrasts with the ECtHR. The role of the ECtHR in Strasbourg is an international Court intended to supervise the application of the ECHR in the Courts of Member States. This makes the ECtHR a *foreign Court*, since it is considered beyond the jurisdiction of Malta. The Strasbourg Court is there to examine the facts of the case and order compensation (either real or moral damages). It can also **encourage the Member State to remedy the situation,** however it will not issue the remedy itself. In a case of fair hearing, for instance, wherein one is not given the right to appeal, the Strasbourg Court will not hear the appeal itself, but it will recommend the Member State to allow and hear the appeal.

The ECJ, unlike the ECtHR, can never be described as a foreign Court. The EU is not a state, nor is the ECJ a Court of a particular state. They are *sui generis* concepts, specially made, and not comparable to Member State equivalents. The EU is a club, of 2 levels of governance (the states, carrying primary membership, and the individuals, carrying secondary membership). Our role as member individuals of the EU is the selecting of individuals to represent Malta as a State in the EU. This would entail the voting of MEP candidates in June, for instance.

The EU Institutions are not foreign institutions. The ECJ is a domestic Court which is shared with the other participating states. The same way that EU Law is our Law, the ECJ is our Court. Interestingly, the judgements of the ECJ are **erga omnes**, while domestic Court judgements are **inter partes**.

This the ECJ is to be considered a domestic Court, falling well within the jurisdiction of each Member State forming part of the Union, allowing for reference thereto in cases of doubt or interpretation. Thus the objective underlying the notion of Preliminary Ruling is that of clarity - to apply and seek correct interpretation of Union Law, the determination of which is essential for the resolution of disputes faced before the Courts. The National Court may (and sometimes must) suspend proceedings to seek such reference to the ECJ in order to obtain a ruling on any point of EU Law relevant to the proceedings. After the point is clarified by the ECJ, the case is remitted to the national Court for a final ruling in light of the legal opinion received. **The CJ does not have power to make final orders or enforce its judgements in the Member States' national legal systems**.

The key issues underlying Preliminary Rulings are the following;

1) The relative importance of **Article 267 TFEU**, including all relevant development of Union law and EU Integration, as well as the role of individuals in such proceedings;

2) The extent to which the national Courts are willing and able to gain access to the CJ in order to resolve questions of Union Law;

3) How far Article 267 has ensured that Union Law is interpreted uniformly throughout the Member States;

4) The nature of the relationship between national Courts and the CJ, and whether that remains one of cooperation between equal partners or whether it has evolved into a hierarchical system, with the CJ serving as a supreme Court; and

5) The extent to which Article 267 Procedures adequately protect fundamental rights and remedies effected by such proceedings.

Article 267 TFEU - Preliminary Rulings

Article 267 TFEU
(ex Article 234 TEC)

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

(a) the interpretation of the Treaties;

(b) The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any Court or tribunal of a Member State, that Court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a Court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that Court or tribunal **shall** bring the matter before the Court.

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

One should note that references for preliminary rulings may also be made on the interpretation of provisions of international agreements concluded by the EU with third states or international organisations, as stipulated in ***Haegeman v Belgium***.

The first case to be decided by means of these procedures was that of ***Robert Bosch GmbH (case 13/61)***, and within it lies the operational essence that renders **Article 267** functional and useful:

"*The provisions of Article 267 must lead to a real and fruitful collaboration between the municipal Courts and the Court of Justice of the Communities with mutual regard for their respective jurisdiction*".

Therefore preliminary reference works only because the National Courts are willing to interpret EU Law properly in order to maintain growth of the Union. If the Member States were to freely apply incorrect interpretation of Union Law, without any way of seeking CJ assistance, then Union Law loses all form of effectiveness. Furthermore, the CJ is hesitant in refusing preliminary references, owing to the fact that it is in no one's interest not to resolve interpretation issues relating to Union Law. Nonetheless, the CJ holds that this refusal to reject is valid to an extent, in that certain conditions do in fact warrant refusal, as will be discussed below.

Article 267 TFEU should be read in conjunction with **Article 275 and 276 TFEU,** which holds as follows;

Article 275 TFEU

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

Article 276 TFEU

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, **the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security**

The CFSP, which remains in the TEU, falls outside the scope of preliminary rulings procedure, as per **Article 275 TFEU**. Further, what was previously the third pillar of the Union (Police and Judicial Co-operation in Criminal Matters) also falls beyond the scope of these procedures.

The ECJ is not superior to domestic Court. The relationship is lateral and horizontal, and thus one cannot refer to the ECJ as superior to the Maltese Court of Appeal, for example.

A reference is a procedure whereby a Court refers a question on a point of law to another competent Court. In Malta, for instance, if in a criminal case there is an allegation of a breach of a fundamental human right, the Criminal Court must refer to the First Hall, Civil Court, to interpret and determine whether a breach occurred. This is referred to **domestic preliminary reference** (wherein any Court makes a reference to domestic law to another domestic Court).

This is different to an appeal, for an appeal refers to an already decided case which is contested by one of the parties. An appeal is made by a party, while **preliminary reference is done by the Court**. The parties may *suggest* or *request* the Court to make preliminary reference, but the discretion is left entirely to the Court.

Relevant Union Developments impacted by these procedures

The importance of **Article 267 TFEU** and all annexing procedures has been greatly increased by the developments made by the CJ pertaining to **direct effect**. Originally, only ***directly applicable*** regulations might have been expected to be invoked by national Courts, yet today by means of Article 267, the national Courts may now be requested to apply provisions emanating from directives, decisions, and even treaty articles, all this being under the principles of indirect effect or state liability. As a result, national Courts play a major role in the enforcement of Union Law, thus creating a cooperative relationship between the CJ and the Member State, in order to enhance the efficiency of such procedures.

Preliminary Rulings have also been fruitful in developing certain principles vital for the substantive development of Union Law, again shedding light on the important developments and principles produced by the CJ in order to better the Union.

For instance, the cases of ***Van Gend en Loos, Costa v ENEL, Francovich and Defrenne v Sabena*** were all products of the preliminary ruling procedures. It is arguably the most common form of procedure brought before and towards the CJEU.

Nature of the procedures

One must make the fundamental distinction between preliminary reference procedures and an appeal. These procedures merely provide the national Courts the means to apply to the CJ for a ruling on matters of interpretation or validity on points of EU Law necessary to resolve issues in disputes before them.

The national Court may raise any point which must necessarily be resolved in order for the judgement to be taken. These must partake the form of **treaty interpretation**, as well as the **validity of Acts of the Institutions of the EU**. Even if the act does not formally fall under the concepts of regulations or directives, a procedure may nonetheless be instituted. There is no restriction vis a vis the legal effects on third parties, for the procedure is wide enough to include even inter partes effects. The preliminary reference procedure is not there for the parties to seek judicial advice, since Article 267 restricts the action to grounds of treaty interpretation and review of EU institution acts. The ECJ will thus not take questions about the facts or applicability of EU Law to the facts. **The ECJ will never strike down a provision of national law for incapability in a preliminary reference procedure, since that is left within the hands of the national judge.** Furthermore, the question on supremacy will never be entered into in preliminary ruling procedures.

Who may institute Article267 TFEU?

The Union actively seeks co-operation with national Courts to ensure uniform and effective interpretation and application of EU Law. It rarely thus discards a point on preliminary reference thus rendering it inadmissible. Consequently, the range of bodies which have successfully raised a point on preliminary reference is quite wide, encompassing bodies and judicial organs which extend beyond the National Courts of Justice.

Article 267 dictates that a preliminary reference may only surround points ***"raised before any Court or tribunal of a Member State"***. Court or tribunal remains undefined, thus allowing for ambiguity, in turn warranting CJ interpretation to understand who may institute such proceedings. The concept of what constitute a Court or tribunal. One of the natural prerequisites is that the Court or tribunal must fall within the jurisdiction of a Member State.

Miles *- a Court or tribunal must fall under a Member State exclusively*

In ***Miles***, the CJ held that it had no jurisdiction to rule on a reference for a preliminary ruling from a complaints board created by Members of the Union and the Union itself. The reasoning was that the board did not form part of any Member State, and thus was not competent to raise the reference, since it must be formally distinct from the Union.

The Criteria establishing a Court or tribunal

The CJ established a number of criteria by which *a Court or tribunal* may be identified, including;

- Statutory origin;
- Permanence;
- Inter partes procedure;
- Compulsory jurisdiction;
- Application of the rules of law; and
- Independence of the body making such reference.

Broekmeulen - *Appeal committee of a Dutch professional medical body as being a competent body*

In ***Broekmeulen***, the CJ ruled that in the absence of redress before a competent Court, and considering considering that the issue revolved around interpretation of EU Law (particularly whether the board fell under the definition of Court or tribunal), and also considering that there doesn't lie an appeal following the final decision, the CJ ruled that the board was competent to raise such reference.

The CJ ruled that it was imperative to ensure that the CJ should have the opportunity to rule on issues of interpretation before such body.

In ***Gabalfrisa v AEAT***, the Court held that the Spanish Economic Administrative Courts fell under the remit of Article 267, despite them not falling under the Judiciary, and this owing to the fact that they fall under the competence of the Ministry of Economic Affairs and Finance.

In ***de Coster***, the CJ ruled that the reference was admissible, owing to the fact that the body in question was ***a permanent body, established by law, that gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory."***

Therefore the leading factors that are considered by the Court before administering validity into the claim is that the body in question is ***permanent, established by law,*** and ***that its decision is final***.

A question often arises as to whether *arbitrators* are able to make such preliminary references. In the early case ***Nordsee Deutsche Hochseefischerei GmbH*****,** the Court concluded that since an arbitrator is allowed to seek assistance from national Courts, then the preliminary reference must then be instituted by such national Court, and not the arbitrator.

Encroaching on National Jurisdiction

An argument may be brought that the CJ, in ruling on preliminary references, tends to override the jurisdiction and territory governed by the national Court who made such reference. In response, the CJ asserts that a somewhat blurry line exists between the CJ's jurisdiction and that of the Member State. The notable case in this regard is of ***Arsenal Football Club v Reed***.

Arsenal Football Club v Reed - *encroachment of jurisdiction*

In this case, the case before the CJ was initiated by Arsenal, in order to prevent Reed from continuing to sell souvenirs carrying Arsenal's name and logos. Reference was made to the Trade Mark Directive at the time, wherein the main issue was declared to be whether protection extended only to the circumstances in which the sign was used as a trademark or whether infringement would subsist irrespective of how the marks were used.

After the CJ's preliminary ruling, and after having referred back to the National Court, the National Court refused to apply the CJ's opinion on the ground that the decision hinged upon the facts of the case, and that the CJ's interpretation was tantamount to a determination of fact. The case was then appealed, on the grounds that the lower Court was under no position to reject the CJ's opinion. The Appeal saw an overturning of the lower Court decision, albeit after agreeing in principle that the CJ would not ordinarily be permitted to discuss the facts of the case.

The CJ's refusal to give ruling / Limitations to P.R.

It has already been mentioned that it is in both the Member State's interest as well as the Union's to resolve interpretation issues on Union Law in a way as uniform as possible, ensuring that a common interpretation is had across all Member States. Nonetheless, there are various circumstances in which the CJ is permitted to reject a preliminary reference.

Artificial Proceedings / No genuine dispute

The most important limitation which restricts application of Article 267 was laid out in the ***Foglia v Novello*** Cases.

Foglia v Novello - *limitation of Preliminary References by artificial proceedings*

The questions referred to in this case concerned legality under Union Law of an import duty imposed by the French on wine from Italy. The parties agreed that neither party shall bear the cost of duties which are in breach of Union Law. The CJ refused to accept a preliminary ruling on this point owing to the fact that the duties have in fact been paid and that the claimant was seeking recovery thereof, and that the question of legality was merely hypothetical and trivial. There was no genuine reason to the dispute, rendering the issue outside the scope of Article 267 TFEU.

Meilicke v ADV/ORGA AG - *no opinions on hypothetical questions*

In this case, the CJ refused to give its opinion on a matter which was brought solely to prove one of the parties' theories, thus proving his argument correct.

Bacardi-Martini SAS v Newcastle United Football Company Ltd - *special vigilance for national law interpretation*

In ***Bacardi-Martini***, the Court reiterated its position established in ***Foglia v Novello***, wherein the CJ held that the Court will apply *special vigilance* in asserting whether there is the need for preliminary reference in the case of questions as to whether national law is compliant with EU Law.

Objective requirement of a preliminary ruling

Another potential limitation on the CJ's willingness to accept references is seen in ***Monin Automobiles***, wherein the CJ suggested that the questions referred must be objectively required by the national Court as *necessary to enable that Court to give judgement in the proceedings before it as required under **267.***

Where such a question is raised before any Court or tribunal of a Member State, that Court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Issue cannot be purely internal

The CJ has also been hesitant on accepting preliminary references on issues in which the subject matter is purely internal and which does not involve EU Law directly. This is because internal issues should be decided and ruled by national Courts applying national law. The CJ ruled, in ***Dzodzi v Belgium***, that it is entirely up to the National Court, after having assessed the facts of the case, whether there is the need of a preliminary reference in order to deliver the judgement in the national Court.

The National Courts and the obligation to refer

While it is true that the National Courts have the discretion of determining whether the case should be referred to the CJ or not, there is a certain case in which the Court or Tribunal is ***obliged*** to refer to the CJ for preliminary reference. Notwithstanding this, there is no way to compel a National Court to institute such proceedings in the case that it refuses to refer to the CJ, further projecting such proceedings as being based upon good faith and collaboration. This makes the National Courts heavily integral in the development of Union Law harmonisation, for the Union relies on the judges of national Courts to institute such proceedings and to apply the outcome onto the national Court case.

The domestic Court is obliged to make preliminary reference, with no room for discretion, when the Court is one of last instance.

Where such a question is raised before any Court or tribunal of a Member State, that Court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a Court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that Court or tribunal **shall** bring the matter before the Court.

Therefore when there lies an appeal from a tribunal or Court decision, the judicial body ***may*** (discretion) refer to the ECJ for clarity, whereas when there lies no appeal, that judicial body ***shall*** (mandatory) refer to the ECJ for clarity. We will further delve into whether the 'obligation' denotes by **shall** is absolute or not.

Thus when an appeal lies following the Court or tribunal decision, then the jurisdiction is coined *permissive*, whereas when the decision is of last instance, then the jurisdiction becomes *mandatory*. One must note that the jurisdiction is mandatory even when an appeal lies within an international body of law, for Article 267 refers to the judicial remedy as being one under national law.

The purpose of having a situation of mandatary jurisdiction must be contextualised by the *raison d'etre* of section 267 as a whole, for this provision seeks to prevent a body of national case law not in accordance with the rules of Union Law from coming into effect in any Member State.

Costa v Enel - *enforcement of mandatary jurisdiction*

In Costa v Enel, the CJ held that *national Courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice*.

The Doctrine of acte clair

For a while, it seemed that once a relevant question of Union law had arisen before a final Court, so long as the point had not been previously ruled upon by the CJ, the national Court must make a reference. This was so even if the point of law was simple and unambiguous. Member State Courts thus often brought arguments as to whether they were capable of resolving the issue in the national case without having to refer to the CJ, owing to the simplistic nature of the question raised.

CILFIT Srl *- acte clair doctrine - the exceptions to mandatary jurisdiction*

In CILFIT, the CJ accepted a very limited version of acte Clair, wherein it held that **if the meaning of a provision is clear, then no question of interpretation arises**. The question raised in CLIFIT is whether the mandatary jurisdiction contemplated by **267 (3)** is one which may be waived or whether it is absolute and subject to no exceptions. The CJ held that there is no need to refer to the CJ for preliminary reference if;

a) the matter was irrelevant;
b) It was materially identical to a question already subject to and resolved in a prior preliminary ruling; or
c) The matter was so blatantly obvious that it leaves *no scope for reasonable doubt*.

Acte clair roughly translates to *clear act*, in that if something is so unambiguous that there is no room for any other interpretation, then the obligation to refer to the CJ for ruling ceases. However, a loose interpretation of the doctrine of *acte clair* may be dangerous, since if a national Court declines to refer on the grounds of *acte clair*, then there is the risk of incorrect application and interpretation of EU Law.

Ignoring rules of precedent

The discretion to refer, as stipulated in **267 (2)** is in no way affected by previous national law rules of precedent within the Member State.

Rheinmulen-Dusseldorf *- rules of precedent do not alter levels of discretion for 267 (2) actions*

In this case, the CJ established that the ruling of a higher national Court on an interpretation of EU Law does not prevent a lower Court in the national system from requesting a ruling on the same provisions from the CJ.

Similarly, a previous ruling by the Court of Justice on a similar question does not preclude a reference. The Court affirms that Article 267 (2) allows a national Court, if it considers it desirable, to refer questions of interpretation to the Court again.

The exercising of discretion by non-final National Courts

When the national Court hears a case in which there arises a question of Union Law, a number of factors will obviously have to be considered in determining whether or not to refer to the CJ. Such factors include whether the CJ has already given judgement on the question, whether the matter was ambiguous or not, the time it would take to refer, the cost, etc. Nonetheless, in ***R v Henn***, lord Diplock held that it may be necessary to refer to the CJ even before all the factors are discovered and considered, depending on the urgency of the case.

Effects of Preliminary Ruling

The effect of a decision taken by the CJ in a preliminary ruling may stem over and beyond the parties to the case, for it may cause ramifications in other Member States and national Courts. **The ruling is binding on the national Court, with no discretion to refuse the ECJ**. This is evident in **Benedetti v Murani**. The interpretation of the provision and acts in question by the ECJ must be applied by the National Court who made the reference, as well as other National Courts. The ECJ will interpret the treaty provision as it was intended to be interpret at the time of its coming into force. It follows that the rule as thus interpreted must be applied by the Courts even to legal relationships arising and established before the judgement, unless the cases preceding the reference would be *res judicata*.

Defrenne v Sabena

This case established that a national Court is not obliged to re-open a *res judicata* in the case wherein the ECJ established an interpretation for a particular treaty provision. This would serve as an exception to the nature of absolute supremacy, since *res judicata* cases which rendered National Law to prevail over EU Law need not be re-opened. This case also established the notion of **horizontal direct effect**, extending direct applicability to individual v individual cases.

Consequentially, if an Institution Act is deemed invalid by the ECJ as per 267 (b), then the invalidation is enforceable by all national Courts, and not only the Court that instituted the preliminary reference procedure. The adopting institution or body that issued the invalidated act is then obliged to take all appropriate steps to make good of the act, as per **Article 266 TFEU:**

Article 266
(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Kuhne & Hertz NV v Productschap voor Plumvee en Eieren - *no obligation to reopen cases*

In *Kuhne & Hertz NV*, the CJ held that the decision taken by the CJ on a preliminary reference is to be abided by all Member States, all national Courts, and all legal relations, in order to ensure harmonisation. Notwithstanding this, the doctrine of legal certainty dictates that there is **no obligation to reopen a res judicata, and that finality of judgements within a reasonable time is an underlying notion of law**. The Court may, if it deems fit, decide to reopen a case, as was done in Kuhne & Hertz, following a preliminary ruling, yet there is no obligation to do so.

Article 340 - Union Liability in Tort: the Action for Damages

Article 340 TFEU
(ex Article 288 TEC)

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

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

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

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

We have already acknowledged the various mechanisms within the Treaty by which the acts of Union Institutions can be reviewed. In addition to challenging acts directly, in cases wherein the challenge is successful and the Union act nullified, it may also be necessary to make good any loss that has been suffered as a result of the unlawful measures. The Treaty contains provisions that provide for the non-contractual liability of the Unions in **Articles 340 and 360 TFEU**. Although Article340 is of great utility, its scope and effectiveness have been somewhat restricted by the Courts.

Scope of non-contractual liability

Article 268 TFEU
(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

In turn, Article 340 TFEU provides that in the case of non-contractual liability, the Union shall make good any damage caused by its institutions or servants in the performance of its duties. Thus, the Union may be liable both for *fautes de service* (i.e wrongful acts) as well as wrongful acts done by **its servants**. Provided in both cases in which a wrongful act is committed, the responsible institution may be sued. Where more than one institution is concerned, or where there is doubt as to which institution is responsible, all may be sued. The question then arises as to how unlawful the wrongful act was. One must note that this action is an **independent action** (unlike 277 TFEU), and thus one **need not invoke action for annulment in order to secure proceedings under Article 268 TFEU.**

Sayag v Leduc - *acts of servants*

This case held that the Union is only responsible for acts by its servants *by virtue of an individual and direct relationship, which proves the necessary extension of the tasks entrusted to it*. This case further established three requirements which must be proven for an action to succeed: **a wrongful or illegal act, damage, and causation**.

Locus Standi

Unlike the position in the area of judicial review, there are **no personal limitations on the right to bring na action under Article 340 TFEU**. There is thus no distinction between privileged, semi-privileged, and non-privileged applicants.

Time Barres

Moreover, a specific and generous limitation of **5 years** is provided to bring an action under Article 340 TFEU, as per **Article 46 of the Statute of the Courts of Justice**. The lapse of time begins running from the occurrence of the event giving rise to liability. The Court has added, to this time requirement, that the lapse of time does not begin running until **all the requirements for liability**, in particular the damage suffered, are met. Where the damage arises from a legislative measure, time runs not necessarily from date of enactment, but rather from the date in which the damaging effects have arisen. In the case of an administrative decision, the lapse begins from the date in which the applicant becomes aware of the fact. In the case of individual measures (i.e a decision), the time does not run until the damage was materialised.

Elements of Non-Contractual Liability

The elements required for an action of Union Liability to succeed are laid out in **Sayag v Leduc**, and are chiefly the following:

1. A **wrongful conduct on the part of the institutions;**
2. Proof of **damage caused to the claimant**; and
3. A **link of causation** between the wrongdoing and the damage suffered.

For liability to arise, all 3 elements must be **cumulatively** proven. The General Court has noted that it is not necessary to prove or establish these elements in any particular order, so long as they are in fact proven and established.

Although not expressly stated in the treaty, Union Liability is grounded on the general principle of **unjust enrichment** This is a concept recognised by most Member State jurisdictions. However, it is essential to distinguish actions of unjust enrichment from contractual or non-contractual liability.

Enrichment is not a necessary element required to prove and succeed in an action of non-contractual liability. However, it may serve relevant in establishing the amount of damage pertaining to the restitution of the claimant.

Wrongful Acts or Omissions

It is somewhat self-evident that liability cannot arise from action taken under primary legislation which emanate from the treaty themselves, unless the acts are illicitly produced, which gives rise to actions for annulment under 263 TFEU. Thus for instance, the completion of the internal market cannot give rise to liability. Nor can the effects of European Competition Law on larger business entities.

Non-contractual liability, under modern continental law, is generally classified into specific kinds of *tort*. Under European Law, wrongful acts or omissions may be classified into 3 broad and distinct classes;

1. **Failures of Administration**: Union institutions are under a duty to maintain good administration. Failures in this regard would pertain to failure to adopt satisfactory procedures, a failure to obtain the relevant facts before making the decision, the issuing of misinformation, or significant delay, among others.

2. **Negligent Acts by a servant in the performance of his duties**: This category would also encompass a single negligent act.

3. The **adoption of wrongful acts having legal effect**: this would also incorporate the wrongful failure to adopt a binding act when under a duty to do so.

Establishing an unlawful Act

The problem in with actions for non-contractual liability lies not in establishing admissibility but in succeeding on the **merits of the case**. Originally, the CJ adopted a very restrictive approach towards Union Liability in tort, particularly towards liability resulting from the adoption of wrongful acts.

For some time, the test established to ascertain whether an act was wrongful or not was the ***Schoppenstedt*** test, often coined the ***Schoppenstedt formula*** which was derived from ***Schoppenstedt v Council***. This test held that where the action concerns a **legislative measure which involves choices of economic policy, the Union incurs no liability unless "a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred**. "

Thus the ***Schoppenstedt*** test required proof of 3 criteria;

1. The **breach of a superior rule of law**;
2. The **rule of law infringed** must be in relation to **the protection of the individual**; and
3. The breach is a **sufficiently flagrant violation**.

Although the term *legislative act* pertains primarily to regulations, it applies even to binding acts which purports to lay out general rules. In ***Gibraltar v Council***, the Court held that for the purposes of Article263 TFEU, a directive was to be interpreted as falling within the scope of the term *legislative act*, as employed by the treaty provision.

The **superior rule of law** could pertain to a **treaty provision, a parent regulation, or a general principle of law**. Any general principle, such as equality or proportionality, are accepted as integral principles underlying EU Law. Such principles would constitute a superior rule of law for the protection of individuals. Thus, a claim for an act which broke a **legitimate expectation** would in fact constitute a valid ground for an action of Union Liability. Most fundamental principles of Union Law (I.e the free movement of persons, non-discrimination between consumers and producers, etc) could form the basis of a claim for damages.

The term **sufficiently serious violation**, as per the ***Schoppenstedt*** test considers the degree of harm suffered. Another consideration in this regard would be the harm in relation to the number of people or entities damaged and the extent of the law's violation, with such considerations being demonstrated evidently in ***HNL v Council and Commission***.

One must note that the Union would not be held responsible or liable for an unlawful act, for the other criteria (i.e a breach of superior rule of law and the breach must be in relation to the individual's protection) must have been cumulatively proven.

Bergaderm marked a different way forward, moving away from the rigid ***Schoppenstedt*** test. Here, the CJ established that the pivotal factor in ascertaining the applicability of Article340 TFEU is the test of **discretion**, namely whether the act involved institutional discretion or not. Following the ***Bergaderm*** case, the consensus followed that the **rule of law** so breached need not be one **superior**, but rather one which conferred **claimable rights onto the individual**.

Following a stream of CJ jurisprudence, the position today is that the Courts no longer emphasise on whether the act in question is legislative or individual. Today, the important consideration to be taken is whether the institution concerned was involved in the exercise of any form of **discretion**.

Today, the 3 elements required to make a successful claim for Union Liability are as follows;

1. An **unlawful act**;
2. From which **damage ensued**;
3. A proven **link of causality between the damage and the act**.

Liability for Lawful Acts

Some confusion arose as to the case of liability emanating from lawful acts. This matter has been addressed by ***FIAMM and FIAMM Technologies v Council and Commission.***

FIAMM and FIAMM Technologies v Council and Commission - *liability from lawful acts*

This case concerned compensation claimed for the damage suffered by the applicants after the United States was authorised under the World Trade Organisation's rules to implement retaliatory measures following the EU failure to change its banana regime. The GC ruled against the applicants, although it suggested that the liability could arise in cases wherein there was no wrongful act. On appeal, the CJ agreed with the GC that there was no wrongful act, and further held that while the conditions for liability for wrongful acts were clear, the same could not be said for lawful acts. It then developed the suggestion that for liability for non-wrongful acts, the following conditions must be met;

1. **Damage,**
2. **Causal Link,** and
3. **Unusual and special nature of the damage**.

The doctrine of liability for lawful acts has not yet been accepted by the CJEU, although the matter has been discussed.

Damage for the purposes of Article 340 TFEU

Specific Loss as being recoverable

The CJ is as restrictive in its approach to damages as it is to fault. Clearly, the Courts will award compensation for damages to person or property provided the damage is **sufficiently direct**. The injured party thus bears the burden of proof in ascertaining the damage suffered. One must note that **losses suffered must be specific, and not speculative**. The EU will only make good damage ***materially and actually suffered***, and not potentiality thereof.

CNTA SA v Commission - *specific loss*

In this case, the Court found that the Commission had breached the principle of legitimate expectation when it introduced a regulation suddenly and without warning which deprive the claimant of export refunds at a particular rate. Although the regulation was not itself invalid, the mode of implementation was wrongful. The Commission was thus found liable. However, although the CNTA had entered into contracts on the basis of this expectation, the Court held that it was only entitled to recover losses for damage actually suffered, and not anticipated profits. It was not therefore entitled to receive damages.

Loss and Third Parties

Where the loss has been passed onto third parties, or could have been passed on in higher prices, **no damages will be recoverable**. Here, an injured party is expected to show reasonable diligence in limiting the extent of his loss.

Dorsh Consult

The GC held that the applicant had not shown actual and certain damage. The case concerned a contract for the provision of services in Iraq. The applicants had not been paid for the work done when the UN Security Council imposed a trade embargo on Iraq, which the EU implemented within the Union. The Iraqi government in turn froze all assets and property and income held by the governments and companies which implemented the embargo created by the EU. The GC held that the applicants, who had their assets frozen, did not try to press for payment, even when the Iraqi law was repealed, thus not warranting a claim for damages.

Loss of Chance

In ***Farrugia***, the GC considered a claim for compensation for the loss of a chance. The applicant claimed that a Commission error concerning his nationality had deprived him of the opportunity as a fellowship in the field of research and technological development in the UK. The GC found that although the Commission ahd made a mistake the applicant had failed to prove that he would have had a strong chance of being awarded the fellowship.

The underlying implication of ***Farrugia*** is that should a claimant prove that an EU Act deprived him of a reasonably expected opportunity, he may, in fact, be awarded damage for Union Liability.

The Link of Causation

The Court is similarly restrictive in its approach to ascertain causation. In ***Dumortier*** it held that the principles common to the laws of Member States cannot be relied on to deduce an obligation to make good every harmful consequence, even if of an unlawful legislation. In ***Dumortier*** the applicants were entitled to receive damages for refunds withheld as a result of an invalid regulation, but not for further alleged losses in the form of reduced sales or for general financial difficulties arising from decisions taken following the issuing of the invalid legislation.

The Loss must be Foreseeable

The CJ has ruled that in order to establish a causal link, the Union, in issuing the act, must have been able to foresee any possible losses that would arise in the issuing of the act or decision. Thus, in ***Dorsh Consult***, the CJ was satisfied that the Union regulation implementing the embargo which led to the Iraqi's freezing of the applicant's assets was objectively foreseeable. Thus, a requirement of foreseeability was implemented as a pre-requisite to ascertain the causal link.

Concurrent Liability

As Union Law is, to a large extent, implemented by national authorities, there may be cases in which it is unclear as to whether the fault emanates primarily from the Union or from the Member State. For instance, the return of money paid under an invalid regulation, or a wrongful failure on the part of a national body to pay a subsidy to which the applicant feels he is entitled, are instances wherein it is unclear as to whether to file the action against the Member State, under state liability, or against the Union, under Union liability.

The Court prefers to direct applicants to seek a remedy before their national Courts, leaving any questions answerable through the preliminary ruling procedure as per 267 TFEU. This approach makes sense, since the Member State will first be able to determine whether the fault owes its existence to a transposition error, in which case the Member State will make good the damage suffered, and in the case of doubt, the issue may be brought before the CJEU in order to clarify.

In ***Krohn & Co Import-Export GMBH & Co v Commission,*** the CJ ruled that in order to decide whether an action should be brought before a national Court or before the CJEU, the appropriate question is whether action before a national Court can provide an **effective means of protection** for the claimant's interest. Where the claimant is merely seeking the return of money paid or the payment of money wrongfully withheld, the claimant should seek national Court redress. Where the claimant seeks damage from the Union for injury suffered as a result of wrongful acts attributable to the Union, then the action must be brought before the CJEU. Where the remedy lies before both, the CJ encourages and often demands that the applicant first exhausts his remedies before the national Courts before turning to the CJEU.

EU Competition Law

The creation of the internal market is one of the central purposes of the European Union. This is enshrined in Article 3(3) TEU:

TEU Article 3 (3). The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

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

It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

While the TEU refers to sustainable development and a social market economy, this is within the context of the creation of *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 Treaty,* as per **Article26 TFEU**.

Article 26 TFEU

(ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise 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.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Prior to Lisbon, the treaties also contained references to the **common market**, which includes, in addition to the four freedoms, the **common commercial policy**, which tackles commercial relations with third countries, as well as **competition policy**.

EU Competition Law has become increasingly complex, and has now evolved to such an extent that is a specialised area of study. **Article 3(3) TEU** promises to promote a ***highly competitive social market economy***. The role of competition policy is pivotal to the internal market, for an effective competition system is essential to the attainment of the internal market. If the restrictions on the free movement of goods and services required to be removed by the Member States could be replaced by restrictive arrangements made between private parties, then the internal market could never be achieved. The rules on EU Competition Law are to be strictly adhered to, both for the interest of the generation and fulfilment of the internal market, as well as for the interest of the large companies who can suffer the consequences of breaching the obligations set out in the treaties. For instance, Nintendo, in 2003, was fined EUR 149 Million for preventing the exports of game consoles from the United Kingdom to the Netherlands.

Structure of the EU Competition Rules

The EU Competition rules are set out by the TFEU, Council and Commission regulations, and a range of *soft law* instruments. Policy initiatives and priorities are set out in a variety of publications such as the EU Commission's annual competition reports and the Competition Policy Briefs made throughout the year by senior officials and the Commissioner.

With regards to the substantive rules, the two TFEU provisions which warrant the most study are **Article 101 and 102 TFEU**.

Article 101 contains three provisions setting out what acts are prohibited, as well as how an exemption may be made available from that prohibition and what consequences flow from engaging in acts restrictive of competition for which no exemption is made.

Article 102 is concerned with the behaviour of undertakings in a dominant position. Being a large company is not an issue in EU Law, but instead, it is the certain types of behaviours by dominant undertakings which may prejudice the competitive structure of the market which is found to violate the EU Competition rules.

With regards to EU Competition Law Enforcement, there seems to have been a shift in the approach taken by the Union. The basic principles of EU Competition Policy as adopted by the **original EEC Treaty** were drafted broadly, leaving the Commission to interpret these provisions and to develop the detailed rules. **Articles 101 and 102** owe their existence to **Regulation 17/62**, which came into force on **March 1, 1962** Article 1 of this regulation confirmed that the prohibition set out in what were the then Articles 85 and 86 EEC ((today 101 and 102 TFEU)) take effect without any prior decision of the Community. The remaining provisions dealt with the obtaining of exemptions under Article 101 (3). Under the original provisions, agreements could be notified to the Commission with a request for either a negative clearance (i.e a declaration that the agreement did not constitute a violation of Competition Law) or else an exemption.

The Commission, in the early days of the establishing of these provisions, took a restrictive approach in terms of what constituted a restriction on competition. This approach resulted into large numbers of notifications of agreements to the Commission, the level of which the Commission was not sufficiently large enough to deal with. Many agreements expired while the notification was still pending. In fact, the Commission was empowered to issue *en bloc* categories of arrangements which would constitute an exemption, meaning that agreements which fell under certain conditions would be able to proceed without seeking a notification of clearance from the Commission.

The modern position is somewhat different. While Articles 101 and 102 are of **direct effect** and thus enforceable in national Courts (as established in ***BRT v SABAM***), the inability of national Courts to consider whether an agreement fulfilled the criteria set out in Article 101 (3) meant that the enforcement of such rules was left again heavily in the hands of the Commission. The Commission began to struggle to keep up with the large numbers of agreement notifications, leaving it unable to tackle the more serious issues which required urgent attention.

Accordingly, the Commission began, with the publication of a White Paper in 1999, a long process of reform which resulted in the adoption of **Regulation 1/2003**, entered into force on **1 May 2004** This regulation repealed and replaced Regulation 17/62, and fundamentally amended the balance of competence in the enforcement of Competition Law. This regulation decentralises the application of the competition rules, sharing competence with the Member States, by increasing the role of the national competition authorities and Courts. The system of prior notification was thereby abolished.

Today, the position is that the responsibility of enforcement of EU Competition rules is on two levels;

1. The **national competition authorities and Courts**; and
2. The **Commission and the CJEU.**

Enforcement responsibilities are organised within the **European Competition Network,** which serves to facilitate the exchange of information among the national competition authorities and European Commission, and to organise the allocation of cases between them. This network was established by Regulation 1/2003.

EU Competition Law

Articles 101 and **102 TFEU** prohibit anti-competitive business practices. These provisions are enforced by the European Commission, national competition authorities and national Courts, operating under the authority granted by Regulation 1/2003.

The enforcement regime established by this regulation is heavily dependent on the **cooperation and collaboration** between the EU Commission and the Member States. The European Commission, empowered through the **Directorate-General for Competition**, is given various powers in this regard.

National Competent authorities are authorised to:

- Investigate alleged infringements of Articles 101 and 102
- Issue decisions
- Impose fines
- Ensure consistency and efficacy

The powers of the European Commission in terms of EU Competition Law

The European Commission has extensive powers to investigate and penalise infringements of Competition rules. It can conduct sector inquiries (where the trend of trade between EU Countries suggests that competition may be restricted or distorted within the internal market). Further, the Commission may, by request or by decision, ask undertakings and associations of undertakings to provide any information it needs to carry out the duties assigned to it by this regulation (i.e any natural or legal person who might have useful information is required to supply any information asked of them. The Commission may also ask governments and national competition authorities for any information it requires to carry out its duties.

The Commission may conduct any necessary inspections of undertakings and associations of undertakings, and the latter are required to submit to such inspections. To this end, officials of the Commission are empowered to:

- Enter the premises, including the homes of directors, managers or other staff members if a reasonable suspicion exists that books or other records related to the business, and the subject matter of the inspection might be held there. It can also seal any business permits and books or records for the period of the inspection;

- Examine and take copies of extracts from the books and other records related to the business;

- Ask any representative or member of staff of the undertaking or association of undertakings for information and record their answers.

Although the Commission lacks the authority for forcible entry, it can seek assistance from national authorities, through the forms of instruments such as search warrants. For violations of articles 101 and 102m the Commission has the power to impose significant fines and daily penalties, so long as its powers are being used within the scope of the regulation and for proper purpose.

Before issuing an adverse decision against undertakings or associations of undertakings, the Commission must provide such undertaking with a **hearing opportunity**. This respects the principle *audi alteram partem*. Additionally, the commission's decisions are subject to **judicial review** by the EU Courts, starting with the GC and allowing for an appeal within the CJEU

Article 101 TFEU

In essence, Article 101 TFEU prohibits business agreements or arrangements that hinder, limit, or distort competition within the internal market and have an impact on trade between Member States. These arrangements typically shield companies from competition by controlling sales areas and pricing in a manner that would not exist in a freely competitive market.

Article 101 TFEU

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 (1) thus prohibits all agreements between undertakings, decisions by associations thereof and concerted practices which adversely affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Internal Market. The term “undertakings” is not defined in the treaty, but has broadly been interpreted to **encompass natural and legal persons engaged in commercial activities for the provision of goods or services**. The term “agreement” encompasses **formal binding contracts as well as less formal arrangements** (i.e a handshake agreement).

Elements for infringement

Article 101(1) contains three essential elements, being;

1. An **agreement between undertakings**, or a decision by an **association of undertakings** or a **concerted practice;**
2. Which may **affect trade between Member States**; and
3. Which must have as its object or effect the **prevention, restriction, or distortion** of the Internal Market's competition.

Agreements between undertakings, decisions by associations of undertakings and Concerted Practices

Agreements

An agreement within the meaning of Article 101 (1) has been interpreted broadly to include both formal and informal agreements (i.e a handshake). There must, however, be a meeting between the parties.

Bayer *- concept of agreement*

In ***Bayer***, the GC held that the concept of an agreement ***centres around the existence of a concurrence of rules between at lest two parties, the form in which manifested being unimportant as long as it constitutes the faithful expression of the parties' intentions***.

Article 101 applies both to **horizontal** and to **vertical** agreements. Horizontal agreements are those made between undertakings operating at the same level in the market (i.e agreements between producers or manufacturers), whereas vertical agreements are those between undertakings operating at different levels of the market (i.e a meeting between a distributor and a producer).

Undertakings

As aforementioned, *undertakings* is left undefined both in the treaties as well as in secondary legislation. It has been interpreted by the EU Commission and the CJEU in the **widest possible sense**, to include any legal or natural person, regardless of the legal status of that entity, engaged economic activity, whether in the provision of goods or services (including cultural or sporting activities). It is **not necessary** that the activity be pursued with a **view to profit**, but it is sufficient that there is the putting of goods or services on the market (as demonstrated in ***Pavlov***). ***Hofner and Elser vs Macrotro***n saw the CJ's definition of undertaking as encompassing every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed. To this, **Prof Silvio Meli,** in ***Malta and European Competition Law***, holds that an NGO or a Government Agency may fall within the scope of undertaking for the purposes of Article 101 TFEU.

FENIN v Commission *- reconsideration of the meaning of undertaking*

In ***FENIN***, the GC emphasised that **an undertaking must carry out an economic activity, which is characterised by the business of offering goods or services in a particular market**, rather than the effective making of purchases. Thus the purchase of medical goods and equipment, with such purchase done solely for the purpose of utility and faculty, is not tantamount to an undertaking.

Poucet *- administering sickness and maternity insurances were not undertakings*

In ***Poucet***, the CJ ruled that French social security offices administering sickness and maternity insurance schemes were not considered to be undertakings.

Article 101 (1) applies to **all undertakings** in the public as well as in the private sphere, but only insofar as they are engaged in economic activity.

Decisions by associations of undertakings

The effect of decisions by associations of undertakings may be to coordinate behaviour amongst participant undertakings. Jurisprudence suggests that even a non-binding recommendation from a trade association which was normally followed by its members could constitute a decision within Article 101 (1), as could a decision by an association of associations. The associations who abide by such decisions, whether binding or non-binding, may also be found liable to breach of competitive rules, provided that the three aforementioned elements are proven.

Concerted Practices

Imperial Chemical Industries Ltd v Commission - *understanding concerted practice*

In ***Imperial***, *concerted practice* was defined as **a form of cooperation between undertakings which, without having reached the state where an agreement was concluded, knowingly substitutes practical cooperation between them for the risks of competition**.

To constitute a concerted practice, it is not necessary to have manifested a concerted plan. It is enough that each party should have informed the other of the position they intended to take so that each could regulate his business conduct safe in the knowledge that his competitors would act in the same way. The GC has held that meeting to exchange information about pricing structures also constitutes a concerted practice, as the participants cannot fail to take this information into account when devising their own market strategies. Among the three prohibited acts, concerted practices are the hardest to prove.

Sphere of Application of Article 101 (1) TFEU

For Article101 (1) to apply there must be an agreement between two or more undertakings which are independent of each other. Arrangements between undertakings which form **part of the same group of companies** may not be subject to competition rules. An agreement between a parent and a subsidiary will fall out of the scope of Competition rules. A subsidiary undertaking which can act independently of its parent (i.e it has its own board of directors who are independent of the parent and who may make independent decisions) is regarded as independent for the purposes of Article101, thus rendering such subsidiary to fall within scope.

With regards to **undertakings which are situated outside of the EU**, then such undertakings may be liable under Article 101 (1) if anti-competitive agreements or practices to which it is a party have effects within the internal market. In ***Imperial,*** the U.K Claimant was held liable for acts of its subsidiaries which were situated in Holland, although the UK was not yet a member of the Union.

In ***Woodpulp***, a number of firms, all from outside the EU, who were not acting through subsidiaries within the EU who supplied two-thirds of the EU consumption of wood pulp, were fined for concerted practices in breach of Article 101 (1) on the grounds that the effects of their practices were felt in the Union.

A small note should be made in regards to **cartels**. Most illicit anti-competitive behaviour is manifested through cartel and clandestine activities. To combat such anti-competitive activity, the Commission has implemented a **leniency policy** which provides immunity from fines or reductions to fines for cartel members who come forward to expose such activities or who provide crucial information about its operations.

Which may affect trade between Member States

The second requirement which must be proven for a breach of Article 101 to subsist is that the agreement in question affects trade between Member States. In the absence of an effect on interstate trade any restriction on competition is a matter left for the national law alone to resolve. However, the question of whether trade between Member States may be affected has been broadly interpreted by the Commission and the Court.

In some cases, the Court held that an agreement was capable of affecting trade between Member States if, on the basis of objective legal or factual criteria, **it allows one to expect that it will exercise a direct or indirect, actual or potential, effect on the flow of trade between Member States**.

The most obvious effect on Member State trade occurs when parties attempt to partition the market along national lines by means of restrictions on parallel imports or exports.

Agreements within Member States

An effect on trade between Member States can occur even when an agreement takes place wholly within a Member State and appears to concern only trade within that state. This is so particularly in the case of decisions of associations or national agreements which are intended to operate across the whole national market. Thus Article 101 applies to agreements between undertakings in the same state.

The Network Effect: combining various smaller but similar effects

In the case of an agreement between individual traders, it may be necessary to examine the agreement in the context of other smaller yet similar agreements, in order to determine whether they are capable of affecting trade between Member States. Here we are not speaking of one agreement which led to adverse effects, but rather a series and plurality of smaller scale decisions which, when put together, could form a breach for the purposes of Article 101. The CJ holds that the question to be asked is whether the agreements taken as a whole make a significant contribution to the sealing off of national markets from competition from undertakings situated in other Member States.

Actual vs Potential Effect

One must note that for the purposes of the second element, the word ***may*** denotes and suggests that it is sufficient to prove **potential harm suffered**, and not actual, material adverse effects. Here, the question of effect is not concerned with the increase or decrease of trade which might result from an agreement - all that is required to be shown is a deviation from the *normal pattern of trade* which might exist between Member States. The Law does not speak of **harming trade between Member States**, but merely that the agreement **affects trade between Member States**.

Cartels

Cartel behaviour is considered to be anathema. Such behaviour occurs when various undertakings agree to limit production or any kind of concerted practice which affects prices, as a consequence of which they may tend to increase quota restrictions. They may take the form of collaboration in tendering processes, the agreement to submit equivalent prices, the rotation of beneficiaries who submit the lowest tenders, information sharing agreements, the sharing of geographical and product market information, etc.

The sharing of information between undertakings raises significant issues which affect trade between member states. Besides the severity manifested in data protection issues, they tend to negatively impact inter-state trade, since such exchanges are limited to particular undertakings, in turn providing an undue advantage to the recipient.

Which have as their object or effect the prevention, restriction or distortion of Competition within the Common Market

If the object of an agreement is to prevent or restrict or distort competition, for instance, a naked price-fixing or market sharing agreement between competing manufacturers, there is no need to prove its effect. Unless the agreement is clearly incapable of affecting competition, an anti competitive effect will be **presumed**.

***Societe Technique Miniere v Maschinenbau Ulm GMBH** (case 56/65)*

In this case, the CJ held that in order to ascertain whether an agreement is capable of preventing, restricting or distorting competition, a number of factors must be examined:

- The **nature and quantity** of the products concerned (i.e the product market, the parties' combined share in that market, etc), in that the greater the market share, the more damaging the agreement is or could be;
- The **position and size** of the **parties concerned** (i.e their position in the market), in that the bigger they are in terms of turnover and relative market share, the more likely that competition will be restricted or hindered;
- The **isolated nature of the agreement or its position in a series** - this is particularly relevant in the case of distribution agreements, which in themselves may come across as *prima facie* irrelevant, but which may nonetheless form part of a network of similar agreements which are cumulatively damaging;
- The **severity of the clauses** - this consideration relates to the substance of the agreement, including the extent to which the agreement is achievable;
- The **possibility of other commercial currents acting on the same products by means of reimports and re-exports** - any agreement which attempts to ban or limit imports or exports will be in breach of Article 101.

The de minimis principle

All agreements between business people to some extent hinge on each other's freedom of action within the marketplace. Clearly, not all such agreements are capable of damaging the market to any notable extent. It is always a question of size and effect whether in fact an agreement damages the competition. In ***Volk** (case 5/69)*, the CJ established and developed the **de minimis principle**, which holds that **in order to come within Article 101 (1), competition must be affected to a noticeable extent; there must be a sufficient degree of harmfulness**. An agreement of insignificant effect does not warrant liability for breach of Article 101. If an agreement falls within the de minimis principle, even if the parties had the intent to restrict competition, they will not be subject to infringement of Article 101. Thus in ascertaining whether there was a breach of Article 101, some form of economic or market assessment must be made in order to assess the amount of damage caused or suffered by that agreement.

The Commission has published a number of notices on agreements of minor importance. **The current de minimis notice was issued in 2014, and states that agreements between undertakings with a combined market share below 10% of the relevant markets, or if each party's market share does not exceed 15%, then the agreement will fall within the de minimis principle.** One must note that in the cases of strict regulations, such as price-fixing or market-sharing, the de minis principle does not apply.

An agreement which falls within the scope of Article 101 TFEU, and which is not exempted from liability under the Articleor which does not fall within the criteria of Article 101(3), will **automatically be void** as per **Article 101 (2)**. Moreover, parties to such an agreement may be fined for their anti-competitive conduct.

Exemptions to Article 101

101 (3). The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

One must note that initially, prior to **regulation 1/2003**, in order to seek an exemption, the agreeing parties had to seek exemption from the condition, by seeking an approval notification. This created a tremendous workload on the Commission which was overwhelming it to the point where various block exemptions were being issued and created. Article 101 (3) creates the exemptions to Article 101 (1). If an agreement satisfies the 101 (3) conditions, then the agreement is permissible and no sanction will ensue. The agreement, in order to be permissible, must therefore satisfy 4 essential criteria;

1. It must **contribute to improving the production or distribution of goods or to promoting technical or economic progress**;
2. It must **allow consumers a fair share of the resulting benefit**;
3. It must **not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives;** and
4. It must **not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question**.

1. Enhancing of production, distribution, technical, or economic progress

The first requirement indicates and suggests that the agreement, as a whole, must show positive benefits. These are expressed in the alternative, although quite often a benefit would fall under all aspects of the condition.

Production benefits are the most frequent benefits observed when it comes to specialised trade agreements. Specialisation enables each party to concentrate its efforts and achieve the benefits of scale, in turn avoiding wasteful duplication.

Distribution benefits are often associated with the streamlining of services, ease of access to products or services, specialised knowledge of the market, after-sale services, maintenance of stocks, etc.

Technical or Economic progress emerge from specialised agreements which are concerned with development and research. A collaboration to mutually assist in the production of a new type of product would fall under technical progress. Economic progress, on the other hand, is presumed if improvements in production or distribution or technical progress are achieved. It is often derived from some other type of benefit.

2. The agreement must allow consumers a fair share in the benefits

Provided there is sufficient (inter-brand) competition within the market, encompassing products of various producers, then the benefit achieved by the producers in their agreements would be inevitably reaped by the consumers, either via a better product, a better services, or a better price. If the parties agreeing manage to derive benefits, such as a better product, but do not supply the product to the consumers, then they do not satisfy this exemption condition.

3. The agreement does not impose arbitrary restrictions

This essentially means that the agreement, in order to qualify for the exemption, **must not impose arbitrary restrictions** on the undertakings (i.e only agreements wherein the attached restrictions are **necessary** for the attainment of objectives will qualify for an exemption under 101 (3)). This is the **familiar proportionality** principle. This is often the condition which most agreements fail to attain before satisfying the conditions for exemption. The Commission will examine each clause in the agreement to see if it is necessary to the agreement as a whole. Fixed prices, even if fixed at maximum or minimum levels, will rarely be deemed necessary. In the 1985 ***Carlsberg Beers*** agreement, an exemption was granted for an agreement done between Carlsberg Brewery Ltd and another large scale public company, whereby the agreement provided for the purchase of 50% of Carlsberg lager supplies by the Company. This agreement was deemed to be exempted, since the condition, although of a large and severe nature, was **necessary** for Carlsberg to establish its presence in the UK.

4. The agreement does not enable undertakings to eliminate competition

In all cases in which exemption has been granted, the parties have been subject to substantial inter-brand competition, whether from producers inside the common market, or from the outside. In the ***CECED Case***, the Commission determined that competition was not eliminated because manufacturers could still vie on other aspects like price and technical performance. Thus the agreement may only be exempted if the subject matter does not eliminate competition from the market.

Block Exemptions

The old-style enforcement system was centralised and vested within the Commission. The Commission was unable to apply a rule of reason to every notification seeking concession or exemption, and thus it sought to resolve the bulk of requests via the issuing of **block exemptions**, which catered for the automatic exemption of agreements which satisfied a certain set of conditions and rules. The block exemptions were passed with the intent to avoid the need for individual appraisal by the Commission.

Most block exemptions were enacted by regulation, and were capable of direct effect, thus rendering them applicable directly in National Courts. Most of the original block exemption regulations followed the same pattern, in that they commenced by laying down the kinds of permissible restrictions (i.e - the **white list**) and followed with the restrictions which pertained to clauses which were not acceptable (i.e - the **black list**). With the **Patent Licensing Regulation**, the Commission introduced a **third category** - the **grey list**, in which the enlisted conditions must be notified to the Commission, and if they were not opposed within a specified period, they were deemed to be accepted, and thus exempt.

As previously mentioned, one must distinguish between **vertical** and **horizontal agreements** in this regard, since block exemptions are issued for vertical and horizontal agreement exemptions **independently**.

Horizontal Agreement Block Exemptions

Article 101 applies both to horizontal (between persons or entities operating at the same level of the market) agreements and to vertical (between persons or entities operating at different levels of the market) agreements.

Some lesser-scale block exemptions were issued in the early 2000s, yet the most influential and most long-lasting horizontal agreement block exemption was issued in 2010, manifested through Regulations 1217 and 1218 of 2010. These regulations, however, expired recently, which is why the EU Commission has issued a revised and updated horizontal agreement block exemption regulation in 2023, being **Regulations 1066 and 1067 of 2023.** These regulations carries a transitory period until 2025, with various ad hoc provisions catering for such transition.

One of the most evident agreements prohibited by Article 101 in relation to horizontal agreements is that of **price fixing**. Because of their obvious anti-competitive effects, price fixing are nearly always inexcusable. Price fixing, whether direct or indirect, in any form, pertains to the setting of minimum or maximum prices, exchanges of price information between parties, and any other agreement which affect or hinges upon price policy, including the agreements and coordination of discounting policies or credit terms. There may be exceptional cases wherein price fixing falls outside the scope of Article 101, such as in the case of legislation which fixes and establishes systems of retail price maintenance for certain products such as books. Another area which falls into this remit is that of **independent distributors**. An agreement between producers and independent producers is often prohibited by Article101. Whilst overall distribution arrangement reaps benefit to the consumer's welfare, by ensuring the efficient distribution of goods and services and by encouraging non-price competition and improved quality of service, such agreements often bear negative effects. Notably, they can **divide markets**, soften competition between the supplier and his competitors, and reducing intra-brand competition between distributors of the same brand. Such **distributor arrangements** may take various forms, including **exclusive distribution, selective distribution,** and **franchise agreements**.

Vertical Agreements Block Exemptions

The Block exemption on vertical agreements was primarily governed by Regulation 461/2010. This regulation expired in 2022, with a Revised Regulation being promulgated shortly after, manifested through **Regulation 2022/720**. The Commission further published **guidelines on Vertical Restraints** in order to assist with the interpretation of this Regulation.

The Scope of these regulations are to grant an exemption to agreements which contain certain vertical restraints, in turn providing a **safe harbour** for agreements which might otherwise fall foul of Article 101. This block exemption places a strong emphasis on **market share**, as stipulated by **Article 3** of the Regulation;

Article 3

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

Thus the exemptions will only apply in the case that **the supplier** does not hold more than 30% of the share of the relevant markets. The same 30% rule applies also to the **buyer**.

Article 1 of the Regulation lays out the key concepts, served to assist in the interpretation of the regulation. Within this article, one finds a definition for **Connected Undertakings**:

> **Article 1:** 'Connected undertakings' means:
>
> (a) undertakings in which a party to the agreement, directly or indirectly:
>
> **i)** has the power to exercise more than half the voting rights, or
> **ii)** has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
> **iii)** has the right to manage the undertaking's affairs;

Furthermore, Article 1 of the Regulation provides a definition for **Vertical Agreement**:

> **Article 1:** (a) 'vertical agreement' means an agreement or concerted practice between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

The Regulation also posits, within its fifth article, certain restrictions to which the block exemption **does not apply**.

As previously stated, agreements which contain **hard core restrictions** cannot benefit from the exemption. **Article 4** of the Regulation thus holds that agreements which are burdened with **hard core restrictions** are not susceptible to exemption. Such hard core restrictions include;

- A restriction on the **buyer's ability to determine sale price**;
- A restriction on the **seller's selling territory**;
- A restriction on the **place of establishment** of the selective distribution system;
- A restriction on the **selling of components** which may be used by buyers to produce products of a similar or identical nature.

Article 7 of the Regulation subsequently provides for the **non-application of the regulation**, in the case wherein parallel networks of similar vertical restraints cover more than 50% of the relevant market. In such cases, the regulation will be disapplied by the European Commission.

> **Article 7**
> Non-application of this Regulation
>
> Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

The Local Sphere of Competition Law

Article 5 of Chapter 379 of the Laws of Malta (Competition Act) is **modelled on Article 101 TFEU,** as described by **Prof Silvio Meli**, in *Malta and European Competition Law*. This article captures all anti-competitive cooperation between firms and undertakings. It is deemed to be sufficient for parties to fall within the ambit of fair competition rules if they in any way express their joint intention to conduct themselves on the market in a specific way. To this extent, direct contract is not a requirement to fall within the scope of this provision. It is enough if the behaviour takes the form of an agreement, decision, or concerted practice between undertakings. The effects of the actions falling under article 5 of Chapter 379 are deemed null, void and ineffective *ipso jure*.

Prohibited agreements are primarily:

- The fixing, whether directly or indirectly, of purchasing or selling prices or other trading conditions;
- Those that limit or control production, markets, technical development or investment;
- Share of markets or of sources of supply/
- The imposition of dissimilar conditions to equivalent transactions to parties outside the agreements, thus creating a competitive disadvantage;
- The conclusion of contracts subject to acceptance being left to third parties who have no connection with the subject of the contract.

Similarly, **article 9 of Chapter 379** is **modelled on Article 102 TFEU.** It seeks to regulate any unilateral behaviour of undertakings having a dominant position as this will inevitably lead to the elimination of competitors. Any such action must also have the object or effect of an anti-competitive action. Dominance, per se, is not prohibited, but rather the abuse thereby.

Silvio Meli contends that even where an undertaking opts to cut down prices to an extent where it is making a loss, such behaviour may be tantamount to an anti-competitive measure, since it results in the disruption of the market and the elimination of rivals. This behaviour is often paired with corrupt practices, such as the issuing of unfair prices and the limiting of production.

Abuse may be classified in a number of categories;

Directly or indirectly imposing an excessive or unfair purchasing or selling prices or other unfair trading conditions, the charging of prices below average variable costs of production to drive rivals away, the limitation of production, markets or technical development to the prejudice of consumers, the refusal to supply goods and services to eliminate rivals, etc.

Local Authorities - the Office for Competition & the Director General

Chapter 510 of the Laws of Malta establishes the Malta Competition and Consumer Affairs Authority. This authority, per the Chapter's Article 4, is tasked with the enhancement of competition, the protection of consumer affairs, and the promotion and smooth transposition of EU Regulations governing Competition Law. Competition Law is dealt with under **chapter 379** of the Laws of Malta (Competition Act), with the main head for dealing with investigative and infringement procedures being the **Director General (Competition)**, established by **article 13 of the Malta Competition and Consumer Affairs Authority Act**.

The same **Article 13 of the MCCAA Act** establishes the **Office for Competition**. Such office is tasked with the investigation of restrictive purchases which may distort competition, the examination and control of concentrations between undertakings vis-a-vis their effects on the competitive market, the study of markets, etc.

The Competition Act (Chapter 379 of the Laws of Malta) was last amended by virtue of Act XLV of 2021. Act XLV amended the Competition Act and the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta) to mainly implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. The Minister had established the 31st of August 2021 as the date on which all the provisions of the said Act have come into force.

Article 102 TFEU

Article 102 TFEU
(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 seeks to **deal with undertakings having a strong position in the market**, by prohibiting activities which could be regarded as an abuse of the undertaking's dominant position in a particular market.

Article 102 thus duly provides that ***any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States***.

This prohibition is followed by a list of examples which may form part of the prohibition under Article 102. For this Article to be violated, the following elements must be proven;

- There must be **an undertaking**;
- Which has a **dominant position** within the market;
- Which position is **abused of**; and
- Such abuse **affects trade between Member States**.

The term *undertakings* is subject to the same broad interpretation as adopted under Article 101, with reference to ***Pavlov*** and to ***FENIN v Commission***.

Joint Dominance

It was originally perceived that Article 102 did not apply to undertakings which were independent of each other (i.e in the case of **oligopolies**). This position has, however, been done away with in the case ***Re Italian Flat Glass***, wherein the Commission held that three Italian producers of flat glass, who held between them a 79-95% of the market share had a **collective dominant position** in these markets and abused of their position. It should be mentioned that this decision was annulled in a subsequent case, owing to a lack of evidence of dominance, yet this does not exclude the fact that the CJ accepted the doctrine of joint dominance for the purposes of Article 102.

The potential application of Article 102 within the context of oligopolies was confirmed in ***Case 393/92***, wherein the CJ stated that a collective dominant position would exist when *the undertakings in question were linked in such a way that they adopt the same conduct on the market*. In ***Irish Sugar***, the GC accepted the possibility that Irish Sugar, which produced sugar, and its distributor were together dominant, thus raising the possibility of both **vertical collective dominance** as well as **horizontal collective dominance.**

The Principle of Dominance

United Brands Co v Commissioner *- defining dominance*

"A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on ***the relevant market*** *by giving it the power to behave to an appreciable extend independently of its competitors, customers, and ultimately of its consumers*.

The Commission added that *the power to exclude effective competition is not… in all cases coterminous with independence from competitive factors but may also involve the ability to eliminate or seriously weaken existing competitors or to prevent potential competitors from entering the market*. To assess if an undertaking has sufficient economic strength to behave independently of, or even exclude, competitors, it is necessary first to ascertain the **relevant market in which competition is said to exist.** The determination of whether an undertaking is in a dominant position will depend on how those parameters are set. The Commission had issued a **Notice on the Definition of the Relevant Market.** The **relevant market** comprises 3 distinct aspects: **product, geography, and season**.

Relevant Product Market

This market is the market for the undertaking's own product or service, plus the market for any substitutable product or service. The relevant product market is one in which products are substantially interchangeable. It includes identical products, or products considered by consumers to be similar by reason of their characteristics, price or use. Two questions relevant to this consideration are;

- To what extent is the customer, importer, or wholesaler, able to buy goods **similar to those supplied by the dominant firm**, or **acceptable as substitutes**. This is known as *cross-elasticity of demand,* or ***demand side substitutability*****.**
- To what extent are other firms **able to supply, or capable of producing acceptable substitutes**. This is known as *cross-elasticity of supply,* ***or supply side substitutability*****.**

The element of **substitutability** features well in the relevant market product, for the test to ascertain whether a particular person or entity is dominating a market surrounds whether the consumer is willing to make use of a substitute or near-substitute of the products or services of that person or entity. Both the **demand** and the **supply** of the products or services within the market must be examined before asserting whether that market is the relevant product market or not. These questions may be assessed by reference to the characteristics of the product, its price, or the use to which it is to be put. Although the principles are expressed in terms of goods or products, they apply equally in the context of services. The relevant product market may be ascertained from different aspects, with the main and largest 2 being the market of **final products** and the market of **raw materials**. The latter market, when breached and dominated, is not often burdensome on the consumer, but rather the **producer**.

Relevant Geographical Market

To fall within Article 102, an undertaking must be dominant ***within the common or in a substantial part of it***. Thus, if the question of dominance must also be contextualised by the relevant geographical market. ***United Brands Co v Commission*** held that the RGM is the one in which the objective conditions of competition are the same for all traders. Where goods are homogenous and easily and cheaply transportable, the RGM may be large. For the person or entity who is allegedly in breach of Article 102, it is beneficial for him that the relevant market in question is large, since it would mean that he owns less of a share, and thus in turn that he would have less dominance over the market. A geographical market may be characterised in a number of ways, including the area to which customers are prepared to travel to buy the product or service, or in which they are prepared to look for substitutes.

Relevant temporal or seasonal market

This final aspect of the relevant market is rarely identifiable. A rare example is demonstrated in ***Re ABG Oil***, wherein the Commission defined the temporal market for oil by reference to the oil crisis precipitated by the action of the OPEC states in the early 1970s.

Dominance over the Relevant Market

Once the Relevant Market is established, it is necessary to ascertain whether the parties concerned are dominant within that market. An undertaking can be dominant irrespective of whether it is a supplier or a purchaser.

United Brands Co defined the moment in which an entity may be considered to be dominant within the relevant market, stating that:

"*Undertakings are in a dominant position* ***when they have the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers.*** *Such is the case where an undertaking's market share, either in itself or when combined with its know-how, access to raw materials, capital or other major advantage such as trade-mark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive al other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes, even If there are differences in the extent to which it dominates individual submarkets*.

Michelin v Commission, the CJ adopted the test for dominance, which is normally today referred to as:

A position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers, and ultimately of consumers.

Thus, the question of dominance requires a wide-ranging economic analysis of the undertaking concerned and of the market in which it operates.

Among the factors which are considered to ascertain dominance, the most vital ones are:

Market Share

This consideration is of fundamental importance. The Court persists in stating that a market share of around 90% is almost always considered to be tantamount to market dominance. This is not always the case, however, for in ***United Brands,*** the company held only 40-45% market share. Where the share is less than 50%, the structure of the market will be considered next, particularly the market share held by the **next largest competitor**. In United Brands, the next competitor held only 16% of the market, which is why the company was deemed to have been dominant in the relevant market. The Commission, in certain cases, that even the situation of 40% share being owned by the company with the next largest competitor owning 20% could be tantamount to dominance. Within this consideration, the CJ will also delve into the **duration of time in which a firm has held its position in the Relevant Market**.

Financial and Technological Resources

A firm with large financial and technological resources will be in a position to adapt its market strategy in order to meet and drive out competitors. Such resources may be utilised by a firm to retain their market position, to push out smaller entities or to prevent potential competitors from gaining momentum within the market. Within this consideration lies the concept of **know-how**, in that a larger scale firm will be equipped with various market strategies and inside information which may be abused of in order to maintain their growth.

The Notion of Vertical Integration

An undertaking that is vertically integrated is one which exerts control in the production and supply chain. This may include *upstream control* (i.e when a raw materials firm exercises control over distribution or product development), or even *downstream control*, the inverse.

Other factors include ***behaviour, barriers to entry***, and ***associated markets***.

Abuse of Market Dominance

It is not dominance per se but the **abuse of a dominant position** which triggers Article 102.

> ***Hoffmann-la Roche -*** *definition of abuse*
>
> *Abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*.

Article 102 provides a series of examples through which **abuse of dominance** is manifested;

> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

These are merely examples, and the list is not exhaustive.

Referring back to Article 101, it is revealed that the kinds of abuse prohibited under Article 102 run in close parallel to the examples of concerted behaviour likely to breach Article 101.

Abuses under Article 102 have been classified into 2 broad categories, being ***exploitative abuses*** and ***exclusionary abuses***. Exploitative abuses occur when an undertaking **seeks to take advantage of its position of dominance by imposing oppressive or unfair conditions on its trading partners**, while exclusionary abuses occur when an undertaking **seeks to reduce or eliminate competition**.

Exploitative Abuses

United Brands co v Commission provides examples of a number of such abuses, one of which is the imposition of ***unfair prices***. The charging of excessively high prices for certain products would fall under this type of abuse. An excessive price was defined by the Court as one which bears **no reasonable relation to the economic value of the product**. Problems then arises as to the understanding of **economic value**. Deciding the economic value of a product or service is a complex accounting exercise which leaves ample scope for differences of opinion.

Another type of exploitative abuse is the setting of ***unfair trading conditions***, which include the refusing to allow importers to resell a product when it is not yet ripe, as was the case of the bananas considered in the ***United Brands*** case. The fact that the consumer *might* avoid purchasing such products in substitute for better ones did not prevent the Commission from rendering this condition an exploitative abuse.

Another example of an exploitative abuse is manifested through the form of ***discriminatory treatment,*** wherein a service would be provided to different purchasers at different rates, when the purchases thereof were of like quality.

Exclusionary Abuses

This kind of abuse is less easy to detect when compared with exploitative abuses. Here, the dominant firm uses its dominance in such a way as to undermine or eliminate existing competitors. This type of abuse may take the form of ***tying and bundling***, wherein a customer would be awarded discounts or rewards for purchasing a group of products or for satisfying a set of purchase conditions set and imposed by a dominant firm. Tie ins require or induce the purchaser of goods or services to buy other goods or services from the same supplier. This form of exclusionary abuse falls foul of **Article102 (d)**, which states;

> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Another instance of exclusionary abuse is the concept of ***predatory pricing***, in which prices are reduced, below cost if necessary, in order to drive competitors out of the market. The Commission, in certain cases, states that it may be necessary to examine a firm's costs and motives in order to ascertain whether its low prices are predatory or merely the result of efficiency. It may even be declared that the lowering of prices to such a heavy extent are deemed to be the result of weakness. Further, the dominant firm would be deemed to exercise exclusionary abuse when it **refuses to supply** certain products or services. While Article 102, in principle, respects the right of dominant firms to choose their contractual partners, in exceptional cases a refusal to supply may fall foul of Article 102 TFEU. Where supplies or services are refused to reduce or eliminate competition, such a refusal will constitute abuse.

Trade Between Member States

As with Article101, there must be some effect on trade between Member States for Article102 to apply. The Court often holds that it is not necessary to establish any **particular or specific effects**, as long as there is evidence that a particular activity ***might*** affect trade between Member States. A possibility or potentiality is thus sufficient.

Exclusion to Article 102 & Relationship with Article 106 (2)

Article 102 will not be applied in certain cases, which a **three-stage test** taking the stage centre. To be able to rely on this exception, not only must the entity show, first, that it is the requisite type of undertaking, but, secondly, that it cannot perform the tasks assigned to it without relying on provisions or behaviour which would normally constitute a breach of Article 102. In ***Corbeau***, the company was prevented from running a postal service because the Belgian portal service has a monopoly. This could have potentially breached Article 102, but the CJ accepted that the Belgian postal service was an undertaking within **Article 106 (2),** and that a certain amount of restriction of competition was necessary to enable it to remain economically viable.

> **Article 106 TFEU**
> (ex Article 86 TEC)
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, **in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.** The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Some public undertakings, such as utility companies, defending a claim of alleged abuse under Article 102 may invoke Article 106 (2). This provides that undertakings entrusted with the operation of services of general economic interest or which have the character of a revenue-producing monopoly are subject to Treaty rules, **unless the performance of the tasks assigned to them would be obstructed by the application of those rules**.

The **interests of the Union** must also be taken into consideration in this regard. Although it is not clear precisely what this element of Article 106 (2) requires, it will clearly curtail the scope of the exception provided under this article. It has been suggested that the same assessment will be made as under Article 101 (1), entailing a balance of the needs of the undertaking with other EU goals.

Enforcement Actions for Articles 101 and 102

Without proper enforcement, the substantive competition rules would lose much of their bite. For 40 years, Regulation 17/62 gave the Commission a central role in enforcing the competition provisions within the EC Treaty, with significant powers of investigation and rights to impose penalties. During this time, two themes emerged in relation to competition enforcement by the Commission - the first being the scope of the Commission's powers, and the second being the strongly centralised systems which resulted in a very large and uncontrollable workload.

With regards to the Commission's powers regarding enforcement **today,** one ought to consider **Regulation 1/2003.**

Within this regulation lies the clarification on the burden of proof allocated to cases of alleged infringement of Articles 101 and 102, with the burden of proof lying on the person alleging the breach.

Article 5 Regulation 1/2003
Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

— requiring that an infringement be brought to an end,
— ordering interim measures,
— accepting commitments,
— imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Although the Commission no longer applies the **notification system** governed by Regulation 17/62, the Commission still retains the power to **investigate potential breaches,** either on its own initiative or else upon response to a complaint received from third parties.

Both national competition authorities and national courts are expected to assist the Commission in cases of inspection, through the issuing of search warrants or other investigative tools disposable by the Member State.

Mergers and Concentrations

Perhaps the most surprising application of Article 102 came in the case of ***Continental Can Co Inc v Commission***, wherein the Commission had applied Article 102 in the context of a proposed merger, namely the proposed takeover of Continental Can. The Commission issued a decision that the proposed takeover consisted of an abuse of their dominant position within the common market (Germany). In annulment proceedings Continental Can argued that such an action could not be regarded as an abuse, an argument not upheld by the CJ. The Court held that Article 102 cannot allow mergers which eliminate competition. In this case, it was deemed **not necessary to prove the causal link between the dominance and the abuse**. This case remained the basis on which the Commission exercised control over mergers until the Court decided in ***BAT &Reynolds v Commission*** that mergers could also fall within Article 101 (1). The case arose from a proposed merger between two large companies, a merger which would have given the acquisitive company a significant competitive advantage against one of its leading competitors. The commission had been alerted to the proposed merger by such competitors, BAT & Reynolds. Although the acquisition of an equity interest in a competitor did not in itself restrict competition, it might serve as an instrument to that end. This decision paved the way to a regulation on merger control. **Regulation 139/2004** thus came into force in May 2004, and applies to mergers, acquisitions, and certain joint ventures (known as concentrations) between firms with a combined worldwide turnover of more than EUR5,000 Million. There are three types of mergers: horizontal, vertical, and conglomerate. Horizontal mergers involve companies producing similar goods or services within the same market level. Vertical mergers occur between companies operating at different stages of product distribution within the same market. Conglomerate mergers involve firms unrelated in any product market. Among these, horizontal mergers pose the greatest threat to competition.

Arguments Against Mergers

The impact of mergers on competition varies depending on their type. Horizontal mergers, for instance, may empower the combined entity to dictate prices and control output akin to a monopolistic entity. In some nations, indices are utilised to gauge the competition reduction resulting from such mergers. Conversely, the effects of vertical mergers on competition are subject to debate. Vertical integration, exemplified by vertical mergers, can establish diverse relationships with downstream entities, ranging from standard contracts to exclusive distribution arrangements. While such relationships could potentially stifle competition by restricting access to other manufacturers, opinions differ on the extent to which they truly harm competition. This disagreement extends to vertical mergers as well, as they might enhance the distribution of a branded product, thus fostering competition among brands. Similarly, opinions diverge on the competitive implications of conglomerate mergers. While some view them as perilous, enabling affluent firms to subsidise products and stifle new entrants, others question whether such mergers inherently harm competition. Another justification for regulating mergers stems from their potential to deplete the assets of the acquired company. While this might serve the short-term interests of certain shareholders, it might not align with the broader long-term public interest. Empirical studies have fuelled these concerns by revealing that mergers frequently fail to deliver the anticipated benefits. A third rationale for merger control is regional policy. Mergers could result in the consolidation of existing facilities, thereby impacting unemployment rates and the overall vitality of regions. Governments may employ merger policies to uphold a balanced dispersion of wealth and employment opportunities across the nation.

Arguments Favouring Mergers

Despite potential drawbacks, mergers can contribute to economic efficiency through various means. Firstly, they can facilitate the realisation of economies of scale, whereby firms operate most effectively at an optimal size for their industry, allowing them to maximise production efficiency. Merging entities can leverage shared resources and infrastructure to achieve these economies. Secondly, mergers can enhance distributional efficiency, particularly when a manufacturing firm aims to expand its market presence downstream. Instead of investing resources in acquiring new distribution skills, merging with an established distributor may prove more efficient. Moreover, literature explores the correlation between mergers and managerial efficiency. The threat of a takeover can incentivise management to operate more effectively, as shareholders dissatisfied with management performance may seek to sell their shares to other companies, fostering competition in the "market for corporate control." The Merger Regulation within the EU acknowledges the inevitability and potential benefits of mergers. It recognises that the removal of internal barriers will lead to significant corporate restructuring, which is seen as a positive step toward enhancing the competitiveness of EU industries in global markets.

Article 107 TFEU - State Aid

Article 107 tFEU lays down the test for state aids. It covers aid given to public undertakings which falls within the scope of Article 106 as well as aid given to private firms. This provision sees three parts, with 107 (1) providing for the general principle of incompatibility with the internal market, 107 (2) which provides exceptions wherein state aid will be compatible with the internal market, and 107 (3) which lists certain examples of such exemptions.

Article 107 TFEU
(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

There are 4 conditions which must be satisfied in order to be classified as state aid which falls within the scope of Article 107 TFEU:

1) The support must take the form of **an advantage conferred on the recipient**;
2) It must come **from a Member State or State Resources**;
3) It must **distort or threaten to distort competition;** and
4) It must carry an **effect on inter-state trade**.

Condition 1: an Advantage conferred on the subject

Article 107 does not explicitly define state aid, and consequentially the ECJ and Commission have adopted a broad understanding of what constitutes state aid. The Commission has issued a list of types of state aid, which includes subsidies, tax exemptions, exemptions from parafiscal charges, preferential interest rates, provision of land or buildings, indemnities against losses, etc.

General measures of economic policy, such as an interest-rate reduction, while benefiting industrial sales, will not fall under the scope of state aid. Conversely, a measure which is **specific** and not applicable to the general market will be deemed state aid. The dividing line which separates general measures and specific measures is not easily ascertained.

In ***Intermills,*** the ECJ made it clear that no distinction could be drawn between aid granted in the form of loans and aid granted in the form of a holding acquired in the capital of an undertaking. Both fall within the scope of article 107.

> ***Belgium vs Commission*** *(Case 142/87)*
>
> "In order to determine whether such measures are in the nature of state aid, the relevant criterion is that indicated in the Commission's decision, and not contested by the Belgian government, namely whether the undertaking could have obtained the amounts in question on the capital market."

This test continues to be applied - when capital is invested by a public investor, there must be some interest in profitability in the long term, in order to fall outside the scope of Article 107. It is important to determine whether the private investor would have entered into the transaction on the same terms as the public investor. The privatisation of an undertaking may also give rise to questions concerning state aid.

It is central to the idea of state aid that **the recipient gains a financial advantage,** either directly or indirectly over its competitors. This will not be so where the assistance is granted to offset public service obligations incumbent on the beneficiary of the aid. This is further developed in ***Altmark***.

These conditions may be summarised as follows;

1 - the undertaking must have **public service obligations to discharge**, which are clearly defined;
2 - the parameters on the basis of calculation of compensation **must be established in advance;**
3 - the compensation **cannot exceed what is necessary** to cover all or part of the incurred costs; and
4 - where the obligations are not discharged by reason of public tender, the compensation is to be calculated on the basis of an analysis of the costs which a **typical undertaking** would have incurred in discharging those obligations.

The Altmark Case *- conditions for financial gain over competitors*

"Where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge the public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107 TFEU.

However, for such compensation to escape classification as state aid, a number of conditions must be satisfied;

First, the recipient undertaking must **actually have public service obligations to discharge**, and the obligations must be clearly defined.

Second, the parameters on the basis of which the compensation is calculated **must be established in advance in an objective and transparent manner**, to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

Third, **the compensation cannot exceed what is necessary** to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations.

Fourth, where the undertaking which is to discharge the public service obligations, in a specific case, is not chosen pursuant to public procurement procedure which would allow for the selection of the tenderer capable of providing those services at least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The ***Altmark*** decision specified that **public service compensation would not constitute state aid**. This enabled the Commission to establish a framework, specifying in greater detail the requirements to be met if the conditions are to be fulfilled.

Condition 2: via a Member State or through State Resources

A second condition for the application of Article 107 is that the state aid should be **granted by a member state or through state resources**. This can include **regional** as well as **central government**. It will not suffice that the measure constituting aid was taken by a public undertaking It must be shown that the state exercised control over the undertaking and was involved in the adoption of a measure. Article 107 can thus capture a number of advantages granted by a public or private body designated by the state. The CJ upholds the notion that there is no distinction, for the purposes of the sphere of activity of article 107, between aid granted directly by the state and where it is granted by a public or private body established or appointed by the state to administer the aid.

Condition 3: Distorts or Threatens to Distort Competition

A third condition for the applicability of Article 107 TFEU is that the aid **distorts or threatens to distort** competition by **favouring certain undertakings or the production of certain goods**. In many cases, this will be unproblematic. The grant of a subsidy, for instance, will indubitably place the recipient in a more favoured position. The Court will consider the position of the relevant company prior to the receipt of the aid, and if this has been improved, then this condition is met. It is **no defence** for the state to argue that the aid is justified because its effect is to lower the costs of an industrial sector that has higher costs than other sectors. Nor is it possible for a state to contend that its aid should be excused on the ground that other states made similar payments to firms within those countries.

Condition 4: Effects on Inter-State Trade

The final element in Article 107 (1) is that there should be an **effect on inter-state trade**. If aid strengthens the financial position of an undertaking as compared to others within the EU, then this condition is met. The relatively small nature of an aid, or the relatively small size of the recipient, does not exclude the possibility of inter-state effects. The fact that the aid is given to one and not all alone provides for a possibility of inter-state effects. It is not necessary for the Commission to prove that such trade will be affected, but merely that it **might be affected.**

Article 107 (2) - the Exceptions

Article 107(2) lists three types of aid which are deemed compatible with the internal market.

> **107 (2)** The following shall be compatible with the internal market:
>
> (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
>
> (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
>
> (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

Article 107 (2) (a) provides that if an aid has **a social character** and is granted to individual consumers, then it is deemed compatible, provided that such aid is granted without discrimination related to the origin of the products concerned. This article legitimises aid only if there is no discrimination as to the goods' origin. This limits the use of this provision, since most state aid is directed exclusively to a particular firm within the Member State.

Article 107 (2) (b) provides that state aid is legitimate if it serves to **make good damages caused by natural disasters or exceptional occurrences**. The limitations to this exceptions are not laid out, which may create room for confusion. This article is construed strictly and will only be held applicable where the economic disadvantage to the state flows directly from the natural disaster or exceptional occurrence.

Article 107 (2) (c) makes provision fro the special position of Germany, emanating from the division of the country, and serves to compensate from the economic disadvantage created by such division. The Council, upon a proposal from the Commission, may choose to repeal this position, when it deems that the division is reduced to a point which no longer warrants the express exception provided for under this article.

Article 107 (3) - the Examples

> 3. The following may be considered to be compatible with the internal market:
>
> (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
>
> (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
>
> (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
>
> (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
>
> (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 107 (3) (a) states that *aid to promote the economic development of areas with a lower standard of living* is permitted. There isa connection between this provision and in sub-section (c) of the same article, in that both relate to **regional development**. This article, however, can only be used where the problem is **especially serious**. The seriousness of this regional problem must be assessed on an EU Level, and not on an international one. The Commission can consider the impact of the aid on the relevant EU markets, and it must be shown that without the planned aid the investment intended to support development of the region , it would not occur.

Article 107 (3) (b) states that *aid to promote the execution of an important project of common European Interest or to remedy a serious disturbance within the Member State's economy* is exempt from Article 107. The first limb to this provision has been used for the development of, for instance, a common standard for high definition television and environmental protection. The CJ interprets the wording of this provision **strictly**, as can be demonstrated in ***Glaverbal***. In ***Glaverbal***, the CJ refused to accept the aid in question to fall outside the scope of Article 107 on the grounds that it did not deem the project in question to be **important** in relation to the **common European Interest**. The second limb to this provision concerns **serious disturbance to the economy of a Member State**. This limb is rarely applied or invoked, since the economic problem must affect the **whole national economy**, and thus there must be some causal link between the **grant of the aid and the alleviation of the economic problems addressed**. More specific problems are catered for in the next exception.

Article 107 (3) (c) provides that *aid to facilitate the development of certain economic activities or of certain economic areas* is permitted, so long as the aid does **not adversely affect trading conditions to an extent contrary to the common interest**. It allows aid to be legitimated by reference to the needs of an industrial sector, and by reference to economic areas, which can have a national, and not strictly EU dimension. The regional aid must form part of a well-defined regional policy of the state and conform to the principle of **geographical concentration**. Moreover, given that such aid will benefit regions that are less disadvantaged than those to which 107 (3) (a) relates, the Commission interprets the geographic scope of this exception alongside the intensity of the state aid provided. The CJ has made it clear that aid will not normally qualify under this article unless it is linked to **initial investment, to job creation and/or to restructuring the activities of the undertaking concerned**. The purpose of the aid must be **to develop a particular sector or region** and not merely a specific undertaking therein.

Articles 107 (3) (d) and (e) were introduced by the **Maastricht Treaty**, and provide the exception to 107 in relation to **aid to promote cultural and heritage conservation**, provided that such aid **does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest**. Article 107 (3) (e) constitutes a safety net by providing that such other categories of aid as may be specified by decision of the Council on a proposal from the Commission may be deemed to be compatible with the internal market.

The Block Exemption

Articles 107 (2) and (3) provide for the individual exemptions to article 107 (1). A block exemption, part of the state aid reform package, was introduced in 2008, which declares that certain categories of aid are compatible with the internal market. This block exemption regulation was revised in 2014. The principal categories covered by this block exemption are: **regional aid, aid to small and medium sized enterprises, aid for research, development, and innovation, environmental aid, training aid, aid for local infrastructures, aid for broadband, and aid for disadvantage and disabled workers**.

This exemption regulation, coined the **GBER** (General Block Exemptions Regulation) was **amended in 2017** to widen its scope to include **aid for port and airport infrastructure, aid for sport and multifunctional recreational infrastructures,** and **regional operating aid schemes for outermost regions**.