

European Market Law

Textbook Vol. I

Hana Horak • Kosjenka Dumančić • Kristijan Poljanec

INTEREULAWEAST

European and International Law Master Programme Development in Eastern Europe



Co-funded by the
Tempus Programme
of the European Union

European Market Law

Textbook Vol. I

**Hana Horak
Kosjenka Dumančić
Kristijan Poljanec**

© 2015.

Hana Horak, Kosjenka Dumančić, Kristijan Poljanec

PUBLISHER

University of Zagreb, Faculty of Economics and Business
Trg J. F. Kennedyja 6, Zagreb, Croatia

REVIEWERS

Nada Bodiroga Vukobrat
Dmitriy Galushko

EDITOR

Hana Horak

TECHNICAL EDITOR

Zvonimir Šafranko

ISBN 978-953-346-014-5 (qrkpg)

This Project has been funded with support from the European Commission. This publication reflects the views only of the authors and the Commission can not be held responsible for any use which may be made of the information contained therein.

PREFACE

The publication in front of you is the result of the long-year academic research. Together with the accompanying Handbook, which was published in 2014, it makes an integral part of the TEMPUS InterEULawEast Project No. 544117, which has been funded by the EU.

The textbook aims at ensuring the sustainability and visibility of the Project after its completion. It will contribute to the promotion of the European Market Law among students and scholars in all countries involved in the Project. The authors have been aware of the practical necessity of providing publication which deals with issues of transnational importance. Thus, additionally, the textbook will serve as a valuable source of information for legal practitioners in cases which include a cross border element. The authors' idea has been to encourage and provide a solid foundation for the future master students in promotion and affirmation of the European values. One of the goals of the TEMPUS InterEULawEast Project is the implementation of the Master Programme *International and European Law*. Therefore, the experts from the EU and teachers from the co-beneficiary institutions are preparing necessary logistic and scientific materials for achieving these goals. These efforts serve to disseminate knowledge and to gain results that will last after the end of the Project's lifetime. Publishing of this book represents one of the achievements of the above-mentioned goals and contribution to the Master Programme *International and European Law*.

The textbook is divided in three parts. The first part gives an introduction to the history and development of socio-political, economic and legal framework of the EU. It should enable a reader to understand better the overall context of the EU's evolution through six decades. The second part of the textbook gives a thorough overview of the stages of market integration which have led to the EU nowadays. Understanding evolution of economic integrations is essential for understanding architecture of the EU, its values and contemporary processes. In the third part of the publication authors have presented four freedoms – the cornerstone of the Internal Market. Each section is followed by cases which fall within the scope of different areas of free movement of goods, persons, capital and services. The selected cases are intended to accompany

theoretical parts of the textbook. Combining theory and practice of EU law has been the principal guideline of the authors in preparing this publication. The textbook should be read together with the Handbook as one comprehensive integrity. Authors dare to say that this is the textbook's greatest didactical achievement. In the end, authors would like to express their gratitude to Faculty of Economics and Business, staff and colleagues for their support in publishing this textbook.

Authors

TABLE OF CONTENT

Part 1. INTRODUCTION	1
1. 1. THE EU – SOCIO-POLITICAL ORIGINS AND HISTORICAL DEVELOPMENT	1
1. 1. 1. <i>THE SCHUMAN DECLARATION (1950.)</i>	3
1. 1. 2. <i>TREATY OF PARIS – FOUNDATION OF EUROPEAN COAL AND STEEL COMMUNITY (1951.)</i>	4
1. 1. 3. <i>TREATY OF ROME - FOUNDATION OF EUROPEAN ECONOMIC COMMUNITY AND EUROPEAN ATOMIC ENERGY COMMUNITY</i>	5
1. 1. 4. <i>MERGER TREATY (1965.)</i>	7
1. 1. 5. <i>THE SINGLE EUROPEAN ACT (1987.)</i>	7
1. 1. 6. <i>THE MAASTRICHT TREATY (1992.)</i>	8
1. 1. 7. <i>THE AMSTERDAM TREATY (1997.)</i>	10
1. 1. 8. <i>THE TREATY OF NICE (2001.)</i>	10
1. 1. 9. <i>EUROZONE</i>	11
1. 1. 10. <i>THE TREATY OF LISBON</i>	12
1. 1. 11. <i>THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION</i>	13
1. 1. 12. <i>ENLARGEMENT OF THE EU</i>	14
1. 2. ADDRESSING GLOBAL CHALLENGES	16
1. 2. 1. <i>PEACE AND SECURITY</i>	16
1. 2. 2. <i>COUNTERTERRORISM AND HOMELAND SECURITY</i>	16
1. 2. 3. <i>DEMOCRACY AND HUMAN RIGHTS</i>	16
1. 2. 4. <i>DEVELOPMENT ASSISTANCE AND HUMANITARIAN RELIEF</i>	16
1. 2. 5. <i>TRADE</i>	16
1. 2. 6. <i>ENVIRONMENTAL PROTECTION</i>	17
1. 3. THE INSTITUTIONAL FRAMEWORK OF THE EU	17
1. 3. 1. <i>EUROPEAN PARLIAMENT</i>	17
1. 3. 1. 1. Political groups	18
1. 3. 1. 2. Common provisions on elections	19
1. 3. 1. 3. Remit and functions of the Parliament	19
1. 3. 2. <i>THE COUNCIL</i>	21
1. 3. 2. 1. Structure of the Council	22
1. 3. 2. 2. President of the Council	24
1. 3. 2. 3. Passarelle clause and the „emergency brakes”	24
1. 3. 2. 4. COREPER	25

1. 3. 3.	<i>THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICIES</i>	25
1. 3. 4.	<i>EUROPEAN COUNCIL</i>	26
1. 3. 5.	<i>COUNCIL OF EUROPE</i>	26
1. 3. 6.	<i>EUROPEAN COMMISSION</i>	27
	1. 3. 6. 1. Appointment procedure	27
	1. 3. 6. 2. The general competences	27
	1. 3. 6. 3. The competences in foreign affairs	28
1. 3. 7.	<i>LEGISLATIVE PROCEDURES IN THE EU</i>	28
1. 3. 8.	<i>COURT OF JUSTICE OF THE EU</i>	28
	1. 3. 8. 1. Selection of Judges and Advocate Generals	29
	1. 3. 8. 2. Judicial competence	29
	1. 3. 8. 3. Procedures before the Court of Justice	29
	1. 3. 8. 4. Widening competences of the Court	31
1. 3. 9.	<i>EUROPEAN CENTRAL BANK</i>	31
1. 3. 10.	<i>EUROPEAN COURT OF AUDITORS</i>	32
1. 4.	THE LEGAL FRAMEWORK OF THE EU	33
1. 4. 1.	<i>PRIMARY SOURCES OF EU LAW</i>	35
1. 4. 2.	<i>SECONDARY SOURCES OF EU LAW</i>	36
1. 4. 3.	<i>IMPLEMENTING ACTS</i>	38
1. 4. 4.	<i>REGULATIONS</i>	38
1. 4. 5.	<i>DIRECTIVES</i>	39
1. 4. 6.	<i>DECISIONS</i>	39
1. 4. 7.	<i>RECOMMENDATIONS AND OPINIONS</i>	40
1. 4. 8.	<i>INTERNATIONAL AGREEMENTS AND CONVENTIONS</i> ...	40
1. 4. 9.	<i>THE CASE LAW OF THE CJEU AS SOURCE OF EU LAW</i> ...	40
1. 5.	PRINCIPLES OF EU LAW	41
1. 5. 1.	<i>AIMS AND VALUES OF THE EU</i>	41
1. 5. 2.	<i>FUNDAMENTAL PRINCIPLES</i>	42
	1. 5. 2. 1. The principle of conferral (the principle of limited or enumerated competences)	43
	1. 5. 2. 2. EU competences	44
	1. 5. 2. 2. 1. <i>Exclusive competences</i>	44
	1. 5. 2. 2. 2. <i>Shared competences</i>	45
	1. 5. 2. 2. 3. <i>Supporting competences</i>	46
	1. 5. 2. 3. Positive and negative powers	46
	1. 5. 2. 4. Principle of subsidiarity	47
	1. 5. 2. 5. Principle of proportionality	48
	1. 5. 2. 6. Principle of loyalty	50
	1. 5. 2. 7. Principle of non-discrimination	50
	1. 5. 2. 8. Principle of autonomy of EU legal order	51
	1. 5. 2. 9. Principle of unique application of EU law	51
	1. 5. 2. 10. Principle of direct application and direct effect ...	51
	1. 5. 2. 11. Principle of priority of EU law	53
	1. 5. 2. 12. Principle of supremacy of EU law	54
	1. 5. 2. 13. Principle of liability for damage	56
1. 5. 3.	<i>APPLICATION OF EU LAW IN MEMBER STATES</i>	58

Part 2. STAGES OF MARKET INTEGRATION	61
2. 1. BARRIERS TO INTERSTATE TRADE	61
2. 2. FREE TRADE ZONE	64
2. 3. CUSTOMS UNION	64
2. 4. COMMON MARKET	65
2. 5. ECONOMIC UNION	65
2. 6. MONETARY UNION	65
2. 7. COMPLETE ECONOMIC UNION	65
2. 8. POLITICAL UNION	66
2. 9. INTERNAL, COMMON AND SINGLE MARKET OF THE EU	66
2. 9. 1. <i>INTERNAL MARKET</i>	66
2. 9. 2. <i>COMMON MARKET</i>	67
2. 9. 3. <i>SINGLE MARKET</i>	67
2. 10. TECHNIQUES OF MARKET INTEGRATION	67
 Part 3. MARKET FREEDOMS	 73
3. 1. FREE MOVEMENT OF GOODS	73
3. 2. FREE MOVEMENT OF PERSONS	86
3. 3. FREE MOVEMENT OF CAPITAL	101
3. 3. 1. <i>HISTORICAL DEVELOPMENT AND THE NOTION</i>	101
3. 3. 2. <i>RESTRICTIONS ON FREE MOVEMENT OF CAPITAL</i>	105
3. 3. 3. <i>JUSTIFIED EXEMPTIONS IMPOSED BY MEMBER STATES</i>	105
3. 3. 4. <i>RESTRICTIONS AND CASE LAW OF THE CJEU</i>	106
3. 4. FREEDOM TO PROVIDE SERVICES	107
3. 4. 1. <i>INTRODUCTION</i>	107
3. 4. 2. <i>SERVICES DIRECTIVE</i>	117
3. 4. 3. <i>JUSTIFICATION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES</i>	120
3. 5. FREEDOM OF ESTABLISHMENT	124
3. 5. 1. <i>INTRODUCTION</i>	124
3. 5. 2. <i>CONTENT AND SCOPE OF APPLICATION</i>	126
3. 5. 3. <i>JUSTIFIED RESTRICTIONS ON FREEDOM OF ESTABLISHMENT</i>	127
3. 5. 4. <i>COMPANY'S SEAT THEORIES</i>	127
3. 5. 5. <i>TRANSFER OF SEAT</i>	129
3. 5. 6. <i>IMPLICATIONS OF FREEDOM OF ESTABLISHMENT</i>	129
3. 5. 7. <i>DEVELOPMENT OF CASE LAW IN THE AREA OF FREEDOM OF ESTABLISHMENT</i>	131
 LIST OF REFERENCES	 141
TABLE OF CASES	145
INDEX	149

TABLE OF FIGURES

<i>Figure 1. Former structure of the EU</i>	9
<i>Figure 2. The founding treaties</i>	14
<i>Figure 3. Rounds of expansion</i>	14
<i>Figure 4. Institutions</i>	17
<i>Figure 5. Political parties in numbers</i>	19
<i>Figure 6. Number of votes per State</i>	23
<i>Figure 7. Calculating majority</i>	23
<i>Figure 8. Treaties</i>	35

Part 1.

INTRODUCTION

1. 1. THE EU – SOCIO-POLITICAL ORIGINS AND HISTORICAL DEVELOPMENT

For many centuries Europe was continent where eras of peace and war took turns. After long era of Roman Empire, with its traditions, religion, culture, language and, last but not least, law, kingdoms of new settlers arose. They continued to exist in various forms all the way through the Middle Ages until the outbreak of The Great War in the first decades of the 20th century. Since the creation of the European Union,¹ Europe has enjoyed the longest period of peace in its dynamic history. European integration is unprecedented in history of mankind.² The process of the EU enlargement has helped to overcome divisions in Europe – contributing to peace, prosperity and stability across the continent. The Single Market has been established, common currency and equal conditions for companies and consumers have been set forth. The EU has united the citizens of Europe, while preserving Europe's diversity. The EU gathers 28 Member States and over 4 million square miles, having a population of 503 million citizens.³

The moto *In varietate concordia* (Unity in diversity) declares the aim of the European integrations. The EU stands for the community of common values: liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. At the same time it is the world's largest economic entity. The EU has proved to be world's most successful model for advancement peace and

¹ Hereinafter as the EU.

² In comparison to other complex constitutional structures e.g. federations and confederations, the EU has unique structure which combines common policies and national policies implemented on basis of principles of subsidiarity, complementary competences, exclusive competences and divided competences.

³ The EU official webpage is available at http://europa.eu/index_en.htm. All the official information on the EU are available in all official languages of the EU. For more information on relevant databases on EU law and policies see Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 13 *et seq.*

democracy. The EU is unique political entity. Member States voluntarily remit part of national sovereignty to the EU in many areas, enabling it to carry out common policies and governance. Nevertheless, it is not a super-state or substitute for Member States or mere organization for international cooperation. From an economic point of view, which has been inherent to the EU from its very beginning, it is world's most opened market for goods and commodities from developing countries. The vision of European unity and common identity is not of recent ages. The idea of united Europe preoccupied philosophers and visionaries much earlier than the first outlines of the EU appeared. To name but a few these were *Pierre Dubois, Pierre Joseph Prudham, Claude Henri de Saint-Simon, Jean Jacques Rousseau, Giuseppe Mazzini, Victor Hugo and Immanuel Kant*. In 1849 Victor Hugo spoke prophetic words:

“A day will come when all the nations of this continent, without losing their distinct qualities and their glorious individuality, will be merged closely within a superior unit and will form the European brotherhood. A day will come when the only fields of battle will be markets opening up to trade and minds opening up to ideas. A day will come when the bullets and the bombs will be replaced by votes.”

The afore-mentioned idea stemmed from different European movements. In 1834 Giuseppe Mazzini initiated association named “Young Europe”. In 1876 Garibaldi's European Congress for Peace took place and in 1946 Union of European Federalists was established. The Hague Congress in 1948 influenced a lot on establishment of the EU.⁴ The outset of today's integration emerges from the idea of two respected political figures - Jean Monnet and Robert Schuman. Historical reasons for creation the EU lie in an effort to prevent repeating the horrors that brought Europe and the world into two world wars, resulting in numerous victims. Jean Monnet (1888. – 1979.) said:

⁴ For details on history of the EU see in Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014; Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, Third Edition, 2010; Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011.; Bodiroga Vukobrat, N., Đerđa, D., Pošćić, A. (eds.) *Zbirka presuda Europskog suda*, Inženjerski biro, Zagreb, 2011.; Čapeta, T, Rodin, S.: *Osnove prava Europske unije*, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Horak, H., Dumančić, K., Pecotić Kaufman, J: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014.; Horak, H., Bodiroga-Vukobrat, N.: *South Eastern Enlargement: Quo vadis Croatia?*, chapter in the book „Quo vadis Europa“, Senden, G., Vlad, M. (eds.), Verlag Kovac, Hamburg, 2005; Urwin, D.: *The Community of Europe: A History of European Integration*, Longman, London, 1995; Pinder, J., Usherwood, S.: *The European Union: A Very Short Introduction*, Oxford University Press, 2013.; Wyatt, D., Dashwood, A.: *European Union Law*, Sweet and Maxwell, London, 2000.

“Where the change was accepted, the growth has been assured ... The origins of the EU can be looked for centuries ago. But for most the EU is the result of political and economic atmosphere in which Europe found itself immediately after World War II.”

The first president of the European Commission (hereinafter the Commission) Walter Hallstein stated that “... *new, integrated Europe wasn't created but reborn.*”

On 5th May 1949 Treaty of London was signed in Palace Saint James. On basis of the treaty the Council of Europe was founded. The treaty was signed by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, the United Kingdom and Sweden. According to the ideas of Jean Monnet, French strategists and experts for the development realized that the only effective way to prevent conflict between France and Germany, concerning establishment of control over the Ruhr area, the center of German heavy and military industry, was to put the French and German coal and steel production under common administration, so called High Authority.

1. 1. 1. THE SCHUMAN DECLARATION (1950.)

The proposition made by Jean Monnet was supported by major European leaders of the time. It was introduced for the first time on 9th May 1950 by a French foreign minister Robert Schuman. In his speech, Schuman proposed integration of industry of coal and steel and invited European countries to pool their industries. In the Declaration⁵ it was stated:

„World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

(...)

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.

(...)

The pooling of coal and steel production... will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

(...)

⁵ The full version of the Schuman declaration is available at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm.

By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.”

The Declaration was approved by Belgium, France, Luxembourg, Italy, the Netherlands and Germany. Since the war wounds were still fresh, this approval was significant in terms of enhancement of relations among two war counter-parties – France and Germany. This is considered to be the initial step towards European intergrations. Nowadays 9th May is celebrated as the Europe’s Day.

1. 1. 2. TREATY OF PARIS – FOUNDATION OF EUROPEAN COAL AND STEEL COMMUNITY (1951.)

In the aftermath of the World War II, the aim was to enable peace among Europe’s victorious and vanquished nations. The idea was to bring them together as equals, cooperating within common institutions. Bearing that in mind, the so called Marshall Plan was of great significance. It was drafted in order to secure economic prosperity to Europe as well as establishment of the Organisation for European Economic Cooperation in 1948, which was in charge of coordination of such plan.⁶ The „six fathers of the EU” wanted to sign a treaty to run heavy industries (coal and steel) under common administration. The Treaty of Paris was signed on 18th April 1951 and entered into force on 24th July 1952. The European Coal and Steel Community (hereinafter the ECSC) was established and the common European market for coal and steel was founded on 10th February 1953. Albeit the remit of the ECSC was limited to coal and steel, it was considered as supranational authority in which the High Authority could adopt decisions other than that by unanimity. It could then serve as the first step towards European integration.⁷ It was signed on 50 years and expired

⁶ Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014; Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011; Čapeta, T., Rodin, S.: *Osnove prava Europske unije*, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014.; Pinder, J., Usherwood, S.: *The European Union: A Very Short Introduction*, Oxford University Press, 2013.; Wyatt, D., Dashwood, A.: *European Union Law*, Sweet and Maxwell, London, 2000.; Omejec, J., *Vijeće Europe i Europska unija. Institucionalni i pravni okvir*, Novi Informator, Zagreb, 2008. p. 78.

⁷ Liggins, W (ed.): *Documents of the History of the European Integration*, University Institute, Florence, 1985 in Barnard, C., Peers, S.: *European Union Law*, Oxford University Press, 2014, p. 13.

on 23th July 2002. The ECSC was structured as follows: the High Authority, the Special Council of Ministers, the Common Assembly, the Court of Justice and the Consultative Committee. The High Authority was composed of nine independent appointees of six Member States' governments and it was the main executive institution having decision making power. The Assembly was made up of national parliament's delegates and had supervisory and advisory powers. The Council was composed of a representative from each national government and had limited decision-making powers and a broader consultative role. The Court of Justice was composed of nine judges.⁸ In 1952, Jean Monnet became the first president of the High Authority. The Treaty of Paris established common system for industry of coal and steel and autonomous institutional structure.⁹ This autonomous structure was a role model for institutional structure of future economic communities.

1. 1. 3. TREATY OF ROME - FOUNDATION OF EUROPEAN ECONOMIC COMMUNITY AND EUROPEAN ATOMIC ENERGY COMMUNITY

Treaty of Rome is commonly used name for two treaties: the Treaty establishing the European Economic Community (hereinafter the TEEC)¹⁰ and Treaty on European Atomic Energy Community (hereinafter the EUROATOM).¹¹ Treaties were signed on 25th March 1957 in Rome and entered into force on 1st January 1958. The six founding countries i.e. Germany, France, the Netherlands, Belgium, Italy and Luxembourg extended their cooperation to other economic areas of "common market." Article 2 of the TEEC specifies:

⁸ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 13.

⁹ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 15; Lipgens, W (ed.): Documents of the History of the European Integration, University Institute, Florence, 1985 in Barnard, C., Peers, S.: European Union Law, Oxford University Press, 2014, p. 13.; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011, p. 5; Čapeta, T, Rodin, S.: Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011.

¹⁰ Treaty establishing the European Economic Community, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11957E/TXT>.

¹¹ Treaty on European Atomic Energy Community, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11957A/TXT&from=EN>.

“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.”

As a result thereof goods, persons, services and capital move freely across the customs union. The TEEC also contained key provisions to ensure that the idea of level playing field is not undermined by the anti-competitive actions of private parties or by national action that favours domestic industry. In addition the TEEC was designed to approximate the economic policies of Member States, to promote harmonious development of economic activities throughout the Community, to increase stability, to raise the standard of living and to promote closer relations between Member States.¹² In terms of economics, the concept of “common market” aimed at removing all barriers to trade, such as tariffs or quotas, which restrict the number of imports of a certain product.¹³ On the other hand, the purpose of the EUROATOM was to establish specialized market for nuclear power, to distribute it throughout the Community, to develop nuclear energy and to sell surplus to non-Community states.

The EEC and the EUROATOM had their own supra-national institutional structure, as well as the ECSC. One should mention Convention on Institutions Common to European Communities. The convention sought to reduce number of institutions. They performed same or similar tasks in each of these communities. There was only one assembly and one court for all three communities.¹⁴

¹² Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 15.

¹³ Ibidem.

¹⁴ Craig P., De Burca, G.: The Evolution of EU Law, Oxford University Press, 2011; Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014; Čapeta, T; Rodin, S.: Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Pinder, J., Usherwood, S.: The European Union: A Very Short Introduction, Oxford University Press, 2013; Wyatt, D., Dashwood, A.: European Union Law, Sweet and Maxwell, London, 2000. Nevertheless, there were also some separate bodies. E.g. the ECSC had its High Authority, and other two communities their commissions. Each community had its own councils. The EEC and the EUROATOM had common Economic and Social Committee. Ibidem.

1. 1. 4. MERGER TREATY (1965.)

Due to separated structure of the governing bodies, there was the idea to merge councils and commissions into one joint body for all three communities. The Merger Treaty¹⁵ or Brussels Treaty was signed in Brussels on 8th April 1965 and entered into force on 1st July 1967. This Treaty was signed as the result of expansion of the Community to new Member States. The United Kingdom chose to remain outside the EEC when it was initially established.

The Merger Treaty merged the executive bodies of the ECSC, the EUROATOM and the EEC into a single institutional structure named European Community (hereinafter the EC). The single Council and the Commission of the European Communities were established instead of separate councils and commissions in each of the three communities. According to the new institutional structure, there were four institutions for three communities: the Commission of the European Communities, the Council of the European Communities, the European Assembly and the Court of Justice of the European Communities.¹⁶

1. 1. 5. THE SINGLE EUROPEAN ACT (1987.)

Single European Act (hereinafter the SEA)¹⁷ stands for significant reform of the Treaty of Rome and the Treaty of Paris. The SEA was signed in Luxembourg on 28th February 1986 and entered into force on 1st July 1987. The SEA made revision of the treaties in order to add new momentum to European integration and to complete the Internal Market. The SEA envisaged „*progressive establishment of internal market*“ by 1992.¹⁸ It amended the rules governing the operation of the European institutions and expanded Community remits, notably in the field of research and development, environment and common foreign policy. The SEA defined the notion “internal market” as area without internal borders in which free movement of goods, persons, services and capital are ensured. On basis of the SEA many changes were made within the European institutions. It gave the legal basis for European Political Co-oper-

¹⁵ Text of the Merger Treaty is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11965F/TXT>

¹⁶ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 16; Omejec, J., Vijeće Europe i Europska unija. Institucionalni i pravni okvir, Novi Informator, Zagreb, 2008., p. 81.

¹⁷ Text of the Single European Act is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1987:169:FULL&from=EN>.

¹⁸ Omejec, J., Vijeće Europe i Europska unija. Institucionalni i pravni okvir, Novi Informator, Zagreb, 2008., p. 82.

ation and formal recognition of the European Council. A Court of the First Instance was created to assist the Court of Justice. So-called “*comitology*” procedure, under which the Council delegates powers to the Commission on certain conditions, was formally introduced. The most important institutional change was the transformation of the role of the European Parliament (hereinafter the Parliament).¹⁹

1. 1. 6. THE MAASTRICHT TREATY (1992.)

The Maastricht Treaty (the Treaty on European Union, hereinafter the TEU)²⁰ was signed on 7th February 1992. It entered into force on 1st November 1993. The TEU established the EU, consisting of three pillars: the European Communities, the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters. The EEC was renamed in the European Community (hereinafter the EC).²¹ Its adoption was a result of two tendencies: to strengthen international position of the EU and to foster progress that was achieved by the SEA.²² The importance of the TEU lies in the fact that it established the EU. Initial steps in establishing the Economic and Monetary Union (hereinafter the EMU), which laid the foundations for introduction of the single currency, creation of EU citizenship and integration of new areas of cooperation were taken.²³ The TEU introduced a number of institutional changes to the Treaty of Rome. The most significant change was the increase in the Parliament’s legislative remit by introducing the so-called “*co-decision procedure*”. It was later on amended and strengthened by the Treaty of Amsterdam. This allowed the Parliament to block legislation which it disapproved.²⁴ The

¹⁹ See the text of the SEA.

²⁰ Text of the Maastricht Treaty is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:224:FULL&from=EN>.

²¹ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 20.

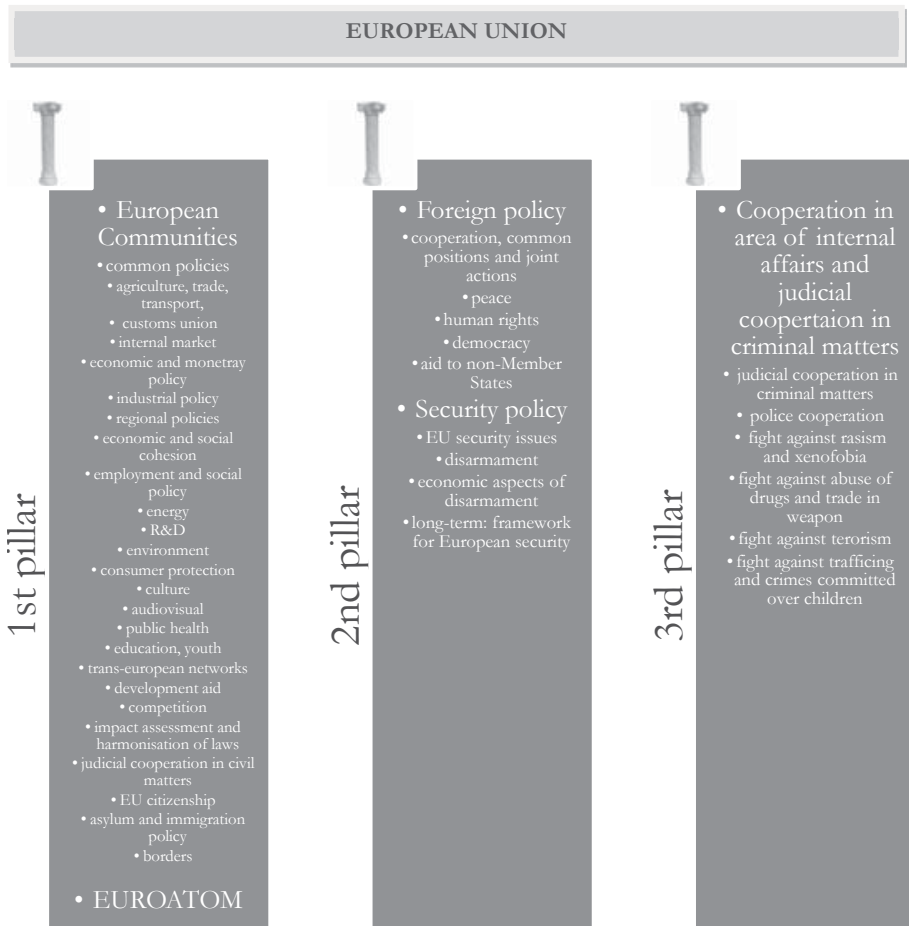
²² Ibidem, p. 21. see also Omejec, J., Vijeće Europe i Europska unija. Institucionalni i pravni okvir, Novi Informator, Zagreb, 2008., p. 83.

²³ Craig P., De Burca, G.: The Evolution of EU Law, Oxford University Press, 2011, p. 13.; Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 20; Čapeta, T, Rodin, S.: Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Pinder, J., Usherwood, S.: The European Union: A Very Short Introduction, Oxford University Press, 2013; Wyatt, D., Dashwood, A.: European Union Law, Sweet and Maxwell, London, 2000; Omejec, J., Vijeće Europe i Europska unija. Institucionalni i pravni okvir, Novi Informator, Zagreb, 2008., p. 85.

²⁴ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 21.

provision was made for the European System of Central Banks (hereinafter as the ESCB) and the European Central Bank (hereinafter the ECB). Their remit is to supervise functioning of the EMU.²⁵ The former three-pillar structure, which has been derogated by the Treaty of Lisbon, was established by the TEU: the European Communities as the first pillar, the Common Foreign and Security policy as the second pillar and the Cooperation in Judiciary and Internal Affairs.

Figure 1. Former structure of the EU



²⁵ Ibidem.

1. 1. 7. THE AMSTERDAM TREATY (1997.)

The Amsterdam Treaty²⁶ was signed on 2nd October 1997 and entered into force on 1st May 1999. It made substantial changes to the TEU. After the TEU, the EU expanded to Austria, Sweden and Finland in 1995. The idea was to enhance the EU's legitimacy. The principle of openness was added so that the decisions should be made as open as possible and as close as possible to the citizens.²⁷

The main changes related to the transfer of competences were those on asylum policy, immigration, visas and judicial and police cooperation. At institutional level the changes were in large part extension and consolidation of reform processes which begun with the SEA. The co-decision procedure was amended to increase the Parliament's powers. Many provisions of the treaty to which it was applicable were extended. It also changed the way that decisions were made in the EU by expanding the number of decisions covered by Qualified Majority Voting (hereinafter QMV). The framework was sketched out for the future accession of ten Member States. It absorbed the Schengen Convention into EU law, creating open borders between twelve Member States and expanded the role of the Common Foreign and Security Policy (hereinafter the CFSP). It also created the idea of enhanced co-operation to allow some Member States to co-operate more closely on areas outside the remit of the EU treaties without unanimous agreement. It recognised the idea of "*constructive abstention*" - whereby a Member State could opt out of security or foreign affairs without preventing other countries from going ahead.

The Treaty of Amsterdam amended the second and the third pillar. The change made to the second pillar included the fact that the Secretary-General of the Council was nominated as the High Representative to assist the Council's Presidency. The Council was given power to conclude international agreements.²⁸

1. 1. 8. THE TREATY OF NICE (2001.)

The Treaty of Nice was signed on 26th February 2001 and entered into force on 1st February 2003. The Treaty of Nice instigated number of changes to the

²⁶ Text of the Amsterdam Treaty is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1997:340:TOC>.

²⁷ Article 1 TEU.

²⁸ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 23.; Craig, P., De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p. 17.

Community institutional structure. Changes were introduced due to the enlargement of the EU to fifteen new Member States in 2004. The Treaty of Nice introduced institutional changes that will be able to follow future enlargement. The Treaty of Nice²⁹ provided an increase of number of seats in the Parliament to 732. It instigated new rules on closer co-operation. It also contained provisions to deal with the financial consequences of the termination of the ECSC. The most important stipulations of the Treaty of Nice concerned the adjustment of the EU institutions to the EU of 25 and later 27 or 28 Member States. The Treaty of Nice defined how the main institutions of the EU will function once the process of enlargement is completed. The Treaty of Nice introduced number of significant novelties concerning key aspects of the EU's operation: The Commission, The Council, the Parliament, majority decisions, enhanced cooperation, fundamental rights and the CFSP. It is worth mentioning that parallel to the discussions that led to the Treaty of Nice the process that led to the adoption of the Charter of Rights of the EU was under way.³⁰

1. 1. 9. EUROZONE

The Eurozone stands for a monetary union of 19 Member States of the EU which have adopted the euro (€) as their common currency. Euro coins and banknotes came into being on 1st January 2002 in 12 Member States. At the moment eurozone consists of Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. Other Member States of the EU (except for Denmark and the United Kingdom) are bound to join once they fulfill the so called “*Maastricht criteria*”. Outside the EU there are some states where the euro is also used. According to the agreements with the EU, euro is also used as official currency in Andorra, Monaco, San Marino and Vatican City. Kosovo and Montenegro have adopted the euro unilaterally. Afore-mentioned countries do not take part in the Eurozone and do not have representation in the ECB. Monetary policy of the eurozone is the responsibility of the ECB³¹ which is governed by a president and a board consisting of the heads of national central banks. The main objective of the ECB is to maintain price stability and to keep inflation under control.

²⁹ Full text of the Treaty is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2001:080:TOC>.

³⁰ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 25; Craig, P., De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p. 19.

³¹ The European Central Bank official webpage is available at <https://www.ecb.europa.eu/>.

1. 1. 10. THE TREATY OF LISBON

Due to the successive enlargements of the EU, the number of the Member States increased to 28. Therefore it was necessary to adjust the functioning of the institutions of the EU and decision-making process. The Treaty of Lisbon enabled revision of several policies of the EU. It redefines and strengthens actions taken at the EU level. The Treaty of Lisbon has amended the TEC and TEU.³²

First attempt of the reform began with the drawing up of the Treaty establishing the Constitution for Europe (hereinafter the European Constitution).³³ It aimed to replace the founding treaties of the EU. The European Constitution was signed in Rome on 29th October 2004. However, before it could enter into force, it had had to pass ratification in all Member States. The ratification process failed in 2005 in several Member States when France, Luxembourg and the Netherlands said no to the European Constitution. On 23th July 2007 new intergovernmental conference took place in Lisbon. The main objective was to find an alternative to the European Constitution and to proceed with proposed reforms. The idea of the European Constitution was therefore abandoned and further negotiations took place with the aim of drawing up amending treaty. On 13th December 2007 the heads of state or government of 27 Member States of the EU signed the new, amending treaty in Lisbon.³⁴ The Treaty of Lisbon (known as the Reform Treaty) entered into force on 1st December 2009, after it had been ratified by the Member States in accordance with their respective constitutional requirements. The Treaty of Lisbon reformed the institutions of the EU and improved the decision-making process in the EU. It strengthened the democratic dimension of the EU. It reformed the internal policies of the EU and strengthened the external policies of the EU.

After the Treaty of Lisbon entered into force, the EU has been founded on two treaties: The Treaty on European Union (hereinafter the TEU) and the Treaty on the Functioning of the European Union (hereinafter as TFEU). These two

³² Craig, P. *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, 2010.; Craig, P.: *The Treaty of Lisbon: Process, Architecture and Substance*, *European Law Review*, 2008; Ingolf E. A. Pernice: *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, *Columbia Journal of European Law*, Vol. 15, No. 3/2009, pp. 349-407.

³³ On the European Constitution see more in De Burca, G.: *The European Constitution Project after the Referendá*, 2006; Ziller, J.: *Une constitution courte et obscure ou claire et détaillée? Perspective pour la simplification des traités et la rationalisation de l'ordre juridique de l'Union européenne*, *EUI Working Papers, Law*, 2006/31.

³⁴ Text of the Treaty is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:306:FULL&from=EN>.

treaties have the same legal value.³⁵ The EU has replaced and succeeded the European Communities. The Treaty of Lisbon has introduced new numbering and references to previous provisions. The Treaty of Lisbon improved the architecture of the EU. It consists of seven parts. The provisions on Police and Judicial Cooperation in Criminal Matters, the former third pillar, have been moved to the TFEU. It should be mentioned that the Treaty of Lisbon is not build on the three - pillar system.

1. 1. 11. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the EU (hereinafter the CFR) prescribes the full range of civil, political, economic and social rights for citizens of the EU, as well as for all other persons living in the EU. The CFR was solemnly proclaimed on 7th December 2000 at the European Council in Nice. At that time, it did not have binding legal effect. On 1st December 2009, at the moment of the oncoming into force of the Treaty of Lisbon, the CFR became legally binding for the EU institutions and for the national governments, just like the EU treaties.

The CFR strengthens the protection of fundamental rights by making those rights more visible and more explicit for citizens. As it has already been mentioned, the CFR³⁶ became legally binding for all Member States in 2009. Number of countries, including the United Kingdom, opposed it because they had argued for new legal obligations would undermine their national sovereignty. Other governments, including those of France, Germany and the Netherlands, welcomed the CFR³⁷ and were keen to enforce it. It is the first formal document of the EU which combines and declares all the values and fundamental rights (economic, social, civil and political) to which citizens of the EU are entitled. The main aim of the CFR is to make these rights more visible. The CFR contains provisions on rights and freedoms in six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. The CFR does not establish new rights, but assembles existing rights that were previously scattered over a range of international sources. Since national courts and the Court of Justice of the European Union (hereinafter the CJEU) have to consider the CFR, it can be consulted in cases where law of the EU is at issue. The provisions of

³⁵ Craig, P.: Development of the EU in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 29.

³⁶ The Charter of Fundamental Rights of the European Union (2012), OJ C 326, 26.10.2012, pp. 391-407.

³⁷ Rodin, S.: Ustavnopravni aspekti primjene Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Zbornik Pravnog fakulteta u Zagrebu (0350-2058) 48 (1998), 1; pp. 85-116.

the CFR are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to the national authorities only when they are implementing EU law. In cases where the CFR does not apply, the protection of fundamental rights is guaranteed under constitutions or constitutional traditions of Member States of the EU and international conventions they have ratified. The CFR does not extend the competence of the EU to matters not included under its competence

1. 1. 12. ENLARGEMENT OF THE EU

The enlargement process of the EU was carried out in several waves of enlargement rounds.

Figure 2. The founding treaties

The founding treaties
1951 foundation of European Coal and Steel Community, 6 founding states: France, Germany, Italy, Belgium, Luxembourg and the Netherlands
1957 European Economic Community
1973 Denmark, Ireland and the United Kingdom entered the EC
1981 Greece joined the EC
1986 Spain and Portugal joined the EC
1995 Sweden, Finland and Austria joined the EU
2004 simultaneous accession of: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia
1.1.2007 Bulgaria and Romania joined the EU
1.7.2013 Croatia joined the EU

Figure 3. Rounds of expansion

Rounds of expansion of EU
1951 Belgium, France, Germany, Italy, Luxembourg and the Netherlands (ECSC) (1957 EEC and Euratom)
1973 Denmark, Ireland and the United Kingdom
1981 Greece
1986 Portugal and Spain
1995 Austria, Finland and Sweden
2004 Cyprus, Czech Republic, Estonia, Lithuania, Latvia, Hungary, Malta, Poland, Slovenia, Slovakia
2007 Bulgaria and Romania
2013 Croatia

On 18th July 1961 Republic of Ireland filed an application for membership in the EC (EEC). On 9th August 1962 the United Kingdom filed an application and on 10th August 1961 Denmark did the same. On 1st January 1973 the first expansion took place. Upon entry of these countries, the EC was significantly strengthened. In 1974 they started thinking about the idea of the European Currency Unit (ECU). It was a basket of the currencies of Member States of the EEC. On 12th June 1975, Greece filed an application for membership in the EC. Portugal filed its application on 28th March 1977 and Spain did it on 28th July 1977. European Monetary Fund was introduced in 1979. It included eight member states of the EC, except the United Kingdom. On 1st January 1981 Greece became the tenth Member State of the EC. In 1986 the EC became larger due to the entry of Spain and Portugal. The EC consisted of 12 Member States. On 29th May 1986 flag of the EC fluttered for the first time in front of the *Berlaymont* building. On 17th and 28th February 1986 the SEA was signed. It reviewed and supplemented the Treaty of Rome. It entered into force on 1st July 1987. The EU received its current name on 1st November 1993 in Maastricht. The Maastricht Treaty changed the EC into the EU and a new phase has begun - a modern integration. A new “*nation*” was created and citizens of Europe, economic and monetary goals were set for future. The Common Foreign, Security and Defence Policy were established. Member States became part of supranational organisation that was named “*the European Union*”. On 1st January 1995 the fourth round of expansion took place. Austria, Finland and Sweden joined the EU. Another Scandinavian country - Norway – completed its negotiation in 1972 but it did not join the EU. Namely, its accession agreement was not ratified due to the repeated refusal of joining the community in referendum. The enlargement of the EU in 2004 was the largest single expansion of the EU, in terms of territory, number of states and population. It was the fifth wave of expansion. The simultaneous accessions concerned Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. The enlargement of the EU in 2007 consisted of Bulgaria and Romania. They joined the EU on 1st January 2007. Bulgarian Cyrillic has become one of the official alphabets (along with Latin and Greek alphabet).

In its 50 years the integration process has brought reforms and consolidated common principles of liberty, democracy, respect for human rights, fundamental freedoms, rule of law and market economy. It has enhanced the EU’s relevance in the world and has made it a stronger and more attractive international partner. Nowadays, the EU is faced with global challenges.

1. 2. ADDRESSING GLOBAL CHALLENGES

1. 2. 1. PEACE AND SECURITY

The EU works for global peace and security alongside the United States of America and multilateral organizations, including North Atlantic Treaty Organisation (hereinafter the NATO) and the United Nations (hereinafter the UN). It undertakes humanitarian and peacekeeping missions and has provided military forces for crisis management around the globe.

1. 2. 2. COUNTERTERRORISM AND HOMELAND SECURITY

The EU has taken steps to improve intelligence sharing, enhance law enforcement and judicial cooperation and to prevent terrorist financing. The EU boosts trade and transport security to support the struggle against terrorism.

1. 2. 3. DEMOCRACY AND HUMAN RIGHTS

The EU works globally for free elections and open democratic processes. It fights racism and intolerance at home and abroad and campaigns for abandonment of capital punishment.

1. 2. 4. DEVELOPMENT ASSISTANCE AND HUMANITARIAN RELIEF

The EU and its Member States are the world's largest aid donor, providing 55% of total official development assistance. It provides billions of dollars in humanitarian aid to more than 100 countries in response to crises and natural disasters.

1. 2. 5. TRADE

The Commission is representative of all 28 Member States of the EU in the World Trade Organization (hereinafter the WTO). Nevertheless, both the EU and its Member States are members of the WTO. The EU supports free trade and open markets, within the rules-based structure of the WTO, in order to promote growth and jobs in both industrialized and developing countries. Developing countries play a significant role in the WTO. The EU is the world's most open market for products and commodities from developing countries – 40% of all imports in the EU originate from developing countries.

1. 2. 6. ENVIRONMENTAL PROTECTION

The EU is a leader in global efforts to protect the environment, maintaining rigorous and comprehensive systems at home. It plays a key role in developing and implementing international agreements, such as the Kyoto Protocol on Climate Change and executes a “cap and trade” system to reduce greenhouse gas emissions. The EU takes the lead in the fight against global warming by adopting binding energy targets (cutting 20% of the EU’s greenhouse gas emissions by 2020).

1. 3. THE INSTITUTIONAL FRAMEWORK OF THE EU

In Article 13 TEU it is stated:

“The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.”

The institutional structure of the EU consists of the following institutions.

Figure 4. Institutions

Institutions
the European Parliament (the Parliament)
the European Council
the Council
the European Commission (the Commission)
the Court of Justice of the European Union (the Court, CJEU)
the European Central Bank (the ECB)
the Court of Auditors (the CA)

1. 3. 1. EUROPEAN PARLIAMENT

The Parliament represents citizens of the Member States of the EU.³⁸ Since 1979 members are elected directly by citizens of Member States. Elections are held every 5 years (last ones were in 2009 according to the “old rules”). Article 22(2)b TFEU provides that every EU citizen living in another Member

³⁸ The European Parliament’s official web page is available at <http://www.europarl.europa.eu/portal/en>.

State can vote or be a candidate for the seat in the Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that state.

Meetings of the Parliament take place in Brussels and Strasbourg. Administrative offices are located in Luxembourg. Since 2014 number of the seats is 751. The minimum number of seats per Member State is 6 and the maximum number of seats is 96. The number does not reflect Member States' population, but it takes it into consideration. The members of the Parliament are grouped by political affinity and not by nationality.

According to the new rules, since 2014 Member States of the EU propose a candidate for the position of future President of the Commission, taking into consideration results of European elections. The Parliament elects new President of the Commission by majority of votes, at least half of 751 elected Members of Parliament (376). Prior to the European elections, European political parties have to introduce their candidates for this leading position in the EU and give an opportunity to the citizens of the EU to influence on election of the President of the Commission. The Parliament is only directly elected institution of the EU. It is currently "a backbone" of decision making process in the EU. It has the same influence as national governments have in passing bills of the EU. Thus the influence of voters has increased.³⁹

1. 3. 1. 1. Political groups

There are currently 7 political groups in the Parliament which act on behalf of more than 160 national political parties. According to the Parliament's rules, members of the political group have to share common political positions and have to consist of at least 25 members from at least $\frac{1}{4}$ of all Member States (at least 7). Members who do not want to take part in or cannot be part of some political group are being referred to as "independent".

The number of members of each political group can be seen at the figure below.

³⁹ Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014; Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, Third Edition, 2010; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011; Bodiřoga Vukobrat, N., Đerđa, D., Poščić, A. (eds.) *Zbirka presuda Europskog suda*, Inženjerski biro, Zagreb, 2011; Čapeta, T, Rodin, S.: *Osnove prava Europske unije*, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011.

Figure 5. Political parties in numbers

Political parties in numbers
220 Group of the European People's Party (Christian Democrats)
191 Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
68 Group of the Alliance of Liberals and Democrats for Europe
50 Group of the Greens/European Free Alliance
70 European Conservatives and Reformists Group
51 Confederal Group of the European United Left - Nordic Green Left
48 Europe of Freedom and Democracy Group
52 Non-attached Members
Total 751 MP's

1. 3. 1. 2. Common provisions on elections

There are common electoral provisions of the EU. They are mainly organised according to national customs and laws. E.g. each Member State decides on its own on question of open or closed election lists and on specific electoral threshold, until it is not above 5%. Minimum age for voting is 18, except Austria where it is 16. Minimum age for candidacy differs from state to state; in most cases it is 18. Voting is mandatory in Belgium, Cyprus, Greece and Luxemburg.

1. 3. 1. 3. Remit and functions of the Parliament

The Parliament⁴⁰ has two main categories of powers. The legislative and budgetary powers it exercises along with the Council. It has powers of political control and consultation. The first category of powers parallels the description of the first category of powers conferred upon the Council.

Legislative powers are shared with the Council of the EU. It can accept, amend or reject the content of proposed legislation. It co-decides with the Council on issues of the former third pillar (including criminal matters). It holds increased powers of concluding international agreements. But it executes no legislative powers in the CFSP. The Parliament **supervises** work of other institutions of the EU, in particular, the Commission. In terms of politics, it can influence the process of electing members of the Commission. It can decide on trust or distrust as regards the Commission's acts by 2/3 majority vote. **Budgetary pow-**

⁴⁰ Peers, S.: The EU's political institutions in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014.

ers are shared along with the Council of the EU. The Parliament may approve or reject the budget. It executes control over budget implementation which is done by the Commission. Each year it dismisses responsibility of the the Commission for costs incurred in the previous year. The Parliament has active and passive *ius standi* before the CJEU. It may initiate legal proceedings against other institutions of the EU. Nonetheless, other institution, Member States and individuals can propose annulment of the acts passed by the Parliament to the CJEU or seek for compensation.

National parliaments receive information on the rogation of the Commission.⁴¹ They take part in the changing procedure of the founding treaties and in evaluation of implementation of the principle of subsidiarity. In order to strenght their role in that area, Protocol on the Application of the Principles of Subsidiarity and Proportionality (hereinafter the Protocol), originally implemented by the Treaty of Amsterdam, has been changed. According to the amended Protocol, any national parliament can accept substantiated opinion specifying the reasons why it finds the rogation contrary to the principle of the subsidiarity, within 8 weeks of its admisssion. Every national parliament has 2 votes on that issue.

According to the Article 5(3) TEU **principle of subsidiarity** applies in areas of separated powers. Institutions which take part in decision making process have to prove that certain issue should be regulated at the EU level. In areas which do not fall within its exclusive powers, the EU can act only when and if the aims of proposed action cannot be properly achieved at State, central, regional or local level but they can be better achieved at EU level due to the proportion or effects of proposed action. The EU institutions apply principle of subsidiarity in a way regulated in the Protocol. National parliaments make sure that this principle is respected in accordance with the procedure prescribed in the Protocol.

According to the Article 5 (4) TEU, if it is justified to regulate certain issue at EU level, when choosing method and intensity of regulation, the institutions of the EU shall take into consideration the **principle of proportionality**. The solutions of the EU shall not restrict other interests in question more than it is necessary. Based on the principle of proportionality, a content and a form of the EU's action shall not exceed what is necessary in order to achieve aims of the Treaty. The institutions of the EU apply the principle of proportionality

⁴¹ More on relation between national parliaments and the Parliament see in Rodin, S.: Europska Unija i njemački Ustavni sud; Pravni fakultet Sveučilišta u Zagrebu, Zagreb, Hrvatska, Politička misao, Vol. 33 No. 4, 1996.

in a way it is prescribed in the Protocol. If there is less restrictive measure to achieve the same aim, measure adopted by the EU shall be considered disproportional and voidable. The burden of proof that both principles are respected lies with the EU institutions which propose adoption of a certain measure. According to the Protocol, if 1/3 majority asks for derogation of an institutional act, the institution in question shall modify the act and decide whether it will be returned to the legislative procedure or withdrawn. Proposition of regulatory measures can be opposed by national parliaments and by regular majority. The Commission can decide to keep the derogation when national parliaments voted against it. Then the special procedure will follow. The Commission must establish an opinion clarifying that the principle of the subsidiarity is respected. Later on the opinions of the Commission and the national parliaments are addressed to the Parliament and the Council which then decide whether the legislative procedure will continue. The Council decides by 55% of its members and the Parliament by regular majority.

1. 3. 2. THE COUNCIL

The Council⁴² is an independent institution. It is the main decision making body, although it shares to a great extent its role with the Parliament. It is usually made up of ministers of Member States' governments. It is a distinct institution from the European Council which is made up of Member States' heads of states and governments.

The Council consists of ministers who represent their Member States' government. They can commit their government and vote on its behalf. It is up to the government of each Member State to decide who will appear in the Council on behalf of the government. The Council does not have a fixed membership. It is made up of different ministers depending on the subject matter. In Article 16(6) TEU two specific configurations of the Council are defined. The General Affairs Council, which usually consists of Member States' ministers of European affairs, is responsible for overall coordination of policies, institutional and administrative questions, horizontal dossiers. Dossiers affect several policies of the EU, such as the multiannual financial framework and enlargement and any dossier entrusted to it by the European Council.⁴³ The Foreign Affairs Council, which consists of Member States' ministers of foreign affairs, elab-

⁴² The European Council webpage is available at <http://www.consilium.europa.eu/en/european-council/>.

⁴³ Article 2(2) TEU.

orates external actions of the EU. It is responsible for entire EU's external action i.e. common foreign and security policy, common security and defence policy, common commercial policy, development cooperation and humanitarian aid.⁴⁴ The Council remit covers two main categories of powers. It exercises Legislative and budgetary functions along with the Parliament. The Parliament is also in charge of policy making and coordination.⁴⁵ The voting procedure in the Council depends on whether the Council votes by unanimity or by qualified majority and on method of calculation of the qualified majority.⁴⁶

1. 3. 2. 1. Structure of the Council

The Council is main regulatory body besides the Parliament.⁴⁷ It takes part in legislative co-decision procedures alongside with the Parliament. In some cases, in independent legislative authorisation, it is bound to consult the Parliament (so called Special Legislative Procedures). It plays independent decision making role in the Common Foreign and Security Affairs. It carries out legislation and establishes budget together with the Parliament as well as policy decisions. It ensures coordination of Member States' economic policies. The individual interests of Member State and the EU are put in balance. Each Member State has one representative at ministerial level. The composition varies according to subject matter of the discussion. The Presidency of the Council is held by each Member State in turn for period of six months. As regards decision making in the Council, decisions are made unanimously, by simple majority voting or by qualified majority. As a general rule, qualified majority is sufficient. The methods for calculating qualified majority will change in various stages (total 345 votes). The number of votes belonging to each Member State can be seen in the figure below.

⁴⁴ Article 2(5) TEU.

⁴⁵ Article 16(1) TEU.

⁴⁶ Peers, S.: *The EU's political institutions* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 57

⁴⁷ On institutional framework of the EU see more in Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011; Ćapeta, T; Rodin, S.: *Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje*, Narodne novine, Zagreb, 2011.

Figure 6. Number of votes per State

Number of votes per State
29 France, Germany, Italy and United Kingdom
27 Poland and Spain
14 Romania
13 the Netherlands
12 Belgium, Czech Republic, Greece, Hungary and Portugal
10 Austria, Bulgaria, Sweden
7 Denmark, Ireland, Lithuania, Slovakia, Finland and Croatia
4 Cyprus, Estonia, Latvia, Luxembourg, Slovenia
3 Malta

Changes in the decision making were introduced by the Treaty of Nice. The stages of calculating majority can be seen in the figure below.

Figure 7. Calculating majority

Stages of calculating majority
1st stage: 1. 12. 2009-31. 10. 2014.
2nd stage: 1. 11. 2014.-31. 3. 2017.
3rd stage: starts on 1. 4. 2017.

First stage was established by the Protocol to the Treaty of Lisbon. There can be two situations. Voting can be launched on the Commission's initiative. The majority is presumed if 255 votes are *pro*, on the condition that at least half of the Council members were *pro*. Other situation is when 255 votes are given by 2/3 of the Council. Additionally each member of the European Council or the Council can demand that these Member States represent at least 62% of the population of the EU.

Second stage may also face two situations. Proposal of the Commission or the High Representative for Foreign and Security Policy will need a qualified majority of at least 55% of members of the Council which represent minimum of 65% of the population and minimum of 15 Member States. Blocking minority must consist of at least 4 Member States. Proposal of others will need qualified majority of at least 72% members of the Council which represent minimum of 65% of Member States. This methodology applies only if member of the Council does not ask to vote on basis of the rules prescribed for transitional period. Upon request of one of the members of the Council, application of mech-

anism of second stage can be replaced by the mechanism of transitional stage. In third stage it is not possible to ask for transitional-period decision method. System of double-majority prescribed for the second stage shall be applied.

1. 3. 2. 2. President of the Council

Prior to the entry into force of the Treaty of Lisbon, the Presidency of the Council was held by each Member State in period of six months. This system was changed by the Treaty of Lisbon which provides that the Foreign Affairs Council is chaired by the High Representative. For the remaining Council configurations, the role of the chair of the Council must be taken by Member States on the basis of “equal rotation” in accordance with a decision adopted by the European Council by qualified majority. According to European Council’s decision, the Presidency is nominally held by groups of three Member States working together. These groups are chosen on the basis of their diversity and geographical balance.⁴⁸

Holding the presidency means that the Member State in question is responsible for scheduling and chairing all Council’s meetings planned for the six months period as well as the meetings of the Council’s preparatory bodies.

1. 3. 2. 3. Passarelle clause and the „emergency brakes”

Provisions of TEU and TFEU allow for transition from unanimous voting system, in areas where it is still prescribed, to qualified majority decision making, without amendments to the founding treaties (so called “*passarelle*” clause). In order to achieve this transition, unanimous decision of the representatives of all Member States in the Council is required. It is a sort of Member States’ supervision over decisions brought at EU level. Qualified majority in the Council is necessary regarding all issues for which the ordinary legislative procedure is prescribed. Previous 3rd pillar policies are put under the Treaty of Lisbon. Since these are delicate areas (criminal law and Member States’ policies), the „*emergency brakes mechanism*”⁴⁹ has been introduced. It allows Member States to temporarily stop passing a bill within the ordinary legislative procedure and thus by qualified majority in the Council (possibility under TFEU in areas of social security, judicial cooperation in criminal matters and crimes harmonisation). The procedure can be launched by any of the Council’s members who invoke particularly important national interests. Within 4 months the

⁴⁸ Peers, S.: The EU’s political institutions in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 60.

⁴⁹ Craig P., De Burca, G.: The Evolution of EU Law, Oxford University Press, 2011, p. 45.

Council can either return the proposed act to the Council, which will continue with the ordinary legislative procedure, or send it to the Commission (or keep it) to draw up a new act, and the original act cannot be adopted.

1. 3. 2. 4. COREPER

The Committee of Permanent Representatives (fr. *Comité des Représentants Permanents*, hereinafter the COREPER) assists the Council in undertaking all EU measures. It is subsidiary body. Ministers sitting in the Council are at the same time ministers in national governments, since Council meets only occasionally. The COREPER provides permanent work of the Council. COREPER has important role in decision making process (with exemption as regards agricultural policy, which is dealt by the Special Committee for Agriculture). Prior to any decision making process in the Council, an issue will be discussed and voted in the COREPER. In principle, if there are no difficulties with passing an act in the COREPER, ministers in the Council will not discuss it and it will be enacted. If no consensus is reached in the COREPER, ministers will discuss it and eventually vote in the Council. The COREPER meets in two different formats. The COREPER II deals with the affairs of the General Affairs Council while COREPER I deals with the subject matters of the six other Council's configurations: Agriculture and Fisheries; Employment; Social Policy; Health and Consumer Affairs; Competitiveness; Education; Youth, Culture and Sport; Transport, Telecoms and Energy; and Environment.⁵⁰

1. 3. 3. THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICIES

This position has been introduced by the Treaty of Lisbon. The High Representative of the Union for Foreign Affairs and Security Policies is appointed by the European Council, acting by qualified majority, in agreement with the President of the Commission. It holds the Presidency of the Foreign Affairs Council. In the Commission it holds position of the Vice-President in charge of foreign affairs. This position is excluded from the six months rotation of the Presidency of the Council. The six month rotation still applies on the Council on other matters. First person who was appointed as High Representative was Baroness Catherine Ashton on 1st December 2009.

⁵⁰ Peers, S.: *The EU's political institutions* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 62.; Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011, p. 45.

1. 3. 4. EUROPEAN COUNCIL

The European Council consists primarily of the heads of State or government of each Member State. It is up to each Member State to decide who attends meetings of the European Council as its representative. The High Representative also takes part in the work of the European Council. The President of the European Council and the President of the Commission are members of the European Council. Only heads of Member State or government have right to vote.

The President of the European Council is institution introduced by the Treaty of Lisbon. The system of 6 months rotation of Member States is derogated. The president of the European Council represents the EU at international level. The institution sets the EU's political direction and priorities. The President is responsible for preparing and chairing meetings of the institution. He also ensures the external representation of the EU's common foreign and security policy at his level.

The Treaty of Lisbon introduced three significant changes to the status and functioning of the European Council. The Treaty of Lisbon made it the official institution⁵¹ of the EU. It means that the European Council can sue and be sued. The role of the European Council has been enhanced by providing that it can adopt much wider array of formal decisions: decisions on major appointments, its own functioning, the composition and functioning of other institutions, and the Treaty amendment process. The European Council retained the power to decide on sanctions against the Member States and to adopt strategic foreign policy decision establishing common defence.⁵²

1. 3. 5. COUNCIL OF EUROPE

The Council of Europe is not to be confused with the Council of the EU and the European Council. The Council of Europe is not part of the institutional system of the EU. It is a regional intergovernmental organisation. It is composed of 47 member states. 28 states are Member States of the EU. All member states signed the European Convention on Human Rights (hereinafter the Convention). The judicial enforcement of the Convention is executed by the European Court of Human Rights, located in Strasbourg.

⁵¹ Article 13(2) TEU.

⁵² Peers, S.: The EU's political institutions in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 67.

1. 3. 6. EUROPEAN COMMISSION

The Commission is the executive body of the EU. It represents interests of the EU and it is not politically responsible to Member States. Its 28 members (commissioners) are appointed for a term of five years by the Commission, Member States and the Parliament. The President of the Commission is nominated by the Commission, acting by qualified majority and afterwards elected by the Parliament, by majority of its members. The Commission is responsible to the Parliament which can vote on its disapproval. It is located in Bruxelles and Luxembourg.

1. 3. 6. 1. Appointment procedure

Appointment procedure consists of two phases. In the first phase there is a list of people nominated for the Commission by the European Council. In the second phase, the Parliament votes on the approval and formal appointment by the Council of the EU will follow. Originally each Member State had two commissioners but, according to the Treaty of Nice, every Member State has one commissioner. Elected commissioners must not represent interests of Member State of origin, but EU's interests as independent members of the Commission.

1. 3. 6. 2. The general competences

The Commission launches proposals and drafts of the EU's policy and legal acts. It has exclusive competence to propose and draft the EU's legislation, except in foreign and security policy where it cannot pass legislative acts. Sometimes legislative initiative is on Member State, the ECB and the CJEU. It takes care of their implementation. It manages budget of the EU. The Commission is so called "Guardian of the Union law." It monitors the application and implementation of EU law by Member States. Institutes infringement proceedings in case of violation of EU law and may refer it to the CJEU. In case of violation of EU law by a Member State, it sends the formal notice. If a Member State has not put an end to such breach, after it had been given a chance to explain certain act, the Commission will send a "*reasoned opinion*" to the Member State in question. Such reasoned opinion is basis for a lawsuit before the CJEU. The Commission will initiate the procedure before the CJEU in case a Member State continues to violate EU law. If it accepts the Commission's stand, the CJEU can issue a declaratory judgement which confirms violation by a Member State. If a Member State does not put an end to violation, the Commission can initiate new procedure before the CJEU. The CJEU is authorized to deliver monetary penalty against Member State in question.

1. 3. 6. 3. The competences in foreign affairs

As mentioned afore, the Council consists of ministers of foreign affairs. Chairman is a Vice-President of the Commission. In the name of the EU and on basis of the powers conferred on it by the Council, the Commission negotiates agreements with international organisations and non-member countries, including accession treaties with candidate states.

1. 3. 7. LEGISLATIVE PROCEDURES IN THE EU

The Parliament, the Council and the Commission take part in legislative procedure in the EU. There are two legislative procedures: ordinary and extraordinary legislative procedure. When it comes to consultative procedure, it has been reduced by the Treaty of Lisbon.

Regular legislative procedure, as it is defined by Article 294 TFEU, substitutes earlier procedures of co-decision and cooperation, admissible to police and court cooperation in criminal matters. The Commission has the legislative initiative. A legislative proposal must be approved by the Council after three readings by qualified majority as well as by the European Parliament.

1. 3. 8. COURT OF JUSTICE OF THE EU

The CJEU consists of 28 judges and 9 Advocates General.⁵³ The CJEU is judicial institution of the EU and the EUROATOM. Three groups of changes have been introduced by the Treaty of Lisbon. There are some nominal changes. The Court of First Instance has become the General Court, the method of appointment of judges and Advocates Generals has been changed and there has been a change in the powers of the Court.⁵⁴ There is a possibility to establish specialised courts. The CJEU has tripartite composition. It consists of the Court, General Court and Civil Servant Tribunal. Main task is the control over lawfulness of acts of the EU and assurance of unique application and interpretation of EU law.

⁵³ Čapeta, T.: Sudovi Europske unije. Nacionalni sudovi kao europski sudovi (Courts of the European Union. National Courts as European Courts), Institut za međunarodne odnose, Zagreb, 2002.

⁵⁴ Albors-Llorens, A.: Judicial Protection Before the Court of Justice of the European Union in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 256.

1. 3. 8. 1. Selection of Judges and Advocate Generals

The board of seven members issues opinion on candidates' competence. Candidates are proposed by Member States. Board members are selected by the Council among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the Parliament.

1. 3. 8. 2. Judicial competence

Article 260 TFEU provides the CJEU with possibility to impose fines to Member States due to non-implementation of directives, without prior need to issue a declaratory judgement declaring such breach. Article 263 TFEU amplifies *ius standi*, in a way that individuals can challenge all acts of the institutions which are addressed to them and not just individual acts. If an act is not addressed to a plaintiff, a plaintiff has to prove her/his legal interests i.e. that an act is of direct and individual interest for her/him. In a case of general acts, a plaintiff has to prove only that such act has direct effect, i.e. that no additional implementation measures are needed. Article 267 TFEU has introduced accelerated procedure in cases when preliminary reference of national court refers to procedure in custody matters.

1. 3. 8. 3. Procedures before the Court of Justice

There are several types of procedure before the Court.⁵⁵

- a. *Preliminary reference*
- b. *Action in case of breach*
- c. *Act for annulment*
- d. *Act in case of omission*
- e. *Appeal and Revision*

⁵⁵ More on judicial protection before the CJEU see in Albors-Llorens, A.: *Judicial Protection Before the Court of Justice of the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 261.

a. Preliminary reference

The Court cooperates in close relation with courts of Member States, which are ordinary courts in charge of application of EU law.⁵⁶ In order to assure efficient and unique application of EU legislation and to avoid various interpretation of EU law, national courts may, and sometimes they must, refer question(s) to the Court asking for clarification of interpretation of EU law in order to check compliance of their national legislation with EU law. A preliminary reference can also refer to a control of validity of acts brought by institutions of the EU.

Upon request the Court does not issue a mere opinion. It gives judgment or reasoned opinion. A national court addressing the preliminary reference to the Court is bound to follow interpretation given in concrete case. At the same time, a judgement of the Court creates an obligation for other national courts which consider the same issue.

b. Action in case of breach

In a case initiated by filing-in this action, the Court supervises if Member States respect obligations imposed by EU law. Prior to initiating procedure before the Court, there is a preliminary phase, launched by the Commission. In this phase a Member State has an opportunity to reply to complaints addressed. If this procedure does not result in breach been eliminated, an action can be filed.

c. Action for annulment

By filing-in this action,⁵⁷ a plaintiff seeks for annulment of an act (in particular regulation, directive or decision) of some institution, body, office or agency of the EU. The Court has exclusive competence over actions of Member States against acts of the Parliament and/or the Council (except for Council's acts in area of state aid, dumping and inter-institutional actions). The General Court has 1st instance competence in other actions of this kind and, in particular, in individual claims.

d. Action in case of omission

This action provides control of lawfulness in case of non-acting of an institution, body, office or agency of the EU. The action cannot be brought before

⁵⁶ Ibidem, p. 284.

⁵⁷ Albors-Llorens, A.: *Judicial Protection Before the Court of Justice of the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 265.

asking this institution to act. If unlawfulness has been found in non-acting, institution or body in question is bound to adopt appropriate measures for cease of non-acting. The competence in this procedure is divided among the Court and the General Court according to the same criteria as for the actions for annulment.

e. Appeal and Revision

An appeal against a judgement and a procedural decision of the General Court can be filed. It can refer only to matters of law. If an appeal is permitted and substantial, the Court shall annul decision of the General Court. If subject matter does not have to be discussed any more, the Court can make a decision. If this is not the case, it shall return the case to the General Court, which is bound to respect decision on appeal. Appellate decisions of the General Court issued against the decisions of Civil Servant Tribunal can be subject to revision before the Court in exceptional cases, according to conditions envisaged in Protocol of Statute of the CJEU.

1. 3. 8. 4. Widening competences of the Court

In accordance with the Treaty of Lisbon, in areas of the former second and third pillar, including cooperation in judicial matters and internal affairs, the CJEU competences have been widened.⁵⁸ Only exemption was in the second pillar– the CFSP– where the CJEU did not have competence over actions enforced by police of Member States. Widened competence in area of third pillar refers only to acts adopted after the Treaty of Lisbon entered into force. Competence of the CJEU in respect of existent acts and measures was narrowed in period of 5 years after the Treaty of Lisbon entered into force. After expiration of that period, special regime shall be in force for the United Kingdom and Ireland.

1. 3. 9. EUROPEAN CENTRAL BANK

The ECB⁵⁹ was founded on 1st January 1999, having seat in Frankfurt, Germany. It manages the official common currency – the euro. It enforces economic

⁵⁸ Albers-Llorens, A.: *Judicial Protection Before the Court of Justice of the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 255.

⁵⁹ The official web page of the European Central Bank is available at <https://www.ecb.europa.eu/home/html/index.en.html>.

and monetary policy of the EU and communicates with central banks of 28 Member States. The ECB acts completely independent and shall not seek for or accept any instructions given by other bodies or institutions.

The main aim of the ECB is to maintain price stability by keeping inflation rate under control, in particular, in countries which use the euro as their currency. Beside that, its role is to maintain financial stability by providing guarantee of appropriate supervision over financial markets and institutions. The most important tasks of the ECB are the following:

- a. determines key interests rates in the eurozone and supervises quantity of money in circulation
- b. manages foreign currency reserves in eurozone and buys and sells foreign currency in situations when stability of currency has to be provided
- c. provides helps to national bodies in establishing appropriate supervision over financial markets and institutions and undisturbed functioning of system of payments
- d. gives approval to central banks in eurozone for issuing euro banknotes
- e. enforces control over price fluctuations and appraises risk for their stability

1. 3. 10. EUROPEAN COURT OF AUDITORS

The European Court of Auditors (hereinafter the ECA) was founded in 1975, having seat in Luxembourg. The Treaty of Maastricht recognised its institutional character and the core institutional system was completed. The ECA is in charge of revision of finances of the EU. Namely, in 1971 the EC replaced its system of financing from state contributions to the system of self-financing. The ECA role is to improve financial management of the EU and to report on use of public funds. Its right is to check each individual or organisation which benefits from the EU funds. The results are submitted to the CJEU and national authorities of the EU in the form of written reports. It submits annual report on previous financial year („*annual dismissal*”) to the Parliament. Prior to the decision on approval of the Commission’s budget management, the Parliament has a thorough look at report of the Court of Auditors. It gives its opinion on financial provisions of EU law and on optimal methods of combating fraud. The ECA is composed of one representative from each Member State.

1. 4. THE LEGAL FRAMEWORK OF THE EU

By establishing the European Communities, Member States created a separate autonomous body of law which binds them, all future Member States, their citizen, their courts and other national authorities. The legal structure of the EU differs from those of 28 Member States and from the structure of international law.⁶⁰ Autonomy implies autonomous criteria for evaluation of its validity before its own judiciary institution – the CJEU.⁶¹ It differs from international law due to the fact that not only states but natural and legal persons are subject to its provisions.⁶²

The legal system of the EU relies on support of national systems for its operation.⁶³ As EU law is superior to and takes precedence over all forms of national law. Thus the national authorities are required not only to observe all forms of EU law but they must implement and give effect to it in respective Member States. Member States have voluntarily restricted their regulatory autonomy by transferring part of their regulatory sovereignty on common institutions of the

⁶⁰ More on EU legal system in: Weatheril, S: Cases and Materials on EU Law, Oxford University Press, 10th Edition, 2012; Tridimas, T.: The General Principles of EU law, Oxford University Press, 2006; Craig P., De Burca, G.: The Evolution of EU Law, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014; Barnard, C.: The Substantive Law of the EU, The Four Freedoms, Third Edition, 2010; Bodi-roga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011; Bodi-roga Vukobrat, N., Đerđa, D., Pošćić, A. (eds.) Zbirka presuda Europskog suda, Inženjerski biro, Zagreb, 2011; Čapeta, T, Rodin, S.: Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014; Horak, H., Bodi-roga-Vukobrat, N.: South Eastern Enlargement: Quo vadis Croatia?, chapter in the book „Quo vadis Europa“, Senden, G., Vlad, M. (ed.), Verlag Kovac, Hamburg, 2005; Urwin, D.: The Community of Europe: A History of European Integration, Longman, London, 1995; Pinder, J., Usherwood, S.: The European Union: A Very Short Introduction, Oxford University Press, 2013; Wyatt, D., Dashwood, A.: European Union Law, Sweet and Maxwell, London, 2000.

⁶¹ Craig, P., De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p. 121; Barnard, C.: The Substantive Law of the EU. The Four Freedoms, Oxford University Press, 2010; Čapeta, T, Rodin, S., Osnove prava Europske unije, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Bobek, M.: The Effects of the EU Law in the National Legal Systems in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 175.

⁶² Ibidem.

⁶³ On harmonization and modernization of national law see also in Horak, H.; Dumančić, K.: Harmonisation of the Croatian Company Law with *Acquis Communautaire* of the European Union, The Business Review, Cambridge, Vol. 18, No. 2, 2011.

EU. This enables institutions of the EU to create autonomous set of rules which, by virtue of harmonization and unification, become integral part of national legal systems.⁶⁴ EU law imposes duties to Member States and their institutions.

Article 4 TEU stipulates:

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

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

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

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

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

EU law has its foundation in TFEU, TEU and EURATOM. It comprises all provisions stipulated in primary law and secondary law. The legal system of the EU as totality of all afore-mentioned legal norms is called *acquis communautaire*. The former three-pillar structure was derogated upon entry into force of the Treaty of Lisbon. Former first pillar was based on three communities and represented core of EU law – the Community law. When talking about EU law before the Treaty of Lisbon, it was the law in force in the EU, whatever treaty might had been the basis and whatever pillar might had been in question. Today a single term – EU law – is used.⁶⁵ The sources of EU law may be identified as follows:

⁶⁴ Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 121;

⁶⁵ See also in Craig P., De Burca, G.: *The Evolution of EU Law*, Oxford University Press, 2011; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011; Ćapeta, T; Rodin, S.: *Osnove prava Europske unije*, II. izmije-

1. Primary legislation
2. International agreements involving the EU
3. Secondary legislation
4. General principles of law
5. Conventions between Member States

1. 4. 1. PRIMARY SOURCES OF EU LAW

Primary sources of EU law are results of Member States' acts. Founding treaties are core source of primary law. They include primary treaties on founding of the European Communities and the EU, amendments to primary treaties, protocols to the treaties, annexes to the treaties and accession treaties of all candidate countries i.e. new Member States. The CFR is not the founding treaty. It is a separate source of primary law. According to Article 6 TEU, it has the same legal value as the founding treaties.

Figure 8. Treaties

TREATIES
Treaties on the accession of the United Kingdom, Denmark and Ireland (1973)
Greece (1981)
Spain and Portugal (1986)
Finland, Austria and Sweden (1995)
the Single European Act (1986)
the Treaty on European Union (1992)
the Treaty of Amsterdam (1997)
the Treaty of Nice which became effective throughout the European Union (2003)
The Treaty of Accession (2003), signed in Athens, which provided for the accession of the following countries to the EU: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia
The Accession Treaties for Bulgaria and Romania (2005) and these countries became members of the EU on 1 st January 2007

The foundation treaties of the European Communities are the treaties on the ECSC, the EUROATOM and the EEC, as amended along with various annex-

njeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011; Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010; Usherwood, S.: The European Union: A Very Short Introduction, Oxford University Press, 2013.; Wyatt, D., Dashwood, A.: European Union Law, Sweet and Maxwell, London, 2000.

es and protocols attached to them. They are primary source of EU law. These Treaties have been amended and supplemented on a number of occasions since the foundation of the European Communities.

Last amendment was the Treaty of Lisbon, which came into effect on 1st December 2009. In 2011 the Treaty of Accession of the Republic of Croatia was signed in Bruxelles. The Republic of Croatia entered to the EU on 1st July 2013.

The founding treaties prescribe fundamentals rights of the individuals (such as the free movement of goods, capital, workers, services etc.), institutional structure of the EU (the Commission, the Council, the Parliament, the European Council, the ECB, agencies etc.), jurisdictions, legislative procedure and legal acts. They contain basic provisions on the EU's objectives and organisation. They set the framework for the operation of the EU which is administered by the EU's institutions.

To conclude, the primary law of the EU currently consists of: the EUROATOM, the treaties of Lisbon (TEU and TFEU), the CFR (which has the same legal value as the treaties).

1. 4. 2. SECONDARY SOURCES OF EU LAW

The law created by the EU institutions in exercising the powers conferred on them by the treaties is referred to as the secondary legislation. The secondary sources are result of the institutions' activities.⁶⁶ These legal provisions are formed and entered into force on basis of the procedure prescribed by primary law and by regulative authority of the EU. Secondary legislation comprises legal acts as listed and defined in Article 288 TFEU. These are regulations, directives, decisions, recommendations and opinions. Secondary sources include fundamental acts of the Parliament and the Council of the EU and implementing measures by the Commission.

The Treaty of Lisbon has introduced several changes to the EU legal acts. For the sake of clarification and simplification, it reduces the number of legal instruments available to the EU institutions. Two changes have been introduced by the Treaty of Lisbon aiming at improvement of the efficiency of decision-making and implementation of decisions. Treaty of Lisbon enables the

⁶⁶ Craig, P., De Burca, G.: *EU Law. Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011.; Horak, H., Dumančić, K.: *Harmonisation of the Croatian Company Law with *Acquis Communautaire* of the European Union*, *The Business Review*, Cambridge, Vol. 18, No. 2, 2011; Horak, H., Dumančić, K., Pecotić Kaufman, J: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.

Commission to adopt a new category of act, delegated act and strengthens the competence of the Commission to adopt implementing acts.

EU legal acts are legislative or non-legislative acts. Depending on their nature, these acts may have a legally binding effect. Before the Treaty of Lisbon entered into force, there had been fourteen types of legal acts. They could have been adopted by the EU institutions. This multitude of acts was due, in particular, to the old EU pillar structure. Namely, each pillar had its own legal instruments.

The Treaty of Lisbon has put an end to this pillar structure. In addition, it has introduced a new classification of legal acts. From now on, the EU institutions may adopt only five types of acts: a regulation, a directive, a decision, a recommendation and an opinion. According to Article 288 TFEU, regulations, directives and decisions are binding acts. However, recommendations and opinions are not legally binding for those to whom they are addressed. A decision no longer needs to specify an addressee. It thus has a broader remit and replaces, in particular, all the instruments formerly used in the area of the CFSP.

Distinction among legislative and non-legislative acts has been introduced by Article 289 TFEU.⁶⁷ Legislative acts are brought in regular or special procedure. Both the Council and the Parliament must adopt a proposal made by the Commission. In most cases they are accepted both by the Council and the Parliament. Some acts are adopted only by the Council or by the Parliament in a special procedure in which another institution plays advisory role. These acts are adopted either as regulations, directives or decisions.

The Treaty of Lisbon⁶⁸ has created a new category of legal acts: delegated acts. The legislator delegates the power to adopt acts amending *non essential elements* of a legislative act to the Commission. E.g. delegated acts may specify certain technical detail or they may consist of a subsequent amendment to certain elements of a legislative act. The legislator can therefore concentrate on *policy direction* and *objectives* without entering into overly technical debates. However, this delegation of power has strict limits. Only the Commission can be authorised to adopt delegated acts. Furthermore, the legislator sets the *conditions* under which this delegation may be implemented. Article 290 TFEU specifies that the Council and the Parliament may revoke a delegation or limit its duration.

⁶⁷ On legal acts see more in Bobek, M. The Effects of EU law in the National Legal Systems in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 146.

⁶⁸ Ibidem.

1. 4. 3. IMPLEMENTING ACTS

The Treaty of Lisbon strengthens the implementing powers of the Commission. The implementation of EU law on Member States' territories is responsibility of Member States. However, certain EU measures require uniform implementation across the EU. Therefore, in these cases, the Commission is authorised to adopt implementing acts relating to the implementation of such measures. Until the entry into force of the Treaty of Lisbon, implementing power was held by the Council, which delegated the adoption of implementing acts to the Commission. From now on, Article 291 TFEU recognises the competence of the Commission. Therefore, EU measures which require uniform implementation in Member States directly authorise the Commission to adopt implementing acts.

At the same time, the Treaty of Lisbon has increased the powers of the Parliament to monitor the implementing powers of the Commission. The modalities of this monitoring were previously determined by the Council. From now on, these modalities shall be adopted in the ordinary legislative procedure, in which the Parliament is on an equal footing with the Council.

1. 4. 4. REGULATIONS

Regulations are legislative instruments of general application.⁶⁹ Regulation shall have general application. They are binding in their entirety and directly applicable in all Member States.⁷⁰ A regulation has equivalent effect to that of a statute in a national legal system. A Member State does not need to adopt any national implementing measure to give the effect to a regulation in na-

⁶⁹ More on regulations and directives in Rodin, S., Čapeta, T.: *Direktive i njihovi učinci prema praksi Europskog suda (Directives and their Effects in Case Law of the European Court of Justice)*, Učinci direktiva Europske unije u nacionalnom pravu, Rodin, Siniša; Čapeta, Tamara (eds.), Ministarstvo pravosuđa RH, 2008; Rodin, S.: *Direktiva Europske unije 123/2006. o uslugama – doseg i opravdanja*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 59, No. 1 February 2009.; Horak, H., Dumančić, K.: *Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 32, br. 2, 2011; Horak, H., Dumančić, K., Poljanec, K.: *Modernizacija i usklađivanje prava društava u Republici Hrvatskoj sa pravnom stečevinom Europske unije i načelo transparentnosti podataka*, Zbornik radova s II. Međunarodne konferencije „Bosna i Hercegovina i euroatlanske integracije - trenutni izazovi i perspektive“, Pravni fakultet Univerziteta u Bihaću i Centar za društvena istraživanja Internacionalnog Burč univerziteta, Bihać, 2014; Horak, H., Dumančić, K., Pecotić Kaufman, J.: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.

⁷⁰ Article 288 TFEU.

tional law. Nevertheless, they might be required to adopt national provisions to implement a regulation.⁷¹ They apply to abstract rather than to individual situations. E.g. many regulations apply to operators in agricultural sector. Regulations are binding in their entirety. Member State has no power to apply regulations incompletely or to apply only those provisions which it approves. Regulation is a legal instrument for implementation of the common policies, as distinct from the internal market measures, which usually take the form of directives.⁷²

1. 4. 5. DIRECTIVES

Directives are legislative instruments which reconcile dual objectives of safeguarding necessary uniformity of Community law and respecting diversity of national traditions and structures. Directives are addressed to Member States. Directive requires Member States to achieve a particular result but leave it to the respective national authorities to decide by which means the Community objective set out in a directive is going to be incorporated into domestic legal systems within prescribed period. A directive is binding as regards the result to be achieved while leaving to national authorities a choice of form and methods.⁷³ It does not acquire legal force and effect until the date for implementation of the directive has expired. The directive is particularly appropriate legal instrument for the pursuit of EU objectives in areas which are already subject to developed legal framework in the Member States. Good examples are national rules on the provision of services.⁷⁴

1. 4. 6. DECISIONS

Decision is an individual act addressed to a particular person or persons. Decision is binding only upon those to whom it is addressed without any need for further implementation into national law. Granting or refusal of State aid, the

⁷¹ Bradley, K.: Legislating in the European Union in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014. p. 99.

⁷² Ibidem, p. 100.

⁷³ Article 288 TFEU.

⁷⁴ More on Services Directive see in Horak, H., Dumančić, K.: Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?, Zbornik Pravnog fakulteta u Sveučilišta u Rijeci, Vol. 32, br. 2, Rijeka, pp. 703-729; on free movement of services see also in Bodiroga Vukobrat, N., Horak, H.: Freedom to provide services in European and Croatian Law, Conference Proceedings “Economic integrations, Competition and Cooperation”, Faculty of Economics, University of Rijeka, 2007.

annulment of agreements or arrangements contrary to fair competition and the imposition of fines or corrective measures can be issued in form of a decision.

1. 4. 7. RECOMMENDATIONS AND OPINIONS

Recommendations and opinions are non-binding instruments of EU law. They are only of persuasive value. Addressed to Member States or individuals, they may bind national bodies if an issue must be resolved or when a regulation must be explained. There are also exceptions of the rule that recommendations and opinions are non binding. In particular, it is the case in the specific area of economic and monetary policy.⁷⁵

1. 4. 8. INTERNATIONAL AGREEMENTS AND CONVENTIONS

After primary and secondary sources, they represent the third relevant source of EU law. There are numerous agreements. They all have an impact on all Member States and must be obeyed in the procedure of *acquis* implementation. The EU can conclude international treaties in all areas envisaged by the founding treaties on the regulatory activity, without direct mandate on arranging relations at international level. Agreements can be concluded among the EU and a third party (country or an international organisation). The mandate is based on explicit articles of the treaties or *implicite* results from the treaties – so called “*implicit authority doctrine*”.

1. 4. 9. THE CASE LAW OF THE CJEU AS SOURCE OF EU LAW

Judgments have an impact not only *inter partes* (between the parties) but also *erga omnes* (towards everyone). The CJEU rulings are source of secondary law. Explanation represents a source of law in concrete procedure and beyond it. It contains the Court’s understanding of the law and the social context that is put into fact’s context due to a court process. Member States are bound to respect and act in accordance with the CJEU rulings. Article 4(3) TEU prescribes honest cooperation obligation and refers to all bodies of the states including, within their authority, national courts. Application of EU law is on Member States.

⁷⁵ Bradley, K.: Legislating in the European Union in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 102.

1. 5. PRINCIPLES OF EU LAW

General principles of EU law are established through the practice of CJEU. They are among the primary sources of EU law. As AG Trstenjak said in her Opinion in *Audiolux*:⁷⁶

“... The reasons that speak against the existence of a general principle would be the principle has no constitutional status neither in the legal system of the EU neither in the legal systems of Member States ... there is no clear support for the existence of the principle in the legal literature ... the principle has no general validity of the legal system that is typically attributed to the general principles...”

General principles of law⁷⁷ are binding for EU institutions and Member States. National law which is contrary to the general principles can be cancelled before the CJEU. National courts must exclude it from application. National law may be subject to judicial review under the criteria of the general principles of EU law only if the situation is within the remit of EU law.

1. 5. 1. AIMS AND VALUES OF THE EU

The EU is based on values such as protection of human dignity, freedom, democracy, equality, rule of law, protection of human and minority rights i.e. common values of all Member States. Article 6(3) TEU incorporates the fundamental rights, as guaranteed by the European Convention on Human Rights. As they result from constitutional traditions common to the Member States, they shall constitute general principles of EU law. Article 4(2) TEU stipulates that the Union shall respect the equality of Member States before the treaties as well as their national identities, inherent to their fundamental structures,

⁷⁶ *SA e.a v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, C-101/08, EU:C:2009:626.

⁷⁷ On principles of EU law and their implementation in national legal order see more in Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 70.; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014.; Urwin, D.: *The Community of Europe: A History of European Integration*, Longman, London, 1995; Pinder, J., Usherwood, S.: *The European Union: A Very Short Introduction*, Oxford University Press, 2013; Wyatt, D., Dashwood, A.: *European Union Law*, Sweet and Maxwell, London, 2000; Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, Third Edition, 2010; Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005.

political, constitutional, regional and local self-government inclusive. Article 3 TEU stipulates that the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

1. 5. 2. FUNDAMENTAL PRINCIPLES

Fundamental principles⁷⁸ are stipulated in Article 5 TEU.

In Article 5 TEU (ex Article 5 TEC) it is stated:

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

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

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

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

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.”

⁷⁸ The list of principles will be given according to Josipović, T., Načela europskog prava u presudama Suda Europske zajednice, Pravna biblioteka, Europsko pravo, Narodne novine, Zagreb, 2005.

1. 5. 2. 1. The principle of conferral (the principle of limited or enumerated competences)

Article 5(2) TEU stipulates that the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States. The EU can act only in purpose defined by the Article 3 TEU.

The “competence” as a term used by the EU Treaties is a synonym for “legal authority” and “power”.⁷⁹ The principle⁸⁰ underlying the division of competences between the EU and the Member States is set in Article 1 TEU. It states that “the Member States confer competences on the Union to attain objectives they have in common.”

In Article 4(1) TEU it is stated that:

“The competences not conferred upon the Union in the Treaties remain with the Member States.”

The EU’s aim is to promote peace, its values and the well-being of its people. The EU shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures, with respect to external border controls, asylum, immigration and the prevention and combating of crime. The EU shall establish the internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological progress. It shall combat social exclusion and discrimination and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion and solidarity among Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe’s cultural heritage is preserved and enhanced. The EU shall establish an economic and monetary

⁷⁹ According to Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 104.

⁸⁰ See more in Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005.

union with the euro as its currency. In relations with the wider world, the EU shall uphold and promote its values and interests and contribute to the protection of its citizens. The competences that are not conferred to the EU remain competences of Member States. The EU law can limit regulatory autonomy of Member States in the areas that are still in their competences. Member States arrange by themselves systems of public health but at the same time they can not discriminate citizens of other Member States e.g. in terms of employment. The TFEU classifies the categories of competences⁸¹ of the EU. There are three categories of competences: exclusive, shared and ancillary.

1. 5. 2. 2. EU competences

The EU was founded on principles of human dignity, freedom, democracy, equality, rule of law, human and minority rights. The afore-mentioned principles are common values of all Member States. Article 6(3) TEU stipulates that EU legal order incorporates fundamental rights arising out of two main sources: European Convention on Human Rights and constitutional traditions common to Member States which represent common EU legal principles. Art 4(2) TEU emphasizes that national identities of Member States, which the EU is bound to respect, represent particular values for the EU. Article 3 TEU stipulates that aims of the EU shall be achieved by appropriate means which are in line with powers conferred to it by Member States.

For the first time the Treaty of Lisbon has *explicite* regulated EU competences. These competences determine relation among Member States and the EU. Tendencies go towards restriction on EU competences and increase of Member States competences. Article 3 TFEU attempts to divide competences. The TFEU makes distinction between three types of competences and draws up in each case a non-exhaustive list of fields concerned. These are exclusive competences, shared and supporting competences.

1. 5. 2. 2. 1. Exclusive competences

Exclusive competences exist within the areas where only the EU may draft legislation and adopt legally binding acts. Exclusive character of these competences is not absolute. The EU may authorize the Member State to adopt legislation and other measure in the area of its exclusive competence.

⁸¹ See also in Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 15.

The exhaustive list of exclusive competences is provided in Article 3 TFEU:

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

(a) customs union;

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

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

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

(e) common commercial policy.

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

1. 5. 2. 2. Shared competences

Shared competences are competences which are neither exclusive neither ancillary. This is a residual category. Any competence which is not listed as being exclusive or ancillary is presumptively “shared” in character and the list provided is only that of “principal areas” of such competences.⁸² Shared competences mean that the EU and Member States are authorised to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence. Shared competences include the following areas:

- internal market;
- social policy, for the aspects defined in this Treaty;
- economic, social and territorial cohesion;
- agriculture and fisheries, excluding the conservation of marine biological resources;
- environment;

⁸² Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 108.

- consumer protection;
- transport;
- trans-European networks;
- energy;
- area of freedom, security and justice and common safety concerns in public health matters, for the aspects defined in the Treaty.

1. 5. 2. 2. 3. Supporting competences

In framework of supporting competences the EU can only intervene to support, coordinate or complement the action of Member States. Consequently, it has no legislative power in those fields and may not interfere in the exercise of these competences reserved for Member States. The EU shall have competence to carry out actions to support, coordinate or supplement the actions of Member States. At EU level, the areas of such action shall be protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation.

As regards ancillary (or complementary) competences, the EU may carry out actions to support, coordinate or supplement actions of Member States. The fact that the EU has an ancillary competence in a given area does not preclude harmonization in the name of the internal market. The areas concerned are all matters of shared concern between Member States where the pursuit of national (or indeed local) policy objectives is inevitably affected by EU measures in areas of shared or exclusive competences.⁸³

1. 5. 2. 3. Positive and negative powers

When Member States have conferred upon the EU the power to regulate certain social issue, one can speak about positive powers. The regulation can be based directly on founding treaties or secondary legislation. The EU is entitled to regulate only areas in which Member States conferred upon it such power. Each act has to indicate legal basis for enactment. Existent positive powers of the EU and executing provisions stand for regulatory framework within which Member States are entitled to regulate those social issues which are not in

⁸³ Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 109.

positive regulatory competences of the EU. They restrict Member States in regulatory possibilities they have in order to regulate areas which are still in their regulatory competences.

1. 5. 2. 4. Principle of subsidiarity

The principle of subsidiarity was introduced by the Maastricht Treaty.⁸⁴ In areas with no exclusive competences, the EU is entitled to execute measures and enact laws only in exceptional cases, if explicitly defined conditions, allowing it to enact, are met. Activity of the EU in area which does not belong to its exclusive competences will be needed only if Member States cannot reach envisaged aims on their own and if impacts of proposed activity can be reached on better way at EU level. It has been added to the principle of conferral of powers. The principle of subsidiarity provides a test⁸⁵ which is intended to serve as a brake under certain conditions, on the exercise of competence which has been conferred to the EU. It is defined in provision of Article 5(3) TEU. This principle has been supplemented by Protocol which lays down procedural requirements to reinforce respect for subsidiarity, including provision which allow for the national parliaments to express their views on whether proposed legislation complies with this principle or not. Since the Treaty of Lisbon entered into force, there is no need to apply it when deciding on exclusive competence of the EU, while they are listed in Article 3 TFEU. The conditions for the EU action according to the subsidiarity test are:

- the “objectives of the proposed action cannot be sufficiently achieved by Member States, either at central, regional or local level” – “the necessity test”
- by the reason of the scale or effects of the proposed action, the EU objectives can be better achieved at EU level.

⁸⁴ On principle of subsidiarity see more in Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005, p 16.; Omejec, J., *Vijeće Europe i Europska unija*. *Institucionalni i pravni okvir*, Novi Informator, Zagreb, 2008, p. 86; Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 349; Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 111. See also Bodiroga Vukobrat, N., Horak, H.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011., p. 5.

⁸⁵ Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, . p. 111-112.

1. 5. 2. 5. Principle of proportionality

Principle of proportionality⁸⁶ prescribes that measures and legal acts brought by the EU must be in line with the envisaged aim, and shall not go beyond what is necessary to achieve aims of the Treaty, neither by their intensity neither by its content, width, enactment and achievement method. Thus, the measures executed by the EU shall be restricted only to what seems necessary for achievement of EU tasks. In light of that principle, it will be assessed if the measure under evaluation is the most appropriate for achievement of certain aim.

According to *Craig and De Burca*,⁸⁷ proportionality entails some idea of balance and according to the test of proportionality five stages of the proportionality test can be defined. They include:

- the relevant interest must be identified;
- there must be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation;
- some view must be taken about whether certain interests can be traded off to achieve other goals at all;
- a decision must be made on whether the public body's decision was indeed proportionate or not in light of the above considerations. The test could be formulated in any of the ways identified above, and different formulations tend to be used in the context of different types of cases
- The court will have to decide how intensively it is going to apply any of the tests mentioned above

The question of proportionality was discussed in *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others*.⁸⁸

Council Directive 81/602 provided that the Council would take a decision as soon as possible on the prohibition of certain hormone substances for administration to animals, but that in the meantime, any arrangements made by Member States in relation to such substances would continue to apply.

⁸⁶ Josipović, T.: Načela europskog prava u presudama Suda Europske zajednice, Narodne novine, Zagreb, 2005., p. 25.

⁸⁷ Ibidem. See also in Craig, P., De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p. 350.

⁸⁸ *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others*, 331/88, EU:C:1990:391.

In 1988 Council Directive 88/146 was adopted as an approximating measure, prohibiting the use of certain of these hormonal substances in livestock farming. An earlier identical Directive adopted in 1985 had been declared void by the CJEU on grounds of infringement by the Council of an essential procedural requirement. The applicants were manufacturers and distributors of veterinary medicine who brought proceedings before the United Kingdom High Court to challenge the validity of the national legislative measure implementing the 1988 Directive on the ground that the Directive itself was invalid. Regarding the proportionality the CJEU decided:

“12 It was argued that the directive at issue infringes the principle of proportionality in three respects. In the first place, the outright prohibition on the administration of the five hormones in question is inappropriate in order to attain the declared objectives, since it is impossible to apply in practice and leads to the creation of a dangerous black market. In the second place, outright prohibition is not necessary because consumer anxieties can be allayed simply by the dissemination of information and advice. Finally, the prohibition in question entails excessive disadvantages, in particular considerable financial losses on the part of the traders concerned, in relation to the alleged benefits accruing to the general interest.

13 The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

14 However, with regard to judicial review of compliance with those conditions, it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see in particular the judgment in Case 265/87 Schraeder [1989] ECR 2237, paragraphs 21 and 22).”

1. 5. 2. 6. Principle of loyalty

Member States and the EU are bound to execute all general or special measures in order to fulfill their obligations arising out of the Treaty or activities of the bodies of the EU. This principle is stipulated in Article 10 TEU.

Article 10 TEU

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

It is in fact affirmation of the principle *pacta sunt servanda* as a common principle of law when it comes to fulfillment of mutual obligations.

1. 5. 2. 7. Principle of non-discrimination

This cornerstone principle prohibits any kind of discrimination⁸⁹ based on nationality.⁹⁰ Citizens of any Member State shall be treated in the same way as domestic citizens.

Article 18 TEU (ex Article 12 TEC)

“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.”

Article 19 TEU (ex Article 13 TEC)

“1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

⁸⁹ Josipović, T.: Načela europskog prava u presudama Suda Europske zajednice, Narodne novine, Zagreb, 2005, p. 44.

⁹⁰ Ibidem, see also in Bradley, K.: Legislating in the European Union in Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 349.

The Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination. This is in line with the principle of equal treatment. This is necessary prerequisite for functioning of the internal market. It includes formal (direct) and substantive (indirect) restrictions, as well as obvious and hidden forms of discrimination. In case of **formal discrimination**, in respect of nationals of another Member States, by law or other regulation, it has been explicitly stipulated that, in order to perform certain right, they are bound to fulfill additional prerequisites which are not imposed on Member States own nationals. In case of **substantive discrimination**, nationals of another Member State are not put directly in less favourable position by national law, in comparison to Member States own nationals, but, in order to achieve certain right, they have to fulfill prerequisites that can be fulfilled only by Member States own nationals or Member States own nationals can fulfill them with less obstacles.

1. 5. 2. 8. Principle of autonomy of EU legal order

EU law is autonomous⁹¹ legal order, independent and separated from the legal orders of Member States. National legal orders of Member States coexist with EU legal order. Main aim of establishing of EU legal order has been creation and functioning of the internal market in territories of Member States. It is in force in all Member States.

1. 5. 2. 9. Principle of unique application of EU law

EU law works as one entity, one body of law. The law is unique and shall apply in the same way in all Member States. Implementation of this principle is precondition for proper functioning of the internal market.

1. 5. 2. 10. Principle of direct application and direct effect

According to *Craig and de Burca*, it should be noted that in the first stage of integration the doctrine of direct effect has been relevant primarily to the Community legal system rather than that of the EU as a whole. This was mainly because the CJEU lacks jurisdiction over the provisions of the second pillar and cannot therefore determine the legal effect and nature of those provisions or of measures adopted under them.

⁹¹ Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005., p. 47.; Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 349.

EU law is in force in all Member States, and it is not necessary to transform it, implement it into national legislation. It applies to certain legal acts e.g. regulations. EU law prevails over national law in all cases when it is important to achieve EU aims.

Principle of direct application⁹² means that certain legal act is valid in Member State without prior transformation or incorporation. But it does not mean that it has automatically direct effect by virtue of this fact. Namely, in order for an act to have direct effect in Member States, it has to fulfil certain prerequisites. There are provisions of primary and secondary law, out of which, under certain conditions, for Member States and individuals, personal rights and obligations directly arise, which their holders can invoke before national courts of Member States. The EU confers rights and prescribes duties directly, not just to the EU institutions and Member States but also to the citizens of the EU. Each citizen is entitled to initiate procedure before national courts and/or the CJEU in case of violation of her or his rights.

Direct effect of EU law has become relevant in the CJEU case law in *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*.⁹³

The Van Gend and Loos was Dutch company which imported a quantity of chemical substances from Germany into the Netherlands. It was charged by the Customs and Excise with an import duty. The company alleged that duty had been increased by changing the tariff classification of the substance from one with a lower to a higher tariff heading. It brought an appeal against payment of the duty before the Dutch Tariefcommissie and it referred two preliminary questions to the CJEU: has Article 12 of the EEC Treaty a direct application within the territory of the Member State in other words, whether nationals of such Member State can, on the basis of the article in question, claim individual rights which the courts must protect. In its judgement the CJEU concluded that “*the conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also in-*

⁹² Josipović, T.: Načela europskog prava u presudama Suda Europske zajednice, Narodne novine, Zagreb, 2005., p. 44.

⁹³ *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, C-26/62, EU:C:1963:1.

tended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community .”

In order to have direct effect, the provisions on which an individual wishes to rely shall be sufficiently clear, unconditional and there is no scope for Member States to exercise discretion in implementation.

“The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of Member States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the Member States. The fact that under this article it is the Member States which are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

...

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect. “

1. 5. 2. 11. Principle of priority of EU law

Principle of priority prescribes priority of EU law in application before national courts. EU law has priority whenever certain EU provision, directly applicable on territory of Member States, collides with national legal provision, which prescribes in the same case and in the same dispute different rights and obligations under national law. EU law shall be applied by giving priority to EU law and thus unique application of EU law will be achieved.

1. 5. 2. 12. Principle of supremacy of EU law

The supremacy of EU law was proclaimed in *Flaminio Costa v. E.N.E.L.*⁹⁴ The CJEU held that in situations where there is a conflict between laws of Member States and EU law, EU law prevails, because “*a subsequent unilateral act incompatible with the concept of the Community cannot prevail.*”

Mr Costa was an Italian citizen who owned shares in an electricity company and opposed the nationalisation of the electricity sector in Italy. He refused to pay his electricity bill, which amounted to 1,925 lire, in protest and was sued for non-payment by the newly created state electricity company, ENEL. In his defence he argued that the nationalisation of the electricity industry violated the Treaty of Rome and the Italian Constitution. The Italian court ruled that, while the Italian Constitution allowed for the limitation of sovereignty for international organisation like the than European Economic Community (now EU), it did not upset normal rule of statutory interpretation meaning, where two statutes conflict, the subsequent one prevails (*lex posterior derogat legi anteriori/priori*). As a result the Treaty of Rome, which was incorporated into Italian law in 1958, could not prevail over the electricity nationalisation law which was enacted in 1962. That judgement was submitted to the CJEU with the request for a preliminary ruling.

In its judgement CJEU gave its argumentation in support of the conclusion that the Community law has supremacy over incompatible national law.

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plan and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence

⁹⁴ *Flaminio Costa v. E.N.E.L.*, 6/64, EU:C:1964:51.

to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in article 5 (2) and giving rise to the discrimination prohibited by article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the treaty grants the states the right to act unilaterally, it does this by clear and precise provisions (for example articles 15, 93 (3), 223, 224 and 225). Applications, by member states for authority to derogate from the treaty are subject to a special authorization procedure (for example articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of article 93 (2), and 226) which would lose their purpose if the member states could renounce their obligations by means of an ordinary law.

The precedence of community law is confirmed by article 189, whereby a regulation 'shall be binding' and 'directly applicable in all member states.' This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law.

It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question ."

According to Craig and de Burca⁹⁵ four arguments can be underlined from that judgement. First is the statement that the Treaty created its own legal order which has immediately become “*an integral part*” of national legal systems. Second, in constitutional terms, Member States created this legal order by transferring “*real powers stemming from a limitation of sovereignty*” to the new Community institutions. The third argument is that it was impossible for Member States to accord primacy to domestic law since the “*spirit*” of the Treaty required that they all act with equal diligence to give full effect to Community laws which they had accepted on the basis of “*reciprocity*”. The

⁹⁵ Craig, P., De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p.258.

fourth argument is that the obligation undertaken by Member States in the Treaty would be “*merely contingent*” rather than unconditional if they were to be subject to later legislative acts on the part of Member States.

However, according to the Maastricht Treaty, the EU does not prevent Member States from maintaining or introducing more stringent laws on working conditions, social policy, consumer protection and the environment, so long as these laws are compliant with the Treaty of Rome, which has relevant provisions in these areas. Some courts in Member States have resented the supremacy doctrine⁹⁶ though it is not commonly challenged and the CJEU has encouraged legal interpretation in light of EU law by courts in Member States as alternative to repealing or amending laws of Member States which conflict with EU law. Historically, a source of tension has been the relationship between the constitutions of Member States and EU law. Unlike the United Kingdom, most continental Member States have written constitutions and some of them have constitutional courts with the exclusive power to interpret the national constitution. EU law is superior to national law, independent of its form, including the legal rules of constitutional law. If national court, in a situation when both norm of EU law and norm of national law, that is contrary to EU norm, are applicable on a specific legal situation, national court is bound to exempt from the application a national norm and to apply directly applicable EU norm or another norm of national law which does not contradict EU law.

1. 5. 2. 13. Principle of liability for damage

Each Member State is bound to compensate damage caused to natural and legal persons due to non-fulfillment of obligations arising out of the Treaty. Member States face the obligation to compensate damage when an individual suffers damage caused by non-application, incorrect application, non-fulfillment or incorrect fulfillment of obligation to implement directives.

Several situations may take place. One of them is breach of obligation to cooperate. An example of this situation was considered in *Commission v. Netherlands*.⁹⁷

⁹⁶ On supremacy doctrine see Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005., p. 62; .T. Bradley, K.: *Legislating in the European Union* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 349.

⁹⁷ *Commission of the European Communities v. Kingdom of the Netherlands*, 96/81, EU:C:1982:192.

The Netherlands failed to implement properly directives on pollution of bathing water. As a part of its submission, the Commission claimed that the Dutch Government had failed to provide information on its compliance with the provisions of one directive. The CJEU decided:

“6. It should be emphasized that, in proceedings under Article 169 of the EEC Treaty, for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission’s responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled and in doing so the Commission may not rely on any presumption.”

Inadequate implementation of Community law is considered to be another case of breach. The CJEU dealt with it in *Commission v. French Republic*.⁹⁸

The French legislature had failed to repeal a provision of the French Code du Travail Maritime (The law on Employment at the Sea) under which a proportion 3:1 of the crew of a ship was required to be of French nationality. This nationality requirement was contrary to Community law but French Government claimed that directions had been given verbally to national authority that Community nationals should be treated the same as French nationals. The CJEU stated the following:

“40. It appears both from the argument before the Court and from the position adopted during the parliamentary proceedings that the present state of affairs is that freedom of movement for workers in the sector in question continues to be considered by the French authorities not as a matter of right but as dependent on their unilateral will.

...

42. The uncertainty can only be reinforced by the internal and verbal character of the purely administrative directions to waive the application of national law.”

Failure to give proper effect to Community law is also a situation of breach on part of the Member State. Member States have obligation to take steps to ensure the effectiveness of Community law. The CJEU stated that Mem-

⁹⁸ *Commission of the European Communities v. French Republic*, 167/73, EU:C:1974:35.

ber States should penalize those who infringe Community law in the same way as it penalizes those who infringe national law. The CJEU dealt with the afore-mentioned situation in *Commission v. Greece*.⁹⁹

23. *It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.*

24. *For that purpose, whilst the choice of penalties remains within their discretion they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”*

1. 5. 3. APPLICATION OF EU LAW IN MEMBER STATES

National court may ask itself whether a situation in question falls within scope of EU law.¹⁰⁰ As regards application of primary law, in purely internal situations, there is no cross-border element and application of national law shall follow. If there is a cross border element, but activities have no economic character, EU primary law will not apply. As regards secondary law, if the regulation is within the scope of EU, EU law is applicable. EU law has direct effect in Member States.¹⁰¹ Legal norm that has direct effect creates individual rights which the courts have an obligation to protect. Direct effect implies such status of legal rules that creates individual rights directly without further legislative or regulatory activity of the executive power. Case *Van Gend en Loos* was the landmark case. It established the standpoint that provisions of the Treaty on EEC were capable of creating legal rights which could be enforced by both

⁹⁹ *Commission of the European Communities v. Hellenic Republic*, 68/88, EU:C:1989:339.

¹⁰⁰ When analyzing relation between EU law and national laws the analysis of nature of EU law should be made. On relation and character of EU law see more in De Witte, B: *EU Law: Is it International law?* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 175.

¹⁰¹ Rodin, S., Čapeta, T.: *Direktive i njihovi učinci prema praksi Europskog suda (Directives and their Effects in Case Law of the European Court of Justice)*, Učinci direktiva Europske unije u nacionalnom pravu, Rodin, Siniša; Čapeta, Tamara (eds.), Ministarstvo pravosuđa RH, 2008.

natural and legal persons before the courts of Member States. This is now called the “*principle of direct effect*.” The case is acknowledged as being one of the most important, if not the most important decision in the development of EU law. The case arose from reclassification of chemicals by Benelux countries into a customs category entailing higher customs charges. The CJEU held that this breached provision of the Treaty requiring Member States to progressively reduce custom duties between themselves, and continued to rule that the breach was actionable by individuals before national courts and not just by Member States of the Community themselves. The CJEU ruled that provisions of the Treaty on EEC were capable of having direct effect before the national courts of Member States. The result was to create an alternative method of enforcement of the obligations undertaken by Member States in the treaties to the more traditional method of state enforcement in the form of enforcement actions taken by the Commission at a supranational level. Individuals could now use national courts to invoke treaty provisions against Member States’ governments.

Part 2.

STAGES OF MARKET INTEGRATION

2. 1. BARRIERS TO INTERSTATE TRADE

Functioning of the single market is not only relevant from the economic perspective, but it is also a legal requirement. Liberalisation of market implies also liberalisation of national legislation. Such state of play leads to regulatory competition among Member States. Legal systems which will be adjusted to market needs in terms of cutting the red tape, reducing obstacles for investment, liberalisation of taxation policy, creation of favourable legal environment for setting up or maintaining enterprises etc. will be considered as the most attractive. There is a legitimate justification for competition in national systems which will be actually tested in the single market.¹⁰² The fundamental market freedoms are defined in primary law of the EU i.e. in provisions of TFEU. Provisions of TFEU, which regulate internal market, enable negative integration by abolishing trade barriers. Negative integration, by deregulation of market, aims at implementation of market freedoms provided by TFEU and strengthening competition. On the other hand, positive integration can be achieved through supranational regulation and harmonisation of national legislation on basis of general requirements which are part of supranational legislation. Harmonisation of legal framework with economic integration in most cases is done according to the principle of mutual recognition or „country origin.“¹⁰³

An economic integration is market integration. Integration includes measures seeking to abolish all restrictions among national economies.¹⁰⁴ Fundamental

¹⁰² See in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 13.

¹⁰³ *Ibidem*, p. 14.

¹⁰⁴ Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p. 548; Snell, J.: *The Internal Market and the Philosophies of Market Integration* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p 301.

idea of economic integration is free movement of goods i.e. liberalised exchange and trade. Importance of free trade can be explained by applying doctrine of comparative advantages, which leads to economy of scale. Desintegrated market is deterrent for free movement of production factors. Among most obvious examples are customs and import duties, which are charged on import of goods. This levy makes those goods more expensive and thus less attractive. Such levys can be based on value or quantity and can be expressed in percentages or vary depending on price level in the domestic market.¹⁰⁵ All markets need freedom. Suppliers of products and inputs need to be able to sell and buy. In the EU, the four freedoms of goods, services, persons and capital provide this.¹⁰⁶

In addition to afore-mentioned, there are charges with effect equivalent to customs and custom duties. Disguised import duties in form of administrative costs, warehouse costs, various tests and controls during customs procedure are some of them.

When talking about barriers to free interstate trade,¹⁰⁷ quantitative restrictions – so called *quotas* – should not be forgotten. Quantitative restrictions (hereinafter QR) are restrictions on quantity of import of certain goods which import is allowed in certain period of time, which can be expressed sometimes as monetary value. Special category of quantitative restrictions¹⁰⁸ are so called customs quotas meaning highest eligible quantity which can be imported under certain price, while all quantities exceeding prescribed level shall be levied by higher customs rate.

Currency restrictions can also impose barriers to cross border trade since such restrictions ban domestic importers from using foreign currency in order to pay goods bought abroad. Exchange rate losses can be deterrent for such cross border payments if the national currency is depreciated.

¹⁰⁵ Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, Zagreb, p. 14.

¹⁰⁶ Snell, J.: *The Internal Market and the Philosophies of Market Integration* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 301.

¹⁰⁷ Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 57.

¹⁰⁸ See more under the chapter on free movement of goods. Also Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011; Barnard, C.: *The Substantive Law of the EU: The Four Freedoms*, 4th Edition, Oxford University Press, 2013; Barnard, C., Scott, J. (eds.): *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002; Snell, J.: *Who Got the Power? Free Movement and Allocation of Competences in EC Law*, *Yearbook of European Law*, 323, 2003.

Other non-custom restrictions¹⁰⁹ such as discriminatory fiscal treatment, legal provisions, safety instructions, state monopolies, public tenders etc. can provide privileged treatment to domestic products comparing to foreign goods.

Independence from other states in regards of strategic goods is considered to be one of the historical arguments to support restrictive measures, in particular, during war. Supporting „developing industries“ in order to help new enterprises and sectors to reach their competitiveness in the market and anti-dumping policy are among arguments to support thesis on necessity to protect domestic products enabling them to compete in the international trade playing field. Sound industrial structure of national economy can be contaminated when foreign goods bear prices lower than production costs in state of origin. Antisocial dumping policy seeks to prevent impacts of the fact that salaries in export state are under level of productivity. Labour force in such countries might consider itself exploited and import from such states might be considered as providing support to such practices. If factors of production are not completely employed, protection can re-direct demand to domestic products, so that way it may lead to employment and evading social costs.

Diversification of economic structure in states specialised for production of one or several products is very vulnerable; difficulties in sale of such products lead to instant lost of revenues from abroad. This argument refers to small developing states and less to big industrialised countries. Restrictions on interstate trade can solve issues of payment balance. Import restrictions reduce sums payable abroad that helps to evade adjustments of industrial structure and accompanying social costs and costs of social tensions (as a result of reduced workers' fees and restrictive policy).¹¹⁰

Nevertheless, imposing unjustifiable restrictions on interstate trade and movement of production factors builds walls in interstate relations and leads to state protectionism. Protectionism can not be accepted as plausible economic solution if Europe wishes to compete with other global market competitors in

¹⁰⁹ Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 60.

¹¹⁰ More on social issues in the EU see in Bodiroga Vukobrat, N., Horak, H.: *A More Liberal and Economic, and a Less Social Approach: The Impact of Recent ECJ Rulings*, Croatian Yearbook of European Law and Policy, Faculty of Law, University of Zagreb, vol. 4, 2008.; Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode v. temeljna socijalna prava (Utjecaj presuda Viking, Laval i Ruffert na temeljna socijalna prava)*, Zbornik radova sa međunarodne Jean Monnet znanstvene konferencije „Socijalna prava kao temeljna ljudska prava“, TIM Press, Zagreb, 2010; Bodiroga Vukobrat, N., Horak, H.: *Pravni položaj radnika u slučaju insolventnosti s aspekta prava Europske unije - presude Europskog suda*, Zbornik radova Hrvatsko insolventijsko pravo, HAZU, Zagreb, 2013.

globalised economy. As a result of efforts done in order to overcome national restrictions and develop integrated market, seven-step process of abolishing national barriers has been initiated.¹¹¹

2. 2. FREE TRADE ZONE

A free trade zone is a form of market integration based on interstate agreement according to which states mutually abolish restrictions to trade such as customs and quantity restrictions. Each state keeps its own customs tariff applicable to goods imported from third countries. Certificates of origin which follow the goods serve to avoid practice according to which goods from third countries enter free trade area through a state imposing most favourable customs on import of certain good coming from a third country and then makes benefits arising out of free trade zone. In free trade zone all restrictions on trade such as import custom duties and quantity restrictions are prohibited among partners. North American Free Trade Agreement (NAFTA) and European Free Trade Association (EFTA) are good examples of such market integration form.

2. 3. CUSTOMS UNION

A customs union is a form of market integration based on agreement among states on abolishment of customs and quantity restrictions in interstate trade, on basis of agreement on application of common customs tariff on import from third countries. Certificates of origin are not needed. This market integration is comprised of two elements. Internal element includes mutual abolishment of customs and quantity restrictions between member states of customs union. External element includes common customs tariff towards third countries, from which goods are imported or exported from the territory of any member state of customs union.

¹¹¹ On possibilities of different market integration see in Snell, J.: *The Internal Market and the Philosophies of Market Integration* in Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 303, Craig, P., De Burca, G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011.; Barnard, C.: *The Substantive Law of the EU: The Four Freedoms*, 4th Edition, Oxford University Press, 2013; Barnard, C., Scott, J. (eds.): *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002; Snell, J.: *Who Got the Power? Free Movement and Allocation of Competences in EC Law*, *Yearbook of European Law*, 323, 2003.

2. 4. COMMON MARKET

A common market is comprised of customs union,¹¹² i.e. free movement of goods within states participating in this integration form, but free movement of production factors as well (labour force, land and capital goods). As regards third countries relations, they can be regulated in various ways, with higher or lesser degree of integrative joint action.

2. 5. ECONOMIC UNION

An economic union implies combination of free movement of goods and production factors, characteristic for common market with certain degree of approximation or complete unification of economic policies, what includes common foreign economic policy governed by common central authority.

2. 6. MONETARY UNION

A monetary union implies existence of common market with unique currency and monetary policy, and can be considered as combination of economic and monetary union. It creates irreversible fixed currency rates and complete convertibility of member states' currencies or one common currency which circulates in all member states. A monetary union implies high degree of integration of macro-economic and fiscal policies.

2. 7. COMPLETE ECONOMIC UNION

A complete economic union implies unification of monetary, fiscal, social and other related policies, in other words, complete integration of economies of participating member states, including establishment of supranational body which issues decisions mandatory for all member states. Speaking in terms of economy, situation is almost the same as in one state. Considering many integrated areas, political integration is often implied (e.g. in form of confederation).

¹¹² Craig, P., De Burca, G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011; Bodiřoga-Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 9-14; Barnard, C.: *The Substantive Law of the EU: The Four Freedoms*, 4th Edition, Oxford University Press, 2013; Barnard, C., Scott, J. (eds.): *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002; Snell, J.: *Who Got the Power? Free Movement and Allocation of Competences in EC Law*, *Yearbook of European Law*, 323, 2003.

2. 8. POLITICAL UNION

A political union implies complete unification of economies with common political supranational bodies, such as alliance or confederation of states.

2. 9. INTERNAL, COMMON AND SINGLE MARKET OF THE EU

An internal market¹¹³ is the main goal of creation of the EU. Originally, aim of the internal market was stipulated in Treaty on EEC, and today this is a part of provisions on aims of the EU mentioned in TEU.

Article 3 para 3 TEU stipulates:

“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”

2. 9. 1. INTERNAL MARKET

Definition of internal market entered into the founding treaties by SEA in 1986. Today it is incorporated in Article 26 para 2 TFEU (*ex* Article 14 para 2 TEU):

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

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

¹¹³ Ibidem.

2. 9. 2. COMMON MARKET

A common market has never been defined by the founding treaties, notwithstanding the fact that both notions “internal market” and “common market” can be found in the original founding treaties. In *Gaston Schul*¹¹⁴ the CJEU defined “common market” meaning moving all obstacles in trade within the Community due to merger of national markets in one unique market which conditions corresponds as much as possible to those in real internal market.

2. 9. 3. SINGLE MARKET

Beside notions “internal” and “common market”, one can often find notion “single market” which is mostly identified with notion “internal market”. In theory, the difference between notions “common” and “internal” market is a matter of dispute. There are two opposite, leading opinions. There is the standpoint on quality difference between notions - common market as narrower notion would be an introduction to internal market. Quantity difference between notions suggests that the common market is wider term, due to the fact that realisation of market without internal borders, beside free movement of goods, services, persons and capital necessary includes other related areas such as competition law, agriculture policy, monetary policy, fiscal policy, environment protection and foreign trade. After entering into force of the Treaty of Lisbon, by way of horizontal harmonisation, the dilemma on different terminology stated in founding treaties is removed. Thus now treaties use only notion “internal market.”

2. 10. TECHNIQUES OF MARKET INTEGRATION

When discussing techniques of market integration, one should consider approaches to integration of markets in order to adjust national legislations, as well as administrative and judicial practice. There are two main methods of market integration. Negative integration implies derogation of all existent obstacles to free movement. Provisions of founding treaties on fundamental freedoms are mainly based on this approach.¹¹⁵ E.g. according to Article 34

¹¹⁴ *Gaston Schul BV v Staatssecretaris van Financiën*, C-354/09, ECLI:EU:C:2010:439.

¹¹⁵ Craig, P., De Burca, G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011; Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 9-14; Barnard, C.: *The Substantive Law of the EU: The Four Freedoms*, 4th Edition, Oxford University Press, 2013; Barnard, C., Scott, J. (eds.): *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Pu-

TFEU, there is a prohibition of quantitative restrictions and measures with equal effect on import. According to Article 56 TFEU, restrictions on free provision of services are forbidden. Negative integration will be achieved by normative deregulation and derogation of national laws and practice which completely render impossible cross border exchange in the EU or make it difficult to enter markets of other Member States. A negative integration is based on the idea of prohibition of discrimination based on nationality or origin. In certain areas of fundamental freedoms this idea leads to complete prohibition of restrictions. Special impetus to such approach is given through principle of mutual recognition. The main idea is that a product or service from state A, where it is lawfully put on the market in accordance with rules of that state, shall be accepted as such in state B. State B can restrict or prevent free movement only by invoking important reasons in public interest. This principle was promoted for the first time in *Cassis de Dijon*.¹¹⁶

A positive integration puts accent on harmonisation, i.e. approximation or complete unification of different national provisions in certain area by enacting new unique act at EU level. This process is named approximation of laws. Articles 114 and 115 TFEU stand as general legal basis for harmonisation of laws in order to achieve internal market, in case there is no special legal basis for enacting of harmonising measures in specific area.

Article 114 TFEU (*ex* Article 95 TEC) stipulates:

“1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the 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.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

blishing, 2002; Snell, J.: Who Got the Power? Free Movement and Allocation of Competences in EC Law, Yearbook of European Law, 323, 2003.

¹¹⁶ *Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42. On *Cassis de Dijon* see more in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011, p. 44; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I., Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 125.

3. *The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.*

4. *If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*

5. *Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*

6. *The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.*

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. *When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*

8. *When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall*

bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.”

Furthermore, Article 115 (ex Article 94 TEC) stipulates:

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

Expect for these two provisions, power of harmonisation of provisions, which is stipulated in so called “general subsidiarity clause,” is also important. It arises out of Article 352 para 1 TFEU (ex Article 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 have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.”

As regards its scope, harmonisation can be full or partial. **Full harmonisation** regulates all aspects of a certain matter; Member States have no room for regulation of the same question which is thoroughly regulated at EU level. **Partial harmonisation** provides certain level for action of the Member States

and autonomous regulation of questions not mentioned in the directives. As regards level of protection, two types of harmonisation can be differentiated: **maximum** and **minimum harmonisation**. By method of maximum harmonisation,¹¹⁷ common standards are established, standing as maximum level for the Member States, which cannot keep or introduce stricter level of protection. By method of minimum harmonisation, minimum standards are established, so the Member States can impose or maintain stricter standards, of course, if this does not impose unjustified obstacle to free movement.

There are several techniques of regulation. **Optional harmonisation** enables producers to choose will they follow harmonised standards. In this case they can put their products on markets of other Member States or apply only national rules of one Member State if they decide to do business only on their local market.

Referential harmonisation¹¹⁸ is typical for “new approach directives, i.e. technical regulation, considering the fact that by this method only general standard and specifications and their detailed regulation are conferred to special standardisation bodies.

By method of **suspensive harmonisation**, particular question is regulated at EU level. Member States can choose among two options: sustain from any legislative activity or create national provision which will completely follow a directive.

In general, application of EU provisions on free movement aim at prevention of application of such national measures that may seek to hinder the exercise of such freedoms. The CJEU interprets extensively the economic freedoms in order to secure the basic personal and social rights.¹¹⁹ By applying EU norms on free movement of goods, persons, services and capital, the integrity of internal

¹¹⁷ On harmonization see in Rodin, S., Čapeta, T.: *Direktive i njihovi učinci prema praksi Europskog suda (Directives and their Effects in Case Law of the European Court of Justice)*, Učinci direktiva Europske unije u nacionalnom pravu, Rodin, Siniša; Čapeta, Tamara (eds.), Ministarstvo pravosuđa RH, 2008. See also in Bodiřoga-Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 19.; Horak, H., Dumančić, K.: *Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 32, br. 2, 2011; Horak, H.; Dumančić, K.: *Harmonisation of the Croatian Company Law with *Acquis Communautaire* of the European Union*, *The Business Review*, Cambridge, Vol. 18, No. 2, 2011.

¹¹⁸ *Ibidem*. See also Snell, J.: *The Internal Market and the Philosophies of Market Integration* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 322.

¹¹⁹ Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011., p. 86.

market is preserved. In respect of afore-mentioned, the CJEU is the arbiter of the application of free movement rights with respect to the “migrant” in the context of goods, persons, services or capital. Thus, the concept of direct and indirect discrimination has been developed.

Article 18 TFEU stipulates:

“Within the scope of application of this Treaty (...) any discrimination on grounds of nationality shall be prohibited.”

It is a general prohibition; it applies unless discrimination is prohibited in specific circumstances by the Treaty. It is a requirement for perfect equality of treatment in Member States in a situation governed by EU law. In EU context, “discrimination” denotes less favourable treatment of the imported good, service, capital or person. Community national is given less favourable treatment by comparison to that given to a domestic good, service, capital and to a host national. The prohibition encompasses both *direct* and *indirect discrimination*. In case *Jean Reyners*¹²⁰ Belgian law permitted only the host nationals to become lawyers. This is an example of direct discrimination which explicitly provides less favourable treatment of nationals from other Member States. Where the measure appears to be nationality-neutral, the discrimination is indirect if the national measure is intrinsically liable to have a greater effect on the migrant national in comparison to the host national.

¹²⁰ *Jean Reyners v. Belgian State*, 2/74, EU:C:1974:68.

Part 3.

MARKET FREEDOMS

3. 1. FREE MOVEMENT OF GOODS

Although the term “goods”¹²¹ is not defined by the TFEU, it regulates the customs union as the cornerstone of trade in goods.

Article 28 (1) TFEU stipulates:

“1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”

Article 30 TFEU amplified this prohibition to customs duties of a fiscal nature:

“Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.”

Beside customs and other duties, the TFEU prohibits quantitative restrictions on import and exports— *quotas* – as stipulated in Article 34 TFEU:

“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

¹²¹ Bodiroga Vukobrat, N.; Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011, pp. 20-21. Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I., Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 120.

and in Article 35 TFEU

“Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.”

To understand what the “good”¹²² is one should analyse the practice of the CJEU. In *Art Treasures*¹²³ the CJEU defines goods “as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.” As a result of this judgement all products that can be considered as work of art (e.g. paintings) are considered as goods. The same situation is with other goods like petroleum products, gas, electricity, waste etc. Articles 34 and 35 TFEU cover all types of imports and exports of goods and products. The range of goods covered is as wide as the range of goods in existence, so long as they have economic value. It should be born in mind that “*by goods, within the meaning of the ... Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions*” as it is defined in *Art Treasures*.

Italy imposed a tax on the export of artistic, historical and archaeological items. The Commission brought an action with justification that this was a breach of the Treaty which prohibited duties and charges on export. Italy argued that these items are not goods for the purpose of the rules on the customs union and that the purpose of the tax was not to raise the State revenue, but to protect the artistic heritage of the country. The Court rejected this argumentation and defined the goods as “the products which can be valued in money and which are capable, as such of forming the subject of commercial transactions”. The article covered by the Italian law, whatever may be the characteristic which distinguish them from other type of merchandise, nevertheless resemble the latter in as much as they can be valued in money and so be the subject of commercial transactions.

¹²² More on free movement of goods in Craig, P., De Burca, G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, Chapter 18; Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, Chapter 12; Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, Part II, Bodiroga Vukobrat, N.; Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 20-85; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I., Voronezh State University and Faculty of Economics and Business Zagreb, 2014, pp. 119-150.

¹²³ *Commission of the European Communities v. Italian Republic*, 7/68, ECLI:EU:C:1968:51.

In case *Thompson*¹²⁴ and *Almelo*¹²⁵ the coins were also defined as good. Coins which are no longer in circulation as currency would equally fall under the definition of goods, as would bank notes and bearer cheques (see *Bordessa and Others*¹²⁶). Goods originating from one Member State have the right to be exported from that state and also the goods originating from another Member State have the right to be imported to that State. According to *Persche*,¹²⁷ waste is to be regarded as good even when it is non-recyclable, but the subject of a commercial transaction. Electricity in *Almelo* and natural gas in *Commission v. French Republic*¹²⁸ also count as goods, but television signals as defined by *Sacchi*¹²⁹ do not.

Direct discrimination in terms of free movement of goods means that the imported good has received different and usually less favorable treatment by comparison with the treatment which the domestic good has received. In *Darby*¹³⁰ discriminatory national laws directly resulted in a total prohibition with respect to the imported good.

The United Kingdom government banned the importation of pornographic materials (six films and seven magazines with pornographic content from Denmark to the United Kingdom) by relying to the Treaty (*ex Art 30 TEC*) with justification that such content offends public morality. The importer claimed that it is a quantitative restriction and that it is not possible to call on public morality since different areas of the country have different regulations regarding pornographic content. The CJEU found that this prohibition is justified under the public morality exception within the meaning of Article 30 and such prohibition can be justified if there is no lawful trade in such goods within the United Kingdom. In addition, the CJEU did not seek to define the boundaries of the concept of public morality. This means there are no standards to determine the scope of the Member State behavior in public morality.

¹²⁴ *Regina v. Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss*, 7/78, EU:C:1978:209.

¹²⁵ *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*, C-393/92, EU:C:1994:171.

¹²⁶ *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre*, Joined cases C-358/93 and C-416/93, EU:C:1995:54

¹²⁷ *Hein Persche v. Finanzamt Lüdenscheid*, C-318/07, ECLI:EU:C:2009:33.

¹²⁸ *Commission of the European Communities v. French Republic*, C-159/94, EU:C:1997:501.

¹²⁹ *Giuseppe Sacchi*, 155/73, ECLI:EU:C:1974:40.

¹³⁰ *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, 34/79, EU:C:1979:295.

Instances of direct discrimination have resulted in designation of “measures having equivalent effect to quantitative restrictions.” Comparing to the quantitative restrictions, which could be detected relatively easy, the measures having equivalent effect are more difficult to define and have many different variations. In solving that problem the CJEU and the Commission took broad view of such measures. Different restrictions are considered to be measures having equivalent effect e.g. phytosanitary inspections¹³¹ imposed only on imported goods, national measure relating to the purity of beer,¹³² imposing a minimum price for fuel which resulted in the import being unable to benefit from lower cost prices in the country of origin,¹³³ national law which required petrol importers to buy 35 per cent of their requirements from the state-owned old refinery at a centrally fixed price,¹³⁴ national law prohibiting private individuals from importing alcoholic beverages.¹³⁵ Indirect discrimination means that national trade laws do not discriminate directly imported good, but impose greater burden on imported goods than to the domestic one.

Art. 34 TFEU stipulates:

“The national measure will be held to be indirectly discriminatory where trade rules, not themselves discriminatory as to product origin, impose a greater impact on the imported good. “

In *Dassonville*¹³⁶ definition of the “measure having equivalent effect” clearly contemplates this. Belgian law provided that goods bearing a designation of origin could only be imported if they were accompanied by a certificate from the government of the exporting country certifying their right to such designation. Dassonville imported Scotch whisky into Belgium from France

¹³¹ *Rewe-Zentralfinanz GmbH v. Landwirtschaftskammer*, 4/75, EU:C:1975:98.

¹³² *Commission of the European Communities v. Federal Republic of Germany*, 178/84, EU:C:1987:126.

¹³³ *Henri Cullet and Chambre syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc a Toulouse and Centre Leclerc a Saint-Orens-de-Gameville*, 231/83, EU:C:1985:29.

¹³⁴ *Campus Oil Limited and Others v. Minister for Industry and Energy and Others*, 72/83, EU:C:1984:256.

¹³⁵ *Klas Rosengren and Others v. Riksåklagaren*, 170/04, EU:C:2007:313.

¹³⁶ *Procureur du Roi v. Benoît and Gustave Dassonville*, 8/74, ECLI:EU:C:1974:82. On *Dassonville* see also in Bodiroga Vukobrat, N.; Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 41-44; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I., Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 120.

without being in possession of the requisite certificate from the British authorities. Since this certificate was difficult to obtain in respect of goods which were already in free circulation in a third country, Dassonville was prosecuted in Belgium and argued before the CJEU that such Belgian rule constitutes a measure which has equivalent effect as quantitative restriction.

In its judgement CJEU stated that:

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

6. In the absence of a Community system guaranteeing for consumers the authenticity of a product’s designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7. Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

8. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9. Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.”

This standpoint has become the rule in all future judgements regarding measures having equivalent effect to quantitative restrictions. This rule is known as *Dassonville* formula.

Such standpoint was confirmed in *Cassis de Dijon*¹³⁷ where German trade rules relating to minimum alcoholic content levels constituted an obstacle to

¹³⁷ *Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42.

free movement of *cassis* between France and Germany. The national rules were effective to ban French *cassis* from German market.¹³⁸

The applicant in the case intended to import the liqueur “*Cassis de Dijon*” into Germany from France. The German authority refused to allow the importation because the French drink was not sufficient alcoholic to be declared as liqueur in Germany. According to German law a drink called “*liqueur*” should have at least 25 per cent of alcohol, whereas the French drink had an alcoholic content between 15 and 20 per cent. The applicant, company Rewe Zentral, which imported the drink, argued that the German rule is the measure of equivalent effect as quantitative restriction since it prevented the French version of the drink from being lawfully traded in Germany.

In its judgement the CJEU stated:

“8. *In the absence of common rules relating to the production and marketing of alcohol – a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p. 2) not yet having received the Council’s approval – it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.*

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

9. *The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.*

10. *As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since,*

¹³⁸ See also *Commission of the European Communities v. Ireland*, 249/81, EU:C:1982:402; *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 207/83, EU:C:1985:161.

in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market are generally consumed in a diluted form.

12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages. This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject. Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public. However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community. In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having high alcohol content by excluding from the national market products of other Member States which do not answer that description. It therefore appears that the unilater-

al requirement imposed by the rules of a Member State of minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

The CJEU gave different examples of measures that are concerned as directly or indirectly discriminatory. One of the most significant judgments in the area of discrimination measures was ruling in *Commission v. Ireland* (“*Buy Irish case*”) ¹³⁹ where Ireland engaged campaign to promote the purchase of domestic products as opposed to imported goods.

The Irish government promoted sales of Irish goods with the aim to achieve a switch of 3 per cent in consumer spending from imports to domestic products. It adopted a number of measures designated to encourage consumers to buy Irish products. The Commission brought action against Ireland alleging that the campaign was a measure with equivalent effect as quantitative restriction. The Irish Government argued that it had never adopted measures as regards provisions of the Treaty concerning free movement of goods, but that this measure should be judged in light of the state aid articles of the Treaty.

In its judgement the CJEU decided:

“21. The Irish Government maintains that the prohibition against measures having an effect equivalent to quantitative restrictions in Article 30 is concerned only with “measures”, that is to say, binding provisions emanating from a public authority. However, no such provision has been adopted by the Irish Government, which has confined itself to giving moral support and financial aid to the activities pursued by the Irish industries.

...

28. Such a practice cannot escape the prohibition laid down by Article 30 of the Treaty solely because it is not based on decisions which are binding

¹³⁹ *Commission of the European Communities v. Ireland*, 249/81, ECLI:EU:C:1982:402. See also in Bodiroga Vukobrat, N.; Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 37-38.

upon undertakings. Even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty.

29. That is the case where, as in this instance, such a restrictive practice represents the implementation of a programme defined by the government which affects the national economy as a whole and which is intended to check the flow of trade between Member States by encouraging the purchase of domestic products, by means of an advertising campaign on a national scale and the organization of special procedures applicable solely to domestic products, and where those activities are attributable as a whole to the government and are pursued in an organized fashion throughout the national territory.

30. Ireland has therefore failed to fulfil its obligations under the Treaty by organizing a campaign to promote the sale and purchase of Irish goods within its territory.”

There are different methods restricting free movement from other Member State. It is not just a question of making this movement restricted but it can also be a question of making it more difficult or costly. That situation was taken into consideration for the first time in *Schloh*.¹⁴⁰

Mr Schloh bought a car in Germany and obtained certificate of conformity to vehicle types in Belgium from a Ford dealer. Under Belgian law he was required to submit his car to two tests for which fees were charged. He argued that these fees constitute measure of equivalent effect:

“12. Under the terms of Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Roadworthiness testing is a formality which makes the registration of imported vehicles more difficult and more onerous and consequently is in the nature of a measure having an effect equivalent to a quantitative restriction.

13. Nevertheless, Article 36 may justify such a formality on grounds of the protection of human health and life, provided that it is established, first, that the test at issue is necessary for the attainment of that objective and,

¹⁴⁰ *Bernhard Schloh v. Auto Controle Technique SPRL*, 50/85, ECLI:EU:C:1986:244.

secondly, that it does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

14. As far as the first condition is concerned, it must be acknowledged that roadworthiness testing required prior to the registration of an imported vehicle may, even though the vehicle carries a certificate of conformity to the vehicle types approved in the importing Member State, be regarded as necessary for the protection of human health and life where the vehicle in question has already been put on the road. In such cases roadworthiness testing performs a useful function inasmuch as it makes it possible to check that the vehicle has not been damaged and is in a good state of repair. However, such testing cannot be justified on those grounds where it relates to an imported vehicle carrying a certificate of conformity which has not been placed on the road before being registered in the importing Member State.

15. As far as the second condition is concerned, it must be stated that the roadworthiness testing of imported vehicles cannot, however, be justified under the second sentence of Article 36 of the Treaty if it is established that such testing is not required in the case of vehicles of national origin presented for registration in the same circumstances. If that were the case it would become apparent that the measure in question was not in fact inspired by a concern for the protection of human health and life but in reality constituted a means of arbitrary discrimination in trade between Member States. It is for the national court to verify that such non-discriminatory treatment is in fact ensured.

16. It must therefore be stated in reply to the jure de paix of Schaerbeek that Article 30 of the Treaty must be interpreted as meaning that a national measure which requires a roadworthiness test for the purpose of registering an imported vehicle carrying a certificate of its conformity to the vehicle types approved in the importing Member State constitutes a measure having an effect equivalent to a quantitative restriction on imports. Nevertheless, such a measure is justified under Article 36 of the Treaty in so far as it relates to vehicles put on the road before such registration and applies without distinction to vehicles of national origin and imported vehicles.”

If the national rule is found to be discriminatory it can be justified under Article 36 TFEU (ex Article 30 TEC) which stipulates

“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health

and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

Arguments justifying restrictive national measures should be analysed using case by case method. In that sense, the CJEU has the leading role. National rules which are discriminatory against goods from other Member States will be closely scrutinized before the CJEU accepts an argument that they can be saved on one of the grounds listed in Article 36 TFEU. The CJEU also insisted that it should pass a test of proportionality. Given that Article 36 TFEU is an exemption to one of the important rights safeguarded by the Treaty. The CJEU demands that the discriminatory measure sought to be justified under Article 36 TFEU is the least restrictive possible.¹⁴¹

The meaning of justification based on public morality was defined in *Darby*¹⁴² and later in *Conagate*.¹⁴³

Company Conagate imported life size inflatable dolls from Germany into the United Kingdom. In the invoice it was stated that the dolls were for the purpose of window display but the United Kingdom customs officials believed that they are for another purpose especially when they found declaration which described items like “love love dolls”. The dolls were seized and Conagate was forfeited. Conagate argued that this was breach of free movement of goods. The national court asked whether a prohibition of imports could be justified even though the Member State did not ban the manufacture or marketing of the same goods at its national territory,

The CJEU decided in its judgement:

“15. However, although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of cer-

¹⁴¹ Craig, P, De Burca, G.: EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, p. 592, Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014, p. 333, Barnard, C.: The Substantive Law of the EU, The Four Freedoms, Part II, Bodiřoga-Vukobrat, N.; Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011; Barnard, C.: The Substantive Law of the EU: The Four Freedoms, 3rd Edition, Oxford University Press, 2010, Chapters 2-6; Gormley, W. L., EU Law of Free Movement of Goods and Customs Union, Oxford University Press, 2009.

¹⁴² See *infra*.

¹⁴³ *Conagate Limited v. HM Customs and Excise*, 121/85, EU:C:1986:114.

tain articles, it must be pointed out that the fact that goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.

16. It follows that a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory.

17. It is not for the Court, within the framework of the powers conferred upon it by Article 177 of the EEC Treaty, to consider whether, and to what extent, the United Kingdom legislation contains such a prohibition. However, the question whether or not such a prohibition exists in a State comprised of different constituent parts which have their own internal legislation, can be resolved only by taking into consideration all the relevant legislation. Although it is not necessary, for the purposes of the application of the above-mentioned rule, that the manufacture and marketing of the products whose importation has been prohibited should be prohibited in the territory of all the constituent parts, it must at least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products.”

In *Conegate* the CJEU examined the relevant national rules more closely and reached the conclusion that the restrictions which existed did not amount to a prohibition on domestic manufactures or marketing. The judgement and its reasoning was different than in *Darby* where CJEU found out that the United Kingdom law did restrain the manufacture and marketing of pornography sufficiently to enable it to conclude that there was no lawful trade in such goods within the United Kingdom.

Public policy constitutes another reason for justification of the restrictions imposed by national measures. The CJEU interpretes this justification in line with the principle of free movement of goods as it is defined in Article 28 TFEU. There is relatively small number of cases dealing with reasons of public policy as justification for national restrictions. In *Cullet v. Centre Leclerc*¹⁴⁴ the reason of public policy was analysed as justification for the restriction.

¹⁴⁴ *Henri Cullet and Chambre syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc a Toulouse and Centre Leclerc a Saint-Orens-de-Gameville*, 231/83, EU:C:1985:29.

French legislation primarily fixed the minimum retail prices for fuel on the basis of French ex-refinery prices and French refinery costs. This fixation of prices constituted the measure with equivalent effect since imports could not benefit fully from lower cost prices in the country of origin. The French government decided to justify its action on the basis of public policy with reasoning that the change in this regulation and the absence of pricing rules will cause civil disturbances, blockades and violence.

The CJEU decided:

“32. For the purpose of applying Article 36, the French Government has invoked the disturbances to law and order (ordre public) and public security caused by violent reactions which should be expected from retailers affected by unrestricted competition.

33. On this point it is sufficient to observe that the French Government has not shown that an amendment of the regulations in question in conformity with the principles set out above would have consequences for law and order (ordre public) and public security which the French Government would be unable to meet with the resources available to it.”

Very similar to public policy is the reason of public security. This issue was raised in *Campus Oil Ltd. v. Minister for Industry and Energy*.¹⁴⁵

In case *Campus Oil* Irish law requested petrol importers to buy 35 % of their requirements from state-owned refinery and the prices of that oil would be determined by the Irish government. The Irish government argued that this rule is important for the country to protect its own oil capacity.

The CJEU held that this rule could be justified on basis of public security because oil is an important energy source for public services even though it is also important for the country's economy.

“31. Consequently, the existing Community rules give a Member State whose supplies of petroleum products depend totally or almost totally on deliveries from other countries certain guarantees that deliveries from other Member States will be maintained in the event of a serious shortfall in proportions which match those of supplies to the market of the supplying State. However, this does not mean that the Member State concerned has an unconditional assurance that supplies will in any event be maintained at least at a level

¹⁴⁵ *Campus Oil Ltd. and Others v. Minister for Industry and Energy and Others*, 72/83, ECLI:EU:C:1984:256.

sufficient to meet its minimum needs. In those circumstances, the possibility for a Member State to rely on Article 36 to justify appropriate complementary measures at national level cannot be excluded, even where there exist Community rules on the matter.

...

34. It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect."

3. 2. FREE MOVEMENT OF PERSONS

Article 45(1) TFEU stipulates:

"1. Freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

This article provides protection not only for workers, self-employed persons and their family members. Provision of Article 45 TFEU was elaborated in various cases and through different sources of secondary law (mainly directives and regulations).¹⁴⁶ These directives and regulations deal with main derogations or exceptions to the rules on free movement, formalities and conditions of entry and residence of workers and self-employed persons, equal treatment principle etc.

¹⁴⁶ E.g. Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health; Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; Regulation (EEC) No. 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.

Free movement of workers¹⁴⁷ includes different rights such as acceptance of the actual offer of employment; free movement within the territory of Member States for employment purposes; stay in a Member State for employment according to provisions governing the employment of nationals of that country provided by law and other regulations; stay in the territory of a Member State upon termination of employment in that country, under the conditions contained in the implementing regulations of the EU. Later this freedom was defined by Directive 2004/38/EC on the right of persons to the status of citizen of the Union and their family members to move and reside freely in EU Member States. The principle of freedom of movement and non-discrimination must be recognized for members of the workers' family. Family members have the same rights as workers. The right on education is also recognized as free movement of persons. According to EU legislation and the practice of the CJEU the term „workers“ was extended. Spouses, family members, divorced spouses, job seekers, students and practitioners enjoy the right of free movement of persons.

The CJEU recognized different situations on discrimination regarding the workers' rights. In *Groener*¹⁴⁸ the right to choose a working place and freedom of workers were considered.

Mrs Groener, a citizen of the Netherlands, worked part time job as an assistant professor teaching art in Dublin. When the same institute responded to applications for admission to full-time associate professor of art, they set a successful examination of the Irish language as employment condition. In this condition Mrs Groener recognized restriction of the possibility for her to choose the occupation and freedom of movement for workers. In its judgment the CJEU stated:

„18. As is apparent from the documents before the Court, although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also

¹⁴⁷ See also Bodiřoga-Vukobrat, N.; Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 106-190; Craig, P, De Burca, G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, p.715; Barnard, C.; Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, p. 357; Barnard, C.: *The Substantive Law of the EU, The Four Freedoms, Part II*; 3rd Edition, Oxford University Press, 2010; Dougan, M, *Cross-border Educational Mobility and the Exportation of Student Financial Assistance*, 33 *European Law Review* 723, 2008; Goldner Lang, I.: *Sloboda kretanja ljudi u EU: kontekst sporazuma o pridruživanju*, Zagreb, Školska knjiga, 2007.

¹⁴⁸ *Anita Groener v. Minister for Education and the City of Dublin Vocational Education Committee*, 379/87, ECLI:EU:C:1989:599.

to promote the use of Irish as a means of expressing national identity and culture. It is for that reason that Irish courses are compulsory for children receiving primary education and optional for those receiving secondary education. The obligation imposed on lecturers in public vocational education schools to have certain knowledge of the Irish language is one of the measures adopted by the Irish Government in furtherance of that policy.

...

21. It follows that the requirement imposed on teachers to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Article 3(1) of Regulation No 1612/68.

...

23. Moreover, the principle of non-discrimination precludes the imposition of any requirement that the linguistic knowledge in question must have been acquired within the national territory. It also implies that the nationals of other Member States should have an opportunity to retake the oral examination, in the event of their having previously failed it, when they again apply for a post of assistant lecturer or lecturer."

In relation to workers, direct discrimination¹⁴⁹ includes the precondition of nationality as prerequisite for employment e.g. French nationality as precondition for permanent employment of public sector nurses in *Commission of the European Communities v. French Republic*¹⁵⁰ based on the application of Article 45 (2) TFEU.

The action was brought against the French Republic due to the fact that French nationality requirement was a precondition for appointment and establishment in permanent employment as a nurse in public hospitals.

The CJEU decided that French Republic did not fulfil its obligation.

"15. The French Government claims that access to employment as a nurse in public hospitals is not subject to any nationality requirement and that such employment is open to the nationals of other Member States when it

¹⁴⁹ On discrimination of workers see more in Bodiroga-Vukobrat, N.; Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 133.

¹⁵⁰ *Commission of the European Communities v. French Republic*, 307/84, EU:C:1986:222.

comes to recruiting employees under contract as opposed to members of the established staff.

16. That argument must be rejected, since the French Republic has not established that all posts as nurses offered in public hospitals were equally accessible to the nationals of other Member States and that when such nationals were recruited they enjoyed conditions — with the exception of the possibility of promotion to posts in the public service within the meaning of the Treaty — advantages and safeguards which were in every respect equivalent to those deriving from the status of members of the established staff, which is reserved to French nationals.

17. In those circumstances, it must be concluded that by restricting to its own nationals appointment and establishment in permanent employment as a nurse in a public hospital, the French Republic has failed to fulfil its obligations under Article 48 of the EEC Treaty.”

The conditions of work and employment favoured Italian researchers in *Commission v. Italian Republic*.¹⁵¹ Such preferences were also declared as discrimination.

The Commission brought an action for a declaration that by discriminating, as regards conditions of work and employment, nationals of other Member States working for the *Consiglio nazionale delle ricerche* (National Research Council, hereinafter CNR) Italy favoured researchers of Italian nationality working for that body. The national law provided that staff employed under contract by the CNR on the date of that law’s entry into force (3 April 1975) are to be appointed to established posts provided that they have the requisite qualifications and fulfil the prescribed requirements. In the absence of established posts, staff employed under contract is to continue to be engaged for an indefinite period and to receive the same remuneration as established staff of the corresponding level. In both cases “*account shall be taken of previous years of service for the purpose of calculating periodical increases in salary*”. Other requirement was the possession of Italian citizenship.

In its judgement the CJEU decided:

“13. In this regard it must be observed that the situation of researchers who are nationals of other Member States is discriminatory by comparison with that of Italian researchers, particularly as regards job security, since they

¹⁵¹ *Commission of the European Communities v. Italian Republic*, 225/85, EU:C:1987:284.

are employed by the CNR under contracts of limited duration and they have no guarantee that those contracts will be renewed. Moreover, it must be noted that the fact that researchers who are nationals of other Member States have no career structure makes it impossible for them to move to higher grades and has an impact on their pay and retirement pensions. Consequently, those researchers do not enjoy a system entailing advantages and guarantees equivalent to those deriving from the status reserved for Italian nationals.

14. In those circumstances, it must be held that by discriminating, as regards conditions of work and employment, against researchers working for the Consiglio nazionale delle ricerche who are nationals of other Member States in favour of researchers of Italian nationality working for that body, the Italian Republic has failed to fulfil its obligations ...”

In *Boukhalfa*¹⁵² the CJEU dealt with the case of German foreign ministry, which made distinction among local staff having German nationality and those who did not.

In *Boukhalfa* the German law on Diplomatic Service governed, *inter alia*, the status of diplomatic representatives, comprising staff on posted from the Foreign Ministry and non-posted (local) staff. With regard to the latter, it distinguished between local staff having German nationality and those not having German nationality. Ms Boukhalfa was a Belgian national, employed as local staff of the German Embassy in Algeria, in the passports department. Her employment contract was concluded in Algeria. Prior to entering into the contract, Ms Boukhalfa had already been established in Algeria, where she also had her permanent residence. Her contract was subject to Algerian law. Ms Boukhalfa asked to receive the same treatment as local staff of German nationality but the German authorities argued that Community law was not applicable to the present case because its scope of application is limited to the territory of the Member States of the EU and Ms Boukhalfa was not in the position of a national of a Member State employed in another Member State but had always worked in a non-member country.

In its judgement the CJEU decided that

“15. ... provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community. ... That principle

¹⁵² *Ingrid Boukhalfa v. Bundesrepublik Deutschland*, C-214/94, EU:C:1996:174.

must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other.

16. In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the law of the Member State which employs her and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax.

17. In situation such as that of the plaintiff in the main proceedings, Community law and thus the prohibition of discrimination based on nationality contained in the abovementioned Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State."

In relation to freedom of establishment, a French measure required doctors established in other Member States to cancel their registration in that state as a precondition for practice in France.¹⁵³

Under Article L 412 of the French Code de la Santé Publique [Public Health Code] any doctor who practices in a département must be enrolled in a register kept by the area Council de Ordre des Médecins [Medical Society]. It also provides that a doctor "*may be enrolled in only one register*", that of the département in which his place of work is situated, save as otherwise provided by the Code de Déontologie [Code of Medical Ethics]. Furthermore, "*a doctor enrolled or registered as a doctor in another country may not be enrolled in any register of the ordre des médecins*". Under Article L 441 of the Code de la Santé Publique, the same rules apply to dental practitioners.

By a letter of 22 December 1983 the Commission informed the French Government that the above-mentioned French provisions were not in conformity with the provisions of the EEC Treaty. In particular, the Commission pointed out in its letter that the French provisions prevented a doctor or a dental prac-

¹⁵³ *Commission of the European Communities v. French Republic*, 96/85, EU:C:1986:189.

itioner established in a Member State who wished to maintain his establishment there from acting as a locum in France, opening a practice in France or practising as an employed person in France.

The CJEU stated:

“12. ... it must be stated first of all that the principle that a practitioner may have only one practice, put forward by the French Government as indispensable to the continuity of medical care, is applied more strictly with regard to practitioners from other Member States than practitioners established in France. Although, according to the documents before the Court and the information provided by the parties, the Councils of the ordre des médecins authorize doctors established in France to open a second practice only at a short distance from their main practice, doctors established in another Member State, even close to the frontier, are never permitted to open a second practice in France. Similarly, the French legislation makes it possible in principle for dental surgeons established in France to be authorized to open one or more secondary practices, but a dental practitioner established in another Member State can never be authorized to open a second practice in France.

13. Secondly, it must be observed that the general rule prohibiting doctors and dental practitioners established in another Member State from practising in France is unduly restrictive. First of all, in the case of certain medical specialties, it is not necessary that the specialist should be close to the patient on a continuous basis after the treatment has been given. That is so where the specialist carries out a single procedure, as is often the case of a radiologist, for example, or where subsequent care is provided by other medical personnel, as is often the case of a surgeon. Furthermore, as the French Government indeed recognized, recent developments in the medical profession show that even in the area of general medicine the increasing trend is for practitioners to belong to group practices, so that a patient cannot always consult the same general practitioner.

14. Those considerations show that the prohibition on the enrolment in a register of the Ordre in France of any doctor or dental surgeon who is still enrolled or registered in another Member State is too absolute and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French rules of medical ethics in France.”

In *D. H. M.*¹⁵⁴ the host national was favoured in respect of admission to national sickness insurance benefits. The discrimination in Dutch law was based

¹⁵⁴ *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen*, 79/85, EU:C:1986:308.

on the location of the registered office in relation to the right to provide services.¹⁵⁵ A residence requirement imposed by the Netherlands in the context of undertaking a professional activity made it “*impossible for persons residing in another Member State to provide services.*” The same situation was in *Commission v. French Republic*¹⁵⁶ where the national law required the migrant lawyer providing services to work with a French lawyer and in *Commission v. Kingdom of the Netherlands*,¹⁵⁷ where an obligation imposed on national broadcasting bodies established in the Netherlands to have all or some of their programmes made by a Dutch undertaking was directly discriminatory.

As regards free movement of persons, much jurisprudence exists which has been founded on the application of the principle of discrimination, which is indirect in nature. As regards workers, for example, the imposition of a time limit on the duration of the employment relationship between universities and foreign language assistants was held to be indirectly discriminatory.¹⁵⁸

Pilar Allue deals with indirect discrimination. Italian law limited the duration of employment contracts of foreign language assistants without imposing the same limit for other workers. Since 25 per cent of the foreign language assistants were Italian nationals, the law essentially concerned nationals of other Member States and it was indirectly discriminatory.

In its judgement the CJEU claims that the limited duration of the employment contract for foreign language assistants cannot be justified:

“16. In that regard it must be stated that the six-year limit on the work in question is not necessary to enable universities to terminate the contract of members of the teaching staff who prove to be incompetent. No such limit exists for lecturers engaged under contract, who also perform teaching duties without having passed a competition.

In their case, although there is in principle a time-limit of three years, the Minister for Public Education may authorize exceptions (seventh paragraph of Article 25 of the Presidential Decree).

...

¹⁵⁵ *Robert-Gerardus Coenen and others v. Sociaal-Economische Raad*, 39/75, EU:C:1975:162.

¹⁵⁶ *Commission of the European Communities v. French Republic*, C-294/89, EU:C:1991:302.

¹⁵⁷ *Commission of the European Communities v. Kingdom of the Netherlands*, C-353/89, EU:C:1991:325.

¹⁵⁸ *Pilar Allue and Carmel Mary Coonan v. Università degli studi di Venezia*, 33/88, EU:C:1989:222.

19. The answer to the first part of the second question should therefore be that Article 48(2) of the Treaty must be interpreted as precluding the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign-language assistants where there is in principle no such limit with regard to other workers.”

Other examples relate to awarding of fixed term contracts in respect of language¹⁵⁹ posts filled mainly by foreign assistants¹⁶⁰ and insisting on migrant worker obtaining a fresh driving license, thereby duplicating one held in the home state, which could have indirectly prejudiced exercise of free movement rights. The CJEU dealt with the latter in *Choquet*.¹⁶¹

Mr Choquet was the accused in the main proceedings since the German law on road required a national of a Member State who holds a domestic driving licence issued by his country of origin, just like other foreign nationals, to obtain a German driving licence after staying one year in the Federal Republic of Germany, and in so far as a national of a Member State who holds a domestic driving licence, when that period has elapsed, is under the threat of punishment for driving without a driving licence if he continues to drive in the Federal Republic of Germany.

When the police carried out a check on the occasion of a road traffic accident in which the accused was involved he produced a driving licence issued by the French authorities. The German administration does not regard that driving licence as being valid, whereas according to the provisions of the national road traffic rules a holder of a foreign driving licence who has been established for more than one year in the territory of the Federal Republic of Germany is obliged to obtain a German driving licence.

„2. However, according to the information supplied during these proceedings, in that case the conditions to which the issue of the driving licence are subject are simplified as compared with the procedure for the issue of

¹⁵⁹ On questions of language discrimination and application of rules on professional qualifications recognition see also in Bodiroga Vukobrat, N., Horak, H.: The Recognition of Professional Qualifications and Problem of Necessary Language Skills in Healthcare Profession, International Multidisciplinary Scientific Geoconference; 14th vol. 1 2014, SGEM 2014 Conference Proceedings; Horak, H., Bodiroga-Vukobrat, N., Dumančić, K.: Professional Qualification and Diploma Recognition in EU law, InterEULawEast Journal for International and European Law, Economics and Market Integration, Volume I, Issue 1, 2014.

¹⁶⁰ *Maria Chiara Spotti v. Freistaat Bayern*, C-272/92, EU:C:1993:848.

¹⁶¹ *Criminal proceedings against Michel Choquet*, 16/78, EU:C:1978:210.

the domestic driving licence and do not as a general rule lead to a fresh driving test. In this connexion the court making the reference points out that the acquisition of a fresh driving licence may nevertheless create language difficulties and involve the person concerned in expenses which are so disproportionate that they may amount to discrimination against nationals of the other Member States in contravention of Article 7 of the Treaty and may impede the exercise of the right to freedom of movement for workers which is guaranteed by Article 48.

3. The Commission considers that the obligation, as defined by the law of the Federal Republic of Germany, to hold a driving licence may be in breach of the right of freedom of movement enshrined in Article 48 of the EEC Treaty if there is a direct connexion between the driving of a vehicle and the objective of the right of freedom of movement, that is to say if it is necessary for a person to drive in order to seek and pursue an activity and if the obligation to hold a driving licence is not justified on grounds of public policy, public security and public health. The obligation to possess a driving licence does not in itself impede freedom of movement, except where the conditions for obtaining this driving licence constitute an intolerable financial burden upon or discriminate against nationals of other Member States.

...

9. The answer to the question referred must therefore be that it is not in principle incompatible with Community law for one Member State to require a national of another Member State, who is permanently established in its territory, to obtain a domestic driving licence for the purpose of driving motor vehicles, even if he is in possession of a driving licence issued by the authorities in his State of origin.

However, such a requirement may be regarded as indirectly prejudicing the exercise of the right of freedom of movement, the right of freedom of establishment or the freedom to provide services guaranteed by Articles 48, 52 and 59 of the Treaty respectively, and consequently as being incompatible with the Treaty, if it appears that the conditions imposed by national rules on the holder of a driving licence issued by another Member State are not in due proportion to the requirements of road safety.”

In relation to the right of establishment, the United Kingdom stipulated the possession of its nationality as precondition for ship ownership.¹⁶² In relation

¹⁶² *The Queen v. Secretary of State for Transport ex parte Factortame and Others*, C-221/89, EU:C:1991:320.

to the right to provide services, a Belgian rule was held unlawful where it provided that fee charging by employment agencies should be subject to the grant of a license.¹⁶³

“2. In case *Wesemael* (which can be also analyzed as a restriction of the freedom to provide services) the questions were raised in the context of two cases of criminal proceedings, each against a person established in Belgium and a French employment agent for entertainers established in France, who are charged with having infringed the provisions of Articles 6 and 20 of the Belgian *Arrêté Royal* of 28 November 1975 relating to the operation of fee-charging employment agencies for entertainers.

3. It provides that, “the operation of a fee-charging employment agency for entertainers shall be subject to the grant of a licence by the Minister responsible for employment”, and that, “foreign employment agencies for entertainers may not, in the absence of a reciprocal convention between Belgium and their country, place anyone in employment in Belgium except through a fee-charging employment agency holding a licence.

4. In each of the two cases the first accused is charged with having, for the purpose of engaging entertainers, resorted to a fee-charging employment agency situated in France the operator of which does not hold a licence in Belgium, and the second accused is charged with having placed persons in employment in that State without acting through an agency holding a licence in Belgium.

...

27. Those essential requirements, which lay down the freedom to provide services, abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.

28. Taking into account the particular nature of certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said State, in so far as the person providing the service is not subject to similar requirements in the Member State in which he is established.

...

¹⁶³ *Ministere public and ‘Chambre syndicale des agents artistiques et impresarii de Belgique’ ASBL v. Willy van Wesemael and Others*, Joined Cases 110 and 111/78, EU:C:1979:8.

39. For all these reasons, the answer should be that when the pursuit of the activity of fee-charging employment agencies for entertainers is made subject in the State in which the service is provided to the issue of a licence, that State may not impose on the persons providing the service who are established in another Member State any obligation either to satisfy that requirement or to act through a fee-charging employment agency which holds such a licence when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the services holds in the Member State in which he is established a licence issued under conditions comparable to those required by the State in which the service is provided and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the Member State in which the service is provided.”

The concept of worker was extended to family members, spouses, students etc. In *Gül*¹⁶⁴ the right on free movement was recognized for spouses of Member States’ nationals.

Mr Gül, Cyprus citizen, was married to a British woman. He lived in Germany and worked as a doctor. Mr Gül applied for permanent authorization to practise, relying on the fact that his wife and the children of their marriage were of British nationality and the fact that his wife worked in Germany as a hairdresser. As the spouse of “a national of a Member State [who was] pursuing an activity as an employed or self-employed person in the territory of another Member State”, Mr Gül requested permanent work permit as a doctor in Germany. The German authorities refused to issue him the permit, on the grounds that the right to a so-called. “aprobation” have only Germans, nationals from the EU and stateless persons, not citizens of the “third countries.”

In its judgement the CJEU stated:

“15. In order to pursue an occupation, such as the medical profession, the access to and pursuit of which are governed by special rules, the spouse of a migrant worker who is a national of a non-member country must meet two requirements: he must show that he has the qualifications and diplomas necessary for the pursuit of that occupation in accordance with the legislation of the host Member State and must observe the specific rules governing the pursuit of that occupation; those requirements must be the same as those

¹⁶⁴ *Emir Gül v. Regierungspräsident Düsseldorf*, 131/85, ECLI:EU:C:1986:200.

imposed by the host Member State on its own nationals. It appears from the documents before the Court that Mr Giil meets both these requirements.

...

20. As the Commission has correctly emphasized, the rights granted to the spouse of a migrant worker by Articles 10 and 11 of Regulation No 1612/68 are linked to the rights which that worker enjoys under Article 48 of the EEC Treaty and Articles 1 et seq. of the regulation. In so far as the spouse can rely on such secondary rights and those rights include the right to take up any activity as an employed person pursuant to Article 11, he must be able to pursue that activity under the same conditions as are applicable to a worker entitled to freedom of movement. Article 3 (1) of the regulation thus requires the authorities of the host Member State to treat the spouse in a non-discriminatory fashion. The 'national treatment' to which workers from Member States are entitled in that regard is thus extended to their spouses."

Children of workers perform a right on a residence permit, movement, and education. The right on education was examined in *Michael S. v. Fonds national de reclassement social des handicapés*.¹⁶⁵

Mr Michael S. and his father were Italian nationals. Father of Michael S., who was 18 years old at the time of the decision, worked in Belgium. Because of its extremely diminished intellectual capacity Mr Michael S. had never worked and his employment opportunities were very weak. Father applied for the government incentives in Belgium for training his son to work on which Belgian citizens with disabilities had a legal right. His appeal was rejected.

The CJEU stated:

"12. By Article 12 of the said Regulation 'the children of a national of a Member State, who is or has been employed in the territory of another Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same conditions as the nationals of that State, if those children reside in its territory'. The Member States are directed to encourage 'steps allowing such children to follow the abovementioned courses under the best conditions'.

13. By the fifth recital of this Regulation, the latter has been adopted inter alia on the ground 'that the right of freedom of movement demands for its exercise, conditions which are objectively those of liberty and dignity, the elimination of obstacles which impede the mobility of workers, especially as

¹⁶⁵ *Michael S. v. Fonds national de reclassement social des handicapés*, 76/72, ECLI:EU:C:1973:46.

regards the right of the worker to be reunited with his family, and the conditions of integration of such family in the environment of the host country’.

14. Such integration presupposes that, in the case of the handicapped child of a foreign worker, this child can take advantage of benefits provided by the laws of the host country with a view to the rehabilitation of the handicapped, under the same conditions as nationals who are in a similar position.

15. The fact that the abovementioned Article 12 does not expressly refer to educational arrangement provided in favour of such children, is not to be understood as denoting the intention to exclude these arrangements from the scope of the Regulation, but is explained by the difficulty of mentioning all hypotheses exhaustively, especially those of an exceptional character, in view of which it is necessary to guarantee the equality of nationals of all the Member States, in order to ensure that the right of freedom of movement can be exercised to its full extent.”

In *Servizi Ausiliari Dottori Commercialisti Srl*¹⁶⁶ an Italian law providing that tax assistance was to be exclusively given by authorized Italian tax advice centers financed by Italy was held indirectly discriminatory.

The concept of indirect discrimination has been deemed by the Court to embrace the imposition of dual burden rules on the migrant national. Examples of such rules include the requirement to hold particular qualifications¹⁶⁷ or licenses.¹⁶⁸ In such situations, the migrant is bound to satisfy two different sets of rules i.e. home state rules and host state rules. By comparison, the host national is bound to satisfy only one set of rules; those of the host state. The resulted “*dual burden*” placed on the migrant has occasionally been referred to by the Court as an “*indistinctly applicable measure*.”¹⁶⁹ The concept of indirect discrimination is broad. The concept embraces instances where the national measure “*is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage*.”¹⁷⁰

¹⁶⁶ *Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori*, C-451/03, EU:C:2006:208.

¹⁶⁷ *Irene Vlassopoulou v. Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, C-340/89, EU:C:1991:193.

¹⁶⁸ *Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne*, 292/86, EU:C:1988:15.

¹⁶⁹ *Christopher Stanton and SA belge d'assurances «L'Étoile 1905» v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*, 143/87, EU:C:1988:378.

¹⁷⁰ *John O'Flynn v. Adjudication Officer*, C-237/94, EU:C:1996:206.

Mr O'Flynn was an Irish national resident in the United Kingdom as a former migrant worker. His son died in the United Kingdom. A religious ceremony was held in the United Kingdom but the burial took place in Ireland. Mr O'Flynn applied for a funeral payment, which was refused on the ground that the burial had not taken place in the United Kingdom.

In its judgement the CJEU stated:

“18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (see Case 41/84 Pinna v Caisse d’Allocations Familiales de la Savoie [1986] ECR I, paragraph 24; Case 33/88 Allué and Another v Università degli Studi di Venezia [1989] ECR I591, paragraph 12; and Le Manoir, paragraph 11) or the great majority of those affected are migrant workers (see Case C-279/89 Commission v United Kingdom [1992] ECR I-5785, paragraph 42, and Case C-272/92 Spotti v Freistaat Bayern [1993] ECR I-5185, paragraph 18), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (see Commission v Luxembourg, paragraph 10, and Case C-349/87 Paraschi v Landesversicherungsanstalt Württemberg [1991] ECR I-4501, paragraph 23) or where there is a risk that they may operate to the particular detriment of migrant workers (see Case C-175/88 Biehl v Administration des Contributions [1990] ECR I-1779, paragraph 14, and Case C-204/90 Bachmann v Belgium [1992] ECR I-249, paragraph 9).

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law (see, to that effect, Bachmann, paragraph 27; Commission v Luxembourg, paragraph 12; and Joined Cases C-259/91, C-331/91 and C-332/91 Allué and Others v Università degli Studi di Venezia [1993] ECR I-4309, paragraph 15).

20. It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically able to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

...

22. A migrant worker will, in his capacity as responsible member, incur costs of the same type as, and of comparable amount to, those incurred by a national worker. On the other hand, it is above all the migrant worker who

may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin.

23. To make payment of any expenses incurred by a migrant worker in his capacity as responsible member subject to the condition that burial or cremation takes place within the United Kingdom therefore constitutes indirect discrimination, unless it is objectively justified and proportionate to the aim pursued.

3. 3. FREE MOVEMENT OF CAPITAL

3. 3. 1. HISTORICAL DEVELOPMENT AND THE NOTION

Free movement of capital is the „youngest“ of the four freedoms.¹⁷¹ The SEA put free movement of capital in balance with other three freedoms and that was the significant way forward towards its development. According to the TEC, free movement of capital existed as element of functioning of the internal market. But it had rather less significant position in comparison to other freedoms. Namely, by the time when free movement of capital affirmed, other market freedoms had already developed on more liberal way through case law. Free movement of capital was subordinated to other freedoms. Provisions on free movement of capital would have come into consideration if transfer of money had been a part of payment for goods or services. Such subsidiarity of free movement of goods was related to economic and monetary policy of the EU. The outset of legislative affirmation and full liberalisation of this freedom began in 1988 with adoption of Directive 88/361/EEZ on implementation of Article 67 TEC (hereinafter Directive on implementation of Article 67). Full implementation of free movement of capital started with the Treaty of Maastricht in 1992.

¹⁷¹ On free movement of capital see in Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, 3rd Edition, Oxford University Press, 2010, chapter 15; Craig, P., De Burca G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, chapter 15; Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 262-280; for case law see in Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, pp. 291-350 and in Bodiroga Vukobrat, N., Đerđa, D., Pošćić, A. (ur.) *Zbirka presuda Europskog suda*, Inženjerski biro, Zagreb, 2011, pp. 179-209.; Flynn: *Coming of Age: The Free Movement of Capital Case Law 1993-2002*, 39 *Common Market Law Review*, 773, 2002; Barnard, C., Snell, J (eds): *The Law of the Single European Market: Unpacking the Premises*, Hart Publishing, 2002.

As regards sources of law, Article 63 TFEU defines free movement of capital as follows:

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

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

Free movement of capital can be considered as the widest freedom since it prohibits not only intra-Community restrictions on capital movements and cross-border payments but also restrictions on capital movements and cross-border payments towards third countries. This freedom has been developed in case law of the CJEU. On the level of secondary legislation, in order to make it easier to apply Directive on implementation of Article 67, the indicative list of types of capital movements has been drafted. The classification is based on „*economic nature of goods and obligations regards them (...)*.“ This list serves as orientation for the CJEU when interpreting Article 63 TFEU. According to the list, direct investments, real estate investments, operations in securities on capital market, credits and loans, mortgages, guarantees, donations, inheritances, endowments, physical capital movements etc. are considered as capital. But one should bear in mind that there is still no definition of notion “capital” itself. The most plausible definition of the term free movement of capital would be the one that includes transfer of capital from one state to another aiming at making certain investment, including legal transactions concerning such investments. The features of parties are not relevant, what matters is the cross border nature of legal transactions.

There is a question what are the criteria of differentiation among free movement of capital and other freedoms. As regards relation between free movement of capital and freedom of establishment, in *Safir*¹⁷² AG Tesauro proposed criterion for distinction. Namely, Article 63 TFEU protects potential investors e.g. shareholders. Article 49 TFEU protects shareholders as regards cross-border establishment of companies and direct investments if they are of entrepreneurial nature („*to set up and manage undertakings*“). In *Marianne Scheunemann*¹⁷³ it was stated that:

¹⁷² *Jessica Safir v. Skattemyndigheten and Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, C-118/96, EU:C:1998:170.

¹⁷³ *Marianne Scheunemann v. Finanzamt Bremerhave*, C-31/11, EU:C:2012:481.

„National legislation applicable to shares which enable shareholder to strengthen her or his final influence over company’s decisions and to make decisions on company’s activities will be interpreted in light of the provisions on Treaty on freedom of establishment. (...) provisions of national legislation applicable to shares acquired with exclusive purpose of financial investments, without intention to execute any influence on management and supervision over company, shall be interpreted exclusively in light of free movement of capital.“

The CJEU dealt with so called golden shares.¹⁷⁴ Golden shares give special management rights to one shareholder, in most cases, to some public authority e.g. state government, regional authorities etc. Such privileged position regarding decision making processes (veto rights) on major corporate decisions can be discouraging for other potential investors – future shareholders. They are aware in advance that there is one shareholder who prevails in the shareholders’ structure. Nevertheless, although its use raises concern in terms of free movement of capital, golden shares as special type of shares are not prohibited in EU law.

In case *Commission v. Netherlands*¹⁷⁵ it was stated that golden shares should be observed in light of restrictions on free movement of capital and there is no need to consider them in light of freedom of establishment. In *Commission v Germany*¹⁷⁶ it took standing that special legal position of a public authority as shareholder can restrict rights of other shareholders and infringe free movement of capital. Rights arising out of golden shares can infringe rights of other shareholders as holders of part of nominal capital and thus be discouraging, resulting in restriction on free movement of capital.

In spite of the fact that the TFEU prohibits restrictions on free movement of capital and cross border payments between Member States and Member States and third countries, the TFEU itself has no definition of capital and free movement of capital. Thus extensive interpretation of this term has been developed in the case law. Interpretations of restrictions on free movement of capital are much more extensive than those referring to other freedoms. In *Luisi and Car-*

¹⁷⁴ On golden shares see more in Grundmann, S, Moslein, F.: Golden Shares-State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects, 1 Euredia 623, 2004.

¹⁷⁵ *Commission of the European Communities v. Kingdom of the Netherlands*, Joined cases C-282/04 and C-283/04, EU:C:2006:608.

¹⁷⁶ *Commission of the European Communities v. Federal Republic of Germany*, C-112/05, EU:C:2007:623.

*bone*¹⁷⁷ there was a question of physical export of financial assets (currency) beyond the amount eligible under national legislation. The CJEU stated that free movement of capital includes cross border transfer of capital in money and objects for investment purposes.

One of the questions which arose in CJEU's case law is the borderline between transfer of capital and cross border payment for services. The CJEU stated that what matters is the purpose: is money being exported with or without in advance specified purpose or in advance specified obligation concerning provision of services or delivery of goods. In *Aldo Bordessa*¹⁷⁸ there was a question on licenses for export of coins, bills and checks on bearer in domestic and foreign currency above certain amount per person and per voyage. So, there was another question on whether it is possible to export financial assets abroad.

Obligation to remove obstacles on free movement of capital has direct application and does not require additional implementing measures. In other words, liberalisation of capital movements does not depend on national implementing measures.

In *Trummer and Mayer*¹⁷⁹ the CJEU stated that a registration of mortgage on real estate is a form of capital movement, and the claim doesn't have to be expressed in national currency. This way right to pledge has been defined as form of capital movement.

In *Klaus Konle*¹⁸⁰ Austrian law, which exempted the host national from the requirements of authorization of pre-land acquisition, was held directly discriminatory against migrant nationals in respect of capital movements between Member States. In *Alfredo Albore*¹⁸¹ requirement of prior authorization placed solely on migrant national with respect to the purchase of property in areas of military importance was held unlawful. In *Blanckaert*¹⁸² it was noted that "*less favorable tax treatment for non-residents only might deter the latter from investing in property in the Netherlands.*" Significant issue is the question of tax discrimination when acquiring real estates e.g. by gift or inher-

¹⁷⁷ *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Joined cases 286/82 and 26/83, EU:C:1984:35.

¹⁷⁸ *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre*, Joined cases C-358/93 and C-416/93, EU:C:1995:54.

¹⁷⁹ *Manfred Trummer and Peter Mayer*, C-222/97, EU:C:1999:143.

¹⁸⁰ *Klaus Konle v. Republik Österreich*, 302/97, EU:C:1999:271.

¹⁸¹ *Alfredo Albore*, C-423/98, EU:C:2000:401.

¹⁸² *Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerle*, C-512/03, EU:C:2005:516.

itance as type of personal capital movement. These questions arose in *Vera Mattner*¹⁸³ and *Hans Eckelkamp and Others*.¹⁸⁴

In *Commission v. Portugal*¹⁸⁵ stocks and other securities were discussed in terms of free movement of capital. Dealings with shareholding and operations with securities on capital market are part of free movement of capital. In *Verkooijen*¹⁸⁶ dividend was considered as type of capital. Thus cross border payment of dividend in a company situated in another Member States is type of capital movement. A tax discrimination of capital i.e. dividend received from a company situated abroad is not allowed.

3. 3. 2. RESTRICTIONS ON FREE MOVEMENT OF CAPITAL

Article 63 TFEU prohibits all measures which render difficult or prevent movement of capital and cross border payments between Member States or Member States and third countries. The prohibition refers both to measures originating from legislation and Member States' practice. There is a prohibition on both direct and indirect discrimination of participants in capital transactions. But non-discriminatory measures can impose restrictions. In *Commission v. French Republic*¹⁸⁷ there is a question on rules on golden shares which enabled state to ask for prior approval for acquisition of shares or voting rights above specific thresholds and veto on capital transactions of daughter companies. Despite the equal treatment of domestic shareholders and shareholders from other Member States, golden shares in question were considered to be restriction on free movement of capital.

3. 3. 3. JUSTIFIED EXEMPTIONS IMPOSED BY MEMBER STATES

Exemptions from prohibitions are stipulated in Article 65 TFEU. The Member States retain rights as regards different tax treatment as regards residence or place where capital is invested. Member States are entitled to prevent infringements of national laws, in particular, in area of taxes and financial supervision, by means of appropriate measures. Restrictions are also allowed if they are related to collecting of statistical data and regulation of financial markets.

¹⁸³ *Vera Mattner v Finanzamt Velbert*, C-510/08, EU:C:2010:216.

¹⁸⁴ *Hans Eckelkamp and Others v Belgische Staat*, C-11/07, EU:C:2008:489.

¹⁸⁵ *Commission of the European Communities v Portuguese Republic*, C-367/98, EU:C:2002:326.

¹⁸⁶ *Staatssecretaris van Financiën v B. G. M. Verkooijen*, C-35/98, EU:C:2000:294.

¹⁸⁷ *Commission of the European Communities v French Republic*, C-483/99, EU:C:2002:327.

The measures which Member States undertake shall be justified by reasons of protection of public interest and public safety. When talking about justifiable measures four requirements have to be met: measures have to be non-discriminatory in relation to domestic citizens and foreigners, justified by general interest, appropriate for achievement of proclaimed aims and proportionate i.e. restrictive only in a way that is necessary for achievement of proclaimed goals. Justified measures have to meet the same criteria which have to be met as regards restrictions on other market freedoms.¹⁸⁸ General rule which should be applied when imposing restrictions is that measures and conducted actions must not be instrument of arbitrary discrimination or hidden restriction on free movement of capital or payments.

But it should be born in mind that there is another category of justified restrictions. These restrictions are imposed by the Commission itself. Article 66 TFEU prescribes that, in case of capital movement to or from third countries, the EU is authorised to impose restrictions if this capital movement causes or threatens to cause serious difficulties for functioning of the European Economic and Monetary Union. In such case the Commission, after prior consultations with the ECB, can impose protective measures which are considered necessary. Such measures cannot exceed period of six months.

3. 3. 4. RESTRICTIONS AND CASE LAW OF THE CJEU

The CJEU has created a list of plausible restrictions. It has made it clear under which conditions certain restriction might be considered justified. First of all, there is an obligation of strict interpretation of exemptions (see *Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v. Prime Minister*).¹⁸⁹ There is no unilateral decision without control mechanism by the EU (see *Rutili v. Minister for the Interior*).¹⁹⁰ A restriction shall not serve for economic purposes (see *Rutili v. Minister for the Interior*). Each

¹⁸⁸ As regards free movement of goods, proportionality test requires that measure is proportionate i.e. that serves for protection of legitimate interests, be appropriate, necessary and in line with its aims. As regards free movement of workers, when talking about general restrictions, measure shall preserve public order, safety or health, be non-arbitrary and unconditioned by economic purpose (protectionism), and as regards special restrictions (public service) there has to be a link among state and its citizens. As regards services, so called *Gebhard test* will apply meaning that measure shall be non-discriminatory, justified by reasons of public interest, appropriate and proportionate to its goal. So, *Gebhard test* is applicable to free movement of capital as well.

¹⁸⁹ *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister*, C-54/99, EU:C:2000:124.

¹⁹⁰ *Roland Rutili v Ministre de l'intérieur*, 36/75, EU:C:1975:137.

party has the right to appeal (see *Unectef v Heylens and Others*).¹⁹¹ Last but not least, exemptions have to be proportionate (see *Commission v Germany*,¹⁹² *Sanz de Lera and Others*¹⁹³).

It can be seen that the role of free movement of capital in contemporary law is significant. Provisions on capital movement provide legal basis for functioning of the internal market for financial services, in particular, for economic activity of companies, banks, financial institutions. Capital Market Law is an area of interference of legal provisions of commercial and company law with significant level of public law. It is an interdisciplinary area comprised of both economic and legal elements.

3. 4. FREEDOM TO PROVIDE SERVICES

3. 4. 1. INTRODUCTION

Freedom to provide services¹⁹⁴ has been developed in line with other freedoms and movement rights at the internal market. Its development follows the de-

¹⁹¹ *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and Others*, 222/86, EU:C:1987:442.

¹⁹² *Commission of the European Communities v Federal Republic of Germany*, C-112/05, EU:C:2007:623.

¹⁹³ *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, Joined cases C-163/94, C-165/94 and C-250/94, EU:C:1995:451.

¹⁹⁴ More on free provision of services see in Barnard, C, Snell, J.: *Free Movement of Legal Persons and the Provision of Services* in Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014, pp. 403-440; Craig, P., De Burca G., *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011, pp. 764-770; Bodiřoga-Vukobrat, N., Horak, H., Martinović, A., *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, pp. 209-234; Adenas, M. Roth, W-H: *Services and Free Movement in EU Law*, Oxford University Press, 2003; Barnard, C. *Unravelling the Services Directive*, 45 *Common Market Law Review*, 323, 2008; Hatzopoulos, V.: *Regulating Services in the European Union*, Oxford University Press, 2012; Barnard, C. *The Substantive Law of the EU: The Four Freedoms*, 4th Edition, Oxford University Press, Chapters 10 and 11. See also in Bodiřoga Vukobrat, N., Đerđa, D., Poščić, A. (eds.) *Zbirka presuda Europskog suda*, Inženjerski biro, Zagreb, 2011; Bodiřoga Vukobrat, N., Horak, H.: *Freedom to Provide Services in European and Croatian Law*, Conference Proceedings “Economic Integrations, Competition and Cooperation”, Faculty of Economics, University of Rijeka, 2007; Bodiřoga Vukobrat, N., Horak, H.: *Cross-border Provisions of Health Services - (Freedom to Provide Services or Health Tourism?)*, Conference Proceedings “7th International Conference Economic Integrations, Competition and Cooperation”, Faculty of Economics, University of Rijeka in cooperation with Faculty of Economics University of Ljubljana, CEDIMES Paris and Antwerpen University; Bodiřoga-Vukobrat, N.; Horak, H.: *Sloboda pružanja usluga u pravu EZ s posebnim osvrtom na turističke vodiče*, *Acta turistica*, Ekonomski fakultet Zagreb, god. 16, br. 2., Zagreb, 2004; Horak, H., Dumančić, K.:

velopment of other market freedoms applying and referring often to practice of the CJEU in area of other market freedoms. Due to the specific nature of services in terms of generating assets and interest, Member States have right to regulate the area in which services are provided. Because of the different types of activities that include the freedom to provide services, it is necessary to look at a range of factors that affect its implementation. Services vary in respect of their importance for Member States and for the EU as a whole. They differ in respect to category of persons who provide them in terms of their education, necessary working conditions, need to change a residence when providing services etc. Services also vary as regards recipients of services. When analyzing services, there is a distinction between situations where the recipient is “necessary” to receive services in another Member State or when he “voluntarily” wishes to receive services in another Member State or from a service provider from another Member State. Taking into account these and other factors, freedom to provide services is specific in relation to other economic freedoms. Its historical development proves the afore-mentioned.

Freedom to provide services, as well as other market freedoms, is defined in the TFEU. These provisions are equal to provisions of other market freedoms. However, the development of the freedom to provide services through secondary legislation and jurisprudence began later than the development of other market freedoms. In this way, despite existing case law in this area, the importance of freedom to provide services until the adoption of the Services Directive has not been emphasized.

Freedom to provide services is part of separate chapter of the TFEU. It is defined in the same head as the remaining market freedom, in the third chapter and includes provisions of Articles 56 to 61 TFEU. Article 56 TFEU stipulates

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

In terms of content, the provisions relating to freedom to provide services have not been changed except for the provisions concerning the responsibilities of the institutions of the EU, in accordance with the amendments related to the competence of the EU institutions on the basis of the Treaty of Lisbon. The provisions of the TFEU assume the abolition of all restrictions on the provision

Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 32, br. 2, 2011.

of services between Member States, whenever there is a cross border element. A cross-border element can be derived from the fact that a service provider is not established or resident in the country where the service is provided or that a service provider has to travel to another Member State other than a Member State of residence or place of residence in order to receive service.¹⁹⁵ The provision of services can also be achieved even when the provider or recipient of services have not changed their headquarters or temporary residence, in cases where a cross-border element results in movement of the service itself.¹⁹⁶ There are three different situations of provision of services.

Active freedom to provide services includes provision of services in another Member State. A service provider leaves his country in a way that provision of services is conditioned by the prior realisation of freedom of establishment. The realization of these two freedoms does not coincide. By determining the interstate and chargeability elements, the existence of freedom to provide services may be established. **Passive freedom to provide services** includes receiving services through a service recipient in another Member State. The third situation includes **crossing the border of a service itself** and both provider and recipient of a service stay in their Member State. The example of such situation can be an e-service when a service is provided *via* e-mail or Internet. Each service entails the right of a service provider to provide a service, but also the right of a recipient to receive a service. Such standpoint has already been given in afore-mentioned *Luisi and Carbone*.¹⁹⁷

In *Luisi and Carbone* criminal proceedings was initiated against Italian citizens for violation of foreign exchange regulations. Luisi and Carbone were Italian tourists who took the currency over the amount that was allowed by Italian regulation for the purpose of paying tourist services and medical treatment in another Member State. The national court requested a preliminary reference from the CJEU as to whether such payment is movement of capital or payment for the provision of services. The CJEU decided that, when it

¹⁹⁵ Bodiřoga Vukobrat, N., Horak, H.: Freedom to Provide Services in European and Croatian Law, Conference Proceedings "Economic Integrations, Competition and Cooperation", Faculty of Economics, University of Rijeka, 2007; Horak, H.; Bodiřoga Vukobrat, N.: Temeljne gospodarske slobode v. temeljna socijalna prava (Utjecaj presuda Viking, Laval i Ruffert na temeljna socijalna prava), Zbornik radova sa međunarodne Jean Monnet znanstvene konferencije "Socijalna prava kao temeljna ljudska prava", TIM Press, Zagreb, 2010.

¹⁹⁶ See also in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011, pp. 215-216.

¹⁹⁷ See in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011, p. 216.

comes to service users, the freedom to provide services includes the right for recipients of a service, without limitation, to enter into another Member State and to retain them for as long as it is necessary to receive a service, and the right to a purpose and an amount of needed cash. It also applies to tourists, people who want medical treatment in another Member State and persons traveling for education or place of work.

The CJEU decided:

“16. It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.

...

23. Consequently, payments in connection with tourism or travel for the purposes of business, education or medical treatment cannot be classified as movements of capital, even where they are effected by means of the physical transfer of bank notes.”

Services create 60-70% of economic activities in the EU.¹⁹⁸ Obstacles have a negative effect on prices and quality of services. They have a negative impact on performance of small and medium enterprises. Freedom to provide services includes the right of natural and legal persons, who have establishment or headquarters, citizenship or residence on the territory of a Member State to enter the territory of another Member State to provide or receive services, continually or temporarily, without restrictions and under the same conditions as citizens of that state, and under condition that they are not in breach of provisions on establishment. Self-employed persons are also free to provide services. Freedom to provide services obliges Member States to respect the right of a service provider to provide services in a Member State other than the one where a service provider is established, and to secure him the right to provide services on the entire territory of that Member State.¹⁹⁹

¹⁹⁸ Bodiřoga Vukobrat, N., Horak, H.: Freedom to Provide Services in European and Croatian Law, Conference Proceedings “Economic Integrations, Competition and Cooperation”, Faculty of Economics, University of Rijeka, 2007.

¹⁹⁹ Bodiřoga Vukobrat, N., Horak, H., Martinović, A: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011., p. 213.

It is important to emphasize the subordinated character²⁰⁰ of freedom to provide and receive services and to distinguish provision of services from other market freedoms, since the rules of the TFEU apply to services only if provisions related to persons, goods or capital do not apply.

In order to make distinction among freedom to provide services and free movement of persons, it is important to define the term “*worker*”. In CJEU’s case law the distinction is made dependent on whether the workers are employed in one Member State or is it a person who temporarily provides services. Service providers are considered “*workers on the basis of their employment in one Member State sent at a specific time in another Member State in order to provide a service, and not in any way seeking entry into the labour market in that second State if they return to their country of origin or in which they reside after completing their work*” (so called “posted workers”).

In order to make distinction among goods and services from an economic point of view, one must consider a good as material and a service as intangible good.²⁰¹ In this respect, they should be treated in different ways. International trade in services is not as wide as trade in goods. It is a result of high costs and the fact that the service provider often has to conduct its activities in close proximity to a customer which makes it necessary for service providers to establish themselves in the same state in which recipient of services resides. Freedom to provide services is subordinated to free movement of goods. It will be applied in situations where specific activity is not subject to the provisions on free movement of goods. This distinction was made in *Sacchi*.²⁰²

In *Sacchi* the CJEU defined that services may vary by commodity based on their non-material nature. Thus, transmission of television signals is considered a service and provisions of the TFEU relating to services apply. Materials such as films, recordings and other products are considered goods.

“4. The first two questions basically ask whether the principle of the free movement of goods within the Common Market applies to television signals, in particular in their commercial aspects, and whether the exclusive right granted by a Member State to a limited company to make all kinds of television transmissions, even for commercial advertising purposes, constitutes a breach of the said principle.

...

²⁰⁰ Ibidem.

²⁰¹ See in chapter on goods. Also see in Barnard, C.: *The Substantive Law of the EU, The four Freedoms*, Third edition, 2010. , p. 335.

²⁰² *Giuseppe Sacchi*, 155/73, ECLI:EU:C:1974:40.

6. In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.

7. On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods. As a result, although the existence of a monopoly with regard to television advertising is not in itself contrary to the principle of free movement of goods, such a monopoly would contravene this principle if it discriminated in favour of national material and products.”

Direct application of provisions of the Treaty on free movement of capital has been adopted only in 1995 in *Bordessa*.²⁰³ Until 1995 the developed practice of the CJEU considered the large number of cases²⁰⁴ in the area of free movement of capital, and most of them were considered together with freedom to provide services.

Aldo Bordessa, an Italian national residing in Italy, arrived at the customs post of La Junquera, Gerona (Spain) travelling towards France. When his car was searched, banknotes worth approximately PTA 50 million were discovered in it, concealed in different places. Since Mr Bordessa did not possess the authorization required under Spanish law for the export of such sum, he was arrested and the money was confiscated. In joined case *Mari Mellado and Barbero Maestre* a married couple of Spanish nationality residing in Spain, crossed the frontier at the same customs post. In the course of an inspection carried out inside France, the French authorities subsequently discovered banknotes worth a total of PTA 38 million in their car. Since no application had been made to the Spanish authorities for granting authorization for export of the amount, criminal proceedings were initiated before the Spanish courts.

²⁰³ *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre*, C-358/93 and C-416/93, ECLI:EU:C:1995:54.

²⁰⁴ See *Safir*. See also *Criminal proceedings against André Ambry*, C-410/96, EU:C:1998:578; *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, C-484/93., EU:C:1995:379 and *Hanns-Martin Bachmann v Belgian State*, C-204/90, EU:C:1992:35.

“25. A requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory..”

The CJEU examined cases in which it placed restrictions on the participation of individuals in pension insurance schemes in other Member States. In these cases the CJEU took the view that the rules applicable to freedom to provide services are relevant. Just as in earlier discussed cases, relation between freedom to provide services and the other market freedoms in practice of the CJEU has been clarified. In situations when the rules on free movement of capital and services apply at the same time, on the ground that obligation provided for in Article 56 TFEU and financial guarantees established by Article 63 TFEU in the receiving State are not taken into account, the principle of mutual recognition does not apply. The rules on free provision of services²⁰⁵ do not apply on activities which are related, even if temporarily, with the performance of public competencies in a Member State.

In order to subsume certain situation under free provision of services three criteria must be met. First of all, a situation must be defined as service within the meaning of the TFEU. There must be a substantial limitation on freedom of movement of services and a situation must include at least two Member States.²⁰⁶ The TFEU does not define meaning of a “service”. The definition is negative if provisions on freedom to provide services apply to situations that are not subject to the provisions concerning free movement of goods, capital or people. Provisions of the Treaty apply if it is necessary to provide a service for remuneration.

²⁰⁵ Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 210; see also in Bodiřoga-Vukobrat, N., Horak, H.: *A More Liberal and Economic, and a Less Social Approach: The Impact of Recent ECJ Rulings*, Croatian Yearbook of European Law and Policy, Faculty of Law, University of Zagreb, vol. 4, 2008.; Bodiřoga Vukobrat, N., Horak, H.: *Freedom to Provide Services in European and Croatian Law*, Conference Proceedings “Economic Integrations, Competition and Cooperation”, Faculty of Economics, University of Rijeka, 2007.

²⁰⁶ Rodin, S.: *Direktiva Europske unije 123/2006 o uslugama – doseg i opravdanja*, Zbornik Pravnog fakulteta u Zagrebu, 59, 2009; Horak, H., Dumančić, K.: *Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 32, br. 2, 2011.

Article 57 TFEU stipulates:

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

“Services” shall in particular include:

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions”*

Economic character of a service was defined in *Grogan*.²⁰⁷

The questions arose in proceedings initiated by the Society for the Protection of Unborn Children Ireland Ltd (‘SPUC’) against Stephen Grogan and fourteen other officers of students associations in connection with the distribution in Ireland of specific information relating to the identity and location of clinics in another Member State where medical termination of pregnancy is carried out.

“17. According to the first paragraph of that provision, services are to be considered to be ‘services’ within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 expressly states that activities of the professions fall within the definition of services.

18. It must be held that termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity.

...

21. Consequently, the answer to the national court’s first question must be that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.”

²⁰⁷ *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan*, C-159/90, ECLI:EU:C:1991:378.

The economic nature of a service is precondition for the application of provisions of the TFEU relating to freedom to provide services. The CJEU interprets extensively the concept of providing services for a fee or a reward. Within its reasoning this and other activities, save for those specified in Article 56 TFEU, can be considered as services if they are provided for remuneration. The list of services is not exhaustive, but has been extended by the CJEU. There are many different examples of other activities that can be considered as services. In *Deliège*²⁰⁸ sport activities are also considered as services.

“41. It is to be remembered at the outset that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty (see Case 36/74 Walrave and Koch v Union Cycliste Internationale [1974] ECR 1405, paragraph 4, and Case C-415/93 Union Royale Belge des Sociétés de Football Association and Others v Bosman [1995] ECR I-4921, paragraph 73). The Court has also recognised that sporting activities are of considerable social importance in the Community (Bosman, paragraph 106).

...

56. In that connection, it must be stated that sporting activities and, in particular, a high-ranking athlete’s participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of the Treaty even if some of those services are not paid for by those for whom they are performed (see Case 352/85 Bond van Adverteerders and Others v Netherlands State [1988] ECR 2085, paragraph 16).

57. For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself.”

Given that provision of services within the public services is exempted from the scope of freedom to provide services there is a problem of their distinction.

²⁰⁸ *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97), ECLI:EU:C:2000:199.*

The issue arose after a ruling in *Humbel*.²⁰⁹

In *Humbel* the CJEU dealt with education as a service. The CJEU was asked to give an answer to the question whether the courses held within the technical institute, forming part of the secondary education of the insured national education system, constitute a service within the meaning of Article 50 para 1 TEC (now Article 57 TFEU). The Court stated that in this way the state does not want to engage in activity that brings profit, but is fulfilling its duties towards its own population in the social, cultural and educational fields, and that the system is based on public financing even when students or their parents sometimes have to pay teaching or enrollment fees in order to contribute/participate in operating costs. The Court took the view that those activities can not be considered as a service in the sense of Article 49 TEC (now Article 56 TFEU).

“17. The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.”

18. That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.

19. The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system. A fortiori, the mere fact that foreign pupils alone are required to pay remuneration can have no such effect.”

This view was confirmed in *Wirth*.²¹⁰

“15. As the Court has already emphasized in Case 263/86 Belgian State v Humbel [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider

²⁰⁹ *Belgian State v. René Humbel and Marie-Thérèse Edel*, 263/86, EU:C:1988:451.

²¹⁰ *Stephan Max Wirth v. Landeshauptstadt Hannover*, C-109/92, ECLI:EU:C:1993:916.

and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

16. Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

17. However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.

...

19. The answer to the first part of the first question must therefore be that courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.”

3. 4. 2. SERVICES DIRECTIVE

The Services Directive²¹¹ shall apply to services supplied by providers established in Member States. This directive is a result of long-lasting negotiations and it is considered to be the most important source of secondary law in the internal market.²¹² Its aim is not only detailed regulation of free provision of services. It also regulates freedom of establishment for service providers. When analyzing the Services Directive, the historical context in which it was brought should be analyzed. The first proposal of the Services Directive, so

²¹¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27. 12. 2006, pp. 36–68.

²¹² Klammert, M.: The Services Directive, the EC Treaty and the Court: Codification or Arrogation?, Internal Market for Services, Knez, R. (ed.), Pravna fakulteta Univerze v Mariboru, International Jean Monnet Conference, Maribor, 2009, p. 45.

called "*Bolkenstein directive*",²¹³ was actually proposed with the intention to eliminate obstacles in the field of services. In that first proposal the idea was to promote the principle of "*country of origin*". According to the country of origin principle, only law of state where a service provider is established applies on her/him. The state where she/he provides the service may not restrict the provision of services by adding additional condition contained in its national domestic rules. This principle was changed into the "*freedom to provide services principle*". It has been said the Services Directive is the "*...most important piece of EU legislation apart from the Constitution.*"

The Services Directive is achievement of one of the goals of the Lisbon Strategy. As its goals, the Lisbon Strategy prescribes effective transposition of EU law at national level, abolishment of all obstacles for free provision of services in the EU, completion of the single market and adoption of rules at EU level which will remove obstacles to free movement of services.²¹⁴

Basic principles on which the Services Directive is based are "freedom to provide services"²¹⁵ and adoption of point of single contact in a state in which a service is provided. It is the place in which information to clients are provided. The Services Directive accepts horizontal approach and same principles are applied on different services. The Services Directive establishes general framework for provision of all services provided for remuneration (with exemption of those services on which it does not apply) taking into consideration particular features of certain activities or persons who provide them.²¹⁶ One should bear in mind that, depending on a method of implementation and a

²¹³ Bodiřoga Vukobrat, N., Horak, H.: A More Liberal and Economic, and a Less Social Approach: The Impact of Recent ECJ Rulings, *Croatian Yearbook of European Law and Policy*, Faculty of Law, University of Zagreb, vol. 4, 2008.

²¹⁴ European Commission Report: „Internal Market Strategy, COM (2000) 257 final, see also Barnard, C.: *Unravelling the Services Directive*, CML Rev 45, 2008, p. 328.

²¹⁵ Bodiřoga Vukobrat, N., Horak, H.: A More Liberal and Economic, and a Less Social Approach: The Impact of Recent ECJ Rulings, *Croatian Yearbook of European Law and Policy*, Faculty of Law, University of Zagreb, vol. 4, 2008; Bodiřoga Vukobrat, N., Horak, H.: *Freedom to Provide Services in European and Croatian Law*, Conference Proceedings "Economic Integrations, Competition and Cooperation", Faculty of Economics, University of Rijeka, 2007.; Horak, H., Dumančić, K.: *Problemi implementacije Direktive o uslugama u pravo RH – oduštanje od socijalnog modela na nacionalnom nivou?*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 32, br. 2, 2011.; Rodin, S.: *Direktiva Europske unije 123/2006 o uslugama – doseg i opravdanja*, *Zbornik Pravnog fakulteta u Zagrebu*, 59, 2009.

²¹⁶ For professional qualifications recognition see in Horak, H., Bodiřoga Vukobrat, N., Dumančić, K.: *Professional Qualification and Diploma Recognition in EU Law*, *InterEULawEast Journal for International and European Law, Economics and Market Integration*, Volume I, Issue 1, 2014.

wording of law itself, or other implementing act, the Services Directive might have implications on provision of services at national level when there is no cross-border element.

Financial services (banking services, credit services, insurance services, investment services, funds, payments, bonds), health, social, telecommunication, transport and port services are excluded from the field of the Services Directive. The same is with electronic communication and traffic, bookings, tax and legal services.

Services of “*general economic interest*” such as post, water supply, electricity supply and waste disposal are included in the scope of application of the Services Directive, but freedom of establishment applies to them. The Services Directive has no influence on labour law, in the sense of neither legal neither contractual provisions to determine work, employment, health protection and safety of work conditions. It applies on wide range of activities, among others, distributive trades (including retail and wholesale of goods and services, the activities of most regulated professions (such as legal and tax advisers, architects, engineers, accountants, surveyors), construction services and crafts, business-related services (such as office maintenance, management consultancy, event organization, debt recovery, advertising and recruitment services), tourism services (e.g. travel agents), leisure services (eg. sports centers and amusement parks), installation and maintenance of equipment, information society services (e.g. publishing – print and web, news agencies, computer programming), accommodation and food services (hotels, restaurants and caterers), training and education services, rentals and leasing services (including car rental), real-estate services, household support services (e.g. cleaning, gardening and private nannies).²¹⁷

Certain services are explicitly excluded from the scope of application of the Services Directive.²¹⁸ It does not apply to financial services, electronic communications, services with respect to matters covered by other community instru-

²¹⁷ On provision of healthcare services see in Bodiřoga Vukobrat, N., Horak, H.: Cross-border Provisions of Health Services - (Freedom to Provide Services or Health Tourism?), Collection of Papers “7th International Conference Economic Integrations, Competition and Cooperation”, Faculty of Economics Rijeka, Faculty of Economics Ljubljana, CEDIMES Paris and University of Antwerp, Opatija, 2009., Opatija, 2009.; Horak, H., Dumančić, K.: Elchinov Case: New Issues, New Member States, New problems, International Multidisciplinary Scientific Geoconference, 14th VOL 1 2014; Conference Proceedings; International Scientific Conferences on Social Sciences & Arts SGEM; Albena, Bulgaria, 2014; Horak, H., Bodiřoga-Vukobrat, N., Dumančić, K.: Sind Patienten im Lichte der Rechtlinie 24/2011/EU über die Ausübung der Rechte der Patienten sowie deren Umsetzung in das kroatische Recht eine unsichtbare Minderheit?, chapter in Unsichtbare Minderheiten, Bodiřoga-Vukobrat, N., Sander, G., Barić, S. (eds.), Schriften zum Sozial-, Umwelt- und Gesundheitsrecht, Verlag Dr. Kovač, Band 4, Hamburg, 2013.

²¹⁸ Article 2(2) Services Directive.

ments, transport services, healthcare services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession, temporary work agencies' services, private security services, audiovisual services, gambling, certain social services provided by state, by providers mandated by state or by charities recognized as such by state, services provided by notaries and bailiffs (appointed by an official act of government). Those services are governed by other sources of EU law.

The Services Directive regulates situations which are subsumed, according to the traditional categorisations on freedom of establishment and freedom to provide services, under freedom of establishment inasmuch situation refers to free provision of services.²¹⁹ Thus the legal basis for the Services Directive must be sought not only within the framework of Article 62 TFEU (*ex* Article 55 TEC) on services but in Article 53 TFEU (*ex* Article 47 TEC) on freedom of establishment as well.

Since service is of intangible nature, the question is who or what is moving across the border? A provider of services can temporarily leave the home country to provide services in another Member State. An user of services can enter from another Member State into a country of provider in order to receive services (freedom to provide services to citizens of other Member States under the same conditions as those provided to local people). Service itself moves from one Member State to another.

As one of the most important innovations, Article 6 of the Services Directive introduces “*point of single contact*”. This is an office within public authority (e.g. Ministry of Economy) of a Member State where administrative procedures related to applications and filling-in of all necessary documents for performance of economic activity take place, helping interested service providers with their applications and provision of all necessary information.

3. 4. 3 JUSTIFICATION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES

In *Gebhard*²²⁰ the CJEU defined four conditions which must be fulfilled in order to justify the application of domestic measures which hinder or unable

²¹⁹ Horak, H., Dumančić, K.: Problemi implementacije Direktive o uslugama u pravo RH – odustajanje od socijalnog modela na nacionalnom nivou?, , vol. 32, br. 2, 2011.; Rodin, S.: Direktiva Europske unije 123/2006 o uslugama – doseg i opravdanja, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 59, 2009.

²²⁰ See also Article 43 TEC. In Croatian literature see more on establishment: Kucich, E., Right to Establishment and Recognition of the Legal Subjectivity of a Foreign Company According to EU Law and Law of the Republic of Croatia, Master Thesis, Rijeka 2004, p. 30.

realisation of basic freedoms. Measures must be non-discriminatory (among domestic and foreign citizens), they must be justified by imperative reasons in the general interest, they must be adequate for the realization of a corresponding goal which they serve and may not go beyond what is necessary for the realization of this goal.²²¹

By *Gebhard* two important rules were established. First rule establishes criteria for distinction among freedom of establishment and freedom to provide services. The second one is the rule that defines the conditions that must be met to justify a national measure restricting freedom of movement. The subject of the dispute was the issue related to the activities of the German lawyer Mr Gebhard, who was a member of the German Bar Association although its practice is not carried out in Germany, but in Italy, where he lived. His income was entirely taxed in Italy, where he had residence. He carried out practice as a lawyer for domestic clients, citizens of Italy, and foreign citizens and he used Italian title “avvocato.” Milan Bar Council dealt with the request submitted by groups of lawyers against Mr Gebhard. They complained that the title “avvocato” used in the header of the memorandum and practical training in the law office are contrary to the Italian law. The fundamental question concerned the criteria that have to be applied in assessing whether the activity is temporary, due to the persistent and repeating nature of the services provided by lawyers in the framework of Directive 77/249/EC. The freedom of establishment, provided for by provisions of Article 49-55 TFEU (*ex* Article 43-48 TEC) is guaranteed for both legal persons, within the meaning of Article 55 TFEU, and natural persons who are nationals of Member States. In accordance with the prescribed conditions and exceptions he is allowed to run and perform all kinds of activities of self-employed persons. A national of a Member State, who pursues a professional activity on a stable and continuous basis in another Member State, where he holds himself out from an established professional base to, amongst others, nationals of that State, comes under the chapter relating to freedom of establishment and not the chapter relating to services. The temporary nature of the activities in

²²¹ *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, ECLI:EU:C:1995:411. On *Gebhard* see also in Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 214; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 192; Horak, H., Dumančić, K., Pecotić Kaufman, J: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.; Bodiroga Vukobrat, N.; Horak, H.: *Sloboda pružanja usluga u pravu EZ s posebnim osvrtom na turističke vodiče*, Acta turistica, Ekonomski fakultet Zagreb, god. 16, br. 2., Zagreb, 2004.

question has to be determined in light of its duration, regularity, periodicity and continuity. This does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question. The possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in light of the activities which he intends to pursue on the territory of the host Member State. Conditions required from a Member State which may consist, in particular, of an obligation or restrictions that are capable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty, such as freedom of establishment can be justified if they comply with requirements: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

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

...

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

...

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

- *the temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity;*
- *the provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question;*
- *a national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services;*
- *the possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State;*
- *where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them;*
- *however, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it;*
- *likewise, Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.”*

The free movement rules may be applied to rules which are not restrictive, but which hinder the entrance on the market. Restrictions are therefore permitted only if they fulfil (one of) three conditions:²²²

²²² Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011., p. 218.

- to serve the public interest
- are applied in a non-discriminatory manner and
- are proportionate (appropriate and necessary, given the content and application).

They must be necessary and restrictive as less as possible. A Member State may restrict provision of services on its territory due to public policy, public safety, environment protection and public health.²²³ These measures may not be discriminatory (for example, based on nationality), must be necessary (public policy, public safety or health protection) and must be proportionate (the request must match the goals set). It is so called “test of reason, truthfulness or proportionality.” The test is based on the CJEU’s insistence on restrictive approach to exceptions from the principle of free movement of goods and freedom to provide services in the internal market. In each particular case, the CJEU submits a disputed measure to this test. Only a measure which is determined to be necessary, proportionate and restrictive to the least possible extent may subsist as an exception in relation to Articles 28, 43, 49 TFEU. The goods and values protected by them are in *numerus clausus* regime.

3. 5. FREEDOM OF ESTABLISHMENT

3. 5. 1. INTRODUCTION

Freedom of establishment can be considered as one aspect of freedom to provide services. Free movement of companies²²⁴ is guaranteed by freedom of

²²³ Ibidem, pp. 119-220.

²²⁴ On freedom of establishment see more in Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Zagreb, Ekonomski fakultet, Sveučilište u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije?, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012; Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010.; Bodiroga Vukobrat, N., Horak, H., Martinović, A.: Temeljne gospodarske slobode u Europskoj uniji, Inženjerski biro, 2011; see also in Craig, P., De Burca, G., EU Law: Text, Cases, and Materials, Fifth Edition, Oxford University Press, 2011, Chapter 22; Barnard, C.: The Substantive Law of the EU, The Four Freedoms, Third edition, 2010, Chapter 12; Barnard, C., Peers, S. (eds.): European Union Law, Oxford University Press, 2014; Chapter 14; for case law in the area of freedom of establishment see more in Bodiroga Vukobrat, N., Đerđa, D., Poščić, A. (eds.) Zbirka presuda Europskog suda, Inženjerski biro, Zagreb, 2011; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, pp. 192-260.

establishment. Primary establishment entails formation of a new company or transfer of seat in another Member State. Freedom of establishment is also manifested as secondary establishment. It includes establishment of subsidiaries, branches or affiliates in another Member State. Establishment is a legal or natural person permanently established in another Member State. This is one distinctive feature comparing to services where legal or natural persons temporarily provide services in another Member State. When it comes to permitted restrictions on freedom to provide services and freedom of establishment, four reasons have to be met in order to justify national measures (proportionality). Restrictive national measure shall be non-discriminatory between domestic and foreign nationals, justified by the public interest and suitable for achieving the objective pursued. Measure shall not go beyond what is strictly necessary to achieve this objective i.e. it shall be proportionate by its nature. Limitations on imposing restrictions are stipulated in Article 52 (1) TFEU:

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

There must be narrow interpretation: distinctly applicable national measures affecting freedom to provide services may be lawful only if they are based on these justifications. The CJEU set out in its decision in *Gebhard* two important rules²²⁵ for the distinction of establishment and free provision of services. The CJEU has established that an essential difference between services and establishment is in the temporariness of the activity performed. The exercise of freedom of establishment implies that a legal or natural person is permanently established in another Member State. The exercise of freedom to provide services implies that a person provides services temporarily in another Member State. Given the fact that only a very small number of services may be provided nowadays without changing the place of residence, it is undisputed that the freedom to provide services may hardly be separated from the freedom of establishment.

²²⁵ For *Gebhard* see also in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 214; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 192; Horak, H., Dumančić, K., Pecotić Kaufman, J.: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.; Bodiřoga-Vukobrat, N.; Horak, H.: *Sloboda pružanja usluga u pravu EZ s posebnim osvrtom na turističke vodiče*, *Acta turistica*, Ekonomski fakultet Zagreb, god. 16, br. 2., Zagreb, 2004.

3. 5. 2. CONTENT AND SCOPE OF APPLICATION

Freedom of establishment entitles both natural and legal persons from the EU to establish legal entity – a company in Member State other than its own and includes setting up and maintenance of independent entrepreneurial activity.²²⁶ One of the main features of freedom of establishment is performance of business activity on permanent and continuous basis. By setting up a primary establishment in another Member State, a new company can be formed or seat can be transferred. By setting up secondary establishment, a daughter company, a branch office or an agency can be established in another Member State.

Article 49 para 1 TFEU (*ex* Article 43 TEC) stipulates:

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

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

Article 54 para 1 TFEU (*ex* Article 48 TEC) stipulates:

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

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

²²⁶ Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010., p. 103.

3. 5. 3. JUSTIFIED RESTRICTIONS ON FREEDOM OF ESTABLISHMENT

In principle, discrimination between domestic and foreign citizens is not allowed. Nevertheless, there are some exemptions concerning freedom of establishment. Exercise of official authority is one of the exemptions. According to Article 51 TFEU:

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

Possible justifications are acceptable if they are within the scope of public policy, public security, public health and reasons established in CJEU case law based on important reasons of public interest. Each restriction renders less attractive execution of a certain activity. Case law has developed requirements for eligible restrictions.²²⁷ Measures should not be discriminatory, must be justified by important reasons in the public interest, must be in line with proclaimed aims, must not be unproportional to proclaimed aims i.e go beyond what seems necessary and are allowed only in non-harmonised area.²²⁸

3. 5. 4. COMPANY’S SEAT THEORIES

Different seat theories apply to recognition and functioning of a company. There are two leading theories.²²⁹

The real seat theory follows the principle that applicable law for a company shall be the law of a Member State in which a company has its real seat, irrespective of place of establishment.

According to **the incorporation theory (registration theory)** a company will be governed by the law of a place where a company has been established (en-

²²⁷ See *Gebhard test*.

²²⁸ On *Gebhard* see also in Bodiřoga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011, p. 119.

²²⁹ On different theories of company’s seat see in Horak, H., Dumančić, K., Šafranko, Z.: *Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije*, Zagreb, Ekonomski fakultet Sveučilišta u Zagrebu, 2013., available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Šafranko, Z.: *Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012; Horak, H., Dumančić, K., Pecotić Kaufman, J: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.

tered into register) and has its registered seat, irrespective of place of its real seat. In principle, real seat cannot be transferred and thus the governing law cannot be changed. Only exemptions can be found in reasons of extraordinary circumstances. It is so called *lex societatis* doctrine. As regards the change of seat, in Member States which apply this doctrine, a formal decision is needed.

In countries of the real seat theory, a company will be governed by the law of a Member State in which its real seat is located i.e. central administration office. As regards change of seat, factual seat transfer will do.

There is a question whether real seat theory is contradictory to freedom of establishment. Namely, there are two scenarios.²³⁰ When talking about immigration of companies, there is a question of entering into Member States. There is a question whether it is allowed to deny freedom of establishment to a company which “evades” less favourable domestic laws.²³¹ There is also a question is it allowed to deny company’s freedom of establishment by applying domestic provisions.²³² There is an issue of imposing additional requirements on companies for which it is considered that “evade” restrictive domestic provisions.²³³ In addition to afore-mentioned, special issue is related to cross border mergers in situations where national provisions of Member States do not permit cross border mergers but only domestic ones.²³⁴

When talking about emigration of companies, there is a question of leaving a Member State. Numerous questions arise as regards this scenario e.g. is it allowed for a Member State to restrict possibility to transfer administrative office in another Member State by keeping at the same time legal personality in the first Member State.²³⁵ Also there is a question is it allowed for a Member State to prohibit entirely possibility to transfer its administrative office in another Member State by keeping at the same time legal personality in the first one?

²³⁰ Ibidem.

²³¹ *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, C-212/97, ECLI:EU:C:1999:126.

²³² *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, C-208/00, ECLI:EU:C:2002:632.

²³³ *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, C-167/01, ECLI:EU:C:2003:512.

²³⁴ *Sevic Systems AG*, C-411/03, ECLI:EU:C:2005:762.

²³⁵ *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, 81/87, ECLI:EU:C:1988:456.

3. 5. 5. TRANSFER OF SEAT

There are several reasons why Member States prohibit transfer of seat from one Member State to another without company going into liquidation. Protection of creditors, minority shareholders and employees are among the most important reasons. Rules on transfer of seat have an impact on regulatory competition, i.e. possibility to choose among most adequate national provisions, including those which do not impose obligations on mandatory employees' participation. Depending on applicable seat theory, change of seat will have implications on change of court jurisdiction. The CJEU's case law is in favour of incorporation theory.

3. 5. 6. IMPLICATIONS OF FREEDOM OF ESTABLISHMENT

According to *Centros*, there is an obligation of a Member States to recognise companies and their branch offices, established under national laws of Member States. The choice of place of establishment i.e. legal order does not imply fraudulent evasion and abuse of rights. Restrictions on freedom of establishment are possible only if this will be in the interest of public order and if all prerequisites are fulfilled. The consequences of freedom of establishment are the possibility to choose "most favourable" law. Not even Member States which apply real seat theory can enable application of their own national law on companies which do business in their territory. There is also competition of legal orders. National legal orders tend to attract entrepreneurs by liberalising their company laws, taxation laws, administrative procedures, by strengthening institutional capacities and level of legal certainty. Member States tend to establish comparative advantages of their national laws in order to attract foreign investments. Rules on protection of employees, protection of creditors by maintenance of nominal capital, protection of minority shareholders, transparency and disclosure in capital markets, stable banking and financial systems, developed anticorruption practices, adjoured land and other public registries, summary administrative procedures, well drafted laws are among qualities which will attract foreign investments.

Companies can transfer real seat in another Member State if all necessary requirements and formalities defined by Member State of affiliation are fulfilled. Each Member State can define different requirements as far as they are proportionate and non-discriminatory. Cross-border transfer of registered seat from a Member State of affiliation to a Member State of destination, and accompanying change of court register, leads to a change of applicable law i.e. to a change of companies' nationality. Fundamental question which arises out of analysis of application of freedom of establishment and its restrictions is the

question of permissive change of company's nationality by keeping its legal personality at the same time. By keeping its legal personality, legal certainty can be secured for all interested parties such as employees, creditors, company's shareholders and other stakeholders.

Since the rules on change of seat are not completely clear, the Commission is working on a proposal on 14th Company Law Directive on transfer of seat.²³⁶

As it can be seen from the case law, both Member State of affiliation and Member State of destination can define restrictions on freedom of establishment.²³⁷

Bearing in mind employees' rights, transfer of seat must be executed according to the principle of flexibility in order to achieve as much labour market flexibility as possible. It will serve interests of employees and employees' rights should be protected. Aim of proposed Directive is to prevent abuse and fraudulent acts in line with the provisions of Directive 2001/86/EC and in line with labour law.

Current mechanisms of cross border transfer of seat are restricted. The procedure of transfer of registered seat from a Member State of affiliation to a Member State of destination is envisaged by provisions of Regulation on Societas Europea, Societas Cooperativa Europea and European Economic Interesting Grouping. Thus, application of Directive 2005/56/EC²³⁸ on cross border mergers is currently only option of transfer of seat without company going into liquidation. This way continuity of existing merging companies is enabled. The basic shortcoming of this procedure is costly procedure which is not appropriate for small and medium-sized companies. Proposal on 14th Directive²³⁹

²³⁶ Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije?, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012; Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010.; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>.

²³⁷ Ibidem. For case law regarding cross border transfer of seat see also Bodiroga Vukobrat, N., Đerđa, D., Poščić, A. (eds.) Zbirka presuda Europskog suda, Inženjerski biro, Zagreb, 2011; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014.

²³⁸ On Directive 2005/56/EC see in Horak, H., Dumančić, K., Poljanec, K., Neusklađenost prava pripajanja i spajanja na unutarnjem tržištu EU kao prepreka slobodi poslovnog nastana, Zbornik radova sa znanstvenog skupa „Zakon o trgovačkim društvima: 20 godina primjene u interdisciplinarnom okruženju“, Ekonomski fakultet Zagreb, 2015, pp. 28-42; Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010, pp. 450-458.

²³⁹ Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije?, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012.

should reduce administrative costs and make the procedure of transfer of seat cheaper. In addition to afore-mentioned, it should enable easier transfer of seat for small and medium sized companies (and micro- companies) what will enable companies to do business in the internal market.

Proposal on 14th Directive refers only to companies on capital. Its scope is limited to cross-border transfer of seat accompanied with real seat transfer to a Member State of destination. This implies change of applicable law. Companies would migrate without going into liquidation, by maintaining legal personality and conversion.

3. 5. 7. DEVELOPMENT OF CASE LAW IN THE AREA OF FREEDOM OF ESTABLISHMENT

There are several landmark cases in the area of freedom of establishment. In *Daily Mail and General Trust*²⁴⁰ the CJEU decided for the first time on application of the Treaty on cross border transfer of seat. The CJEU did not invoke judgement in *Daily Mail* before 2008 and judgement in *Cartesio*. In *Daily Mail* the CJEU gave advantage to national law in relation to the Treaty (this was not accepted in *Centros*, *Überseering* and *Inspire Art*).²⁴¹

Daily Mail was a British company which wanted to transfer its management seat from Great Britain to the Netherlands, but to keep its legal personality, which is in line with British laws. By virtue of this change, company would become Dutch tax obligee. In order for company to cease to be a tax payer in Great Britain, authorisation of Ministry of Finances of Great Britain is necessary which it didn't want to issue. The question which arose is whether it is possible to set up a condition of prior authorisation as prerequisite for transfer of seat or it is contrary to provisions on freedom of establishment. According to British law, in order for a company to be treated as resident in terms of taxation, the place where company's management is situated is relevant. In order for a company to be treated as British company, the registered seat is relevant.

²⁴⁰ *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, 81/87, EU:C:1988:456.

²⁴¹ For detailed analysis of *Daily Mail and General Trust* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010. p.117; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014., p. 204.

It is both possible for a company to be British company and a Dutch resident, considering that according to British law, transfer of management seat does not lead to cease of company. In most Member States transfer of company's seat leads to cease of a company, with prior obligation to pay due taxes.

There was a question whether to apply provisions on freedom of establishment or not. According to the Commission's standpoint, it depends on national law whether it is allowed for a company to become a resident of another Member State and to cease to be a resident of the Member State of establishment by keeping at the same time legal personality in the Member State of establishment. If this is not allowed in concrete case, it is not possible to apply provisions of the Treaty on freedom of establishment. If it is, then the Treaty shall apply. According to the judgement of the CJEU, the aim of provisions on freedom of establishment is to assure that foreign individuals and companies are treated in the same way as those established in that Member State, but also this provisions forbid a home Member State from preventing its citizens or companies established according to their law to set up business in another Member State. By their national laws, Member States regulate establishment and formation of companies. The CJEU insists on different legal orders of Member States in comparison to company's seat and its transfer. Application of the Treaty binds that differences in national provisions should be solved by enactment of provisions or international treaties considering that they are not solved by provision of the Treaty on freedom of establishment. Provisions of the Treaty on freedom of establishment cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

Issue of evasion of stricter national rules was discussed in *Centros*.²⁴²

In *Centros* there was a question of widening the scope of freedom of establishment also to situations when it comes to evasion of stricter national rules

²⁴² *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, C-212/97, ECLI:EU:C:1999:126. For detailed analysis of *Centros* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010. p.111; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20PO-SLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014, p. 214.

by establishment of companies in a State with more favourable legal order. The situation arose due to the fact that the company did not perform any business activity there. Afterwards this “foreigner” appears in more restrictive Member State with requirement to establish a branch office. In concrete case, Danish citizens had established private limited company in England. For Centros Ltd there was no obligation to subscribe nominal capital for establishment in order to evade Danish provisions which required significant amount of nominal capital. This way primary establishment was achieved. Centros Ltd. filed a request for registration of a branch office in Denmark where there is no need to pay nominal capital. It wished to exercise freedom of secondary establishment. Denmark refused to register branch office with explanation that this is evasion of restrictive provisions. Centros Ltd invoke its right to execute its secondary establishment. Denmark considered this as abuse of right by establishment of a non-active company in England and seeking to establish a branch office in Denmark in order to evade subscription of nominal capital. The CJEU considered that there is no abuse of right and that the very purpose of provisions on freedom of establishment is to enable companies established in one Member State, where they have their registered office, management seat or central place of business to do business in another Member State through daughter companies, branch offices or agencies. There is no abuse of freedom of establishment if citizens of one Member State form a company in another Member State which has favourable provisions and afterwards establishes branch office in another Member State. The fact that the company is not active in one Member State is not enough to prove abuse or fraudulent behaviour. Referring to Danish legislation and high subscription rates, on basis of creditor protection, and needs for prevention of false insolvency proceedings, the CJEU emphasized that refusal to register branch office does not stand for protection of creditors. Creditors are familiar with the fact that the company is established in accordance with English law. The legal implications of afore-mentioned judgement are stimulation of regulatory competition among Member States.

An issue of legal and procedural capacity under German law of a company established in the Netherlands with its real seat in Germany was a matter of dispute before the CJEU in *Überseering*.²⁴³

²⁴³ *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, C-208/00, ECLI:EU:C:2002:632. For detailed analysis of *Überseering* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010, p.114; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih

Germany applies the real seat theory. The procedural capacity was not recognised to the company named *Überseering* before German courts. Application of German law would mean re-establishment of company in Germany in order for a company to become German company and obtain procedural capacity. Thus the question arose whether the real seat theory is contrary to freedom of establishment. Recognition of a company by a Member State in which company wishes to establish is a prerequisite of freedom of establishment. Real seat of *Überseering* was transferred to Germany considering that all company's shares were held by German citizens. Requirement of German legislation for re-establishment of company in Germany is opposite to freedom of establishment granted by the TFEU.

German government stated that this practice is not discriminatory since such restrictions are applied to all companies. There are important reasons of public interests which justify such measures – legal certainty, protection of creditors (due to the fact that there is no minimum nominal capital at the level of the EU, what was envisaged in German legislation), protection of minority shareholders (due to the fact that there was no protection of minority shareholders at the level of the EU), protection of employees' rights (due to fact that German provisions on employees' participation will be evaded) and fiscal reasons (possibility to seek tax privileges in more than one state). Nevertheless, the CJEU stated that these reasons are not proportionate and do not justify restrictions. The same as in *Centros*, evasion of German national legislation cannot justify established restrictions.

The CJEU concluded that application of the real seat theory leads to negation of freedom of establishment if there is no recognition of legal personality of a company established on basis of Member States' national law. Possible solution to this problem would be application of the theory of registration or mutual recognition on companies. The issue of real seat remains in domain of rules on international private law. One should bear in mind that the CJEU did not forbid application of the real seat theory.

društava u pravu Europske unije, Zagreb, Ekonomski fakultet Sveučilišta u Zagrebu, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014., p. 226.

Establishment of a foreign branch office was considered in *Inspire Art*.²⁴⁴

When it comes to establishment of a foreign branch office, *Inspire Art* seems relevant. 1997 Dutch law on foreign companies prescribed conditions which foreign companies establishing branch offices in the Netherlands have to fulfil. Establishment of branch offices is regulated by 11th Council Directive 89/666/EEC. The Netherlands wished to avoid possibility to establish companies only in order to use the most favourable regulatory system. The CJEU stated that Dutch provision is preventing the use of freedom of establishment due to the fact that the same rules, which are applicable to domestic limited liability companies should apply to branch office of a company established in another Member State, if it does business in the Netherlands. The reasons why a company has chosen one Member State of establishment over another are irrelevant. Freedom of establishment guarantees freedom of secondary establishment. The solution is mutual recognition of companies. Justified restrictions are important reasons of public interests e.g. protection of creditors (*Inspire Art* acts in the market as English company and rules on minimum nominal capital are not needed in terms of informing creditors considering the fact that there is significant amount of information for creditors that they are dealing with a foreign company).

Issue of cross border mergers and acquisitions was discussed for a long time at EU level. The discussion aimed at finding the best legal form to regulate them. By means of merger, companies execute their right of secondary establishment and enter other markets without being wound up or liquidated. The landmark decision was a decision in *SEVIC Systems*.²⁴⁵

²⁴⁴ *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, C-167/01, ECLI:EU:C:2003:512. For detailed analysis of *Inspire Art* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010. p. 118; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, e-book, Zagreb, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>.

²⁴⁵ *Sevic Systems AG*, C-411/03 ECLI:EU:C:2005:762. For detailed analysis of *Sevic Systems AG* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010. p. 120; see also Horak, H., Dumančić, K., Poljanec, K., Neusklađenost prava pripajanja i spajanja na unutarnjem tržištu EU kao prepreka slobodi poslovnog nastana, Zbornik radova sa znanstvenog skupa „Zakon o trgovačkim društvima: 20 godina primjene u interdisciplinarnom okruženju“, Ekonomski fakultet Zagreb, 2015, pp. 28-42; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>.

The German court refused to add to court register merger of the Luxembourgish company with the German acquiring company due to the fact that German national provisions envisaged only merger of companies situated in Germany but not cross border ones. The CJEU stated that freedom of establishment consist of all measures which provide for and make easier entrance to another Member State and doing business in that Member State under the same conditions as for national subjects. In that context, a cross border merger is a form of execution of freedom of establishment. Different treatment means restriction. Germany emphasized that in particular situation provisions on freedom of establishment do not apply because they imply setting up of a new company, branch office or agencies, and it cannot be applied in case of merger of existent companies. Germany justification was that by these restrictions it protects creditors, minority shareholders and employees, maintenance of fiscal supervision and fairness in transactions between merchants. According to the CJEU, national measures have to be adequate and necessary. General refusal to register a merger of companies in court register of a company situated outside the Member State in which company has its seat is considered to be a restriction of freedom of establishment. Prohibition exceeds what is necessary and the same purpose can be achieved in a way that is less restrictive. Harmonisation of laws cannot be prerequisite for execution of freedom of establishment.

One of the latest judgements dealing with cross border transfer of seat was the judgement in *Cartesio*.²⁴⁶

The Hungarian private limited liability company named *Cartesio* asked from Hungarian court to add change of its real seat from Hungary to Italy to register, assuming that Hungarian law will remain applicable law. Hungarian law is applicable to companies located in Hungary. The place where central management is situated is considered to be the company's seat. According to Hungarian law, a transfer of management seat is not possible, and if it happened, that would mean cease of a company as Hungarian company. Given that there is no supranational law regulating connecting factor between

²⁴⁶ *CARTESIO Oktató és Szolgáltató bt*, C-210/06, EU:C:2008:723. For detailed analysis of *Cartesio* see in Horak, H., Dumančić, K., Pecotić Kaufman, J: Uvod u europsko pravo društava, Školska knjiga, Zagreb, 2010. p.128; Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije, Ekonomski fakultet Zagreb, 2013 available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: European Market Law, Handbook, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014., p. 244.

a company and a national territory, the preliminary reference concerning freedom of establishment dealt with the question is it possible for a state to influence the connecting factor between a company and a national territory. The CJEU confirmed that it is a matter of national law to evaluate the possibility for a company to leave its state of establishment. One can say that there are two groups of cases before the CJEU. There are cases in which there is a question of restrictions in execution of freedom of establishment of a company established in one Member State for execution of freedom of establishment in another Member State. There are also cases dealing with a question whether company should be considered as a company having nationality of Member State of establishment. If not, right to enjoy protection under Article 54 TFEU should be denied. Such differences result in different treatment of entering other Member State (accorded to freedom of establishment) comparing to leaving (national law applies). Companies decide on their own on its place of establishment (entrance), but later on (entrance) they are not free any more to change applicable national company law (leaving). The Opinion of AG Maduro in *Cartesio*, mentioning that the rules on leaving the country should be accorded to the Treaty, was refused. There are two situations.

First of all, there is a situation when there is a transfer of seat of a company established according to law of one Member State to another Member State without changing applicable law (company is not entitled to protection on basis of provisions of the Treaty on freedom of establishment). When a company, accompanied by change of applicable law is transferred from one Member State to another, by conversion to another legal form regulated by law of that another Member State, it is so called “*reincorporation*”. Company can invoke provisions on freedom of establishment.

If company transfers abroad only its real seat, having no intention to reincorporate in another Member State, the CJEU considers that Member State can prescribe that it should mandatory cease due to the transfer of company’s seat. It is due to the fact that this company does not exist any more as company of the state of establishment, i.e. there is no company which is entitled to protection on basis of provisions on freedom of establishment. If a company has an intention to reincorporate in another Member State i.e. to do business on basis of Member States’ law which will become applicable for that company, due to the fact that it transfers registered seat and cease to exist according to law of Member State of establishment, it can invoke freedom of establishment. *Cartesio* wanted to transfer its seat without changing the applicable law. Such transfer is not contrary to provisions of the Treaty on freedom of establishment due to the fact that national law can autonomously regulate transfer of company’s seat. Thus, there was a question on reincorporation

of company. A company changes applicable law by the fact that company established in one Member State ceases to be company established under that Member State's law and by transferring its registered seat to another Member State it becomes company to which different law becomes applicable. Thus, a company has to adjust to rules applicable in other Member State.

The essence of reincorporation is that there should be no legal discontinuity of a company. It means that both home Member State and host Member State enable transfer of registered seat without cease of a company. Key question is whether the right on incorporation without necessity to wound up a company enjoys protection under EU law, i.e. is it forbidden for Member States to ask for cease of a company wishing to reincorporate in another Member State? The CJEU stated that Member States can decide on their own on the connecting factor between a company and an applicable law. Nevertheless, Member States cannot prohibit companies from changing their seats to another Member State if applicable law has changed. The CJEU judgement changed considering that Hungarian law does not provide for transfer of central management seat by keeping at the same time legal personality in Member States of establishment. *Cartesio* could not invoke freedom of establishment. The CJEU concluded that the question of cross border seat transfer should be dealt with by secondary law at EU level. As it can be seen, there are no significant changes in comparison to *Daily Mail and General Trust*.

The importance of this judgement, *inter alia*, lies in the fact that the CJEU stressed importance of introducing solutions contained in Recommendations for adopting of 14th Directive. The same direction was confirmed in case *VALE*.²⁴⁷

VALE Costruzioni was a company registered in Italy. In 2006 it was removed from the court register due to the fact that it wanted to change its central management seat from Italy to Hungary. Italian law does not impose requirements for winding up of a company considering the fact that company

²⁴⁷ *VALE Építési kft.*, C-378/10, EU:C:2012:440. For detailed analysis of *VALE* see more Horak, H., Dumančić, K., Šafranko, Z.: *Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije*, Ekonomski fakultet Sveučilišta u Zagrebu, 2013, available at <http://web.efzg.hr/dok/KID/SLOBODA%20POSLOVNOG%20NASTANA.pdf>; Horak, H., Dumančić, K., Šafranko, Z.: *Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije?*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012; Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I, Voronezh State University and Faculty of Economics and Business Zagreb, 2014., p. 255.

will continue to do business in Hungary. In 2007 VALE Epitesi wanted to register as successor of VALE Construzioni in the court register in Hungary. Hungarian law only permits conversion of Hungarian companies and only Hungarian companies can be mentioned as antecessors. There is a difference between *Cartesio* and *VALE* due to the fact that Hungarian law does not permit transfer of seat from Hungary to Italy and keeping at the same Hungarian law as applicable law. The CJEU has repeated the rule according to which leaving the Member State of establishment should be regulated by national law of that Member State while EU law should apply to entering to Member State. This standpoint was justified on basis of request for protection of shareholders, creditors, employees and other stakeholders. Companies are entities of national law and exist exclusively on basis of national law which refer to their establishment and performance. According to the CJEU, Member States are entitled to define connecting factor for a company in order to be considered as company of a Member State of affiliation and national provisions on company's establishment and performance shall apply. Nevertheless, national provisions should not be contrary to provisions of EU law which refer to freedom of establishment. Hungarian national legislation allows for conversion of companies which have their seat in that Member State. This way Hungarian law makes difference between "domestic" and "cross border" conversions which stands for unjustified restriction on freedom of establishment. In case of cross-border conversion, a Member State of destination is entitled to define national law which will apply on such activities and define a list of requirements related to claims and company's property. A Member State cannot refuse to grant registration, with cross-border conversion, since antecessor of a company has requested registration. Member State cannot refuse to take into consideration documents attached to company's application issued to competent authorities of a Member State. This judgement was in line with Opinion of AG Jääskinen. Economic reasons have overcome the legal ones. Namely, as it can be seen from the judgement, it was the matter of request for enabling continuation of economic activity in order to provide protection of third persons, but primarily the CJEU dealt with maintainance of economic performance.

One can conclude that provisions on transfer of registered seat must provide the right to be informed and the right of employee's participation during and after transfer of seat. Provisions have to comply with Directive 2001/86/EC. Management bodies must consult with companies' shareholders and employees' on legal and economic consequences of transfer of companies' seat and must draft reports which contain all relevant information and justifications accompanied by detailed plan of transfer at least one month before general

meeting of shareholders at which shareholders vote on giving consent on proposed transfer. Plan has to be disclosed and made available free of charge to all employees and their representatives. Rights and obligations of companies arising out of laws, accepted practice and individual employment contracts regulating working conditions in a home Member State must continue to apply in Member States of destination (host Member States). A continuation of company's activity is what matters.

LIST OF REFERENCES (in alphabetical order)

Books:

- Barnard, C., Peers, S. (eds.): *European Union Law*, Oxford University Press, 2014.
- Barnard, C.: *The Substantive Law of the EU, The Four Freedoms*, Third edition, 2010.
- Barnard, C., Scott, J. (eds.): *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002.
- Bodiroga Vukobrat, N., Horak, H.: *South Eastern Enlargement: Quo vadis Croatia?*, Chapter in the book „*Quo vadis Europa*“, Senden, G., Vlad, M. (eds.), Verlag Kovac, Hamburg, 2005.
- Bodiroga Vukobrat, N., Horak, H., Martinović, A.: *Temeljne gospodarske slobode u Europskoj uniji*, Inženjerski biro, 2011.
- Bodiroga Vukobrat, N., Đerđa, D., Pošćić, A. (eds.) *Zbirka presuda Europskog suda*, Inženjerski biro, Zagreb, 2011.
- Craig, P., De Burca, G.: *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, 2011.
- Craig, P.: *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, 2010.
- Ćapeta, T., Rodin, S.: *Osnove prava Europske unije*, II. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 2011.
- Goldner Lang, I.: *Sloboda kretanja ljudi u EU: kontekst sporazuma o pridruživanju*, Zagreb, Školska knjiga, 2007.
- Gormley, W. L.: *EU Law of Free Movement of Goods and Customs Union*, Oxford University Press, 2009.
- Horak, H., Dumančić, K., Poljanec, K., Vuletić, D.: *European Market Law, Handbook*, Vol. I., Voronezh State University and Faculty of Economics and Business Zagreb, 2014.
- Horak, H., Dumančić, K., Šafranko, Z.: *Sloboda poslovnog nastana trgovačkih društava u pravu Europske unije*, Zagreb, Ekonomski fakultet, 2013, available at <http://web.efzg.hr/dok/KID//SLOBODA%20POSLOVNOG%20NASTANA.pdf>,
- Horak, H., Dumančić, K., Pecotić Kaufman, J.: *Uvod u europsko pravo društava*, Školska knjiga, Zagreb, 2010.
- Josipović, T.: *Načela europskog prava u presudama Suda Europske zajednice*, Narodne novine, Zagreb, 2005.

Kucich, E.: Right to Establishment and Recognition of the Legal Subjectivity of a Foreign Company According to EU Law and Law of the Republic of Croatia, Master Thesis, Rijeka 2004.

Pinder, J.: Usherwood, S.: The European Union: A Very Short Introduction, Oxford University Press, 2013.

Rodin, S., Čapeta, T., Goldner Lang, I. (eds.): Izbor presuda Europskog suda, Novi informator, Zagreb, 2009.

Rodin, S., Čapeta, T.: Direktive i njihovi učinci prema praksi Europskog suda (Directives and their Effects in Case Law of the European Court of Justice), Učinci direktiva Europske unije u nacionalnom pravu, Rodin, Siniša; Čapeta, Tamara (eds.), Ministarstvo pravosuđa RH, 2008.

Tridimas, T.: The General Principles of EU law, Oxford University Press, 2006.

Urwin, D.: The Community of Europe: A History of European Integration, Longman, London, 1995.

Weatheril, S.: Cases and Materials on EU Law, Oxford University Press, 10th Edition, 2012.

Wyatt, D., Dashwood, A.: European Union Law, Sweet and Maxwell, London, 2000.

Articles:

Barnard, C.: Unrevealing the Services Directive, 45 CML Rev.

Bodiroga Vukobrat, N., Horak, H.: The Recognition of Professional Qualifications and Problem of Necessary Language Skills in Healthcare Profession, International Multidisciplinary Scientific Geoconference; 14th Vol. 1., 2014.; SGEM 2014 Conference Proceedings; International Scientific Conferences on Social Sciences & Arts SGEM; Albena, Bulgaria, 2014.

Bodiroga Vukobrat, N., Horak, H.: Pravni položaj radnika u slučaju insolventnosti s aspekta prava Europske unije - presude Europskog suda, Zbornik radova Hrvatsko insolventijsko pravo, HAZU, Zagreb, 2013.

Bodiroga Vukobrat, N., Horak, H.: Temeljne gospodarske slobode v. temeljna socijalna prava (Utjecaj presuda Viking, Laval i Rüffert na temeljna socijalna prava), Zbornik radova sa međunarodne Jean Monnet znanstvene konferencije "Socijalna prava kao temeljna ljudska prava", TIM Press, Zagreb, 2010.

Bodiroga Vukobrat, N., Horak, H.: Cross-border Provisions of Health services - (freedom to provide services or health tourism?), Collection of Papers "7th International Conference Economic Integrations, Competition and Cooperation", Faculty of Economics Rijeka, Faculty of Economics Ljubljana, CEDIMES Paris and University of Antwerp, Opatija, 2009.

Bodiroga Vukobrat, N., Horak, H.: A More Liberal and Economic, and a Less Social Approach: The Impact of Recent ECJ Rulings, Croatian Yearbook of European Law and Policy, Faculty of Law, University of Zagreb, vol. 4, 2008.

Bodiroga Vukobrat, N., Horak, H.: Freedom to Provide Services in European and Croatian Law, Collection of Papers "Economic Integrations, Competition and Cooperation", Faculty of Economics, University of Rijeka, 2007.

Bodiroga Vukobrat, N., Horak, H.: Sloboda pružanja usluga u pravu EZ s posebnim osvrtom na turističke vodiče, Acta turistica, Ekonomski fakultet Zagreb, god. 16, br. 2., Zagreb, 2004.

- Craig, P.: The Lisbon Treaty: Law, Politics and Treaty Reform, Oxford University Press, 2010.
- Craig, P.: The Treaty of Lisbon: Process, Architecture and Substance, *European Law Review*, 2008.
- Ćapeta, T.: Sudovi Europske unije. Nacionalni sudovi kao europski sudovi (Courts of the European Union. National Courts as European Courts), Institut za međunarodne odnose, Zagreb, 2002.
- De Burca, G.: The European Constitution Project after the Referendá, 2006.
- De Witte, B.: Setting the Scene: How Did Services Get to Bolkenstein and Why?, Edinburgh Europa Institute, Mitchell Working Paper Series, 3/2007.
- Dougan, M.: Cross-border Educational Mobility and the Exportation of Student Financial Assistance, 33 *European Law Review* 723, 2008.
- Grundmann, S., Moslein, F.: Golden Shares-State Control in Privatised Companies: Comparative Law, *European Law and Policy Aspects*, 1 *Euredia* 623, 2004
- Horak, H., Bodiřoga Vukobrat, N., Dumančić, K.: Professional Qualification and Diploma Recognition in EU Law, *InterEULawEast Journal for International and European Law, Economics and Market Integration*, Volume I, Issue 1, 2014.
- Horak, H., Bodiřoga-Vukobrat, N., Dumančić, K.: Sind Patienten im Lichte der Rechtslinie 24/2011/EU über die Ausübung der Rechte der Patienten sowie deren Umsetzung in das kroatische Recht eine unsichtbare Minderheit?, Chapter in the book *Unsichtbare Minderheiten*, Bodiřoga -Vukobrat, N., Sander, G., Barić, S. (eds.), *Schriften zum Sozial-, Umwelt- und Gesundheitsrecht*, Verlag Dr. Kovač, Band 4, Hamburg, 2013.
- Horak, H., Dumančić, K.: Elchinov Case: New Issues, New Member States, New Problems, *International Multidisciplinary Scientific Geoconference ; 14th Vol. 1 2014.; Conference Proceedings, Social sciences & arts; SGEM 2014; International Scientific Conferences on Social Sciences & Arts SGEM; Albena, Bulgaria, 2014.*
- Horak, H., Dumančić, K.: Transparency and Disclosure as Key Elements for Companies and Markets, 2nd International Conference Legal and Economic Aspects of Corporate Governance – Market Transparency and Disclosure in Private and Public Companies, *Collection of Papers, Faculty of Economics and Business*, 2013.
- Horak, H., Dumančić, K.: Problemi implementacije Direktive o uslugama u pravo RH – odstajanje od socijalnog modela na nacionalnom nivou? *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 32, br. 2, 2011.
- Horak, H.; Dumančić, K.: Harmonisation of the Croatian Company Law with *Acquis Communautaire* of the European Union, *The Business Review*, Cambridge, Vol. 18, No. 2, 2011.
- Horak, H., Dumančić, K., Poljanec, K.: Neusklađenost prava pripajanja i spajanja na unutarnjem tržištu EU kao prepreka slobodi poslovnog nastana, *Zbornik radova sa znanstvenog skupa „Zakon o trgovačkim društvima: 20 godina primjene u interdisciplinarnom okruženju“*, Ekonomski fakultet Zagreb, 2015.
- Horak, H., Dumančić, K., Poljanec, K.: Modernizacija i usklađivanje prava društava u Republici Hrvatskoj sa pravnom stečevinom Europske unije i načelo transparentnosti podataka, *Zbornik radova s II. Međunarodne konferencije „Bosna i Hercegovina i euroatlanske integracije - trenutni izazovi i perspektive“*, Pravni fakultet Univerziteta u Bihaću i Centar za društvena istraživanja Internacionalnog Burč univerziteta, Bihać, 2014.

Horak, H., Dumančić, K., Šafranko, Z.: Sloboda poslovnog nastana trgovačkih društava – što donosi prijedlog Četrnaeste direktive u pravu Europske unije? Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33, br. 2, Rijeka, 2012.

Horak, H., Mlikotin Tomić, D., Pecotić, J.: Implementing the EU Four Freedoms: Concept and Practice, Collection of Papers, International Conference „Economic Integration Prospects and Dilemmas“, University of Ljubljana, Faculty of Economics, 2007.

Ingolf E., Pernice, A.: The Treaty of Lisbon: Multilevel Constitutionalism in Action, Columbia Journal of European Law, Vol. 15, No. 3/2009.

Klammert, M.: The Services Directive, the EC Treaty and the Court: Codification or Arrogation? Internal Market for Services, Knez, R. (ed.), Pravna fakulteta Univerze v Mariboru, International Jean Monnet Conference, Maribor, 2009.

Lindstrom, N.: Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict? Journal of Common Market Studies, Vol. 48, number 5, 2010.

Rodin, S.: Direktiva Europske unije 123/2006 o uslugama – doseg i opravdanja, Zbornik Pravnog fakulteta u Zagrebu, 59, 2009.

Rodin, S.: Ustavnopravni aspekti primjene Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda, Zbornik Pravnog fakulteta u Zagrebu, 48 (1998), 1

Rodin, S.: Europska Unija i njemački Ustavni sud; Pravni fakultet Sveučilišta u Zagrebu, Zagreb, Hrvatska, Politička misao, Vol. 33 No.4, 1996.

Snell, J.: Who Got the Power? Free Movement and Allocation of Competences in EC Law, Yearbook of European Law, 323, 2003.

Ziller, J.: Une constitution courte et obscure ou claire et détaillée? Perspective pour la simplification des traites et la rationalisation de l'ordre juridique de l'Union européenne, EUI Working Papers, Law, 2006/31

TABLE OF CASES (In alphabetical order)

Alfredo Albore, C-423/98, EU:C:2000:401

Anita Groener v. Minister for Education and the City of Dublin Vocational Education Committee, C-379/87 EU:C:1989:599

Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister, C-54/99, EU:C:2000:124

Audiolux SA e.a v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others, C-101/08, EU:C:2009:626

Belgian State v. René Humbel and Marie-Thérèse Edel, 263/86, EU:C:1988:451

Bernhard Schloh v. Auto Controle Technique SPRL, 50/85, EU:C:1986:244

Campus Oil Limited and Others v. Minister for Industry and Energy and Others, 72/83, EU:C:1984:256

CARTESIO Oktató és Szolgáltató bt, C-210/06, EU:C:2008:723

Centros Ltd v. Erhvervs- og Selskabsstyrelsen, C-212/97, EU:C:1999:126

Christelle Delière v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and *François Pacquée* (C-191/97), EU:C:2000:199

Christopher Stanton and SA belge d'assurances "L'Étoile 1905" v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti), 143/87, EU:C:1988:378

Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne, 292/86, EU:C:1988:15

Commission of the European Communities v. Federal Republic of Germany, C-112/05, EU:C:2007:623

Commission of the European Communities v. Federal Republic of Germany, 178/84, EU:C:1987:126

Commission of the European Communities v. French Republic, C-483/99, EU:C:2002:327

Commission of the European Communities v. French Republic, C-159/94, EU:C:1997:501

Commission of the European Communities v. French Republic, C-294/89, EU:C:1991:302

Commission of the European Communities v. French Republic, 96/85, EU:C:1986:189

- Commission of the European Communities v. French Republic*, 307/84, EU:C:1986:222
- Commission of the European Communities v. French Republic*, 167/73, EU:C:1974:35
- Commission of the European Communities v. Hellenic Republic*, 68/88, EU:C:1989:339
- Commission of the European Communities v. Ireland*, (“Buy Irish case”), 249/81, EU:C:1982:402
- Commission of the European Communities v. Italian Republic*, 225/85, EU:C:1987:284
- Commission of the European Communities v. Italian Republic*, 7/68, EU:C:1968:51
- Commission of the European Communities v. Kingdom of the Netherlands*, Joined cases C-282/04 and C-283/04, EU:C:2006:608
- Commission of the European Communities v. Kingdom of the Netherlands*, C-353/89, EU:C:1991:325
- Commission of the European Communities v. Kingdom of the Netherlands*, 96/81, EU:C:1982:192
- Commission of the European Communities v. Portuguese Republic*, C-367/98, EU:C:2002:326
- Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 207/83, EU:C:1985:161
- Conegate Limited v. HM Customs and Excise*, 121/85, EU:C:1986:114
- Criminal proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepción Barbero Maestre*, Joined cases C-358/93 and C-416/93, EU:C:1995:54
- Criminal proceedings against André Ambry*, C-410/96, EU:C:1998:578
- Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, Joined cases C-163/94, C-165/94 and C-250/94, EU:C:1995:451
- Criminal proceedings against Michel Choquet*, 16/78, EU:C:1978:210
- D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*, 79/85, EU:C:1986:308
- Emir Gül v. Regierungspräsident Düsseldorf*, 131/85, ECLI:EU:C:1986:200
- Flaminio Costa v. E.N.E.L.*, 6/64, EU:C:1964:51
- Gaston Schul BV v. Staatssecretaris van Financiën*, C-354/09, EU:C:2010:439
- Giuseppe Sacchi*, 155/73, EU:C:1974:40
- Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Joined cases 286/82 and 26/83, EU:C:1984:35
- Hanns-Martin Bachmann v. Belgian State*, C-204/90, EU:C:1992:35
- Hans Eckelkamp and Others v. Belgische Staat*, C-11/07, EU:C:2008:489
- Hein Persche v. Finanzamt Lüdenscheid*, C-318/07, EU:C:2009:33
- Henri Cullet and Chambre syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc a Toulouse and Centre Leclerc a Saint-Orens-de-Gameville*, 231/83, EU:C:1985:29

- Ingrid Boukhalfa v. Bundesrepublik Deutschland*, C-214/94, EU:C:1996:174
- Irene Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* 340/89, EU:C:1991:193
- Jean Reyners v. Belgian State*, 2/74, EU:C:1974:68
- J. E. J. Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, C-512/03, EU:C:2005:516
- Jessica Safir v. Skattemyndigheten and Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, C-118/96, EU:C:1998:170
- John O'Flynn v. Adjudication Officer*, C-237/94, EU:C:1996:206
- Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, C-167/01, EU:C:2003:512
- Klas Rosengren and Others v. Riksklagaren*, C-170/04, EU:C:2007:313
- Klaus Konle v. Republik Österreich*, C- 302/97, EU:C:1999:271
- Manfred Trummer and Peter Mayer*, C-222/97, EU:C:1999:143
- Maria Chiara Spotti v. Freistaat Bayern*, C-272/92, EU:C:1993:848
- Marianne Scheunemann v. Finanzamt Bremerhave*, C-31/11, EU:C:2012:481
- Michael S. v. Fonds national de reclassement social des handicapés*, 76/72, ECLI:EU:C:1973:46
- Ministere public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL v. Willy van Wesemael and others*, Joined Cases 110 and 111/78, EU:C:1979:8
- Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*, C-393/92, EU:C:1994:171
- NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 26/62, EU:C:1963:1
- Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme*, C-484/93, EU:C:1995:379
- Pilar Allue and Carmel Mary Coonan v. Università degli studi di Venezia*, 33/88, EU:C:1989:222
- Procureur du Roi v. Benoît and Gustave Dassonville*, 8/74, EU:C:1974:82
- Regina v. Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss*, 7/78, EU:C:1978:209
- Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, 34/79, EU:C:1979:295
- Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411
- Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42
- Rewe-Zentralfinanz GmbH v. Landwirtschaftskammer*, EU:C:1975:98
- Robert-Gerardus Coenen and Others v. Sociaal-Economische Raad*, 39/75, EU:C:1975:162
- Roland Rutili v. Ministre de l'intérieur*, 36/75, EU:C:1975:137
- Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori*, C-451/03, EU:C:2006:208

Sevic Systems AG, C-411/03, EU:C:2005:762

Staatssecretaris van Financiën v. B. G. M. Verkooijen, C-35/98, EU:C:2000:294

Stephan Max Wirth v. Landeshauptstadt Hannover, C-109/92, EU:C:1993:916

The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, 81/87, EU:C:1988:456

The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others, 331/88, EU:C:1990:391

The Queen v. Secretary of State for Transport ex parte Factortame and Others, C-221/89, EU:C:1991:320

The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan, C-159/90, EU:C:1991:378

Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and Others, 222/86, EU:C:1987:442

Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), C-208/00, EU:C:2002:632

VALE Építési kft., C-378/10, EU:C:2012:440

Vera Mattner v. Finanzamt Velbert, C-510/08, EU:C:2010:216

INDEX

(in alphabetical order)

A

Acquis communautaire 34
Action for annulment 30
Action in case of breach 30
Action in case of omission 30
Appeal and Revision 31

B

Bolkenstein directive 118

C

Charter of Fundamental Rights 13
Co-decision procedure 8
Comitology 8
Companies 126
Company's seat theories
incorporation theory real seat theory 127
Complete economic union 65
Constitution 12
Constructive abstention 10
COREPER 25
Council 26
Country of origin 118
Court of Justice of the EU 28
Currency restrictions 62
Customs union 64

D

Dassonville formula 77
Decisions 39
Directive 2005/56/EC 130
Directives 39
Discrimination 51
Doctrine of comparative advantages 62

E

Economic union 65
emergency brakes mechanism 24
emigration of companies 128
Enlargement 14
EU competences 44
EU law 34
European Central Bank 31
European Coal and Steel Community 4
European Commission 27
European Council 26
European Currency Unit 15
European Parliament 17
Eurozone 11

F

Family members 87
Founding treaties 14
Free trade zone 64

G

General economic interest 119
General subsidiarity clause 70
Golden shares 103
Goods 62

H

Horizontal approach 118

I

Implicit authority doctrine 40
Indistinctly applicable measure 99

J

Jean Monnet 2

L

Lex societatis doctrine 128

Lisbon Strategy 118

M

Maastricht criteria 11

Market integration 61

Measures having equivalent effect to quantitative restrictions 76

Monetary union 65

N

Necessity test 47

New approach directives 71

Non-custom restrictions 63

O

Opinions 40

P

Passarelle clause 24

Point of single contact 120

Political union 66

Positive powers 46

Preliminary reference 30

Principles of EU law 41

Production factors 65

Proportionality test 48

Public morality 83

Public policy 84

Public security 85

Q

Quotas

customs quotas 62

R

Reasoned opinion 27

Recommendations 40

Reform Treaty 12

Regular legislative procedure 28

Regulations 38

Regulatory competition 129

Reincorporation 137

S

Schuman Declaration 3

Seat theories 127

Self-employed persons 121

Sources of EU law 34

Special Legislative Procedures 22

Subsidiarity test 47

Substantiated opinion 20

T

Techniques of market integration 67

Test of reason, truthfulness or proportionality 124


The Council 21

Treaties 35

W

Workers

posted workers 87



European and International Law Master Programme Development in Eastern Europe (InterEULawEast) is a Tempus IV project funded with the support of European Union. Agreement number 2013-4548/001-001.