Fundamentals of European Union Law

Including Lisbon, the Croatian Accession and the new EUR-Lex

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Sources of law (excerpt):

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 229/35, as rectified by OJ 2007 L 204/28

Directive 2006/123/EC on services in the internal market, OJ 2006 L 376/36


Further reading (excerpt):
Barnard, The Substantive Law of the EU. The Four Freedoms, Oxford 2013
Craigie Büche, EU-Law, Oxford 2011
Foster, EU Law Directions, Oxford 2012
Hartley, The foundations of European Union law, Oxford 2010
Piris, The future of Europe. Towards a Two-Speed EU?, Cambridge 2012
Steiner/Woods, EU Law, Oxford 2012
Weatherill, Cases and Materials on EU Law, Oxford 2012

Further reading in the German language (excerpt):
Anweller, Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften, Frankfurt 1997
Bieber/Epiney/Haag, Die Europäische Union, Baden-Baden 2012
Borchard, Die rechtlichen Grundlagen der Europäischen Union, Wien 2012
Eilmansberger/Herzig/Jaeger/Thyri, Materielles Europarecht, Wien 2012
Frischhut, Grundlagen des Rechts der Europäischen Union. Inklusive Lissabon, Beitritt Kroatien und EUR-Lex neu, Wien 2013 [N.B. German version of this LPS]
Hummer (Hrsg), Neueste Entwicklungen im Zusammenspiel von Europarecht und nationalem Recht der Mitgliedstaaten, Wien 2010
Lachmayer/Bauer, Praxiswörterbuch Europarecht, Wien 2008
Öhlinger/Potacs, EU-Recht und staatliches Recht, Wien 2011
Ranacher/Frischhut, Handbuch Anwendung des EU-Rechts. mit Judikatur (EuGH, VGH, VwGH, OGH), Wien 2009
Ranacher/Staudigl, Einführung in das EU-Recht, Wien 2009
Schroeder, Grundkurs Europarecht, München 2011
Streinz, Europarecht, Heidelberg 2012
Streinz/Ohler/Herrmann, Der Vertrag von Lissabon zur Reform der EU, München 2010
Streinz/Ohler/Herrmann, Der Vertrag von Lissabon zur Reform der EU, München 2010

Selection of leading cases:
ECJ 26.2.2013, Case C-617/10, Åkerberg Fransson (Applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter of Fundamental Rights of the EU [CFR])
ECJ 26.2.2013, Case C-390/11, Melloni (Emphasizing the importance of the principles of “the primacy, unity and effectiveness of EU law” in the context of national authorities and courts implementing the CFR)
VwGH 23.1.2013, 2010/15/0196 (National courts thoroughly obliged to ensure those rights guaranteed by the CFR)
OGH 17.12.2012, 9 Ob 15/12 (Reference for a preliminary ruling concerning the CFR; OJ 2013 C 226/2)
ECJ 27.11.2012, Pringle (EU law does not preclude the conclusion and ratification of the Treaty establishing the European Stability mechanism [ESM] by the Member States whose currency is the euro)
VGH 14.3.2012, U 466/11 etc (CFR rights to be treated in a similar way as fundamental rights guaranteed by the Austrian Constitution)
ECJ 24.1.2012, Case C-282/10, Dominguez (Principle that national law must be interpreted in conformity with European Union law)
ECJ 26.1.2010, Case C-118/08, Transportes Urbanos y Servicios Generales (Expanding case-law concerning Community law [State liability] to EU law)
ECJ 23.10.2008, Case C-157/07, Krankenheim Ruhesitz am Wannsee (Uniform interpretation of the rules of the EEA Agreement and those of the TFEU in the context of the fundamental freedoms)
OGH 17.05.2004, 1 Ob 57/04w (Breach of EU law and nullity according to § 879 [Austrian] General Civil Code [ABGB])
ECJ 19.11.1991, Case C-6/90, Francovich (State liability in the case of breach of EU law)
ECJ 19.1.1982, Case 8/81, Becker (Direct effect of directives)
ECJ 5.2.1963, Case 26/62, van Gend & Loos (Concept of the “the vigilance of individuals concerned to protect their rights”)
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1. Introduction

This manual is designed to give (students on non-legal studies in particular) a brief overview of the European Union (EU) and its laws.

As a result, the manual will not give a comprehensive picture according to a dogmatic structure. Instead, it is designed along a focus point-oriented structure according to the needs of students and – as the case may be – practitioners. However, an overview will also be given in selected places (chapter 3.1. and 4.4.1.) in order to allow for the areas dealt with to be considered in an overall context.

First of all, a general illustration of the EU will be given with the help of a few facts (chapter 2.), before the major “players” (chapter 3.) are dealt with. Chapter 4. focuses on the question under which circumstances the European level is allowed to act and in which fields (so-called sectoral policies) EU law has been issued. This structure is also based on clear examples and is, therefore, not conclusive. Chapter 4. also focuses on the question how EU law is adopted in cooperation between the institutions and the topic of lobbying will also be covered. This is accompanied by a description of the most important principles (chapter 5.), before the very practically important fundamental freedoms are dealt with in chapter 6.

These topics are primarily presented by means of the relevant documents and chapter 6. on the fundamental freedoms by means of the case-law of the Court of Justice of the EU (ECJ). As the European search facility for these documents is relatively simple, chapter 7. will demonstrate in short, how for example the sources mentioned in this manual, can be searched for on the EU homepage.

Certain redundancies will highlight any important aspects once again (for example, in chapters 6.8. and 6.9.), while cross-referencing will make overall-understanding that bit easier.

All wording in this manual should be understood as gender-neutral.

For their help in translating and/or proof-reading, the author thanks Ms Rebecca Hutchinson (on the 1st edition) and Mr Brian Galvin (1st to 3rd editions). Nevertheless all mistakes made are those of the author.

The author also thanks the “Publications Office of the EU” (especially Mr Tommaso Materossi) for the kind support and help in answering several questions concerning the new EUR-Lex version.
(especially concerning the transitional period from the old to the new EUR-Lex version).

2. Facts and history

2.1. Historical developments

2.1.1. Schuman-Plan

At the beginning of European integration there was the plan of the then French foreign minister, Robert Schuman, to establish a long-lasting reconciliation between the two long-term rivals, France and Germany. This plan proposed joint control of the French and German coal and steel production: at the time the most important materials for the armaments industry. This joint control should be independent from the will of the Member States (in other words, “supranational”). As a result of this, future wars should be prevented. This supranational institution, once known as the so-called “High Authority”, is known today as the European Commission. In remembrance of this plan presented by Schuman on 9th May 1950, Europe day is celebrated on 9th May every year.

By the time of the founding of the European Coal and Steel Community in 1951, Italy, Belgium, the Netherlands and Luxemburg had already joined alongside France and Germany.

2.1.2. Accessions

Denmark, the United Kingdom (UK) and Ireland joined in 1973. Greece followed in 1981 and Spain and Portugal in 1986. The former German Democratic Republic never officially joined, but was “integrated” into the Federal Republic of Germany instead in 1990.

On 1st January 1995 Austria, Sweden and Finland joined the EU. Austria had already been a member of the European Economic Area (EEA) since January 1994, and for that reason certain aspects of EU law had already been implemented in Austria at that time. Norway was supposed to join in 1995 as well, but the Norwegian population spoke out against it in a referendum.

In 2004 the ten Central and Eastern European Countries (CEEC), the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined the EU (for the transi-
tional measures in terms of the free movement of workers see chapter 6.5).

2007 saw the accessions of Romania and Bulgaria and on 1st July 2013, Croatia joined the EU.

Currently, other countries such as Iceland, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey are EU candidate countries.

A candidate country, which wants to become a full Member of the EU, has to fulfill the following criteria (so-called Copenhagen criteria) (confer also Art 49 EU-Treaty [TEU; to be mentioned immediately]):

- Political criterion: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,
- Economic criterion: existence of a functioning market economy,
- Legal criterion: taking over all of EU law (so-called acquis communautaire)
- and the Union’s capacity to absorb new members.

2.1.3. Treaty revisions

It is not just in the way of accessions that important revisions are made to the founding treaties, for example the allocation of seats in the European Parliament or the weighting of votes in the Council (also see chapter 4.3.4.) etc. By means of so-called Intergovernmental Conferences, the Treaties are continuously adjusted to any interim needs (like, for example, new fields of activity) (confer also Art 48 TEU).

In the institutional field the European Parliament was gradually strengthened (especially by means of the introduction and expansion of the scope of the ordinary legislative procedure, formerly: co-decision procedure; see chapter 4.3.1.). In the Council unanimity was gradually replaced by qualified majority voting (see chapter 4.3.4.).

- 1986 saw the first revision in terms of the Single European Act. This introduced the Single Market concept (an area without internal borders, in which the fundamental freedoms are ensured; see chapter 6.) and broadened the task areas on
the European level to include, for example, environment policy (for these sectoral policies, see chapter 4.2).

• The Treaty of Maastricht (the treaties are named according to the place where they are signed) established the European Union in 1992 and with it the concept of Citizenship of the Union (which shall be “additional to and not replace national citizenship”). In addition, the Economic and Monetary Union (EMU) and, for example, the following sectoral policies were introduced: trans-European networks, (TEN), industry, consumer protection, education.

• The Treaty of Amsterdam in 1997 primarily saw changes to the institutional structure of the EU in order to account for the growing number (then 15) of Member States and to prepare the EU for future challenges.

• The Treaty of Nice in 2001 tried to prepare the EU for the upcoming enlargement. This was done in particular through extension of the scope of qualified majority voting and introduction of the double majority in the Council (see chapter 4.3.4.).

• In the meantime the integration process had run out of steam. So the Treaty establishing a Constitution (signed in 2004) tried to raise the process of integration to a new level. Particularly due to its name (“constitutional”) and because some Member States feared a European super state it was rejected and finally failed in two referendums in France and the Netherlands.


  – The coexistence of the two international organisations of the European Community (EC) according to the so-called Temple model (see also the 1st edition of the published German version) on the one hand and the (old) EU on the other hand were abolished. The new EU remains, which is why the corresponding Treaty is called TEU (new) (TEU). The EC-Treaty (TEC) was also renamed in the Treaty on the Functioning of the European Union (TFEU). The basic provisions can be found in the TEU, while further details can be attained in the TFEU. N.B. According to Art 1
Paragraph (para.) 2 TFEU, the TEU and the TFEU have “the same legal value”.  

- **Evidence:** Due to its minor importance the European Atomic Energy Community (OJ 2012 C 327/1), which still exists as its own international organisation, will not be dealt with in the following.  
- In comparison with the Treaty establishing a Constitution, certain delicate areas in particular were eased. The term “constitution” was dropped again. Also state symbols such as flag, anthem etc were removed and the Charter of Fundamental Rights of the EU (CFR) was not formally integrated into the Treaties. **N.B.** According to Art 6 para. 1 TEU, the CFR “shall have the same legal value as the Treaties” (OJ 2007 C 303/1), therefore the decision not to integrate it into the Treaties was a purely (!) symbolic one. **N.B.** In the meantime, the CFR has been extensively applied by the ECJ in its case-law, however, due to the limited extent of this course manual, all those details cannot be dealt with; just see ECJ 26.2.2013, Case C-617/10, Åkerberg Fransson, and the rest of the judgments indicated at the beginning of this course manual).  
- The (less user-friendly) procedure was also maintained to revise the old Treaties again instead of creating a new document altogether. As a result, the Treaty of Lisbon amended the Treaty on European Union (TEU [old]) as well as the EC-Treaty (TEC).  
- The Treaty of Lisbon brought an added value through the introduction of a catalogue in terms of the vertical distribution of competencies in order to make clear in which areas the EU and in which areas the Member States are responsible (chapter 4.1.) for decision-making (chapter 4.3.).  
- The Treaty of Lisbon allows for the possibility of withdrawal from the EU for the first time with Art 50 TEU.  
- The content changes concern not just the institutions (see chapter 3.), but also the fields of activity of the EU. The Treaty of Lisbon added the following sectoral policies: European space policy, energy, tourism, civil protection and administrative cooperation (see chapter 4.2.).  
- Lisbon did not make any content changes concerning the fundamental freedoms (chapter 6.).
**N.B.** These amendment treaties do not replace, as mentioned before, the founding treaties (TEU, TEC), but revise their content instead (the Constitutional Treaty, on the other hand, would have replaced the founding treaties). For that reason, the provisions, for example, are not found in the Treaty of Lisbon, but in the TEU instead (as amended by the Treaty of Lisbon). In order to be spared the long process of piecing together the founding treaties in the framework of all the revisions, **consolidated** (in other words, unofficial; the counterpart would be officially codified) **versions** of the TEU and TFEU are published in the Official Journal (see also question 8 in chapter 7 concerning practical research).

### 2.2. Significance of the EU

The EU currently consists of 28 Member States. In total, it comprises a **surface area** of approximately 4.3 million km². This means, the EU is around half the size of the People’s Republic of China (approximately 9.3 million km²) and, accordingly, the United States of America (USA; approximately 9.2 million km²), but is bigger than Japan (approximately 0.4 million km²).

The population of the EU comprises around 508 million people. As a result, the EU is not even half the **population** size of China (approximately 1.3 billion), but outnumbers the USA (approximately 314 million), Russia (approximately 143 million) and Japan (approximately 127 million).

In terms of **gross domestic product**, the ranking (valid as of 2011) of the EU and the previously mentioned countries (in Euros billion) is as follows: EU (12,600), followed by the USA (10,800), China (5,200), Japan (4,200) and Russia (1,300). From an economic point of view, this Union of 28 Member States represents a significant power, but in foreign policy less so. Data source: http://europa.eu/abc/euslides/index_en.htm (sourced 12.8.2013).

A challenge, which becomes apparent with the 28 Member States, is the fact that there are 24 equally **official languages** united in the EU. Documents of general importance like the Official Journal (OJ) of the EU or the European Court reports are published in all 24 languages. Also the information and documents at the website of the EU are normally available in these 24 languages. **N.B.** The more specialized a topic is, the greater the probability that its content is only available in English, French and/or German (for how to perform a search, see chapter 7.).
These 24 languages are also applied to the ECJ (one talks in this context of the language of a case). If, for example, a national court asks the ECJ for a preliminary ruling (see chapter 3.5.), the case language is that of the relative national court.

The working languages appropriate to the institutions are, on the other hand, mostly English and French (ECJ).

According to Art 24 para. 4 TFEU every citizen of the Union (for the Citizenship of the Union see chapter 5.6.) may write to any of the institutions or bodies in any of the 24 official languages and has the right to an answer in the same language.

3. Institutions

3.1. Overview

There are several institutions acting within the framework of the (new) EU. The Union’s institutions (Art 13 TEU) are the European Parliament, the European Council, the Council (of Ministers), the European Commission, the Court of Justice of the EU, the European Central Bank and the Court of Auditors.

Further explanations will concentrate on those institutions which play an important role in the legislative process (Commission, Council [of Ministers] and Parliament) as well as the European Court of Justice. Only an overview will be given of the remaining institutions.

- The European Council (Art 15 TEU; Art 235 and 236 TFEU) consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. This institution defines the general political directions, but is not involved in the legislative process. The Treaty of Lisbon introduced the function of a President. He chairs the European Council (but not the Council [of Ministers]; see chapter 3.3.). The first president elected was the Belgian, Herman van Rompuy.

N.B. The European Council must not be confused with the Council of Ministers (see chapter 3.3.) and the Council of Europe (International Organisation which elaborated the European Convention on Human Rights).
• The European Central Bank (Art 282 to 284 TFEU) based in Frankfurt am Main is responsible for interest rates. Its main task is to ensure price stability in the Euro-zone.
• The Court of Auditors (Art 285 to 287 TFEU) is in charge of the economic control whereas the ECJ is in charge of the legal control.
• The Economic and Social Committee (ESC) consists of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas. The Committee of the Regions consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly. Both of them exercise only advisory functions (Art 300 to 307 TFEU) within the legislative process.
• The European Investment Bank (Art 308 and 309 TFEU) shall grant loans and give guarantees which facilitate the financing of projects for developing less-developed regions or, for example, projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.
• EU citizens can address themselves to the European Ombudsman (Art 228 TFEU) concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies (with the exception of the Court of Justice of the EU acting in its judicial role).
• A number of specialised and decentralised EU agencies have been established to support the Member States in tasks of a legal, technical and/or scientific nature, such as the European Food Safety Authority in Parma, the European Aviation Safety Agency in Cologne, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in Alicante and the European Union Agency for Fundamental Rights in Vienna.

3.2. European Commission

The European Commission (Art 17 TEU; Art 244 TFEU to 250 TFEU) promotes the general interest of the Union. This fact is also reflected in its composition, whereby the Commissioners must be completely independent. In other words, they are not allowed to act
in the interests of the Member State from which they come. For example, the former Austrian agriculture commissioner Fischler was not allowed to act in the interests of Austrian (mountain) farmers. Notwithstanding, a Commissioner represents an important connection between a Member State and “Brussels administration” (compare also OJ 2007 C 306/254).

At the moment the Commission consists of one national of each Member State, thus 28 Commissioners. They are appointed by the European Council with approval of the Parliament (OJ 2010 L 38/7). N.B. According to the Treaty of Lisbon, there could be a reduction in the number of Commissioners as from 1st November 2014 (Art 17 para. 5 TEU), however, the European Council – for the time being – has abstained from such a reduction (OJ 2013 L 165/98).

According to its function as a “motor of integration” the Commission has the right of initiative. Therefore, in principle, every new project at the European level has to be launched by a Commission’s proposal (for example, the proposal for a Council Regulation on the statute for a European private company, COM[2008] 396 final 25.6.2008).

The European Commission also promotes the interests of the EU by monitoring the proper application of EU law. Acting as a “guardian of the Treaties”, the Commission brings Member States who have failed to fulfil their obligations to account at the ECJ by means of so-called infringement proceedings (for example, the Commission brought Austria before the ECJ and Austria was finally condemned for discrimination against foreign students by means of unfair conditions of access to university education; ECJ 7.7.2005, Case C-147/03, Commission/Austria).

3.3. Council

The Council (of Ministers) (Art 16 TEU; Art 237 to 243 TFEU) represents the interests of the different Member States, which is also reflected in its composition. The Council consists of one representative of every Member State (minister or state secretary). Depending on the different topics discussed, different persons meet. For example, when discussing environmental affairs the Austrian environment minister meets his 27 colleagues etc. In total, there are ten such Council configurations, such as Economic and financial affairs, Competitiveness (internal market, industry, research and
space), Agriculture and Fisheries, etc (see OJ 2009 L 315/47; OJ 2009 L 325/51; OJ 2010 L 263/12).

At the national level, the ministers are part of the executive power. Even if they have not been elected directly at the European level the Council exercises (jointly with the European Parliament) legislative functions.

At the beginning, only the Council made decisions while Parliament was merely consulted. Nowadays, as a rule, those two institutions decide (so-called ordinary legislative procedure, see chapter 4.3.1.) as equal partners.

The question of decision making is of great importance in the Council, which normally is done by qualified majority (see also chapter 4.3.4.).

Every six months, a new Member State chairs the Council (for the order compare OJ 2009 L 322/28, rectified in OJ 2009 L 344/56). The presidency is in charge of representing the Council, drawing up the agenda and chairing the meetings. It is therefore possible, to a certain extent, for the relevant Member State to decide its focus. In order to guarantee more continuity in its work, the Council’s “Rules of Procedure” (OJ 2009 L 325/35; as amended by OJ 2013 L 183/11) provide so-called 18-month programs (comprising three presidencies); compare, for example, the program of the Irish, Lithuanian and Greek Presidencies (Council document 17426/12).

3.4. European Parliament

Finally, the European Parliament (Art 14 TEU; Art 223 to 234 TFEU) represents the interests of EU citizens, which is also reflected in its composition. The Parliament is composed of representatives of the Union’s citizens, elected every five years.

The Treaty of Lisbon sets a maximum number of 751 representatives (including the president) from the Member States. Unlike the TEC, it does not attribute a fixed number of seats to each Member State. The representation of citizens shall be progressively proportional, with a minimum threshold of six members per Member State and a maximum number of ninety-six seats. N.B. The current Parliament (for an overview see Fig. 1: Members of the European Parliament in chapter 4.3.3.) has been elected according to the old legal basis of the Treaty of Nice (for the relevant adjustments until
the end of the 2009-2014 parliamentary term see OJ 2010 C 263/1 and OJ 2012 L 112/26).

As mentioned above, the institutional position of the Parliament has been continually strengthened in the course of European development and, in the majority of cases, it decides according to the **ordinary legislative procedure** together with the Council on an equal footing.

### 3.5. Court of Justice (of the European Union)

**N.B.** The institution, the “Court of Justice of the European Union” (Art 19 TEU; Art 251 to 281 TFEU) comprises the “Court of Justice”, the “General Court” and “specialised courts”. According to the customary abbreviation from before the Treaty of Lisbon, “ECJ” will be primarily used to refer to the “Court of Justice”.

Unlike the other institutions mentioned so far (Commission, Council and Parliament), the ECJ does not represent any interests. It is in charge of **legal control** (and the Court of Auditors in charge of economic control).

**N.B.** The Treaty of Lisbon increases the ECJ’s competencies (compare also the press release 104/09, available at [http://curia.europa.eu](http://curia.europa.eu)), amongst others concerning the **Charter of Fundamental Rights of the European Union**, which is now legally binding. However, the CFR cannot be invoked against the UK and Poland, which are covered by derogations; it had been planned that the Czech Republic should also be covered by a similar derogation. The Lisbon Treaty has also given the ECJ competence of reviewing the legality of acts of the European Council (Art 263 TFEU). Some restrictions still remain concerning the ECJ’s competencies in terms of the Common Foreign and Security Policy (CFSP) (Art 275 TFEU), partly also concerning the area of freedom, security and justice (Art 276 TFEU).

The Court of Justice consists of one **judge** from each Member State (i.e. 28 since the accession of Croatia; confer OJ 2013 L 184/6). This is important insofar as different legal systems (like, for example, the common law system in the UK and the civil law system in Austria) are united in the EU as well as in the ECJ, even though the TEU requires “persons whose independence is beyond doubt”. The judges are appointed for six years by common accord of the governments of the Member States. Every three years, there is a partial
replacement of the judges in order to guarantee the continuity of its jurisprudence.

In several procedures (Art 19 para. 3 TEU) the ECJ oversees the legality of the activities of the institutions (review of legality and infringement for the failure to act). The ECJ also gives preliminary rulings on the interpretation of EU law or the validity and interpretation of acts adopted by the institutions.

This preliminary ruling procedure is a form of collaboration between national courts and the ECJ. A national court applying EU law can refer the question to the ECJ asking for the “validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”. In Austria, for example, the Austrian Code of Business and Industry (“Gewerbeordnung”, GewO; Bundesgesetzblatt [Federal Law Gazette, BGBl] 1994/194), prohibits the selling of certain goods from door to door. So the Austrian High court in civil matters (“Oberster Gerichtshof”, OGH), asked the ECJ, whether Art 28 TEC (now Art 34 TFEU) is to be interpreted in a way that this Austrian law is against the free movement of goods (ECJ 13.1.2000, Case C-254/98, TK-Heimdienst; see also chapter 6). Even if these procedures have the disadvantage of lasting 15.7 months on average (in 2004 at least 23.5 months) (ECJ Annual reports 2008 and 2012), they form an important instrument in the development of EU law according to a bottom-up principle. In 2012, more than 60 % of all new as well as completed cases were preliminary ruling procedures (ECJ Annual report 2012).

The judgements of the ECJ which becomes apparent due to the numerous references to it throughout this course manual, is of particular significance for the continual development of EU law. Numerous EU law definitions (for example, the definition of a good or an employee where the fundamental freedoms are concerned; see chapter 6.3.) are not found in the TFEU, but occur instead in the numerous judgements of the ECJ.

A function, which is not common to many Member States including Austria, is the so-called “Advocate General” at the ECJ (currently nine advocates general, confer OJ 2013 L 179/92). Their task is to present reasoned submissions on cases in open court, acting with complete impartiality and independence. In this way, they present their points of view on certain cases and suggest a particular solution to the ECJ. The significance of these reasoned submissions lies in the fact that they are usually more detailed than the judgements of
the ECJ and the latter follows these judgements in approximately 80–90% of cases. However, neither the ECJ nor the national courts are “bound either by the Advocate General’s Opinion or by the reasoning on which it is based” (ECJ 22.9.2011, Case C-323/09, *Interflora*).

4. Legislation (Competencies, fields of activity and procedure)

4.1. *Vertical distribution of competencies*

Sometimes the EU is criticised for not acting sufficiently or, in some cases, not at all regarding certain fields. Obviously this criticism is unjustified, if the EU is not even responsible in this field. Apart from this, in the case of a new project at the European level, the question has to be addressed, whether the EU is actually competent in this field. In legal terms, this raises the question of the *vertical distribution of competencies* between the 28 Member States on the one hand, and the EU on the other.

The basic principle is simply as follows. Originally the Member States had competence for all fields (health, trade etc). In the course of time, the Member States have transferred more and more competencies to the EU in different treaty revisions (see chapter 2.1.3.). According to the so-called *principle of conferral* (Art 5 para. 2 TEU), the relevant articles of the TEU and TFEU ascertain, whether the EU can take action at all. If this is the case, those articles also indicate rules concerning the relevant circumstances, such as competent institutions, necessary majorities and the relevant legal act.

For the first time, the Treaty of Lisbon has explicitly provided rules concerning the *vertical distribution of competencies* between the EU and the Member States in the Treaties (Art 2 TFEU).

In the case of an *exclusive* competence (Art 3 TFEU; for example, customs union, establishing of the competition rules, common commercial policy), only the EU may pass legislative acts. The competencies are *shared* between the EU and the Member States in terms of the internal market, social policy, agriculture, environment, consumer protection etc (Art 4 TFEU). The EU only has competence to *support, coordinate and supplement*, for example, in the following areas: public health, culture, education and vocational
training (Art 6 TFEU): in these fields a harmonisation of national law is explicitly excluded (Art 2 para. 5 subparagraph 2 TFEU).

Ex-Art 47 para. 2 TEC (now Art 53 para. 1 TFEU) stated, amongst others, that “the Council shall, acting in accordance with the procedure referred to in Article 251 [co-decision procedure, now ordinary legislative procedure, see chapter 4.3.1.], issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons”. It was in particular based on this legal provision that for the liberalisation of cross-border services, the so-called services directive (Directive 2006/123/EC on services in the internal market, OJ 2006 L 376/36) was issued.

Similarly, for other cases, other articles especially of the TFEU provide concrete legal bases for the EU to take action in other fields. There is, for example, no specific article in the TEU/TFEU for the question, whether the EU has competence for roaming tariffs. Nevertheless, this does not mean that the EU cannot issue legal provision in this context.

Therefore, in practice, one very important legal basis is Art 114 TFEU (ex-Art 95 TEC) on the approximation of laws in the internal market. According to this article the Parliament and the Council, “acting in accordance with the [already mentioned] ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

For instance, the following legislation has been adopted based on Art 114 TFEU (respectively on ex-Art 95 TEC):

- Directive 2000/84/EC on summer-time arrangements (OJ 2001 L 31/21),
- Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps (OJ 2012 L 86/1),
- Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union (OJ 2012 L
In the case of the just mentioned roaming-regulation, the pre-condition of the “functioning of the internal market” will be apparent.

On the other hand, if it is not the objective of a certain directive (for example, Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003 L 152/16; referred to from here on as tobacco-directive) to foster, but, by contrast, to prohibit (!) the cross-border trading of certain products (for example, tobacco), then one could assume that this directive cannot be based on Art 114 TFEU (ex-Art 95 TEC). However, the ECJ has dismissed Germany’s action against the tobacco-directive and has confirmed ex-Art 95 TEC (now Art 114 TFEU) as being the appropriate legal basis also for this directive and its prohibition of advertising and sponsorship in respect of tobacco products (ECJ 12.12.2006, Case C-380/03, Germany/Parliament and Council).

Art 168 TFEU explicitly excludes “any harmonisation of the laws and regulations of the Member States” in public health (for further details see chapter 4.2.). Nevertheless, Parliament and Council have adopted a cross-border patient-mobility directive, also due to this case-law of the ECJ.

Apart from Art 114 TFEU (ex-Art 95 TEC), there is another legal basis with a similar function, the so-called gap-filling clause of Art 352 TFEU (ex-Art 308 TEC). 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 (principle of conferral) 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. N.B. The Parliament now has to consent, whereas before the entry into force of the Treaty of Lisbon it was only consulted.

For example, the so-called supranational companies have been adopted on the legal basis of Art 308 TEC (now Art 352 TFEU). N.B. The term “supranational” refers to the fact that they are created
at the European level, above the level of the Member States. For example, the European Public Company (Regulation [EC] 2157/2001 on the Statute for a European company [SE], OJ 2001 L 294/1; referred to from here on as SE-regulation), which requires a minimum capital of € 120,000 and is only available for cross-border activities. Furthermore, the European Cooperative Society (Regulation [EC] 1435/2003 on the Statute for a European Cooperative Society [SCE], OJ 2003 L 207/1) requires a minimum capital of € 30,000 and also presupposes cross-border activities. There are plans (Proposal for a Council Regulation on the statute for a European private company, COM[2008] 396 final 25.6.2008; SPE) for a European Private Company (with limited liability), which should also be based on Art 352 TFEU (ex-Art 308 TEC). However, according to the Commission, the SPE does not require cross-border activities and the minimum capital is quite low (€ 1).

Apart from approximation of laws in the internal market (Art 114 TFEU, ex-Art 95 TEC) and the gap-filling clause (Art 352 TFEU, ex-Art 308 TEC) there will be a brief overview of the traditional fields of activity of the EU.

4.2. Excursus: sectoral policies

The policies of the EU, divided into certain sectors, are grouped under the term sectoral policies; in other words, their areas of activity. The following is a simple overview on the basis of some noteworthy examples.

- **Common Foreign and Security Policy (CFSP) (Art 23 ff TFEU)**

As the Temple structure of the old EU, as mentioned in chapter 2.1.3., was dissolved by the Treaty of Lisbon, the CFSP (as the former second pillar of the Temple) is, from now on, a sectoral policy of the EU as well. Nevertheless, some specifics of the CFSP (regulated as the only single policy in the TEU and not in the TFEU) exist. The first High Representative of the Union for Foreign Affairs and Security Policy since the entry into force of the Treaty of Lisbon was the Briton Catherine Ashton (Art 18 TEU).

In the way of Operation Atalanta, the EU, for example, is cracking down on piracy off the Somali coast (Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33).
- **Agriculture (Art 38 ff TFEU)**
  Agricultural policy, with its direct payments and subsidies, still accounts for a significant part of the EU budget.

- **Area of Freedom, Security and Justice (Art 67 ff TFEU)**
  The existing third pillar of the Temple model (Police and Judicial Cooperation in Criminal Matters; PJCC) from before the entry into force of the **Treaty of Lisbon** now becomes, after an already partially successful conversion through the Treaty of Amsterdam, supranational as far as possible.

  The PJCC demonstrates itself in, for example, the so-called “spill-over” effect, whereby integration expands from one area to other areas. Due to the “unlimited” free movement of Union citizens, the need for cooperation in terms of criminal proceedings becomes apparent (Framework Decision 2002/584/JHA on the **European arrest warrant** and the surrender procedures between Member States, OJ 2002 L 190/1). However, infringements, for example, against traffic regulations can also be enforced cross-border (Framework Decision 2005/214/JHA on the application of the principle of mutual **recognition** to financial **penalties**, OJ 2005 L 76/16).

  In terms of immigration policy measures (Art 79 TFEU), Directive 2009/50/EC regulates, for example, the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ 2009 L 155/17); also referred to as a **Blue Card** in imitation of the American Green Card, and Directive 2011/98/EU provides for a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343/1).

  Even if the name does not necessarily suggest it, important legal acts for economic life are also encompassed by this area (judicial cooperation in civil matters, Art 81 TFEU), which answer, for example,

  - the question of **applicable laws** in cross-border cases (Regulation [EC] 593/2008 on the law applicable to contractual obligations [Rome I], OJ 2008 L 177/6; and Regulation [EC] 864/2007 on the law applicable to non-contractual [particularly damages and unjustified enrichment] obligations [Rome II], OJ 2007 L 199/40),
• as well as the question (to be answered separately) of the competent court (Regulation [EC] 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1).

- Transport (Art 90 ff TFEU)

In terms of transport, the important transport infrastructure cost directive (Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures, OJ 1999 L 187/42) regulates the issue of an acceptable toll; an issue which for some regions, for example Tyrol, is a very important one.


- Competition, Taxation and Approximation of Laws (Art 101 ff TFEU)

In terms of competition law, (a) with respect of private companies, issues such as cartel law (Art 101 TFEU; for example, the Commission fined E.On and GDF Suez € 553 million each for market-sharing in French and German gas markets; compare IP/09/1099), abuse of a market-domination position (Art 102 TFEU; for example € 1.06 billion on Intel for engaging in illegal anticompetitive practices to exclude competitors from the market for computer chips; compare IP/09/745) as well as merger control (Regulation [EC] 139/2004 on the control of concentrations between undertakings [the EC Merger Regulation], OJ 2004 L 24/1; for example in depth investigation of the proposed takeover of Austrian Airlines by Lufthansa; compare IP/09/1065 and OJ 2009 C 114/12) are dealt with.

In terms of competition law, (b) in the public field, state aids (Art 107 TFEU; for example authorisation of the Austrian “bank support scheme”; compare OJ 2009 C 172/3), as well as the public
**procurement law** (transparent allocation of contracts by the public for the coverage of its supplies and services needs; compare, for example, Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114) are to be named.

In terms of **tax law**, the Council (according to Art 113 TFEU unanimously) decides about the harmonisation of so-called indirect taxes (for example, turnover taxes, excise duties etc). For example, Directive 2009/55/EC (OJ 2009 L 145/36) regulates the question of tax exemptions applicable to the permanent transfer of an individual’s personal property from another Member State.

The “approximation of laws” also mentioned in this Title (VII) of the TFEU was already dealt with in chapter 4.1.

- **Economic and Monetary Policy (Art 119 ff TFEU)**

Besides a customs union (abolition of the internal tariff and introduction of a common customs tariff in relation to countries outside the EU) and the establishment of a common market (for the fundamental freedoms, see chapter 6.), European integration also encompasses a **monetary union** as a subsequent step in terms of integration.

In particular, this encompasses the irrevocable regulation of the exchange rates as well as the introduction of a common currency (Euro). The so-called **convergence criteria**, as follows, are an important step towards this: low rate of inflation, government deficit under 3 % of the gross domestic product (GDP) and government debt under 60 % of GDP, observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System and low long-term interest-rate levels.

Some EU Member States still have not introduced the **Euro** (for example, Lithuania, Denmark, Bulgaria, Poland, Romania, Sweden, the Czech Republic, Hungary, Croatia and the UK). In exchange, some third-country states are entitled to use the Euro as their official currency (for example, Monaco, San Marino, Andorra and the Vatican City State). Estonia has adopted the Euro on 1 January 2011 (OJ 2010 L 196/24), Latvia, on 1 January 2014 (OJ 2013 L 195/24).

Due to limited space, the European stability mechanism (ESM) will not be dealt with any further (see ECJ 27.11.2012, Case C-370/12, Pringle).
• **Employment (Art 145 ff TFEU)**

Even if the goal of full employment is established in the TEU, the Member States are primarily responsible for it.

• **Social policy (Art 151 ff TFEU)**

Union citizens who, due to the free movement of workers, have the right to work in other Member States (see chapters 5.6. and 6.) raise, inter alia, the issue of the recognition of social security qualifying periods. For this reason, the social security systems of the Member States were coordinated in matters relating to the following benefits: sickness, maternity and paternity, invalidity, old-age, accidents at work and occupational diseases as well as in the case of unemployment (compare Regulation [EC] 883/2004 on the coordination of social security systems, OJ 2004 L 166/1; and the implementing Regulation [EC] 987/2009, OJ 2009 L 284/1).

Art 157 TFEU establishes the basic principle of equal pay for male and female workers for equal work or work of equal value. This regulation not only has a programmatic character, but has a direct effect. In other words, Union citizens can directly rely on it (see also chapters 4.4.3. and 5.2.). This provision obligates not only the legislator, but also, for example, the parties involved in any collective wage agreement (ECJ 7.2.1991, Case C-184/89, Nimz).

• **Education, Vocational Training, Youth and Sport (Art 165 f TFEU)**

This policy covers both vocational training (Art 166 TFEU) and education (Art 165 TFEU). Union action in the latter aims not only at developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States, but also to encourage student (study abroad semester) and teacher (teaching staff exchange) mobility. The legal basis for the relevant programs in this field – Comenius (school education), Erasmus (higher education), Leonardo da Vinci (vocational training) and Grundtvig (adult education) – is Decision 1720/2006/EC establishing an action programme in the field of lifelong learning (OJ 2006 L 327/45).

• **Culture (Art 167 TFEU)**

In terms of culture policy, the Union only provides a contribution (!) to the development of the cultures of the Member States. The concept of European Capital of Culture should be mentioned in this context, which is based on Decision 1622/2006/EC and which
establishes Community action for the promotion of the European Capital of Culture event for the years 2007 to 2019 (OJ 2006 L 304/1). The nomination right alternates between the Member States. In 2017, Denmark (Aarhus) and Cyprus (Paphos) will have this nomination right, in 2018 Malta (Valetta) (OJ 2013 L 162/9).

- **Public health (Art 168 TFEU)**
  The health sector is a good example of how the text of primary law, accorded by the Member States, is further developed in practice by the ECJ. According to Art 168 TFEU, Union action shall respect the responsibilities of the Member States in the definition of their health policy and in the organisation and delivery of health services and medical care. Harmonisation of the laws and regulations of the Member States is excluded (!) and the activities of the Union are limited to the support, coordination or supplementation of the actions of the Member States.

  Nevertheless, the ECJ has developed a right of patient mobility (for example ECJ 28.4.1998, Case C-158/96, Kohll) based on the (passive) freedom of services (see chapter 6.3.). Even in the case of no prior authorisation of the relevant social security insurance for a medical treatment in another Member State, patient mobility includes the right to a reimbursement of expenses up to the rates of the Member State of affiliation. In other judgements, the ECJ has allowed the Member States, in the case of hospital treatments (and in the case of medical treatment requiring the use of major medical equipment; ECJ 5.10.2010, Case C-512/08, Commission/France), to ask for prior authorisation, not, however, in outpatient cases (for example ECJ 12.7.2001, Case C-157/99, Smits and Peerbooms). In order to ensure legal certainty in terms of patient mobility, despite the already mentioned (chapter 4.1.) harmonisation ban, the Commission has suggested a directive (Proposal for a Directive of the European Parliament and of the Council on the application of patients’ rights in cross-border healthcare, COM[2008] 414 final 2.7.2008; for the legislative procedure, see chapter 4.3.), which finally has been adopted in March 2011 (Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare, OJ 2011 L 88/45).

- **Consumer protection (Art 169 TFEU)**
  Numerous questions dealt with in terms of the Austrian Federal Act Governing Provisions to Protect Consumers (BGBI
1979/140, “Konsumentenschutzgesetz”, KSchG) occur in the implementation of various directives such as:

- the question, in particular regulated in § 3 KSchG, concerning the right of renunciation in cases of [doorstep selling](Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31; referred to from here on as doorstep selling directive),

- the question, in particular regulated in § 5a to 5i KSchG, concerning the conclusion of [distance contracts](Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; referred to from here on as distance contract directive),

- the question, regulated in § 6 KSchG concerning illegal provisions of business [general terms and conditions](Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993 L 95/29),

- or the issue, regulated in § 9 KSchG (respectively in §§ 922 ff Allgemeines Bürgerliches Gesetzbuch, [Austrian General Civil Code, JGS 1811/946; ABGB], of [warranty rights](Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12).

The new [Directive on Consumer Rights](Directive 2011/83/EU, OJ 2011 L 304/64) repeals the first two (85/577/EEC and 97/7/EC), and amends the last two directives (93/13/EEC and 1999/44/EC).

Also in the [Federal Act Against Unfair Competition](BGBl 1984/448, “Gesetz über den unlauteren Wettbewerb”, UWG), numerous regulations can be found which implement, among others, the following directives:

- Directive 2005/29/EC concerning [unfair business-to-consumer commercial practices](OJ 2005 L 149/22; referred to from here on as unfair commercial practices directive)


In other laws, noteworthy examples can also be found of the implementation of directives where consumer protection is concerned:
• Directive 2008/48/EC on credit agreements for consumers (OJ 2008 L 133/66) amongst others in the Consumer Credit Act (BGBl I 2010/28; “Verbraucherkreditgesetz”),

In the context of consumer disputes, the EU has recently adopted a Directive on alternative dispute resolution (ADR; Directive 2013/11/EU, OJ 2013 L 165/63) and a Regulation on online dispute resolution (ODR; Regulation [EU] 524/2013, OJ 2013 L 165/1).

For two case studies from the area of consumer protection see below in chapter 4.4.3.

- Trans-European Networks (TEN) (Art 170 ff TFEU)

Provisions in terms of infrastructure are not just essential for the free movement of goods. This policy includes, as a result, the establishment and development of the trans-European network in the areas of transport, telecommunications and energy infrastructure.

The general rules for the granting of Community financial aid in the
The projects with priority in this area, like, for example, the Brenner tunnel, were decided upon in Decision 661/2010/EU on Union guidelines for the development of the trans-European transport network (OJ 2010 L 204/1 [121]).

- **Industry (Art 173 TFEU)**
  Numerous Commission proposals are designed according to the needs of small and medium enterprises (SME; compare the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, OJ 2003 L 124/36). This focus emphasises, for example, the so-called Small Business Act (Communication from the Commission, “Think Small First”, COM[2008] 394 final 25.6.2008). The separate SPE has already been mentioned in context (chapter 4.1.; see also below chapter 4.3.2.).

- **Economic, Social and Territorial Cohesion (Art 174 ff TFEU)**
  Particularly in terms of this policy, the differences in the stages of development of the different regions in the 28 Member States shall be diminished by means of different funds. This financial solidarity should, therefore, also contribute to economic integration. The Treaty of Lisbon focuses on rural areas as well as mountain regions among others.

- **Research and Technological Development and Space (Art 179 ff TFEU)**

  The European space travel policy was launched by the Treaty of Lisbon. This policy, in particular, aims at promoting industrial competitiveness.
Environment (Art 191 ff TFEU)
The previously mentioned Brenner base tunnel concerns not only the trans-European network, but also environment policy. Currently, with such a project, the environmental effects are checked before approval is given. The legal basis on the European level is Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26/1).

In terms of chemical substances, for example, the so-called REACH regulation, should be mentioned: Regulation (EC) 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2007 L 136/3).

Energy (Art 194 TFEU)
During the colder seasons, the issue of energy supply security is particularly relevant, which the new Art 194 TFEU introduced by the Treaty of Lisbon names as one of its goals. Therein, the solidarity between the Member States in this area is also consolidated.

Tourism (Art 195 TFEU)
Also newly introduced by the Treaty of Lisbon was the responsibility of the Union, though only supportive, coordinative and, as the case may be, complementary, concerning business competitiveness in this area.

Civil protection (Art 196 TFEU)
The same thing applies to civil protection for the prevention of natural catastrophes or those caused by man.

Administrative Cooperation (Art 197 TFEU)
The administrative cooperation policy was also introduced by the Treaty of Lisbon as a supportive, coordinative and supplementary responsibility. Activities in this area may include facilitating the exchange of information and of civil servants as well as supporting training schemes.

Common Commercial Policy (Art 206 f TFEU)
As already mentioned, the customs union includes a customs abolition in internal affairs and the agreement of a common customs tariff in external affairs. Furthermore, the common commercial policy includes the conclusion of customs and trade agreements, export policy as well as trade defence instruments, for example in the case of dumping and subsidies.
Other policies concerning the Union’s External Action
(Art 205 and Art 208 ff TFEU)

The Treaty of Lisbon has (besides the common commercial policy) combined several policies such as development cooperation (Art 208 ff TFEU), economic, financial and technical cooperation with third countries (Art 212 f TFEU), the new chapter on humanitarian aid (Art 214 TFEU) and others among the fifth part of the TFEU (the Union’s external action). These policies will not be looked at in any greater depth.

4.3. Legislation in detail

4.3.1. Procedure

Even though it is not the only legislative procedure within the EU, in the following, the decision making process will be illustrated in relation to the ordinary legislative procedure (Art 294 TFEU), due to its practical significance. N.B. The Treaty of Lisbon has renamed the former “co-decision procedure” (ex-Art 251 TEC) and describes it in a more user-optimised way – but has not changed it substantially in terms of content. However, as the name already indicates, it will be applied more often and thus its significance is strengthened.

If a legal basis, as for example, Art 114 TFEU (ex-Art 95 TEC; approximation of laws in the internal market) refers to this Art 294 TFEU (ex-Art 251 TEC), then Parliament and Council act as “legislators” on an equal footing.

In the following, this decision making process will be described less in terms of the inter-institutional cooperation of the institutions (see, for example, also the inter-institutional agreement on better law-making, OJ 2003 C 321/1), but rather from the perspective of praxis and the following two questions: which institutions have which extent of influence concerning content and when will the legal act be adopted. Many times, for example, the media reports that the European Parliament has adopted a legal act, whereas, in reality, this was “first reading” (which will be explained in the following pages) only.

N.B. Apart from the final adoption of a legal act it might be that the latter enters into force only after a certain period of time (so-called “vacatio legis”), which makes it easier to get accustomed to this new legal act. For example, the above mentioned SE regulation was

- After the Commission has submitted a proposal (the Commission’s right of initiative as so-called “motor of integration”), the Parliament adopts its position in **first reading** (in terms of a so-called “legislative resolution”).
- If the Council does not approve the amendments proposed by the Parliament, the Council adopts (in its **first reading**) its position (formerly: “common position”).
- Then the Parliament again deals with this legislative project (in **second reading**) within a timeframe of basically three months (in terms of a so-called “recommendation”). Parliament can either reject the Council’s position by a majority of its component members (this is rarely the case, so, for example, in the context of the Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, COM[2002] 92 final 20.2.2002; see OJ 2006 C 157E/265). On the contrary, if Parliament (only) proposes amendments (and the Council does not accept them in its **second reading**), then the “toing and froing” between Council and Parliament comes to an end. Also in the case of the Council, the timeframe for this second reading basically comprises three months.
- In this case, a **Conciliation Committee**, consisting of members of Parliament and Council, is convened. The Commission takes part in the Conciliation Committee’s proceedings. The Conciliation Committee, within six weeks of its being convened, has the task of reaching agreement on a joint text. Both Council and Parliament can allow this project to fail.
- Otherwise, Parliament and Council (in a **third reading**) have a period of six weeks from that approval in which to adopt the act in question.

**N.B.** The periods in this proceeding can be extended by a maximum of one third in each case.

**Summary**

*Summing up*, one could – in simple terms – speak of two “rounds” (readings) in both the Parliament and the Council, before the Conciliation Committee is convened. Earlier agreement is always possible. Apart from the political level, which might be difficult to appraise, one can at least roughly estimate when (from the date of the Commission’s proposal) a legislative project will be adopted.
From a statistical perspective, it is only seldom the case that all of the levels mentioned will be passed. During the period of July 2009 to December 2011, for example, “[n]early 78% of the files were concluded at first reading and a little over 18% at second reading (of which 7% at early second reading)” (see the current Activity report of the delegations to the Conciliation Committee, available on the following website: http://www.europarl.europa.eu/code/default_en.htm).

Apart from the just-mentioned ordinary legislative procedure and its described course of action, there is also a special legislative procedure (Art 289 para. 2 TFEU). For the latter there is no similarly determined course of action. It can rather be characterised by a modification (by the miscellaneous articles of the TFEU, according to the already mentioned principle of conferral) of the institutions’ interaction in different ways (for example unanimity instead of qualified majority voting in the Council; Parliament is only consulted).

As already mentioned, the legal basis for the plans to create a European limited liability company (SPE with a minimum capital of €1 only) was the so-called gap-filling clause (Art 308 TEC, now Art 352 TFEU). According to this provision the Council made the decisions (after proposal of the Commission), while the Parliament was merely consulted. The Parliament’s position is now strengthened, as it has to consent.


The Treaty of Lisbon also established a contribution of the national parliaments in the EU’s decision making process (compare Art 12 TEU). National parliaments have to be informed, and can express their views during the decision-making process (OJ 2007 C 306/148 ff). After a legislative act has been adopted, an action may be filed by them at the ECJ in the case of a breach of the principle of subsidiarity (OJ 2007 C 306/150 ff).

4.3.2. Commission

At the beginning of every projected legislative act at the European level stands, as a rule of thumb, a Commission’s proposal, both in ordinary legislative procedures and in others. As mentioned above,
the Commission is the “motor of integration” due to its **right of initiative**.

This right of initiative is important in terms of two different aspects. On the one hand, it is up to the Commission to decide if and **when** a proposal for a projected legislative act is presented (question of necessity). In the case of the already mentioned SPE, the Commission was hesitant for a long time, probably due to the long and difficult genesis of the SE, and was asked several times (even under the threat of an infringement proceeding) by the Parliament to act. (N.B. In principal, the Commission cannot be forced in terms of an infringement proceeding to present a proposal; compare Gellermann, in Streinz 2012, 2473.)

On the other hand, it is up to the Commission to shape the **content** of the relevant legislative project. The significance of the Commission’s proposal should not be underestimated, even though in the end it has to be adopted by Parliament and Council (in several readings) and certainly can be amended by them. N.B. When certain lobbying groups want to influence a new project, the best and easiest way is probably to concentrate on the first proposal of the Commission and not on the amendments of the latter.

The following **case study** (concerning the already mentioned SPE) will demonstrate how the assessment of the necessity and the shaping of the content take place in practice.

- In this context the Commission financed a **feasibility study** (which was then presented in 2005), in the course of which 2,147 enterprises were consulted in all 25 Member States (at the time).

- The Commission also made use of the so-called European Business Test Panel (EBTP; N.B. In the meantime, this panel has been merged with another one, and the relevant page can now be found here: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/listening-to-smes/index_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/listening-to-smes/index_en.htm)).

  With those **consultation mechanisms**, the Commission gets feedback on the possible positive or negative impact of a new legislative project. In terms of the SPE, for example, 56.1% of companies consulted, answered the question on the usefulness of an SPE in the affirmative (timeframe of the EBTP in terms of the SPE: 3.10. to 5.11.2007).

- The Commission’s consultation mechanism is not restricted to enterprises. Also via the internet **everyone** has the oppor-
tunity to express their opinion on new proposals to the Commission (http://ec.europa.eu/yourvoice/index_en.htm). Concerning the SPE (timeframe: end of July to 31st October 2007) a majority was in favour of “maximum flexibility” (compare IP/07/1146, and http://ec.europa.eu/internal_market/company/docs/epc/consultation_report.pdf), which was taken into account by the Commission in its proposal.

- On 10th March 2008, the Commission also organised a conference in order to get some input from different experts (compare IP/08/411, and http://ec.europa.eu/internal_market/company/epc/conference_en.htm).
- It is then up to the relevant Directorate General (DG) of the Commission (in this case DG Internal Market and Services) to shape the content of the proposal, before the college of Commissioners decides on it (Proposal for a Council Regulation on the statute for a European private company, COM[2008] 396 final 25.6.2008).

**Decision making** within the Commission is not very spectacular. Decisions are taken by a majority of its members (Art 250 para. 1 TFEU).

Concerning the Commission’s right of initiative, the Treaty of Lisbon introduces a new aspect, (the so-called citizens’ initiative), as at least one million citizens who are nationals of a significant number of Member States (7 out of 28), can invite the Commission to submit an appropriate proposal (Art 11 para. 4 TEU). The necessary details are entailed in Regulation (EU) 211/2011 on the citizens’ initiative (OJ 2011 L 65/1); further information can be found at the following page: http://ec.europa.eu/citizens-initiative/public/welcome?lg=en.

### 4.3.3. Parliament

The contribution of the European Parliament (cooperating with the Council) has already been mentioned. It can be supposed that decision making in a national Parliament (in terms of political compromises between the different political parties) is well known. In terms of the European Parliament, there is an interesting difference as the level of the political parties is not the only one. In the 7th parliamentary term (2009 to 2014) the composition of the European Parliament appears as follows:
As one can see from this overview, besides the political parties, there is also the level of the Member States. So it might be the case that...
that, in terms of environmental standards, northern Member States have different points of view than southern ones.

In the Parliament, decision making is not very spectacular either, as, in principal, decisions are passed by a majority of the votes cast (Art 231 TFEU).

4.3.4. Council

By contrast, in the Council, the issue of decision making is a very complex one.

- One possibility would be to pass all decisions by majority of the Member States (simple majority, thus at the moment 15 out of 28). However, this is only rarely the case (for example, according to Art 240 para. 3 TFEU concerning the adoption of its Rules of Procedure). The reason for not choosing the simple majority more often is simply the fact that in this case neither population numbers nor the geographical size (and therefore often the political standing) of a country would be taken into account.

- Also, unanimity (consent of all members) would not be a good solution either as one single Member State could obstruct the unification process with his veto right (for example, according to Art 19 TFEU concerning the adoption of secondary legislation in order to combat discrimination, and according to Art 342 TFEU concerning the rules governing the languages of the institutions of the Union).

- Except where otherwise stated in the Treaties, the Council acts by qualified majority (Art 16 para. 3 TEU). The complexity (compare even more OJ 2009 L 314/73) of the system (described in the following only in a simplified way) reflects how important decision making is for the Member States.

  - Until 31st October 2014 a certain number of votes are attributed to each Member State according to its size etc. Therefore, for example, larger Member States (Germany, France, Italy and the UK) have 29 votes each, Bulgaria, Austria and Sweden ten votes each and Malta, for example, has three votes. In total, this amounts to 352 votes. A qualified majority needs 260 out of these 352 votes. This corresponds to approximately 74 %. Therefore, a British minister, with 29 votes, by raising his hand could “tip the scales” more than, for example, an Austrian minister, who
has just ten votes. Besides a (qualified) majority of these weighted votes the Treaty also requires a majority of the Member States (thus 15 out of 28). Therefore, this system is referred to as a “double majority”. The Treaty provides for special quorums, in the case of the Council not acting on a proposal from the Commission (the above mentioned right of initiative of the Commission acting as a “motor of integration”).

- In principal, as of 1st November 2014, a qualified majority is defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union (for numbers of the total population of each Member State see OJ 2013 L 16/16 and OJ 2013 L 183/11). Also in this case there is a special quorum where the Council does not act on a proposal from the Commission (72 % of the members of the Council and 65 % of the population of the Union).

4.3.5. **Excursus: Lobbying**

The European Commission defines the term lobbying as “all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions” (compare the Green Paper – European transparency initiative, COM[2006] 194 final 3.5.2006, 5). In this context this term is also often referred to the picture of the “lobby” of the English Parliament, where certain groups tried to influence the parliamentarians before the voting took place.

The term lobbying is seen as a negative one in many countries (as, for example, in Austria), whereas the Commission has a more differentiated approach and also recognizes a possible valuable input.

According to estimations of the European Parliament (OJ 2009 C 271 E/48), there are about 15,000 individual lobbyists and 2,500 lobbying organisations in Brussels.

Where should lobbying start most appropriately? As mentioned before, it might make most sense already to influence the content of the Commission’s proposal. The underlying principle will be well known: Influencing the further discussion in a significant way can be achieved by being the first to draft a proposal, whereas all the
others might have the need to border their position with regard to this first proposal.

Also the European Parliament will be the object of lobbying activities in the context of its afore-mentioned influence in the ordinary legislative procedure. Especially the relevant rapporteur, who drafts the report which then has to be voted in plenary, might be of interest for lobbyists.

As mentioned before, the relevant Ministers meet in the Council. Therefore, besides the relevant working groups in Brussels (and the country holding the presidency; see chapter 3.3.) also the national governmental departments will be a target group of lobbyists.

Even though lobbying is also perceived as something positive, Brussels is aware of possible risks. Therefore the European Parliament and the Commission have established a common “Transparency Register”, which is freely available via the internet (http://europa.eu/transparency-register/index_en.htm). This common register covers all activities “carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions”. Thus, a very wide definition which excludes only certain activities concerning the provision of legal and other professional advice, certain activities of the social partners etc.

Those two institutions have also set up a Code of conduct, which imposes certain obligations on lobbyists. They always have to identify themselves, shall not obtain or try to obtain information dishonestly, and have to insure that information, which they provide, is complete, up-to-date and not misleading. Furthermore, they shall, for example, not induce EU staff to contravene rules and standards of behaviour applicable to them.

Non-compliance with the code of conduct may lead to suspension or removal from the register and withdrawal of the badges affording access to the premises of the European Parliament.

The European Council and the Council are reluctant to join this register, even though they “are invited” to do so.
4.4. Sources of law

4.4.1. Overview

The following chapters will focus on these sources of law which are of special importance in practice: the regulation and the directive (both secondary law). Moreover, a short overview will mention other sources of law in the context of the EU.

One of the objectives of the Treaty of Lisbon was to reduce the number of different sources of law. Accordingly, the following overview is relatively short.

- **Primary law** comprises all sources of law, which are created and amended by all Member States. This includes the TEU, the TFEU, as well as all modifications (for example, accession treaties and treaty revisions; see chapters 2.1.2. and 2.1.3.).

  **N.B.** Therefore, for example, the Treaty of Lisbon could only enter into force after all (!) Member States had ratified it.

- **Secondary law** comprises all sources of law which are created and amended by the institutions (for decision-making see chapter 4.3.). This also includes, for example, recommendations and opinions, which both have no binding force and also decisions, such as, for example, the mentioned Decision on Union guidelines for the development of the trans-European transport network.

  **N.B.** According to the Treaty of Lisbon, the “legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior [therefore, the majority of the legal acts mentioned in this course manual] to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties” (OJ 2007 C 306/163).

4.4.2. Regulation

A regulation has general application (Art 288 para. 2 TFEU). In other terms, it regulates an undefined number of cases in an abstract way. Therefore, for example, the already mentioned roaming-regulation applies for all mobile operators within the EU. Unlike a directive, (which will be explained in the following pages) a regulation is binding in its entirety (!) and therefore does not have to be
**Fundamentals of European Union Law**

**transposed** into national law. A regulation is directly applicable in all Member States. Therefore, from the perspective of a citizen, EU regulations have effects similar to national law. The roaming-regulation, for example, introduces caps on roaming prices. Therefore, on the one hand, mobile operators have to adhere to these tariffs, and, on the other hand, the customers can directly rely on it (even though it has not been adopted by the Austrian Parliament).

### 4.4.3. Directive

By contrast, a **directive** (Art 288 para. 3 TFEU) does not directly affect individuals. Figuratively speaking, the national legislator stands between the directive (for example, the already mentioned doorstep selling directive), which has been adopted at the European level, and the individual. In legal terms, the directive has to be **transposed** into national law; that is to say, the national Parliament has to adopt (one or several) laws (at the Federal or regional level) (for example, § 3 KSchG). Member States are bound, “as to the result to be achieved”. Nevertheless, from their perspective, the flexibility (choice of form and methods) in the concrete implementation maintains a certain advantage.

Directives always indicate a certain **time limit for transposition.** It should be as short as possible and not exceed two years (OJ 2003 C 321/4).

In this context the term **“golden platting”** refers to a practice which is often criticised by the economy. Golden platting implies that, when transposing a directive, the national legislator adopts standards which are more (!) stringent than the directive would require. It is up to the relevant directive whether this is legally possible; for example, the new Directive on Consumer Rights now basically provides a concept of full harmonisation. If the directive does not undertake a full harmonisation, a Member State can adopt more stringent laws.

In the following two **case studies,** this concept will be explained in the context of consumer protection (compare chapter 4.2.):

- In a Belgian case, the question was whether a so-called “combined offer” from **Total Belgium** (free breakdown services for a period of three weeks with every purchase of at least 25 litres of fuel) was possible, even though, according to national law, it was forbidden. The unfair commercial practices directive (which in Austria, as mentioned above, has been transposed in the UWG) in an annex lists commercial
practices, which are in all circumstances unfair. However, combined offers are not referred to in that annex. As the ECJ states, “the Directive fully harmonises those rules at the Community level”, and therefore “Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection.” (ECJ 23.4.2009, Case C-261/07, Total Belgium). Consequently, the national prohibition of combined offers could not legally be applied to Total Belgium.

• Mr Scarpeelli, purchasing an Audi A4 1900 TD, signed a credit contract with a bank. As the vehicle had still not been delivered to him after having made 24 monthly repayments, he ceased making monthly repayments to the bank. As the car dealership was declared insolvent, Mr Scarpeelli claimed reimbursement from the credit bank of the amount already paid by way of monthly instalments. According to national law, this was possible. In this context, the ECJ states that Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42/48) “prescribes minimal harmonisation in matters of consumer credit” and therefore, “Member States are [...] free to lay down rules which are more favourable to consumers.” (ECJ 23.4.2009, Case C-509/07, Scarpeelli). Consequently, Mr Scarpeelli could claim back reimbursement of the sums already paid to the grantor of the credit.

Sanctions

Individuals (natural and legal persons) can derive rights from provisions of EU law (see chapter 5.2.). For a directive (unlike a regulation) to take effect against individuals, it is necessary for the Member State, as mentioned above, to adopt national provisions which then can take effect in favour of or against the individual. If a directive entitles individuals vis-à-vis the State (for example, tax advantages based on the Sixth Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes, OJ 1997 L 145/1; now OJ 2006 L 347/1), the Member States’ motivation to transpose the directive (in due time) might be low. Clearly, this situation would be unsatisfactory as, on the one hand, the individual would be deprived of his rights and, on the other hand, the malpractice of the State would be unsanctioned.

In order to secure the individual’s rights ensured by the directive and, at the same time, sanction the behaviour of the defaulting
Member States, the ECJ has developed the so-called **direct effect** of directives (in particular ECJ 19.1.1982, Case 8/81, *Becker*), whereby an individual in the case mentioned can directly rely on the directive.

The **preconditions** therefore are the following:

- The relevant directive (and the relevant article) must be formulated in a sufficiently clear way so that the case in question can be solved based on these provisions (in other words, it must be **directly applicable** or “self-executing”). The following example will demonstrate this: Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283/23; now OJ 2008 L 283/36) required the establishment of so-called guarantee institutions (in Austria, the “Insolvenz-Engelt-Fonds” according to § 13 of the Austrian Law on the Guarantee of Salaries in the Event of Insolvency, “Insolvenz-Entgeltsicherungsgesetz”, BGBl 1977/324). The provisions of this directive were considered to be “sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee”. However, the directive did “not identify the person liable to provide the guarantee”. Consequently, as the Member States had a “broad discretion with regard to the organization, operation and financing of the guarantee institutions”, Mr *Francovich* could not rely on this directive, which had not been transposed in Italy (ECJ 19.11.1991, Case C-6/90, *Francovich*; for State liability see chapter 5.5.).

- Another precondition is that the directive, as mentioned before, has **not** been transposed at all (as in this case) or has been implemented **wrongly**.

- Last but not least, the directive must **entitle** the individual (in this case, the workers’ rights against the guarantee institutions to be established).

The ECJ has concretised this last aspect as follows. On the one hand, this, however, does not work the other way round, in other words, the Member State against an individual. The reason for this is the already mentioned idea of sanctioning the Member State. Therefore, for example, a public prosecutor in a criminal proceeding cannot rely on a directive (in the case of said directive not having...
been transposed into national law) against an individual (no direct effect of inculpatory directives).

On the other hand, individuals cannot rely on a directive against other individuals. For example, an individual who bought a book on his/her doorstep cannot rely on the right of renunciation, according to the above mentioned doorstep selling directive, against the seller, in the case of said directive not having been transposed into national law (therefore no right of renunciation according to national law).

Directives do not have a horizontal effect between individuals, but only in the mentioned case between individuals against the State (vertical cases).

However, particularly in these cases, there is a compensating principle (from the point of view of the individual), whereby national law has to be interpreted in the light of a directive. If, for example, it is unclear how to understand a certain term in the Austrian E-Commerce Act, the interpretation of this term has to take place according to the already mentioned E-Commerce-Directive. The principle is called that of directive-conform interpretation (see also Fig. 7 in chapter 7.).

The ECJ has expanded this principle step by step, so that today one can say that the entirety of national law has to be interpreted in the light of the entirety of EU law (EU law conform interpretation). Just trying to solve a case according to national law will, therefore, not be enough. This is especially so, because a national law does not only have to be interpreted in the light of the directive which it transposed into the national legal order. Also, directives adopted after (!) the relevant laws have to be taken into account when solving the case. Without going into too much detail (confer ECJ 4.7.2006, Case C-212/04, Adeneler; or, more recently, ECJ 24.1.2012, Rs C-282/10, Dominguez), it can be said that in particular in the above mentioned horizontal cases, this directive-conform interpretation, in the end, comes quite close to a horizontal effect, which has been rejected by the ECJ. Another compensation principle can be the so-called State liability (see chapter 5.5.).

N.B. The Treaty of Lisbon has tightened possible sanctions against a Member State which has failed to fulfil its obligation to notify measures transposing a directive (adopted under a legislative procedure) (Art 260 para. 3 TFEU; see also the documents at http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm).
5. Principles of EU law

N.B. The principles, which are presented here, were developed by the ECJ basically in the area of Community Law, before the Treaty of Lisbon dissolved the Temple model. Already before the Treaty of Lisbon, the ECJ had extended some principles to the whole Temple (compare Ranacher/Frischhüt 2009, 31). In the meantime, the ECJ has widely applied these principles to all of EU Law (for example, in the field of State liability [see chapter 5.5.]: ECJ 26.1.2010, Case C-118/08, Transportes Urbanos y Servicios Generales). For this reason, terminology has been adapted accordingly in the following format (apart from quotations).

5.1. Primacy

The importance of EU law becomes particularly apparent when it conflicts with national law. In other words, a conflict of content ensues in the synopsis of both. For example, there was, on the one hand a ban in the Austrian GewO on the sale of refrigerated goods from door to door. On the other hand, the TFEU stipulates the free movement of goods in Art 34. If, after examination of this case, (see also the judgement of the ECJ 13.1.2000, Case C-254/98, TK-Heimdienst in terms of the fundamental freedoms in chapter 6.) an infringement against the TFEU is found to exist, the practical consequences must be considered.

The ECJ had already developed a solution to that relatively early on and it can be summarised in one sentence: EU law (ECJ 8.9.2010, Case C-409/06, Winner Wetten) in its entirety has primacy over the entirety of national law. This basic principle was made all the more concrete as follows:

- EU law has primacy over national law, no matter whether the latter was issued before or after EU law (ECJ 9.3.1978, Case 106/77, Simmenthal). When European integration is conducted seriously, this is doubtlessly the compelling solution. Otherwise, Member States could simply undo their European obligations with a national law later on.

- EU law has primacy over any national law in its entirety, whether it concerns basic law or constitutional law. N.B. If that were not so, Member States could get around EU law relatively easily. The highest level of Constitutional law in
Austria are the so-called basic principles (“Bauprinzipien”) of the Austrian constitutional structure (whereas Austria is a democracy, a federal state and a republic, guaranteeing fundamental rights, the separation of powers and the rule of law). The question of whether EU law also has primacy over these constitutional principles is debatable. The ECJ has decided in favour of primacy also over constitutional principles (ECJ 17.12.1970, Case 11/70, *Internationale Handelsgesellschaft*).

- Even if – with primacy even over Constitutional law – a lay person would most likely not wonder about this topic, the primacy over individual concrete legal acts (for example, decisions made by administrative bodies, legal judgements) is still a partly non-clarified one in EU law (compare Ranacher/Frischhut 2009, 379 ff).

- The primacy of EU law is also valid for private legal agreements. For example, the already mentioned “prohibition on discrimination between men and women [for Art 157 TFEU see chapter 4.2.], applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals” (ECJ 8.4.1976, Case 43/75, *Defrenne*). This primacy extends, as previously mentioned, to EU law (which in the concrete case is directly applicable; see also chapter 4.4.3.) in its entirety. Therefore, besides the prohibition of discriminations (see chapter 5.6. of the TFEU, secondary law is to be observed in private legal agreements as well. An example is, that agreements concluded by mobile providers have to adhere to a maximum tariff set out in the previously mentioned roaming-regulation. N.B. As a result, according to the case-law of the already mentioned Austrian OGH, an infringement of EU law can be assessed as a so-called “Gesetzeswidrigkeit” (lawlessness) according to § 879 ABGB. Therefore, an agreement breaching a legal provision (or public morality) is void (OGH 17.05.2004, 1 Ob 57/04w).

- The primacy of EU law is a so-called primacy in application (ECJ 22.10.1998, Case C-10/97, *IN.CO.GE.’90*; ECJ 19.11. 2009, Case C-314/08, *Filipiak*). Consequently national law, which is against EU law, may not be applied, but EU law does not have the effect of rendering that rule of national law non-existent. Therefore it is still an integral part of the Austrian legal system. The previously mentioned provision of the
Austrian GewO, which is against the free movement of goods, thus may not be applied with regard to other EU Member States due to this ECJ judgement. Yet it still may be applied in two other situations. On the one hand with regard to third-countries and on the other hand in purely internal cases, that is, if there is no crossing of a border, and consequently the fundamental freedoms do not apply (see chapter 6.6).

- Irrespective of that, the Member States – for the reasons of transparency, bear an obligation to remove from their domestic legal order any provisions incompatible with EU law (see ECJ 2.7.1996, Case C-290/94, Commission/Greece). In the same way, for example, § 53a para. 2 GewO, which has been declared to be against the free movement of goods in Case TK-Heimdienst, has been removed (BGBl I 2000/88).

Unlike the Constitutional Treaty, the Treaty of Lisbon has not integrated the principle of primacy into the Treaties, but has “banished” it to a declaration concerning the provisions of the Treaties (OJ 2007 C 306/256). Still, this fact has a purely (!) symbolic significance and it does not affect the case-law mentioned so far.

5.2. How EU law affects EU citizens

Relatively early on, the ECJ developed the principle, whereby individuals could be entitled by the Treaties (in terms of rights), but can also be bound by the Treaties (in terms of obligations).

- Therefore, the company TK-Heimdienst can, for example, rely on the (directly applicable; see also chapter 4.4.3.) free movement of goods (see chapter 6.) in order to counter national law (for example § 53a para. 2 GewO).

- On the other hand, a company can, for example, according to competition law, be obliged to pay a fine (up to € 553 million of fines against E.On and GDF Suez as mentioned in chapter 4.2.).

N.B. Apart from EU law, it is, in the context of other international organisations, rather unusual to address citizens directly. Traditional Public International Law (for example United Nations Law) primarily addresses States, which then, on a secondary level, oblige citizens. In EU law, on the contrary, Member States as well as Union citizens are directly affected.
On the one hand, this principle is the result of various provisions of EU law (for example, the Citizenship of the Union according to Art 20 ff TFEU, ex-Art 17 ff TEC). On the other hand, this concept had already been developed early on by the ECJ. From the perspective of the ECJ “the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted [...] to the diligence of the Commission and of the Member States” by means of infringement proceedings (ECJ 5.2.1963, Case 26/62, van Gend & Loos). An individual, who bases himself on a right conferred by EU law, therefore benefits not only himself, but also the enforcement and effective application of EU law (for the efficiency principle, see chapter 5.5).

5.3. Application of EU law

As a rule, EU law is not, as might be presumed, applied by the EU (especially the Commission) itself. This is, for example, the case in terms of state aids, trade policy, and the economic and monetary policy.

N.B. Two aspects always have to be distinguished, the question of who is competent to issue new laws on the one hand, and the question of who is competent to apply those laws on the other hand.

As a rule, EU law is applied decentralized by the Member States. This form of application might be difficult insofar as EU law (with its provisions and principles) encounters the relevant national law in each of the 28 Member States. In the engagement between both legal systems, several challenges can arise (compare Ranacher/ Frischhut 2009).

It might be obvious that from the perspective of both EU law and EU citizens the question of interaction between EU law and national law cannot be left to national law. For this reason, the ECJ developed, for the purposes of the enforcement of EU law, the principles of uniformity on the one hand and of equivalence and effectiveness on the other (which will be explained in the following pages).

The latter are reiterated by the ECJ in settled case-law as follows: “The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States” (ECJ 7.1.2004, Case C-201/02, Delena Wells), provided that they are not “less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively
difficult to exercise rights conferred by EU law (principle of effectiveness)" (ECJ 18.3.2010, Case C-317/08, Alassini).

5.4. Principle of uniformity

According to this principle, all concepts of EU law must be uniformly applied and interpreted. It is clear that a varying understanding in the 28 Member States could, in the meantime, lead to distortion of competition.

This principle in particular is also important, as the 24 official languages previously mentioned, are applied in the EU with its 28 Member States. Apart from the differing legal conditions, centrifugal tendencies could also result from this language diversity.

In terms of the practical research of accessing EU archives (see chapter 7.), due to their availability in (almost always) all 24 official languages, someone will almost always choose the document in their mother tongue. Nevertheless, the other versions are not to be disregarded. If one version is unclear (but even if one version “considered on its own, is clear and unambiguous”), “it is settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages” (ECJ 17.7.1997, Case C-219/95 P, Ferriere Nord/Commission).

- The principle of uniformity also ensures that, as mentioned, according to the principle of EU law conform interpretation, Member States must interpret the entirety of their national law in a manner consistent with the entirety of EU law (see chapter 4.4.3.).
- Also primacy (see chapter 5.1.) is very important for the uniformity of EU law and is to be looked at in this context.
- In addition, it is of practical significance, that all terms and definitions of EU law are not determined by national courts (or administrative authorities), but centrally by the ECJ (also see in the context of the fundamental freedoms below in chapter 6.3.).

5.5. Principle of effectiveness (including State liability)

Solving legal cases might “be all Greek” to a lay-person. Knowing the principles behind the solution to each and every case makes finding the (hopefully) correct answer easier. Where the solution of (legal) cases is concerned, one can, in theory, proceed in either a
more dogmatic or a more pragmatic way. The ECJ prefers to follow – contrary to national courts in most Member States – a pragmatic approach.

The following example (see also chapter 4.4.3.) should clarify this. If an individual suffers damage, it is an accepted basic principle that this individual (on the presentation of certain conditions such as illegality, fault and causality) is compensated. Mr Francovich suffered financial damage as his employer went bankrupt and Italy had not transposed the mentioned directive for the protection of the employee against employer bankruptcy into national law early enough.

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The TFEU only provides for the liability of the Union, its servants and the European Central Bank (Art 340 TFEU). One can rather safely assume that the Member States consciously did not envisage any provisions concerning their own liability in the case of an infringement of EU law (for example, a directive not being implemented in due time). If it had decided in a dogmatic way, the ECJ would have had to come to a solution, whereby Mr Francovich would have had no entitlement to compensation against the Italian state. Without being able to support itself on a corresponding legal basis of EU law, the ECJ developed “the principle whereby a State must be liable [State liability] for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible” (ECJ 19.11.1991, Case C-6/90, Francovich).

The ECJ establishes this principle as follows: “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.” Especially if an individual will only be entitled if a Member State has fulfilled his obligation to act, the principle of effectiveness requires the liability of a Member State, in the case of him not complying with his duties.

In conclusion, this principle requires that the provisions of EU law must be applied and interpreted in a way that the effectiveness of EU law can be guaranteed.
Apart from State liability, the **effectiveness principle** has led to numerous (!) developments of EU law by the ECJ, of which only a few important examples should be mentioned:

- The **direct effect of directives** (possibility for the individual to rely on a directive, under certain preconditions, against the Member State), which has already been mentioned (in chapter 4.4.3.), has been developed by the ECJ on the following grounds: “Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the **effectiveness** of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and if national courts were prevented from taking it into consideration as an element of Community law” (ECJ 19.1.1982, Case 8/81, Becker).

- Also the already mentioned concept of individuals as “guardians of EU law” (see chapter 5.2.) is based on the idea of the effective enforcement of EU law. As already mentioned, “the vigilance of individuals concerned to protect their rights amounts to an **effective supervision** in addition to the supervision entrusted [...] to the diligence of the Commission and of the Member States” (ECJ 5.2.1963, Case 26/62, van Gend & Loos).

- Based on a similar concept, the ECJ has decided that the full effectiveness of EU anti-trust-law “would be put at risk if it were not open to any [...] individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”; so-called “**private enforcement**” (ECJ 20.9.2001, Courage/Crehan). In this context, see also the Commission’s proposal for a directive “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”, COM(2013) 404 final 11.6.2013.

- In terms of the **fundamental freedoms**, the principle of effectiveness was the reason to also bind sports associations (apart from the Member States) to the fundamental freedoms (see chapter 6.7.). In this context the ECJ has decided as follows: “In those circumstances, the nationality clauses cannot be deemed to be in accordance with [the free movement of workers], otherwise that article would be deprived of its
practical effect and the fundamental right of free access to employment [for professional football players] which the Treaty confers individually on each worker in the Community rendered nugatory” (ECJ 15.12.1995, Case C-415/93, Bosman).

5.6. Principle of equivalence

A topic, which is still heavily discussed in Austria, is that of the so-called preferential rates for locals, whereby Austrians (sometimes also only locals living in the immediate vicinity) pay lower tariffs than foreigners at, for example, mountain railways. This unequal treatment contradicts the prohibition of discriminations (expressed positively: principle of equal treatment or principle of equivalence).

As previously mentioned, in the context of the application of EU law, national procedural provisions, deadlines etc may not be less favourable for European cases than for similar national cases.

Art 18 TFEU (ex-Art 12 TEC) provides for a general prohibition of discriminations, whereby “within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. As a result, not just so-called direct discriminations on grounds of citizenship, but also so-called indirect discriminations are covered. The latter category, even if in fact ostensibly ties in with neutral criteria (for example residence), in the end also leads to the same result, being a discrimination of foreigners.

- For example, a registration fee in Belgium which is only imposed on foreign students has been assessed by the ECJ to be an infringement of the general prohibition of discriminations (ECJ 13.2.1985, Case 293/83, Gravier).
- Another example illustrates the prohibition of discrimination. A drunk Austrian lorry driver and a German (found to be in possession of a type of knife that is prohibited) were not allowed to have their criminal proceedings conducted in German, even though this possibility existed for German speaking Italians being resident in that area (South Tyrol). According to the ECJ (ECJ 24.11.1998, Case C-274/96, Bickel and Franz), this constitutes an indirect discrimination according to Art 12 TEC (now Art 18 TFEU).

The clause “without prejudice to any special provisions” already indicates that there are also special prohibitions of dis-
criminations, apart from this general principle. They are found, for example, in the fundamental freedoms (see chapter 6.8.) and, in principle, precede Art 18 TFEU (ex-Art 12 TEC).

Irrespective of Art 18 TFEU (ex-Art 12 TEC), another provision of the TEC (now TFEU) in the context of the prohibition of discriminations has become more and more important in recent years. According to Art 17 TEC (now Art 20 TFEU), Citizenship of the Union, as already mentioned, is additional to and does not replace national citizenship. According to Art 18 para. 1 TEC (now Art 20 para. 2 litera a TFEU) every citizen of the Union has “the right to move and reside freely within the territory of the Member States”.

From this right of residence the ECJ has developed a comprehensive non-discrimination concept which exceeds that of Art 18 TFEU (ex-Art 12 TEC) in some areas (for further details, compare Ranacher/Frischhut 2009, 128 ff). According to the ECJ’s case-law “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for” (ECJ 20.9.2001, Case C-184/99, Grzelczyk).

As Art 12 TEC and Art 17 TEC were combined by the Treaty of Lisbon in a single chapter (Art 18 ff TFEU), one can, from now on, act on the assumption of a unified principle.

As the significance of this right derived from Art 18 TEC (now Art 20 TFEU) presumably is not conjecturable with the mentioned wording, it shall be drafted shortly with the help of the following case studies:

- A Belgian provision, whereby the entitlement for unemployment benefit is conditional to a residence clause, is a restriction on the freedoms conferred by Art 18 TEC (now Art 20 TFEU), but can be justified by the need to monitor compliance with the statutory conditions (ECJ 18.7.2006, Case C-406/04, De Cuyper).
- People who only move to another Member State after their occupational activity cannot rely on the freedom of movement of workers (see chapter 6.). Therefore the ECJ has examined the Finnish Law on income tax in the light of Art 18 TEC (now Art 20 TFEU). According to this national
law, recipients of a Finnish retirement pension were treated worse in terms of taxation (tax rate of 35% instead of 28.5%) if their permanent residence was abroad (Spain instead of Finland). Consequently this national law was considered to be a breach of Art 18 TEC (now Art 20 TFEU) (ECJ 9.11.2006, Case C-520/04, Turpeinen).

- A Polish provision, which refuses to pay to its nationals a benefit granted to civilian victims of war or repression solely because they moved to another Member State, was considered to be a breach of Art 18 TEC (now Art 20 TFEU) (ECJ 22.5.2008, Case C-499/06, Nerkowska).
- Art 18 TEC (now Art 20 TFEU) also precludes the authorities of a Member State, in applying national law, from refusing to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth (ECJ 14.10.2008, Case C-353/06, Grunkin and Paul).

As can be recognised with the help of these examples, this interpretation deviates far from Art 18 TEC (now Art 20 TFEU) (EU citizens’ “right to move and reside” freely within the EU).

Going back to the preferential rates for locals mentioned at the beginning of this chapter. In an Italian case (ECJ 16.1.2003, Case C-388/01, Commission/Italy), the ECJ classified a national provision, which stated that only Italian citizens or, as the case may be, those resident in Italy, have free entry into museums, memorials, galleries etc, as an unjustified breach of the general (Art 12 TEC, now Art 18 TFEU) as well as the special prohibition of discriminations in field of the free movement of services. This is not good news for the preferential rates for locals in Austria. Also Art 20 of the services directive (amongst others transposed by the “Dienstleistungsgesetz”, BGBl I 2011/100) opposes directly (citizenship) or indirectly (for example, residency criteria) discriminating preferential rates for locals.

6. Fundamental freedoms

6.1. Positive and negative integration

The practical effect of EU law on national law and, consequently, its significance as well is mirrored on two levels.
On the one hand, European provisions (for the legislative process compare chapter 4.3. and for the sources of law chapter 4.4.) influence natural and legal persons in the Member States. The question concerning to what extent, for example, telecommunications companies are duty-bound to save data without case for suspicion (data retention) arises from the relative directive (Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ 2006 L 105/54). One speaks, in this context, of positive integration, as Austrian law is in this area determined by an EU legal act.

The reverse argument, according to the motto, where there is no directive etc, there would be no duty (for Member States and EU citizens) to adhere to EU law, is not valid. For the question of whether German citizens are allowed to buy property in Tyrol under the same conditions, there is, in fact, no directive. In the search for a legal basis on the national level, one could find, for example, the Tyrolean property transaction law ("Tiroler Grundverkehrsgesetz", LGBl 1996/61; TGVG). On the European level one would not come across any relevant legal act (for the practical research, see chapter 7.). Regardless, the fundamental freedoms of the internal market (in this case, the free movement of capital; for an overview on the fundamental freedoms see chapter 6.2.) are to be adhered to in such a case. Overall, this means that, even if there is no relevant regulation, directive etc in an area, EU law is to be adhered to in this case, in which, for example, the prohibition of discriminations in the free movement of capital fords the degrading of German citizenship. This is called negative integration.

N.B. In the year 2012 approximately one in every five cases completed concerned the fundamental freedoms or Citizenship of the Union (ECJ Annual Report 2012).

6.2. Overview fundamental freedoms

The fundamental freedoms stipulated by the TFEU can be classified according to whether they concern people, products or capital.

The fundamental freedoms related to people can be sub-classified according to two criteria: dependence and duration.

- If someone wants to work abroad as an employed person, they can rely on the free movement of workers (long term employed activity).
• Someone who also wants to work abroad long term, but on a self-employed basis as businessman, can rely on the **freedom of establishment** (long term self-employed activity). Therefore, an Austrian management consultant can open a branch in Germany in order to work the German market.

• If this management consultant only wants to work in Germany for a short period of time, then he can rely on the **freedom of services** (self-employed activity for a short term).

The free movement of goods is a product related fundamental freedom whereby products which are in free circulation in one Member State can freely circulate between the EU Member States. This freedom includes imports, exports, or goods in transit. Consequently a German carrier who, for example, wants to transport goods to Italy can rely on the free movements of goods against the Austrian authorities (refer to ECJ 12.6.2003, Case C-112/00, Schmidberger).

Also, the transfer of capital has been liberalized within the EU due to the **free movement of capital**. As mentioned above, investments in real estate fall within the ambit of this fundamental freedom. That is why national law governing the transfer of land must comply with those requirements. The free movement of payments is – so to say – an annex to the other freedoms. According to this freedom (which is provided in the same chapter), all restrictions (for the ban on restrictions, refer to chapter 6.8.) on payments in relation to the fundamental freedoms shall be prohibited.

### 6.3. Definitions

As mentioned before, the terms used so far (worker, establishment, services, good, capital) have huge **practical consequences**. If the term capital did not include the transfer of land, then, for example, German citizens would not be able to buy real estate in Tyrol (and the relevant Tyrolean law would not have to be amended due to the ECJ judgements again and again). It is obvious that individual interpretations of those definitions at the level of the Member States could not only limit the ambit of the fundamental freedoms (for example, a definition of the term capital excluding the investment in real estate), but could also lead to different definitions in the 28 Member States (for the principle of uniformity refer to chapter 5.4.).

In this regard it is thus vital, that all those terms are defined by only one central institution, which is the **ECJ**.
Therefore, all terms, which open the scope (ratione materiae) of the fundamental freedoms, have to be interpreted in a **broad sense**. Thus, not only investments in real estate fall within the definition of capital. Apart from the classical cases of employees, the following groups of persons can also, for example, rely on the freedom of workers: employers (ECJ 7.5.1998, Case C-350/96, *Clean Car Autoservice*), recruitment agencies (ECJ 11.1.2007, Case C-208/05, *ITC*), professional football players (ECJ 15.12.1995, Case C-415/93, *Bosman*), and also prostitutes (ECJ 18.5.1982, Case 115/81, *Adoui and Cornuaille*).

Other terms like the so-called reasons of justification (chapter 6.9.) limit the ambit of the fundamental freedoms. Therefore, they always have to be interpreted in a **narrow sense**. For example, the concept of public policy, which, amongst other things, enables possible constraints to the freedom of services “must be interpreted strictly” and “may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society” (ECJ 14.10.2004, Case C-36/02, *Omega*).

Where the **free movement of goods** is concerned, under the term “goods”, it states that “there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions” (ECJ 10.12.1968, Case 7/68, Commission/Italy). This term also covers electricity (ECJ 23.10.1997, Case C-158/94, Commission/Italy) and waste (ECJ 9.7.1992, Case C-2/90, Commission/Belgium).

Where the **free movement of workers** is concerned, the essential feature of an employee is “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration” (ECJ 23.3.2004, Case C-138/02, *Collins*). Examples have already been given.

The **freedom of establishment** not only covers establishments of undertakings (so-called **primary** freedom of establishment), but also the setting-up of agencies, branches or subsidiaries (**secondary** freedom of establishment). This, for example, also covers the founding of a pure letterbox company in another Member State (ECJ 9.3.1999, Case C-212/97, *Centros*). The motivation, therefore, might be the lower requirements in terms of the minimum share capital; for example, only €1 instead of €10,000 as in Austria (before 1.7.2013 even €35,000; see BGBl I 2013/109). The freedom of establishment applies in this case, even if this company then only
operates within Austria where it establishes a branch (which de facto would have to be qualified as the main establishment).

Where the freedom of services is concerned, the ECJ has stated that not only the service provider (for example, the Austrian lawyer that advises a client in Munich) can rely on this freedom in another Member State (so-called active freedom of services), but also the service recipient, who moves to another Member State (for example, a citizen from Vienna who gets a haircut in Budapest or the aforementioned cases concerning patient mobility) can rely on the (passive) freedom of services. The same is true if they both (for example, a tour group) cross the border or if only the service itself (for example, radio broadcasting or television) crosses the border.

At this point, some remarks have to be made relating to the question of employment in public administration. This topic of the so-called “official authority exception”, can be summed up by the following question: “Can a civil servant rely on the fundamental freedoms?” The answer, as a rule of thumb, would be yes, as the notion of employee has to be understood in a very broad sense, as mentioned before. Basically, this is the right solution and a very important one as otherwise a Member State could exclude large areas from the scope of the fundamental freedoms by broadly applying the concept of civil servants.

However, there are also “sensitive areas”, such as judicature (judges, public prosecutors, but not lawyers), armed forces, tax administration, the diplomatic corps, ministries, local governments, police etc, where it might make sense to require the nationality of the relevant Member State.

Where the free movement of workers is concerned, the legal basis for excluding certain sensitive areas from the ambit of the fundamental freedoms is Art 45 para. 4 TFEU. According to this article, this fundamental freedom “shall not apply to employment in the public service”. As already mentioned, this idea of public service is interpreted by the ECJ in a very strict sense. The relevant question is whether there is a “direct or indirect participation in the exercise of powers conferred by public law”.

This has been accepted in the examples mentioned above (refer also to OJ 1988 C 72/2) and has been rejected in the following cases:

- In the areas of “research, education, health, transport by land, sea and air, [postal services] and telecommunications, televi-
sion broadcasting, water, gas and electricity distribution services and, finally, music” (ECJ 2.7.1996, Case C-290/94, Commission/Greece).

- Also in the case of a period of service in preparation for the teaching profession (ECJ 3.7.1986, Case 66/85, Lawrie Blum).

N.B. Rules similar to the mentioned Art 45 para. 4 TFEU in the area of the free movement of workers can be found in Art 51 TFEU for the freedom of establishment and in Art 62 TFEU in conjunction with Art 51 TFEU for the freedom of services.

6.4. Beneficiaries

Who can rely on these fundamental freedoms? As mentioned before, this has to do with the interpretation of the relevant terms: good, worker, establishment, service, capital, payment (known as scope ratione materiae).

Concerning the fundamental freedoms related to people, it also depends on the person, who wants to rely on the fundamental freedoms (known as scope ratione personae). Generally speaking only EU citizens (citizens of a Member State) can rely on the fundamental freedoms. N.B. When legal persons are concerned, for example, a limited company, the connecting factor is the registered office, central administration or principal place of business (Art 54 TFEU).

This means for example, in Spain, an Austrian, but not a Cuban, can rely on the free movement of workers, unless the latter is, for example, additionally a Finnish citizen (dual citizenship).

N.B. Where goods and capital are concerned, nationality of the owners is not relevant.

If this third-country national (for example, a Cuban citizen of single nationality) is a family member of an EU citizen (for example, the Cuban is married to a Hungarian), he can derive certain rights from this connection with a citizen of a Member State. Further details can be found in the EU Citizens Directive (Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 229/35).
Apart from this, third-country nationals can derive certain rights from association agreements. According to the so-called “Hallstein-formula”, this includes agreements, which are more than mere commercial treaties, but would not reach the highest scale of complete EU membership (commercial treaty +1, accession -1). Therefore, for example, based on the Association agreement EU – Turkey, Turkish citizens have certain rights which would be less than those of EU citizens, but which would put them on a better level than other third-country nationals.

Another important association agreement is the agreement concerning the European Economic Area (EEA). On the one hand, this connects the three EFTA (European Free Trade Area) countries of Norway, Iceland and Liechtenstein and, on the other hand, the 28 EU countries. Within this agreement, the fundamental freedoms apply. Unlike association agreements with certain third countries, the ECJ has decided that “in the area in question, the rules of the EEA Agreement and those of the EC Treaty must be given a uniform [!] interpretation” (ECJ 23.10.2008, Case C-157/07, Krankenheim Ruhesitz am Wannsee). N.B. In a case concerning one of those three EFTA countries, the fundamental freedoms have to be taken into account in the same way as between EU countries.

Switzerland, as the fourth EFTA country, is not connected to the EU by means of the EEA, but via so-called bilateral agreements (confer, for example, ECJ 11.2.2010, Case C-541/08, Fokus Invest). N.B. If, for example, an Austrian wants to work in Switzerland, he can derive certain rights out of these agreements.

6.5. Transitional measures in the case of accessions

In the case of the accession of new Member States, there is one exception to the above mentioned principle that EU citizens can rely on the fundamental freedoms (known as scope ratione temporis).

The accession treaties with “new” Member States contain transitional measures which limit the access of workers from these Member States. This regime was set up in order to allay the fears of the “old” Member States concerning the opening of their labour markets. This system, elaborated on the occasion of the accession of the ten CEEC on 1st May 2004 (for example, for the Czech Republic refer to OJ 2003 L 236/803), is also applied mutatis mutandis for the accessions of Romania and Bulgaria (for Bulgaria refer to OJ 2005 L 157/104), as well as for the accession of Croatia (OJ 2012 L
According to this so-called 2+3+2 model, the “old” Member States can implement restrictions within the first two years after the date of accession and thus legally exclude citizens from those Member States (for example, Croatia) from the free movement of workers; something which would not be possible with regard to a French citizen. This system can be prolonged for another three years by means of a mere communication to the Commission. For another two years, the relevant Member State must prove to the Commission “serious disturbances of its labour market” or at least the “threat thereof”.

As is well known, Austria, in the meantime, has applied those restrictions with regard to its national labour market. The Member States thus excluded from the Austrian labour market can “maintain in force equivalent measures” against Austrians (principle of reciprocity). Furthermore, Austria cannot implement measures more restrictive than those which existed at the date of signing the accession treaty (prohibition of deteriorations).

6.6. Crossing of a border

As mentioned several times before, the fundamental freedoms only apply between two EU Member States (known as scope ratione limitis); exceptions like the EEA have also already been mentioned.

On the flipside, purely national cases without any cross-border aspect do not fall within the scope of the fundamental freedoms. For example, an Austrian company cannot rely on the freedom of establishment against an Austrian authority in order to be exempt from the Austrian assessment of needs for a private outpatient dental clinic. However, if this company has a subsidiary in Germany, it is able to rely on the fundamental freedoms (see ECJ 10.3.2009, Case C-169/07, Hartlauer). N.B. The existence of a cross-border aspect can thus strongly contribute to the solution of a case.

The act of discriminating purely national cases is also-called “reverse discrimination”. According to the ECJ, such a reverse discrimination is permissible (otherwise the precondition of a cross-border aspect could not be maintained). At least, an Austrian in a purely Austrian case can rely on the opinion of the Austrian Constitutional Court (“Verfassungsgerichtshof”, VfGH), whereas a reverse discrimination is a breach of the Austrian constitutional principle of
equality, but not of EU law (VfSlg 14.963/1997). N.B. In the end, this means, that an Austrian in a purely Austrian case might be successful, but that he cannot rely on EU law only, but rather in conjunction with this jurisprudence of the Austrian Constitutional Court instead.

As mentioned before, the ECJ is very liberal in interpreting those terms, which open the scope of the fundamental freedoms. The same is true for the cross-border aspect. Therefore, “returnees” (who have once been abroad) fall under this term (ECJ 26.1.1999, Case C-18/95, Terhoeve) in the same way as “frontier workers” do (ECJ 18.7.2007, Case C-212/05, Hartmann).

6.7. Obliged parties

It is primarily the Member States, which are duty-bound to the fundamental freedoms. Hence, they cannot place restrictions on the fundamental freedoms in an inappropriate way. In other terms, all national laws must be in accordance with the fundamental freedoms (the so-called principle of negative integration).

However, the term, “Member States”, not only comprises laws (for example, the Austrian Federal Act on fixed prices for books (“Bundesgesetz über die Preisbindung bei Büchern”, BGBl I 2000/45), refer to ECJ 30.4.2009, Case C-531/07, Libro; law amended by BGBl I 2009/82), but also judgements of courts and measures of administrative authorities (horizontal perspective in the light of the separation of powers).

Furthermore, not only at a federal level, but also at a regional level, and at the level of municipalities, all these entities have to abide by the fundamental freedoms (vertical perspective).

Due to the ECJ’s very broad interpretation of these terms, the Member States might try to restrict the fundamental freedoms by means of apparent private companies (for example, a limited company). Based on the principles mentioned so far, it might not be surprising that the ECJ has filled this gap. A company, which is financed, the management of which is appointed, and whose aims are defined by the state, is answerable in its activities to the state. Hence, this company has to comply with the fundamental freedoms (ECJ 24.11.1982, Case 249/81, Buy Irish).

For quite some time this was the state of affairs. From the point of view of a worker (for example, a professional football player who,
as mentioned above, fulfils the definition of a worker), it does not make any difference if he is not allowed to play in another Member State due to a national law or because of the regulations of a sports association. This is because the real power of those sports associations (for example, UEFA, FIFA) might be similar to those of national laws. That is why according to the ECJ, also so-called “collective measures“, are subject to the fundamental freedoms. Consequently, the above mentioned football player, Bosman, can successfully rely on the free movement of workers (ECJ 15.12.1995, Case C-415/93). This judgement once again shows the very pragmatic approach of the ECJ. The ECJ stated, that if he had decided otherwise, the free movement of workers “would be deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community [would have been] rendered nugatory” (refer to chapter 5.5).

From the point of view of natural or legal (companies) persons, this preliminary result is very satisfying. They can derive rights from the fundamental freedoms (see chapter 5.2.) and rely on these rights as protection from those to which they are duty-bound. On the flipside, private persons in general are not duty-bound by the fundamental freedoms. For example, an EU citizen who, as a matter of principle, does not buy German beer in a supermarket is not in breach of the fundamental freedoms, even though strictly speaking he is “discriminating” against foreign goods.

There is one important exception to the principle that private persons are not bound by the fundamental freedoms. Where the free movement of workers (!) is concerned, the ECJ has decided that those provisions apply to private persons as well (ECJ 6.6.2000, Case C-281/98, Angonese).

6.8. Principles of the fundamental freedoms

A basic principle of the fundamental freedoms is the prohibition of discrimination (see also chapter 5.6.) – as can also be seen in the example concerning foreign beer in supermarkets.

Consequently, a foreign product (or foreign capital) cannot be treated worse than a domestic one. Where the fundamental freedoms are related to people, citizens of other Member States may not be treated worse than home citizens. For example, the law according to
which, only Italian citizens get free access to national Italian museums (ECJ 16.1.2003, Case C-388/01, Commission/Italy) is a direct discrimination and hence not allowed.

A Member State could be tempted to circumvent this interdiction by using a superficially neutral criterion which, in the end, is able to attain the same objective (favouring nationals and discriminating foreigners). For example, if Italy uses the criterion of residence, the majority of Italians will be favoured even though there might be some Swedish who have their residence in Italy and consequently would also be granted free access to Italian museums. Such a disguised (indirect) discrimination (as, for example, residence) is also prohibited.

- **Example:** The Austrian law requiring legal persons to appoint as manager a person residing in the country has been assessed as an indirect discrimination (ECJ 7.5.1998, Case C-350/96, Clean Car Autoservice).

Up until now, the impact of so-called negative integration has already been quite strong. National rules, which (directly or indirectly) discriminate, are challenged according to the fundamental freedoms. The practical influence of EU law on national law, and therefore its relevance, goes even further as the ECJ has also expanded the prohibition of discriminations into a prohibition of restrictions with huge consequences. What does this mean? Based on this extension in the ECJ’s case-law, not only measures which make a distinction with regard to nationality or the origin of a product, but also ones which do not make a distinction (in other terms which do not discriminate) can be challenged by the fundamental freedoms.

- In this way, the ECJ, for example, concluded that the Austrian law prohibiting the sale of non-packaged confectionery from vending machines (based on hygienic considerations) was a restriction. The reason is that additional packaging for chewing gum imported from Germany would cause additional costs, which makes importing more difficult.

This example shows that every provision of national law can be challenged in the case of a successfully claimed breach of the fundamental freedoms. Even if, in a certain field, there is no provision of EU law (positive integration) the whole national legal order is subject to European standards due to the fundamental freedoms (negative integration).
Literally speaking, the ECJ became a victim of its own success and consequently, had to find some form of exit strategy in order to resolve some cases (especially restrictions, which do not differentiate between national and cross-border cases) separately from the scope of the fundamental freedoms.

This concept shall be explained by means of the following example: Even a measure (not differentiating between national and cross-border cases), which ensures, that no goods may be sold on Sundays constitutes a restriction of the fundamental freedoms. The reason for this is, that without this law more goods could be sold. Even though in this case the real reason behind the law is, in fact, a socio-political/religious one, rather than any protective considerations.

- In a similar case in France, two businessmen were prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price (resale at a loss). In this leading case, the ECJ came up with a new distinction in order to sort out certain cases where restrictions (measures which don’t differentiate between national and cross-border cases) are concerned. So-called selling arrangements which are related to the questions where (for example, in a supermarket or in a pharmacy), when (for example, interdiction to open shops on Sundays), and how (for example, only in shops or also away from business premises) goods can be sold, basically do not fall within the scope of the fundamental freedoms (for further examples, refer to the Opinion of the Advocate General from 6.5.2004 in the Case C-463/01, Commission/Germany). Hence, since the judgement in this French case (ECJ 24.11.1993, Case C-267/91, Keck and Mithouard) a national measure prohibiting the opening of shops on Sundays does not fall within the ambit of the fundamental freedoms.

- The counterpart to selling arrangements are the so-called “product related measures”. They are measures related to size, weight, composition, denomination, form, appearance, labelling, packaging, and so on, of the product. They still fall within the ambit of the fundamental freedoms.

- In order to avoid circumventions, there is an additional requirement where selling arrangements are concerned. They only fall outside the scope of the fundamental freedoms, “so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in
the same manner, in law and in fact, the marketing of domestic products and of those from other Member States”. What does this mean if one applies it to the above example (interdiction to open shops on Sundays) of a selling arrangement? If this example were modified in a way in which it was only prohibited to open shops on Sundays where imported goods are sold (provisions do not apply to all relevant traders and render the selling of imported products more difficult) then this selling arrangement would still fall within the scope of the fundamental freedoms. This example once again shows the ECJ’s pragmatic approach (refer also to chapter 5.5).

- It might be obvious that the distinction between selling arrangements and product related measures only makes sense where the free movement of goods is concerned. However, the same distinction exists for the other fundamental freedoms. In this way, for example, in the sphere of the free movement of workers, the equivalent terms would be access to the profession – as counterpart to product related measures (which fall under the prohibition of the fundamental freedoms) – and exercise of the profession (as counterpart to selling arrangements).

Besides this first exit strategy (“certain selling arrangements”), the ECJ has developed another one concerning the prohibition of restrictions (measures which do not differentiate between domestic and cross-border cases): the so-called theory of substantial effect. The purpose of this theory is to resolve certain cases which “have nothing to do with the fundamental freedoms” so that they are not dealt with according to these freedoms.

The following case study will clarify this theory. This case concerns the (old) Austrian law on entitlements to a compensation payment on termination of employment (“Abfertigung”). According to the relevant provisions, there is no entitlement to compensation, if the employee gives notice (leaves prematurely for no important reason or bears responsibility for his premature dismissal). The German citizen Volker Graf terminated his contract of employment which he had with Filzmoser Maschinenbau GmbH in Upper Austria in order to move to Germany and take up new employment in that country. Mr Graf claimed that the refusal to pay this compensation payment in the case that he had given notice constituted an infringement of the fundamental freedoms. For Mr Graf, the relevant Austrian law might have been only one reason (amongst others) not to make use

Substantial effect

Case study

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of his right of free movement as a worker. Therefore, the ECJ ruled that “[s]uch an event is **too uncertain and indirect** a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers” and, therefore, does not fall within the ambit of the fundamental freedoms. In this particular case, the result is that the Austrian law on compensation payments on termination of employment is in accordance with the fundamental freedoms (ECJ 27.1.2000, Case C-190/98, Graf/Filzmoser).

In practice the ECJ’s **definition** of the substantial effect theory – “[s]uch an event is too uncertain and indirect” – is very vague and hence not very useful.

Therefore, some further **examples** will create a picture of the types of cases which are resolved with this theory:

- A German rule imposing an obligation to provide information prior to contract (**culpa in contrahendo**), as a result of which a parallel importer is under an obligation to inform purchasers of a given branded product that certain authorized dealers in that brand refuse to perform services under the guarantee for products which have been the subject of parallel imports (ECJ 13.10.1993, Case C-93/92, CMC-Motorradcenter).
- A Dutch law which authorizes the collector of direct taxes to seize goods, other than stocks, which are found on the premises of a taxpayer even if those goods are from a supplier established in another Member State who has sold them on instalment terms with **reservation of title** (ECJ 7.3.1990, Case 69/88, Krantz).
- An Italian provision prohibiting the issue of a **summary payment order** to be served outside national territory (ECJ 22.6.1999, Case C-412/97, ED Srl).
- In a Spanish case the question of whether one would not plan to stay in another Member State as a tourist or student because the level of cover for costs of an **unscheduled hospital treatment** could be less than if this treatment were undergone at home (ECJ 15.6.2010, Case C-211/08, Commission/Spain).

These examples clarify that in all those cases a **certain threshold** has **not** been **reached** even though there is a slight impact on the fundamental freedoms. Consequently, in those cases there is no substantial effect on the fundamental freedoms and they thus fall
outside the freedoms’ scope (similar in the case of certain selling arrangements which do not discriminate foreign goods).

6.9. **Limitations of the fundamental freedoms**

Even though the fundamental freedoms are important in order to guarantee an internal market (an area without internal frontiers between the 28 Member States) there are certain values which are more significant and, consequently, can justify an obstacle to the fundamental freedoms (so-called reasons of justification).

In the case mentioned above (Austrian law prohibiting the sale of non-packaged chewing gum from vending machines), there is an indisputable restriction to the free movement of goods (additional costs for packaging chewing gum imported from Germany). Yet this Austrian law can make sense if looked at as an attempt to protect the health of consumers.

Apart from this reason, called “protection of health and life of humans, animals or plants”, there are other reasons of justification mentioned in **Art 36 TFEU:**

- **Public morality.** For example, in order to ban the import of pornographic articles; for once (see chapter 6.3.) no uniform ECJ definition but consideration of the different concepts of morality in the different Member States instead (ECJ 14.12.1979, Case 34/79, Henn and Darby).
- **Public policy.** For example, a prohibition to destroy coins “because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the state” (ECJ 23.11.1978, Case 7/78, Thompson).
- **Public security.** For example, in an Irish case, the national rules which require all importers to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory as “petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country’s existence” (ECJ 10.7.1984, Case 72/83, Campus Oil).
- **Protection of national treasures** possessing artistic, historic or archaeological value. This reason, in practice, is of minor importance. It covers, for example, bans on exports, licensing requirements etc.
• Protection of **industrial and commercial property**: patent rights, trade mark rights, copyrights, design patents, plant breeders’ rights etc., which might restrict the free movement of goods; for example, the right of the proprietor of a brand consisting of a word in general use in the language of several Member States to oppose the use of labelling, which could lead to confusion, on goods imported from another Member State (ECJ 30.11.1993, Case C-317/91, Renault/Audi).

Besides Art 36 TFEU related to the free movement of goods, there are also reasons of justification for **other fundamental freedoms** (public policy, public security and public health) in the relevant articles of the TFEU:

• Free movement of workers: Art 45 para. 3 TFEU,
• Freedom of establishment: Art 52 para. 1 TFEU,
• Freedom of services: Art 62 TFEU in conjunction with Art 52 para. 1 TFEU.

All those reasons of justification are so-called “treaty reasons” as they are provided in the TFEU.

In the *Cassis de Dijon* case, the ECJ has not only extended the prohibition of discriminations to a prohibition of restrictions, it has also invented a second category called “**mandatory requirements in the general interest**” (ECJ 20.2.1979, Case 120/78, Rewe-Zentral). Therefore, on the one hand, the *Cassis* judgement is in favour of EU citizens and companies as they can challenge more national rules in the light of the fundamental freedoms. On the other hand, the Member States now have more reasons available to justify obstacles.

What is special about this category of reasons is the fact that they are developed in the case-law of the ECJ and therefore cannot been known entirely in advance. From the point of view of a Member State relying on those reasons of justification, this is an advantage insofar as they can invoke **further reasons**, which is not possible in the category of treaty reasons.

The ECJ has recognized the following examples as “mandatory requirements in the general interest” (also called *Cassis* reasons):

• Fiscal supervision
• Protection of public health (already mentioned in Art 36 TFEU)
• Fairness of commercial transactions
• Defence of the consumer
• Plurality of the media
• Financial equilibrium of the social security systems
• Protection of the supplying of goods at short distance to the advantage of local business
• Environmental protection

N.B. The main difference between treaty reasons and Cassis reasons is that, in the case of a discrimination (the measure makes a difference between domestic and cross-border cases), only the first can be invoked, whereas, in the case of a restriction (the measure makes no difference between domestic and cross-border cases), both categories of reasons of justification can be put forward.

All reasons (no matter whether treaty or Cassis reasons) have the following points in common (at this point the principles already mentioned in chapter 6.3. will be repeated and deepened):

• They are defined by the ECJ. Therefore, for example, a well-known definition of a “salaried employee” according to the Austrian “Salaried Employees Act” (“Angestelltengesetz”) is not relevant in terms of the fundamental freedoms, only the ECJ’s definition counts.
  – One exception, which has already been mentioned, is the concept of public morality because, in this case, the ECJ respects the different concepts of morality in the different Member States.
  – There is another reason of justification, which has a certain exceptional position. Generally speaking, all reasons of justification are on the same level. Public health is one exception to this principle. In this context the ECJ allows the Member States more flexibility because “the health and life of humans rank foremost among the assets or interests protected by [Art 36 TFEU] and it is for the Member States, within the limits imposed by the Treaty, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved” (ECJ 11.9.2008, Case C-141/07, Commission/Germany).

• All concepts, which open the scope of the fundamental freedoms (for example, good, worker, cross-border aspect, measure etc), have to be interpreted in a very broad sense. As
mentioned above, also electricity falls within the definition of a good.

• All concepts, which derogate from the fundamental freedoms, have to be interpreted in a very narrow sense. As mentioned above, “the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society”. A system like the Dutch one, which, in the case of EU citizens, establishes “a systematic and automatic connection between a criminal conviction and a measure ordering expulsion”, is not permissible (ECJ 7.6.2007, Case C-50/06, Commission/Netherlands).

If, in a certain case, a valid reason of justification has been found, there is one last, but very important hurdle, which has to be cleared. The reason why this last hurdle is such an important one is due to the fact that a lot of ECJ cases are finally decided at this last level in terms of whether a national measure is in accordance with the fundamental freedoms or not. Why is it mainly this last level where cases are finally decided? This is closely related to the fact that the very broad interpretation of a lot of concepts has deprived them of their function as a filter in resolving certain cases. To hit the nail on the head, this last examination is about the question whether the national measure (for example, prohibition to sell non-packaged chewing gum) “overshoots the mark” (public health). This so-called review of proportionality is about the question whether the measure is appropriate, necessary and reasonable. In other words, to ensure that the national measure does not go beyond what is necessary in order to achieve the legitimate objective.

The following cases will illustrate this concept:

• In the case of the Austrian prohibition to sell non-packaged chewing gum from vending machines, which has already been mentioned, the ECJ has approved the proportionality of this Austrian law (ECJ 24.11.2005, Case C-366/04, Schwarz). Even an independent institution (the Austrian Health and Food Safety Agency) stated that the national prohibition should be regarded as justified on the grounds of the protection of public health, “given that, in the past, non-packaged goods were impaired by moisture or insects, in particular ants, within vending machine containers”.
• In another case, which has already been mentioned, (ECJ 13.1.2000, Case C-254/98, TK-Heimdienst) about the protection of the supplying of goods at short distance (to the advantage of local business), the ECJ did not approve the proportionality of the provision of the Austrian Code of Business and Industry (GewO) prohibiting the sale of certain goods from locality to locality or from door to door. Even though it might be “necessary to avoid deterioration in the conditions under which goods are supplied at short distance in relatively isolated areas of a Member State [for example, some remote valleys in Tyrol], legislation such as that in point in the main proceedings, which applies to the whole of the national territory, is in any event disproportionate to that objective”. Also the objective of public health “can be attained by measures that have effects less restrictive [...] for example, by rules on refrigerating equipment in the vehicles used”. Consequently, the national law went beyond what was necessary.

N.B. A total prohibition (as in the present case) always risks being assessed as disproportionate by the ECJ.

• Another example for a measure going beyond what is necessary can be found in the field of consumer protection. In Germany, under the denomination “beer”, only products, which fulfil the German purity requirement (“Reinheitsgebot”), may be marketed. “In any event, such rules go beyond what is necessary in order to protect the German consumer, since that could be done simply by means of labelling or notices.” The total prohibition, therefore, was declared disproportional (ECJ 12.3.1987, Case 178/84, Commission/Germany).

• Concerning the person-related fundamental freedoms, it is settled case-law, that measures taken in order to deter others (so-called general prevention) are not allowed. Measures must be based exclusively on the personal conduct of the individual concerned. Therefore, previous criminal convictions cannot in themselves constitute grounds for expulsion measures (refer also to Art 27 EU citizens Directive).

• One very important question in the context of proportionality is also how the Member State handles domestic cases. Even though the ECJ is quite liberal with regard to the concept of public morality, it is not possible for the UK to rely on this reason of justification in order to prohibit the importation of
certain goods (inflatable dolls) from Germany on the ground that they are indecent or obscene when its legislation contains no prohibition on the manufacture and marketing of the same goods on its own territory (ECJ 11.3.1986, Case 121/85, Co-negate). With regard to this case, it must be emphasized that the ECJ does not accept double moral standards. More generally speaking, the ECJ always takes into account the behaviour of a Member State with regard to national products/own citizens.

Moreover, the ECJ not only compares national and cross-border cases, but also different rules within one Member State. In the Austrian Hartlauer case (chapter 6.6.) this examination of the consistency of the measure to be justified lead to the result, that even though outpatient dental clinics on the one hand and group practices on the other hand generally offered the same medical services, their different treatment concerning the criterion of the assessment of the need to set up a new health institution was qualified to be disproportionate (ECJ 10.3.2009, Case C-169/07, Hartlauer).

After having examined the proportionality, one can finally answer the question,

- of whether the measure in question (in the case of disproportionality) is against the fundamental freedoms and consequently may not be applied (in this case and similar cross-border cases) any more (for the concept of primacy refer to chapter 5.1.),
- or, in the case of proportionality, that the measure is not against the fundamental freedoms.

7. Practical research (accessing EU archives)

The final section comprises an overview of how to find the sources mentioned in this course manual (legal provisions, judgements etc) on the homepage of the EU. For didactic reasons, this chapter will be structured in a question-answer manner.

Via the homepage http://europa.eu, the EU offers a very user-friendly internet portal which is available in the 24 different official languages and which also includes links to the web pages of the different institutions.
The EU’s legal database, called EUR-Lex (http://eur-lex.europa.eu), offers free access to EU law (legal provisions, ECJ judgements etc).

Since March 2013, EUR-Lex has also been available in a new version, which at the moment (August 2013) is in a transitional stage. Currently, the new version can be accessed via http://new.eur-lex.europa.eu/homepage.html?locale=en. After this transitional period however, the new version can be accessed via the link indicated in the previous paragraph (and the old one via http://old.eur-lex.europa.eu). The reason for this new version is due to Regulation (EU) 216/2013 on the electronic publication of the Official Journal of the European Union (OJ 2013 L 69/1); according to which, as of 1.7.2013, the electronic (and not the paper) version of the OJ is authentic and produces legal effects.

**Question 1: How can secondary law such as the previously mentioned roaming-regulation (Regulation [EU] 531/2012), be found?**

The easiest way to find this regulation is to go to the new EUR-Lex and in the “Search” section to use the → “Document Reference Search”. Three pieces of information (type of document, year and number) are enough to identify and find a particular document on this page.

![Authentic electronic Official Journal](image)

> From 1 July 2013, thanks to Regulation (EU) No 216/2013, the electronic version of the Official Journal of the EU is authentic and produces legal effects.

Each OJ issue is electronically signed on the day of its publication and becomes available – together with its signature file – on EUR-Lex, after signing.

![Search](image)

**N.B. Other types of documents** can be found in the same way on this page such as the previously mentioned communication from the Commission on the consequences of the entry into force of the
Treaty of Lisbon for ongoing inter-institutional decision-making procedures, COM(2009) 665 final 2.12.2009. For ECJ judgements also refer to question 4. As already mentioned, the user sees from Fig. 2, that since 1.7.2013 the electronic version of the OJ is the authentic one, which produces legal effects.

- **Question 2: How can you be sure of working with the most up-to-date version of a legislative act?**

When performing this search, and after clicking on → “About this document”, the following result comes up:

![Image](image-url)

Fig. 3: Background information and text in the new EUR-Lex

As can be seen in Fig. 3, this regulation has not been amended so far (planned end of validity date would be 2022). After clicking on → “Text”, one can download the Regulation in the desired language, as it was published in the OJ on 30.6.2012.

- **Question 3: What is the significance of the number (32012R0531) mentioned in Figure 3?**

That is the Celex-number which clearly identifies each document in the database. N.B. The name Celex (short for Communitatis Europae Lex) comes from an earlier database (available for a fee), which has been merged with the database EUR-Lex (cost-free).

This number (3 2012 R 0531) can be understood as follows:

- “3” identifies the **sector code**: In this regard, for example, “1” stands for primary legislation (TEU, TFEU etc), “3” for secondary legislation (as in this example), “6” for ECJ case-law and “7” for national implementation measures (also refer to the question 5).
• “2012” stands for the **year**.

• **N.B.** Sometimes the year is indicated with 2 digits (thus 3 12 R 0531) only (refer, for example, to Fig. 7) and therefore no result will be displayed. That is why it is recommended to type in 4 digits (thus 3 2012 R 0531).

• In the different sectors (for example, “3” for secondary legislation), there are different **document types** representing the legal form or category of the document. Here, only the most important ones will be mentioned: “R” for regulation (as in this example), “L” for directive, (“C”) for ECJ judgements, and (“C”) for the Advocate General’s opinion.

• Finally “0531” stands for the so-called **document identifier** of regulation (EU) 531/2012.

**Question 4:** How can an ECJ judgement, such as the current one from 11\(^{th}\) July 2013, Case C-627/10, Commission/Slovenia, be found?

Searching for this judgement is done in the same way as described in Fig. 2 with regard to secondary law (especially directives and regulations) and will display the following result:

As can be seen from Fig. 4 searching by means of the indicated information (“Case C-627/10”) will display two documents: the ECJ’s judgement and the Advocate General’s opinion (refer to chapter 3.5.). The two Celex document types (“[C]J” and “[C]C”) have already been mentioned.
Following the link → “html” (or “pdf”) you can browse the text of the judgement or the opinion. In the tab → “About this document”, a list of sources of information concerning published literature, in journals dealing with the judgement in particular, can be found.

In addition, the ECJ’s judgements can also be found on its homepage (http://curia.europa.eu) based on the same kind of information (Case C-627/10). Furthermore, this webpage also contains press releases concerning the most important judgements, the most important texts governing procedure and the annual report.

**Question 5: How can the national execution measures in implementing Directive 93/13/EEC on unfair terms in consumer contracts, for example, in Austria be found?**

Searching for this judgement is done in the same way as described in Fig. 2 and 3. In the tab → “Linked documents” there is a link → “Display the national execution measures”, where the references can be found where to this directive has been implemented into national law. **N.B.** The fact, that there is a reference to national execution measures, does not necessarily mean, that these measures are either comprehensive or in conformity.
Fig. 6: Implementation of a directive in the new EUR-Lex

When following this link → “NEM”, it can be seen, that this directive has not only been transposed into the “Federal Act Governing Provisions to Protect Consumers” (“Konsumentenschutzgesetz”), but also into other laws. N.B. If you know how to work with the Celex numbers, the implementation measures (71993L0013) concerning this directive (31993L0013) can be found straightforwardly in the “Advanced search” (confer also Fig. 8).

- **Question 6: Which directives have been implemented in the Federal Act Governing Provisions to Protect Consumers?**

Conversely, the question can be raised whether a national law has been issued or amended due to a directive. This is very important in the context of the principle of directive-conform interpretation (see chapter 4.4.3.)

In Austria, the equivalent to EUR-Lex is the Legal Information System of the Republic of Austria (RIS), a computer-assisted information system (http://www.ris.bka.gv.at), which is coordinated and operated by the Austrian Federal Chancellery (also free of charge). Similar to EUR-Lex, it contains legislative acts (for example, Federal and Regional laws) and judgements especially of the Austrian High courts (for example, the judgement of the Austrian Constitutional Court mentioned in the context of reverse discriminations VfSlg 14.963/1997, or the judgement of the Austrian OGH concerning the nullity of contracts breaching EU law, 1 Ob 57/04w).
This webpage also contains an English version including a selection of translated Austrian laws. As it is more comprehensive, the following explanations refer to the German version. When clicking on → “Bundesrecht” (Federal law) and searching the “Konsumentenschutzgesetz” (Federal Act Governing Provisions to Protect Consumers) in the field → “Titel, Abkürzung” (Title, abbreviation), the initial information displayed will most likely be “§ 0”. This paragraph doesn’t exist as part of the formal law. It has a similar function to the “About this document” tab in EUR-Lex, giving general information concerning this law.

Fig. 7: § 0 in RIS

By following the different links, it is possible not only to download all amendments by certain federal law gazettes (“Bundesgesetzblätter”) and government bills (“Regierungsvorlagen”), but also (by means of the Celex number) to check which amendments to the “Federal Act Governing Provisions to Protect Consumers” have
been adopted in implementation of a directive. The already mentioned directive on distance contracts (397L0007; Directive 97/7/EC) has, for example, been implemented by means of BGBl I 1999/185.

N.B. Once again, instead of using the direct link in RIS, the Celex number should be entered into the according field in EUR-Lex and, in addition, with 4 digits (31997L0007) as the link in RIS will not display all the amendments etc indicated in the bibliographic notices.

- **Question 7:** Where can the legislative procedure for a specific act, concerning, for example, the Proposal for a Council Regulation on the statute for a European private company (COM[2008] 396 final 25.6.2008) be followed?

At the European level there are two database, which documents the legislative procedure for a specific act: the database Prelex (http://ec.europa.eu/prelex) which is operated by the Commission and database OEIL (http://www.europarl.europa.eu/oeil) which is operated by the European Parliament.

According to the “Publications Office of the EU”, the Prelex website is foreseen to be integrated in the new EUR-Lex. Most likely, Prelex will then be shut down once this transition has taken place; according to the Parliament, OEIL should not be affected by this development. Consequently, in the following, reference will primarily be made to the new EUR-Lex.

In the new EUR-Lex, the relevant information (similar to Fig. 2 concerning the “Simple search”) can be found using the → “Advanced search” and the following information: the type of the document (COM for a Commission’s document), the year, and the number.
As a result, in the tab “Text” the text of this proposal can be downloaded in the desired language. After clicking on the tab → “Procedure”, the result will be displayed as follows:

In the example, which is shown in Fig. 9, the proceeding is still ongoing. All contributions of the different institutions (for the legislative procedure refer to chapter 4.3.) can be accessed via the different links.
The research in the database OEIL (→ “Search”, → “Search by Reference” and → “Commission document”) is very similar; nevertheless, it is worth checking the status of the proceedings in both databases.

Fig. 10: Result of research status quo of legislative procedure in OEIL.

**Question 8: How can the mentioned transitional measures concerning Croatia (OJ 2012 L 112/67), be found?**

In the new EUR-Lex, the Link → “Official Journal” contains the newest as well as older issues of the Official Journal.
On the page displayed below, one can then select the pdf-version of the desired language, where the transitional measures concerning Croatia can be found on page 67.

In the same way, it is possible to download the consolidated versions (OJ 2012 C 326) of the TEU and TFEU (N.B. According to
the “Publications Office of the EU”, a new consolidated version including the amendments brought by the accession of Croatia will only be made available in 2014). An overview on the founding treaties, accession treaties and other treaties can be found in the tab “EU law and related documents” at the link → “Treaties”.

- **Question 9:** How can the above mentioned press-release, (IP/09/1065) concerning the initiation of an in-depth investigation of the proposed take-over of Austrian Airlines by Lufthansa be found?

In the EU news room (http://europa.eu/newsroom/index_en.htm) in the tab → “Press releases”, after clicking on → “Rapid database” and → “Search”, the desired press release can be found after entering the given information (IP/09/1065) in the “Reference” field.

- **Question 10:** How can the above-mentioned 18-month programme (17426/12) from the Irish, Lithuanian and Greek Presidencies be found?

As already indicated, the links to any of the sites of the respective institutions can be found on the EU homepage (http://europa.eu). In
In this case, the document is to be found on the Council homepage (http://www.consilium.europa.eu).

Once on the homepage, follow this path: → “Documents”, → “Access to Council documents: Public Register”, → “Search in the Register” → “Advanced search”. There, the 18-month programme can be found using the document number.

![Document search in the Council register](image)

**Fig. 14:** Document search in the Council register

Finally, pay attention to a free service (http://europa.eu/europedirect/index_en.htm), which answers questions about the EU via the free telephone number 00 800 67 89 10 11. Simple questions are normally answered immediately. Where complex topics are concerned, one will be put in touch with the respective experts.
Fig. 15: Europe Direct