European Law

Syllabus

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I- EUROPEAN INTEGRATION

The making of Europe

- History of European integration activates after 1945.

- However, the *Idea of Europe* – of a united Europe – can be rooted since the Roman Empire, throughout the times, with political leaders like Charlemagne, the Habsburgs, Napoleon, Hitler, or thinkers such William Penn, Rousseau, Saint-Simon, Victor Hugo, Mazzini and others.

- The late 19th century was signed by the rise of nationalism in Europe and an increased rivalry between countries that culminated in WWI

- The First War redrawn the political map of Europe, with the dismantlement of central and Eastern European Empires, and the creation of several new states, based on a national ground.

- Coudenhove-Kalergi with the book *Paneuropa*, 1923: the idea of a European Federation, aiming to keep peace between nations.

- Attempts by Aristide Briand, within the League of Nations, 1929.

- Economic depression, the rise of fascisms, and Hitler growing hegemony in European politics, cooled the efforts of integration

- **After WWII** economic rebuilding took precedence over attempts for a unified Europe.

- **The Hague Congress**, 1948. Churchill thesis on the need of reconciliation between France and Germany. Britain did not have to be part on that European unity, just associated with it. The idea of a European Assembly

- Treaty of Brussels, 1948, for collective self-defense (the basis for the future Western European Union)

- Bideau Declaration, 1948: European economic and customs union and a European Assembly

- **Council of Europe**, 1949, signed by 10 states: first European organization. Based on the format of traditional cooperation between states. Cleavage between France, Italy and Benelux nations with the UK and Nordic countries, on the extent of European unification.

- UK succeeded in limiting the scope of action of the Council of Europe

- **Schuman Declaration**, 1950, on the establishment of a High Authority for coal and steel:

    . fears of France regarding the ability of Germany to produce steel at a cost below what France could manage;

    . it allowed Germany to regain sovereignty over the Saar region, which still remained under French control

- **Treaty of Paris**, 1951: the High authority represented the supranational nature of the ECSC

- The ECSC *spillover* to other economic sectors

- Korea war and the rearmament of Germany. The French opposition to it

- The idea of a European army, the Pleven Plan: it followed the Schuman Plan closely.

- **The European Defense Community**, 1952. The German price: Western Allies to end occupation and to give control over foreign policy.

- EDC as a way for France to guarantee itself against presumable German aggression, as much as an anti-Soviet organization

- Need for political direction to EDC: European Political Community (EPC), 1953

- Failure on the French ratification of the EDC Treaty, 1954. It also meant the fall of the EPC

- The return to the short steps strategy advocated by Monnet

-1955 Messina Conference and the relaunching of European integration. Two opposed perspectives: Benelux countries and the need for a global economic integration, through a common market; France preference for sectorial integration, in the area of nuclear energy

- Spaak report, 1956. The opening of the IGC

- **Treaties of Rome, 1957**: the EEC and the EURATOM

The EEC enlargement

- **The first EC enlargement**: the reversal of UK approach towards European integration.
- UK first applied for admission into the EEC, 1961.
- French veto by De Gaulle, 1963, doubting on the sincerity of Britain's intents.
- A new application by the UK, 1967. A new veto by De Gaulle
- De Gaulle resignation, 1969
- Treaty of Accession, 1972, signed with four countries.
- 1973, the first enlargement to nine Member States

- the transition to democracy and **the southern enlargement**
- Application for admission of Greece, 1975; Portugal and Spain, 1977
- Treaty of Accession with Greece, 1979
- Treaty of Accession with Portugal and Spain, 1985

- The enlargement to the so-called **European Economic Area** countries
- Treaty of Accession with Austria, Finland, Sweden and Norway, 1994

- The enlargement to the **Eastern European** countries
- The fall of the Berlin Wall and the redesign of new European borders
- The Copenhagen criteria for joining the EU
- The European agreements.
- The first phase of enlargement: negotiations concluded in 2002 with 10 states, which became new members in 2004
- Romania and Bulgaria signed the Accession Treaty in 2005, becoming members in 2007

- *Turkey and Croatia* initiated negotiations to join the EU in October 2005.
- Croatia signed the Accession Treaty in December 2011, and joined in 2013.

- Turkey accession remains a hard-political issue for Europe. During the 2017 election campaign Merkel said she was always against Turkey joining the EU…
- Meanwhile, Iceland initiated negotiations in 2010, however suspended it in 2013, and dropped its bid in 2015 (first country to do it, ever);
- Montenegro initiated negotiations in 2012; Serbia initiated negotiations in 2014.
- EU widening in the Balkan area: Albania and North Macedonia with status of *candidate countries*; Bosnia-Herzegovina and Kosovo are just considered *potential candidate* countries.

The deepening of European integration

- The Hague Summit, 1969
- The Werner Report on the economic and monetary union, 1970
- Development of new EC competences
- European Political Cooperation, 1973
- The advent of the European Council, 1974
- Direct elections to the European Parliament, 1979
- The European Monetary System, 1979

- Jacques Delors' Presidency of the Commission. The legislative roadmap for the single market: the White Paper on the completion of the Internal Market, 1985
- The European Council decided to call for an IGC, to make treaty amendments

Single European Act, 1986

- The main goal was to achieve an European single market by the end of 1992
- The broadening of qualified majority vote, to pass the internal market program
- The increase of the Europe Parliament's legislative role
- The institutionalization of the European Council
- The setting-up of the Court of First Instance
- New EC competences were added: environment; research and technological development; cohesion policy
- Reference to European Political Cooperation

- The *spillover* of the internal market
- Delors Report on the economic and monetary union, 1989: the EMU as the corollary of the single market
- The fall of the Berlin Wall, November 1989
- The question of German reunification
- The new European political geography
- Franco-German agreement on German unification
- The call for two IGC's, 1990: one the EMU and the other on the European Political Union

The Treaty on the European Union

- The Maastricht agreement that concluded the IGC's, 1991
    - Signed in 1992

- The three pillar structure
    - Unwillingness of some member states to conduct internal security and foreign policy with supranational decision-making
    - Supranational v. intergovernmental principles

- Common Foreign and Security Policy. Scope: foreign policy, security and, eventually, defense

- Cooperation on Justice and Home Affairs. Scope: immigration, asylum and criminal matters

- Treaty on the European Community
    - Economic and monetary union. Single currency and the European Central Bank
    - European Citizenship
    - The principle of subsidiarity
    - The increase of European Parliament's powers: co-decision procedure, applicable to 15 legal bases; right to approve Commission as a whole.
    - New competences conferred to the European Community

- Ratification procedure. The Danish referendum, 1992
    - It came into force by the end of 1993

The Amsterdam Treaty

- The 1996 IGC
    - The institutional reform to prepare the Eastern enlargement
    - The legitimacy crisis in the aftermath of the Maastricht Treaty
- The Amsterdam agreement, 1997
    - Simplification and renumbering of the EU and EC Treaties
    - The EU political principles (freedom, democracy, rule of law and human rights)
    - A wider scope for the principle of non-discrimination
    - Closer cooperation, enabling Member States to take advantage of the concept of variable speed integration
    - The EU as an area of freedom, security and justice
        - The incorporation of the Schengen Agreements
    - Common Foreign and Security Policy
        - The High Representative for the CFSP
        - The Peterbserg tasks, allowing the EU to make humanitarian and peace-making missions
    - EC Treaty:
        - The competences on employment policy and social fundamental rights
        - The strength of European Parliament powers: co-decision procedure to be applied to 32 legal bases; right to approve the Commission President
    - The failure of institutional reform. The Protocol on institutional refor

The Treaty of Nice

- During the IGC for The Treaty of Nice, 2001, Member States restricted the agenda in order to find out the conditions for institutional reform in view of EU enlargement, namely:
    - the composition of the Commission (one national for Member State)
    - The number of votes allocated to the Member States within the Council, regarding Qualified Majority vote, had been changed with the five biggest countries of the EU states passing from 55% to 60% of the total number of votes
    - The number of seats in the European Parliament
- The setting of specialized chambers within the Court of Justice
- Final Declaration on the Future of Europe, calling for a wider debate about the EU.
    - The 2004 IGC should be preceded by a wide European debate on the future of Europe
    - This debate should involve the European Parliament, national parliaments, the European Commission and national governments
    - The debate should discuss the following issues:
        - *division of powers* between the EU and the MS;
        - legal status of the EU *Charter of Fundamental Rights*;
        - *simplification* of the EU Treaties;
        - the role of *national parliaments*

The European Constitution

- The European Council, December 2001, decided to call an European Convention to debate the future of Europe

- European Convention initiated its work on February 2002, chaired by former French President, Giscard d'Estaing. Composed by 105 members, representing the EU Member States and the 10 new countries

- Convention had a mandate that ended on June 2003.

- June 2002, *the Convention agreed* that it should prepare a draft text of an European Constitution

- On June 2003, the Convention submitted to the European Council a *draft Treaty establishing a Constitution for Europe*

- The draft European Constitution was a major step in European integration by:

    - simplifying the texts of the founding Treaties, and abolishing the EC
    - ending with the structure of the Union based in 3 different pillars
    - incorporating the Charter of Fundamental Rights into its text
    - clarifying the division of powers between the Union and the Member States
    - enlarging the scope of decisions taken by qualified majority voting
    - simplifying the reach of qualified majority
    - increasing the legislative status of the European Parliament (to 90 legal bases)
    - allowing the national parliaments to control EU legislation on the basis of subsidiarity
    - reforming the legal acts adopted by the EU
    - extending the communitarian method to the whole space of freedom, security and justice,

  - creating the position of Minister of Foreign Affairs and ending with the double EU external representation
  - the EU was given legal personality, which was instrumental for external representation

- Draft Constitution prepared by the European Convention was not binding for the IGC: Member States are the *Masters of the Treaties*
  - However, the European Council considered the draft Constitution submitted by the Convention as a *good working basis* for the IGC.

- Inter-Governmental Conference (IGC), initiated its works in October 2003
  - IGC leaded by the Heads of Government of the Member States. Leaders of the accession States participate on equal basis with the actual Member States.
  - IGC was concluded in June 2004.

- **The Constitutional Treaty**, which was very similar to the draft European Constitution, was signed in October 2004

- As for the legal nature of both the draft European Constitution and the Constitutional Treaty were the same: a treaty between Member States. In any case it was not a Constitution based on the idea of popular sovereignty. Indeed:
  - Right of secession: Member States may decide to withdraw from the Union, at any time
  - Constitutional amendments need to be approved by all Member States

- Then, it went through the Ratification procedure.
  - National *referenda* in France and the Netherlands, June 2005.
  - European Council called for a period of reflection on the Constitutional Treaty

The Treaty of Lisbon

- With the European Constitution the EU was supposed to close the constitutional cycle initiated with the Maastricht Treaty, in 1992.

- Constitutional crisis originated by the 2005 *referenda*, was followed by a reflection period. At the end prevailed the idea of rescuing the so-called *constitutional acquis* through a reform treaty.

- Until the Berlin Declaration on the 50th anniversary of the Treaty of Rome, March 2007, some Member States still believed on the rescuing of the whole European Constitution. However, the content of the Declaration erased such optimism.

- The Reform Treaty was shaped during the German Presidency of the Council, 2007: Mrs. Merkel purpose to find a way out for the constitutional crisis; along with the changing of political leadership in France and UK.

- Letter sent by the German Presidency to the Member States, April 2007, launched the basis for a Reform Treaty: Member States were asked whether they would accept:

- A *reform to the Treaties* on the EU and EC, but with the suppression of the Union's pillar structure.

- A change on the terminology used to refer the *Constitutional* treaty, the *legal acts* of the Union, the FA *Minister*, but without any changes regarding its content.

- The removal of the provisions regarding EU *symbols and primacy* of EU law.

- The preservation of the so-called *institutional package*, established by the EU Constitution.

- The incorporation of the *Charter* into the Treaty text would be replaced by a Treaty provision that would give it with full legal force.

- *Member States' answers* allowed for the idea of a Reform Treaty, which main advantage would be to *introduce only partial amendments* to the existing Treaties, with the purpose to *avoid a new series of national referenda*.

- European Council of *June 2007 called for an IGC*, to be concluded until the end of the year, and approved a *detailed mandate* to it. It was for the Portuguese Presidency to lead the IGC and conclude the final agreement.

- **Treaty of Lisbon** aimed to rescue the Constitutional *acquis*, namely, the institutional reform, the role of national parliaments, the democratization of the EU political process, the division of competences between the EU and the Member States, the end of the pillar system and the communitarization of the 3rd pillar.

Formal changes:

- Existing EU and EC Treaties were not replaced, but only reformed. Indeed, changes were introduced into the exisiting Treaties, unlike the Constitutional Treaty.

- The European *Community was absorbed* by the Union, with the end of the pillar system.

- However, *Common Foreign and Security Policy* remained an *intergovernmental* policy.

- Removal of all elements that could have a statehood sound: the word *constitution*; the name *Minister* of foreign affairs; the reference to *European laws* and *Framework laws*; the clause on *primacy* of EU law; provision on the *symbols* of the Union.

- Structure of the amended Treaties (compared with the Constitutional Treaty):

- **The EU Treaty** structure became closer to the idea of a **basic Treaty**: *General Provisions; Democratic Principles; Institutions; Enhanced (Closer) Cooperation; Common Foreign and*

Security Policy; Final Provisions. There is just one Title lacking, the one of the *division of competences*, which was relegated to the Treaty on the Functioning of the Union.

- **The Treaty on the Functioning of the Union** (former Treaty on the European Community, which was renamed by the Lisbon Treaty, due to abolishment of the European Community) includes a Title on the Area of Freedom, Security and Justice and the Title on the External Action of the Union. It is quite similar to the *structure of Part III of the EU Constitution.*

- The EU **Charter of Fundamental Rights** (Part II of the Constitution) was formally discarded from the text of the Treaties, despite being conferred the same legal force. Indeed, art 6(1) TEU states that the Charter is fully binding, with the same legal value of the Treaties.

- The most important aspects of the Part IV of the EU Constitution, namely the **revision of the Treaties and the right of secession**, reemerged on the final provisions of the EU Treaty.

Substantive Changes:

- The Lisbon Treaty rescued almost all the content of the EU Constitution.

- it includes the so-called institutional package: the *European Council* became a separated institution, with a *full time President*; the increase of *European Parliament legislative and budget powers;* the changes on the *Council voting system* and the exercise of its *Presidencies*; the role of a foreign affairs minister, named *High Representative for foreign affairs*; the *composition of the Commission.*

- The role of national parliaments on the Union political process, namely on the control of the principle of subsidiarity.

- Institutional changes were supposed to strengthen the political dimension of the Union, in particular the *democratization of the political process*. The *Parliament* has more legislative and budgetary *powers* and *elects the President of the Commission*, according to the results of the

European elections. Theoretically, it would allow for a competitive choice by the citizens that could choose between different candidates, with some similarities to national elections.

- There should be also a new political dimension resulting from the *personification of the institutions*: The European Council President, fully devoted to the Union, and not conditioned by its national facet.

- The European Union received legal personality.

- The recognition of the legal force to the EU Charter of Fundamental Rights, and the accession to the ECHR.

- the rules on the division of competences included in the EU Constitution were fully saved, with a general provision on the EU Treaty and a new Title on the categories and areas of EU competence in the Treaty on the Functioning of the Union.

- Majority voting rule applies to some 50 new areas of EU action, in order to improve the efficiency of the decision-making process.

- Lisbon Treaty kept the distinction between legislative acts and non-legislative acts, foreseen by the Constitution.

- Provision on the right of secession, recognizing Member States' right to withdraw from the Union, article 50º TEU.

- The so-called *Brexit case* as the first time this provision to be applied, following the UK referendum in June 2016.

- With the coming into force of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, reached in October 2019, the UK left the EU 31-01-2020.

- Since January 2021, the Trade and Cooperation Agreement governs the new relationship between the EU and the UK.

- It included the Constitution provisions on the revision procedures, with a distinction being made between *ordinary revision procedure* (that needs a Convention, an IGC and ratification) and the *simplified revision procedures* (without IGC and Convention and soft form of national approval).

- Simplified revision procedures introduced some suppleness on Treaty rigidity:

  - The European Council can amend provisions from articles 26º to 197º of the TFEU (half of the Treaty provisions), by unanimity, with Member State approval.

  - The European Council can determine that the Council will decide by majority voting. It needs the approval of the European Parliament and it can be no opposition from any national parliament, in six months. This simplified revision procedure also applies to the replacement of special legislative procedures by the ordinary legislative procedure.

- Therefore, the Lisbon Treaty was the device used to save the Constitutional Treaty, through deconstruction of its content.

- The Lisbon Treaty rescued almost all the Constitution: Part I (with 60 articles) was divided in 30 articles included in the EU Treaty and 27 articles on the TFEU; Part II was fully saved, through a different technique; Part III, that reordered the EC Treaty, emerged in the structure of the TFEU; the innovative provisions of Part IV were also rescued, namely those on Treaty revision.

- Regarding the 448 Constitution articles, the Lisbon Treaty did not rescue 5 provisions, only.

- Hence, the Treaty of Lisbon is the Constitutional Treaty with *new clothes*.

II – THE EUROPEAN UNION POLITICAL SYSTEM

European Union Institutions

- The institutional framework, article 13 TEU
  - Seven institutions
- Representative democracy, article 10 TEU

The European Council

- The **origins** of the European Council:
  - The **European Summits**, which became regular in 1974 (due to combined effect of 1965 Luxembourg Compromise; 1973 EC enlargement; and 1973 EPC)
  - Treaty of Maastricht: Recognition of formal status to the European Council
  - Treaty of Lisbon: The European Council as a separate institution, article 13 TEU
- Composition of the European Council, article 15 (2) TEU
- **Meetings** of the European Council, article 15 (3) TEU
  - *Formal meetings*, four times a year. Followed by Conclusions
  - *Informal meetings*, without Conclusions
  - *Extraordinary meetings*, in exceptional situations
- Powers of the European Council, article 15 (1) TEU
- President of the European Council, article 15 (5) TEU

- **Decisions** of the European Council:
    - general rule, article 15 (4) TEU: **consensus**. Decisions are to be taken without formal vote (provided no objections are rose by any MS).
        - Whenever Treaties require decisions by **unanimity** (normally in case of decisions that produce legal effects, such as art. 7 (2) TUE) proposals must be voted, which implies no negative vote by any MS).
        - Difference between consensus and unanimity is to be found on the formality of voting procedure
    - article 235 TFEU: Decisions by qualified majority voting and by simple majority
- The Treaty-making power, article 48 TEU

The Council

- Made-up of Ministers of the Member States

- It meets in ten different configurations, depending on the agenda of the discussions
    - EU Treaty only mentions the General Affairs Council and the Foreign Affairs Council, article 16 (6) TEU

    - There are also the following configurations:

        - *Economic and Financial Affairs (ECOFIN); Justice and Home Affairs (JHA); Employment, Social Policy; Health and Consumer Affairs; Competitiveness; Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; Education, Youth and Culture*
        - Informal configuration for Eurozone countries: The *Eurogroup*
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- Council **powers**, article 16 (1) TEU:
    - Legislative power
    - Budgetary power
    - Coordination of economic policy of the member states, art. 5 TFEU
    - Implements common foreign and security policy, art. 26 (2) TEU
    - Concludes international treaties with third states and international organizations, on behalf of the Union, art. 218 TFEU

- Presidency of the Council, article 16 (9) TEU
    - Assured by each member state, in turn
    - Permanent President for Foreign Affairs configuration (High Representative)
    - Decision by the European Council on the Presidency's configurations, article 236 TFEU

- Qualified majority voting, article 16 (3) TEU
    - Since November 2014, double majority of 55% of member states (15 member states), representing at least 65% of the Union population. Blocking minority must include at least 4 member states
    - Until 2014, there was the traditional weighted voting system: with 28 member states, decisions were reached by 262 votes (on a total of 352 votes)

- Treaties also define cases where unanimity and simple majority voting (article 238 (1) and 240 (3) TFEU) are applied.

- The action of the Council relies on two bodies: COREPER and the General Secretariat

- **COREPER –** The work of the Council is prepared by a Permanent Representatives Committee, article 16 (7) TEU
    - COREPER works *as a kind* of Council of Ministers in permanent session
        - As a continuous negotiating body, it works as a decision-making factory of the Council, providing indicative votes for most decisions
        - It plays a pivotal role in EU decision-making, though working behind the scenes
    - COREPER meets in two compositions
        - COREPER II (27 MS ambassadors or permanent representatives) deals with the more important subjects, such as external relations (trade, development policy, international agreements), budget or institutional issues
        - COREPER I (27 deputy ambassadors) deals with policy areas (single market, agriculture, environment, etc.), namely Council action under ordinary legislative procedure (comprising conciliation procedure)
    - COREPER is vertically placed d between ministers and national experts
        - At a lower level, COREPER frames the action of some 150 working groups (composed by national experts), which also operate under the structure of the Council

- **General Secretariat –** The Council's administrative staff, art. 240 (2) TFEU.
    - It is organized across several departments (DGs), employing some 4000 European civil servants.
    - The General Secretariat assure both the logistical part of Council meetings (preparation, documentation, translation, interpretation, etc.) and its technical dimension (drafting papers and minutes, making reports, providing legal and procedural advise, preparing press releases, etc.)

The Commission

- Supranational nature of the Commission: principles of solidarity and the idea of integration

- It represents the general interest of the Union, article 17 TEU

- Independence of the Commission, article 17 (3) TEU

- Composition, one national from each Member State, article 17 (4) TEU; despite provision of paragraph 5 for a smaller Commission…

- **Appointment procedure** of the Commission, article 17 (7) TEU
    - Election of the President by the EP
    - List of Commissioners, voted by the EP, after parliamentary committees hearings
    - Nomination by the European Council

- Five years mandate, article 17 (3) TEU

- **President** of the Commission leadership, article 17 (6) TEU

- **College of Commissioners**: Collective responsibility; Commissioners' portfolios

- Commission duality: a Political face, with an Administrative body.

- **Political dimension** of the Commission: the President, the College, and Commissioners' cabinets

- Commissioners' cabinets are supposed to act between the College and the services, bridging the political and administrative spheres of the Commission.
    - Composed by some officials, and leaded by a head of cabinet and a deputy head
    - Cabinet members are said to tend to channel member states' views…

- **Administrative body**: Bureaucracy/staff of the Commission (around 24000 permanent officials + some 8000 agents)
    - organized in some 40 Departments [the so-called Directorates-Generals (DG's) and Services];

  - organizational structure strongly inspired by French administration
  - DG's support the work of Commissioners portfolios

- Most functions of the Commission apply both to the College, as well as to the services.
  - A *grey area* that hidden a clear separation of lines between its political tasks and the administrative role
  - Most Commission decisions are adopted by the College of Commissioners without discussion (being agreed at lower levels)

- Role of the Secretariat General in the link between the College and the services, as well as in the coordination of the different Commission administrative units.
  - Headed by a Secretary General, who is the Commission most senior official, or its *first burocrat*. He also chairs the heads of cabinet weekly meetings

- Trend to externalize Commission administrative and regulatory tasks to EU agencies (Medicines; Food Safety; Environment; Safety at work; Vocational training, Banking, etc).
  - Some 30 EU agencies, endowed with legal personality and some financial autonomy, in a wide variety of policy areas, located across all member states

- **Powers** of the Commission, article 17 (1) TEU:
  - To propose draft legislation: the monopoly of initiative.
    - [by setting the EU agenda, it is considered to be the *engine* of integration]
  - *Guardian* of the Treaties, i.e., to enforce EU Treaties and EU legislation, Article 258 TFEU
  - To represent the EU in trade negotiations, and external representation in general (with the exception of common foreign and security policy)
  - To implement the EU budget and to manage EU policies
  - To enforce competition policy [seen as the *most supranational* policy]
  - To supervise national fiscal policy, as a result of Six-Pack & Two-Pack. The case of *Troika* missions
  - To make rules and regulations, for instance in competition policy
  - Role of political broker between Council and EP negotiations, within the framework of the ordinary legislative procedure, art. 294 TFEU

- Commission is politically accountable to the European Parliament, art 17 (8) TUE

European Parliament

- Initially named as the *Common Assembly* by the ECSC Treaty, it was established as an institution of political control

- EP represents the citizens of the Union, article 10 (2) TEU

- EP is the only directed elected EU institution (direct elections to EP since 1979).

- EP seats are fixed according to a criteria of digressive proportionality, article 14 (2) TEU
    - With a maximum of 96 MEPs per member state
    - and a minimum of 6 MEPs from each member state

- 2019 European elections citizens voted for 751 representatives (MEPs), from 28 member states, for a 5 years term, article 14 (3) TEU
    - After Brexit, there are now **705 MEPs** from 27 countries, with 46 of the 73 UK seats freed up available for likely future EU enlargements, and remaining 27 UK seats shared among 14 countries, supposedly underrepresented. See: http://www.europarl.europa.eu/news/en/press-room/20180607IPR05241/number-of-meps-to-be-reduced-after-eu-elections-in-2019
    - Before the first European elections (1979) there were 198 MEPs, from nine member states
    - MEPs are elected by proportional representation

- EP elections as *second order elections,* when compared to national parliament elections

- MEPs elect their own President, for a 30 months term.
    - EP President chairs plenary sessions, represents the institution and oversees its internal work.

- MEPs are organized by **political parties/groups**, not by nationality:
    - European parties, article 10 (4) TEU
    - Several political groups in the EP, since the first direct elections.
        - After 2019 elections there are seven political groups.
    - Main political groups: EPP and S&D

        - Socialists (S&D) were the largest group until 1994 elections;
        - EPP ranks first since 1999 elections
    - MEPs are elected through national parties, which control candidate selection
        - MEPs with stronger loyalty to national parties than to EP political groups, in particular when seeking reelection.
        - MEPs are voted from more than 150 national parties across EU
    - National parties carry out EP electoral campaigns, mostly on domestic issues
        - Political parties tend to be more pro-integrationist than their voters
        - Eurosceptical parties benefit more from EP elections
    - National party delegations are the foundations of EP party groups
        - They often have their own staff, a chairman and meet prior to party groups meetings
    - European parties are more federations of national parties, or party networks
    - EP party groups remain unknown to most European citizens

- EP decides by simple majority, article 231 TFEU.
    - Yet, some issues need an absolute majority of MEPs
    - Left / Right contest is the main cleavage within EP political debate and vote, followed by the pro-integration / Eurosceptical divide.

- Most EP legislative power is exercised within parliamentary **committees**:
    - There are some twenty specialized committees, which composition reflects that of the whole EP (both by nationality and ideological origins)
    - Committees allow EP to be more efficient on the exercise of law-making power
    - Parliamentary committees meetings are open to the public, unlike Council meetings
        - Hence, accessible by those intended to influence the course of EU policies (*lobby* groups)
    - All legislative proposals are directly referred to one of the committees (one committee only is responsible for a proposal)
    - Committees assign reports to EP political groups
        - National parties then are key players to allocate *rapporteurs*
    - *Rapporteur* system:
        - The committee appoints *a Rapporteur*, who is in charge of the proposal.
        - *Rapporteur* must prepare a report on the legislative proposal to be approved by the committee, and then voted on the plenary, fixing EP position
        - *Rapporteurs*' draft report form the basis of most EP resolutions

- Other EP working bodies:
  - *Conference of Presidents*, composed by the President and the leaders of all political groups: fixes the agenda of plenary sessions, and settles conflicts of competence between EP committees
  - *Bureau*, composed by the President and the fourteen EP vice-presidents: deals with internal functioning

- EP functioning, and headquarters:
  - 12 plenary sittings, in Strasbourg
  - Parliamentary committees and political groups, are based in Brussels (as well as additional plenary sittings)
  - EP Secretariat located in Luxembourg

- **EP powers**:
  - Law-making powers, under *ordinary legislative procedure* (the so-called co-decision procedure, created by the Maastricht Treaty).

  - EP decides on the EU budget, together with the Council, article 14 (1) TEU.
    - Still, it has only spending powers, art. 314 TFEU
    - Indeed, the EU has no taxing competences.

  - EP gives its assent to the signing of international agreements by the Union on trade agreements, accession and withdrawal of MS, penalties to MS: the consent procedure

  - EP exercises political control, over the Commission:
    - Elects the President of the Commission, on the basis of the EP elections results, articles 14 (1), and 17(6) TEU
    - It approves the College of Commissioners, article 17 (6) TEU
    - It scrutinizes the activities of the Commission, art 230 TFEU
    - Commissioners to appear before its standing committees
    - It can establish committees of inquiry, article 226 TFEU
    - It can pass a vote of censure to the Commission, which implies its dismissal, article 17 (8) TUE, and article 234 TFEU

  - EP can invite the Commission to present legislative proposals, art. 225 TFEU

  - EP elects the European Ombudsman, article 228 TFEU

EU Decision-making power

- Commission has the exclusive right of initiative, concerning legislative acts, article 17 (2) TEU

- Co-decision, with the Lisbon Treaty became the ordinary legislative procedure.
    - The Lisbon Treaty placed the EP on equal foot with the Council concerning the vast majority of EU laws, article 14 (1) TEU
    - Ordinary legislative procedure with a total of 90 legal basis with the Lisbon Treaty, compared with 15 legal bases for co-decision in the Treaty of Maastricht and 32 legal basis with the Amsterdam Treaty

- The main phases of the ordinary legislative procedure, article 294 TFEU
    - First reading, by EP and Council
    - Second reading, by EP and Council
    - Conciliation committee, common draft to the EP and Council
    - Third reading, by EP and Council

- Interinstitutional negotiations during the ordinary legislative procedure:
    - The use of the so-called *Trialogue* meetings between MEPs, Council representatives (see COREPER I) and Commission officials
    - '*Trialogues are informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission. Their purpose is to reach a provisional agreement acceptable to both the Council and the Parliament. They may be organised at any stage of the legislative procedure and can lead to what are known as 'first reading', 'second reading' agreements, or to a 'joint text' during conciliation.*' (See: https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html)

- Trend to approve more legislative acts at first reading, unlike the early stages of co-decision, which even had some twenty per cent procedures on conciliation committee
-

III – THE EUROPEAN UNION LEGAL SYSTEM

Sources of European law

- **Primary law** of the Union: founding Treaties, amending Treaties, accession Treaties, Charter of Fundamental Rights

- **Secondary law** of the EU: legal acts adopted by the EU, article 288 TFEU

- **Supplementary law:** the unwritten general principles of EU law declared by the ECJ and the case law of the ECJ; as well as International law, including the international agreements signed by the EU.

Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

***A regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

***A directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

***A decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*

***Recommendations and opinions** shall have no binding force.*

Regulations: it doesn't have specific addressees; it lays down general rules

- Binding in its entirety, both at the Union level and at the national level
- Directly applicable in all Member States
- Regulations are a method to achieve uniform EU law

Directives: are addressed to the Member States

- Not binding in its entirety. Member States are obliged only to the result to be achieved; they leave the national authorities the choice of form and methods
- They are not directly applicable in the Member States: they need to be transposed to national law
- Directives are a method to harmonize EU law

Decisions specify to whom they are addressed.

- They are only binding on them
- They are binding in its entirety
- Normally used to deal with particular cases.
- Closer to administrative or executive acts

Treaty of Lisbon introduced the concept of **legislative acts**: article 289 (3) TFEU: Legal acts adopted by legislative procedure shall constitute legislative acts.

- Ordinary legislative procedure (article 294) and
- Special legislative procedures
- legal acts that do not fall within the definition of a legislative act constitute a **non-legislative act**.
  - They may binding, and have the form of a regulation, directive or a decision, but not entitled to the designation of legislative act

Non-legislative acts:

- **Delegation of Power:** Treaty of Lisbon introduced the **delegated acts**, article 290 TFEU: A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application *to supplement or amend certain non-essential elements* of the legislative act. EP on a equal footing with the Council on delegated acts.

- **Implementing Power:** Treaty of Lisbon introduced also the concept of **implementing acts,** article 291 (2) TFEU: Where *uniform conditions for implementing* legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
    - EP is out of implementing acts procedure, due to the fact that implementing power of EU legal acts belongs to member states, article 291 (1) TFEU
    - The so-called *Comitology committees*, chaired by the Commission and bringing together representatives of the member states

The Court of Justice of the European Union

As for its structure, following the Treaty of Lisbon:

- Court of Justice, articles 251-253 TFEU
- General Court (former Court of First Instance, 1989), article 256 TFEU
- Specialised courts, article 257 TFEU

Article 19 TEU

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

The Court of Justice

- Composed by one Judge from each Member State
- The Court of Justice sits normally in Chambers, article 251 TFEU.
    - There are Chambers of 3 and 5 judges.
    - There is a Grand Chamber of 15 judges.
    - Exceptionally, and according to its Statute, it can sit in a full Court, the plenary formation.
- The Court of Justice has also 11 Advocates General, article 252 TFEU.
    - Advocates General make reasoned conclusions on the cases presented to the Court.
    - The AG Conclusions could be seen as a sort of first ruling, although with no binding force for the Court decision.

Court of Justice jurisdiction:

- Treaties give the Court of Justice limited jurisdiction
- The first distinction on its jurisdiction is between *judgments* and *opinions* (the latter being much rarer, and related to the conclusion of international agreements by the Union)

Article 218 (11) TFEU:

> *A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.*

- As for judgments, basic distinction is between actions that begun in the Court of Justice – *direct actions* – and actions that begun (and end) in a national court, indirect actions or *preliminary rulings*.
- Decisions of the Court of Justice are not subject to appeal

a) Direct actions

Enforcement actions, article 258 TFEU

- Actions against Member States, for violation of its obligations under EU law
- Formally known as **Actions for failure to fulfil obligations**
- Procedure is initiated by the Commission
- The proceedings in enforcement actions consists of two stages: and administrative stage, and a judicial stage
- The administrative stage, article 258 (1):
    - The Commission first sends a *letter of formal notice*, for the Member State to submit its observations
    - When becomes clear that the MS do not want to accept its position, the Commission issue the *reasoned opinion*, which formally states the alleged violation

Article 258 TFEU

If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

- The reasoned opinion marks the end of the administrative stage.
- Then it comes the judicial stage, where the action is put before the Court of Justice, article 258 (2)
- The Commission has a discretionary power to open the proceedings and has no time limit for the initiation of the proceedings, or for the delivery of the reasoned opinion.
- The scope of the proceedings is limited to the infringements specified in the reasoned opinion, i.e., the Commission cannot raise new obligations before the Court
- If the Court of Justice finds the allegation proved, it will give judgment against the Member State, declaring the MS has failed to fulfill an obligation under the Treaty.
- Court decision is declaratory in nature. The Court of Justice has no power to order the MS to do, or not to do, something; nor can it declare national legislation to be invalid. Although, the decision is binding for the Member State
- Indeed, the Member State is obliged to comply with the judgment, article 260, being required to take the necessary measures to comply with the judgment of the Court.

- Note that a Member State can also bring an enforcement action against another Member State, article 259 TFEU, although is very rare. Indeed, , *Austria v Germany* (18 June 2019) was just the 7th case in the whole history of the European Court of Justice.

Article 260 TFEU

1. *If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.*
2. *If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*
If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
This procedure shall be without prejudice to Article 259.

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

- When the Member State fail to obey the judgment, **sanctions** can be applied, article 260
- It follows a similar procedure of the enforcement action, with the Commission bringing the case before the Court, for the Member State to be fined.
- The Commission should specify the amount of the lump-sum fine or penalty payment that it considers appropriate.
- Periodic penalty payment is a payment of a specified amount for day that elapses until compliance take place. It applies in the future (after the second judgment). The lump-sum fine penalizes the infringement between the date of the first judgment and that of the second.
- With the Treaty of Lisbon, special case in case of failure of transposition of a directive. Article 260 (3), with a possibility of the sanction being fixed in the original judgment. That is to say that the Court can set the level of the fine in advance, and it will be automatically applied to the Member State in case it does not comply with the judgment (transposition)

Annulment actions, article 263 TFEU

- Actions aimed to review the legality of the institutions of the Union legal acts
- Acts that can be subject to review: legally binding acts (*other than recommendations and opinions*).

- Institutions that can see their acts subjected to legal review by the Court of Justice:
    - Council, European Parliament, Commission, European Council; European Central Bank

- as well as the acts of other bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties

- Who can bring the proceeding to the Court of Justice? (*locus standi*)
  - Privileged applicants: Member States, European Parliament, Council and Commission.
    - They can always challenge any Union reviewable act. They benefit from a privileged status

  - Non-privileged applicants, article 263 (4), any natural or legal persons
    - They can bring proceedings against an *act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*
    - With the Treaty of Lisbon any act can be challenged by a non-privileged applicant, provided that he is individually and directly concerned by it. The act doesn't need any more to be a decision.

  - Special situation of semi-privileged status: Court of Auditors, European Central Bank and the Committee of Regions
    - may bring proceedings to protect their prerogatives.

- Grounds for review, article 263 (2): *lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*.

- If the action is successful the Court will declare the act void, article 264.

Article 263 TFEU

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

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

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

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

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

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

b) Indirect actions

Preliminary rulings, article 267 TFEU

- The only judicial action that does not begun, and end, at the Court of Justice
- National courts are the common enforcers of European law. There is a system of decentralized application of EU law

- Need for a uniform interpretation of EU law: there is a system of centralized interpretation of EU law.

- The action begun in a national court. Whenever that court has a doubt on an aspect of EU law, that if considers relevant for its final decision, it refers the case to the European Court of Justice.

- The national court asks preliminary questions to the Court of Justice

- The European Court of Justice does not decide the case as such. It just gives a ruling on the preliminary questions formulated by the national court.

- After the European Court's ruling the case is then sent back to the national court, which will take a decision.

- The issues referred to the Court of Justice may be about:
    - Interpretation of the EU Treaties
    - Validity and interpretation of any provision of EU law. The validity of the Treaties cannot be raised.

- Any national court may make a preliminary request to the Court of Justice

- A national court from which decision there is no appeal must make a reference to the Court of Justice, whenever there is a relevant question of EU law to its decision.

- The national court is bound by the Court of Justice's ruling.

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

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

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

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

FUNDAMENTAL PRINCIPLES OF EU LAW

I- Primacy of European Law

- Relationship between European law and national law
- Conflict of norms' resolution
- In the *Costa v. ENEL (1964)* case, the Court of Justice stated the principle of primacy, or supremacy, of European law over domestic law of the Member States:

  "It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
  The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise."

- Any provision of European law always prevails over any provision of national law, for the Court of Justice.
  - Supremacy of European law applies irrespective of the nature of the Union provision (primary law, secondary law) or that of the national provision (constitution, ordinary law, lower rules);
  - And it also applies irrespective of whether the Union provision came before, or after, the national provision.
- Legal effects of supremacy: national provision is *inapplicable* (not void)
- European law prevails over national law because of its own legal nature
- There was no reference in the founding Treaties regarding the principle of supremacy

- Constitutional Treaty, article I-6º, stated the primacy of European law
- This provision was not rescued by the Treaty of Lisbon
- However, Declaration nº17, annexed to the Final Act of the IGC:

Declaration 17

Declaration concerning primacy

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

'Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (1) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

II- Direct effect of European Union law

- A provision of European law produces direct effect when it can be invoked by individuals before national courts

- If a provision of European law is given direct effect, that provision is applied by a national court as part of the law of the land.

- The principle of direct effect was first introduced by the *Van Gend en Loos* case, 1963:

"The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

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

- For a provision of European law to be directly effective:
  - It must be *clear and unambiguous*
  - It must be *unconditional*

- With the statement of the direct effect principle, the Court of Justice '*democratized*' European law, allowing individuals to invoke these provisions before national courts

- Provisions of the Treaties may produce direct effect, provided they are clear, precise and unconditional

- Vertical and horizontal direct effect of EU law

- Direct effect of regulations and decisions

- Direct effect of directives:
  - Special situation when the deadline for transposition expired and the Member State did not incorporated it in its national law
  - Court of Justice wanted to prevent the Member States to take advantage of its wrongdoing
  - By admitting that directives could be directly effective in those special cases, the Court of Justice wanted to sanction Member States for the lack of implementation and to strength the effectiveness of European law
  - Hence, directives can just produce the so-called vertical direct effect

EUROPEAN UNION PROTECTION OF HUMAN RIGHTS

The **European Community** was created with an economic purpose. By historical reasons, Treaties were just concerned with the establishment of a European common market. They did not contain any reference on human rights protection within the EC.

EC law had a legal gap concerning the protection of human rights. It was for the European Court of Justice (ECJ) to face this question.

In the *Stauder* case, the ECJ stated that human rights were part of the general principles of law that were ensured by the Court.

In the *Internationale Handelgesellschaft* case, the Court said that the protection of human rights in EC law was inspired in the common constitutional traditions of the Member States and that it would not allow any application of EC measures that breached fundamental rights guaranteed by national constitutions.

In the *Nold* case, the ECJ mentioned the international acts concerning human rights, where the MS took part, as another source of inspiration for its protection in EC law

In the beginning, the scope of ECJ human rights protection was limited to the acts of Community institutions.

Later, the ECJ extended its jurisdiction to national measures that implemented EC law (*Wachauf* case)

Hence, in EC legal order the ECJ created a **jurisdictional method for protection** of human rights.

Notwithstanding, the nature of jurisdictional protection of human rights – based on non-written general principles - did not provide a sustainable guarantee for human rights in EC law, considering the wide scope of its competences. Specially, it created uncertainty for private persons to identify the content of human rights ensured within the EC legal order.

Need for a sounder approach on human rights protection within the European Community.

There were two main solutions traditionally referred to overcome the situation:

- the EC accession to the 1950 European Convention on Human Rights

- the adoption of a European Union catalogue of human rights

Those solutions were not conceived as alternative remedies for EC human rights discussion, but rather complementary roads.

The approach on rights by the ECJ basically consisted in a negative protection. However, fundamental rights also require a positive action by public authorities.

- Indeed, the protection of rights by the ECJ was initially focused on first generation rights.
- This did not prevent the Court to state that social rights were also included in the scope of protection of fundamental rights.
- Principle of indivisibility of fundamental rights, as a general trend in modern legal orders, tend also to be accepted in EC law.

The Constitutional Treaty on Article 5 (2) stated that "*The Union may accede to the ECHR. The accession to the ECHR do not change the competences of the Union*".

- That provision was retaken by the Lisbon Treaty, Article 6 (2) TEU.
- Following the Treaty of Lisbon, the Commission negotiated an agreement for the EU accession to the ECHR.
- However, in **Opinion 2/13**, the Court of Justice considered the Draft Agreement on EU accession to the ECHR to be contrary to article 6(2) of the TEU.

European Union Catalogue of Rights

- *Opinion 2/94* favored the adoption of a EU catalogue of fundamental rights
- In the 1990's, increased need for a strong basis on EU human rights action:
  - enlargement to Eastern countries
  - EU powers on justice and internal affairs, which could affect human rights
  - International agreements with third countries
- 50th anniversary of the Universal Declaration of Human Rights in 1998. European Commission called for alternatives on EU fundamental rights protection.
- German European Council Presidency, 1999. The idea of a catalogue was part of the coalition agreement
  - European Council of Cologne, 1999, adopted the proposal for a European Union Charter of Fundamental Rights
  -

The Convention (the body named itself *Convention)* finished its work by September 2000. The European Council agreed the draft submitted during the Biarritz summit of October.

In December 2000, during the European Council of Nice, the Council, the European Parliament and the Commission solemnly proclaimed the EU Charter of Fundamental Rights

THE EU CHARTER OF FUNDAMENTAL RIGHTS

The Charter broke with the duality of fundamental rights that marked any catalogue of rights: political and civic rights on the one hand, economic and social rights, on the other hand.

Charter brings a new systematization of rights presented in the form of major principles: *Dignity; Liberties; Equality; Solidarity; Citizenship; Justice* (heads of its 6 chapters). Last chapter deals with the so-called horizontal questions, which concern all Charter rights

Legal nature:

- the convention worked *as if* the charter would be binding (President Herzog)
- no immediate incorporation in the Treaties was the price to pay to some MS for integrating social rights in its text (UK)
- Charter of Fundamental Rights was included in Part II of the Constitutional Treaty
- *Treaty of Lisbon did not formally incorporate it into the Treaties, but granted primary law legal status to the Charter, Article 6(1) TEU*

Addressees of the Charter

- article 51(1), the EU institutions and bodies, and the MS whenever they apply Union law
- The Charter does not apply in all the cases that belong to the domestic jurisdiction of the MS

Beneficiaries of the Charter

- They were not subject of a general clause; there is a case by case solution. Depends on the terms of each article. Kind of variable geometry of Charter rights
- most of the articles are formulated with respect of the universality of rights principle
- Restrictions to EU citizens are concentrated on citizenship rights. Although there are some universal rights: Articles 41, 43, 44

Competences

- Charter rights do not allow for an extension of EU competences: Article 51 (2) and §5 of the Preamble, i.e., respect for the existing division of competences
- this was already in the Cologne mandate: to draft a Charter a *droit constant*
- Distinction to be made: if the EU must respect fundamental rights absolutely, any EU action taken in this field needs to be supported by express competence

Relationship with ECHR

- article 52 nº3: in case of conflict between the Charter and the ECHR, this provision states the later as the minimum standard of human rights guarantee
- Charter keeps the actual relationship between EU law and the ECHR system: autonomy of EU law and risk of a different interpretation of the ECHR by the ECJ

Civic and political rights

- ECHR was the basic source of inspiration
- Charter did some update in the writing of its provisions
- Charter include some new rights compared to the ECHR: article 2; article 8, article 41
- In a rule of law system, access to justice as a fundamental right
- One of the negative aspects in EU legal order is the access to the ECJ by private people: strict legal standing of articles 263 and 265 of the TFEU.
- Article 47 §1, refers access to a court. National courts are also considered as jurisdictional bodies in the application of EU law. They are covered by this provision

Citizenship rights

- Listed on a separated part (chapter V)
- They are basically political rights
- article 45 do not confer full residence right in the EU. Must be read in closed link with general clause of article 52(2)

Social rights

- One of the most difficult issues during the Convention draft work
- Its inclusion represents by itself the value added of the Charter when compared with the ECHR
- Special legal nature of social rights. They are not subjective rights. Normally, they consist on rights to receive a State allowance
- Mandate excluded social rights that merely established objectives for Union action
- Convention made a basic distinction between rights, principles and objectives. It excluded social objetives.
  - *Principles* are those social rights that need to be implemented by public powers (like environment rights or consumer rights)
  - The lack of implementation of these principles can be subject to judicial review
  - Hence, rights are judicially guaranteed; principles need to be implemented
  - norms that state very wide goals are to be considered *objectives*. The large discretion they confer to public powers do not allow any form of judicial review (ex. full employment rule)

- Distinction between rights and principles was added to the Charter by the Lisbon Treaty, article 52(5).
- Most of the Charter social rights were inspired by the European Social Charter and the Community Charter of Social Rights; other rights came from national law and even from EC Treaty provisions (non-discrimination rules)

Since 2007 there is a **European Union Agency for Human Rights** (FRA), based in Vienna, to provide advice to EU institutions and Member States on human rights listed in the Charter, to collect and analyzing information and data on the scope of application of the Charter and also to raising rights awareness.

IV – INTERNAL MARKET

- Common Market: four fundamental freedoms; common policies
- Internal Market: Single European Act; removal of internal frontiers; ideological dimension, art. 26(2) TFEU
- Negative integration; positive integration:
  - Suppression of physical, technical and tax barriers to trade
  - Approximation of laws; approximation of indirect taxation
  - Principle of mutual recognition

FREE MOVEMENT OF GOODS

- Significance of free movement of goods (FMG) in the Treaty of Rome
- Legal foundations of free movement of goods: removal of tariff and of non-tariff barriers to intra-Community trade
  - Customs union
  - Prohibition of quantitative restrictions and measures of equivalent effect
- Concept of goods by the ECJ in *Italian Art Treasures* case, 1968
  "…products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions"
- Addressees of Treaty provisions on FMG: direct effect

1) THE CUSTOMS UNION

- Concept, art 28 TFEU
- Internal dimension: Prohibition of customs duties and charges of equivalent effect
- External dimension: Common Customs Tariff

- Origin of goods: products coming from third countries and *free circulation*, article 29 TFEU
- Charges having equivalent effect: definition by the ECJ, *Commission v. Italy*, 1969

> "*Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect... even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product*."

Internal (national) taxation on goods:

- Member States retain Tax sovereignty
- Complementarity between articles 30 and 110 TFEU
- Principle of a neutral tax system (nondiscriminatory), article 110 TFEU
  - Scope of application: indirect taxation. Normally, taxes on specific consumptions (alcoholic drinks, oil products, tobacco, cars or luxury goods), the so-called excise duties (*accises*), which are supposed to have negative externalities.

- **Similar products: article 110 (1) TFEU**

In *Humblot case*, 1985, §6, the ECJ stated:

"*Article 95 of the EEC Treaty [**now article 110 TFEU**] prohibits the charging on cars exceeding a given power rating for tax purposes of a special fixed tax the amount of which is several times the highest amount of the progressive tax payable on cars of less than the said power rating for tax purposes, where the only cars subject to the special tax are imported, in particular from other Member States.*"

- **Concurrent goods: article 110 (2) TFEU**

In the first *Wine and Beer* case (*Commission v. UK*), concerning UK tax system, 1980, the ECJ stated:

"*the second paragraph, for its part, applies to the treatment for tax purposes of products which, without fulfilling the criterion of similarity, are nevertheless in competition, either partially or potentially, with certain products of the importing country. That provision, precisely in view of the difficulty of making a*

sufficiently precise comparison between the products in question, employs a more general criterion, in other words the indirect protection afforded by a domestic tax system.

…there is a competitive relationship between wine and beer; in the case of certain consumers they may therefore actually be substituted for one another and in the case of others they may, at least potentially, be so substituted. The two beverages in fact belong to the same category of alcoholic beverages which are the product of natural fermentation; both may be used for the same purposes, as thirst-quenching drinks or to accompany meals.

…it may therefore be stated that according to the only criterion whereby an objective, although imperfect, comparison can be made between the rates of tax applied to wine and beer, it seems that wine is subject in the United Kingdom to a tax burden which is relatively heavier than that imposed on beer."

- Legal consequences of indirect taxes with a discriminatory effect

2) PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES OF EQUIVALENT EFFECT

- Article 34 TFEU
- Suppression of quotas
- Concept of measures of equivalent effect: ECJ in *Dassonville* case, 1974, §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 regarded as measures having an effect equivalent to quantitative restrictions.*"

- Technical rules issued by the Member States regarding the making and trading of goods: composition; packaging; labelling; size, form; designation of origin

. Rau case, 1982, on margarine **packaging shape**

"… the application in one member state to margarine imported from another member state and lawfully produced and marketed in that state of legislation prohibiting the marketing of margarine or edible fats where each block or its external packaging does not have a particular shape , for example the shape of a cube , in circumstances in which the consumer may be protected and informed by means which hinder the free movement of goods to a lesser degree constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of article 30 of the EEC Treaty [now art. 34 TFEU] ."

- In the absence of European rules of technical harmonization, the ECJ in the *Cassis de Dijon* case, 1979 stated the principle of mutual recognition

"This French blackcurrant-based drink was at the heart of one of the European Court of Justice's (ECJ) most celebrated decisions. In 1979, Rewe-Zentral AG, one of Germany's biggest food and drinks retailers, complained to the ECJ that the German authorities were making it difficult for the company to import and sell Cassis de Dijon. The Court ruled in the firm's favour and declared that under European law, if a company is allowed to make a product freely available for sale in one European Community country, then it must be allowed to do so in all member states. As Cassis de Dijon was obviously already freely available in France, the Court argued that all other European citizens also had the right to buy and drink it. The ruling allowed the Community to develop the all-important **principle of mutual recognition** - which in turn paved the way for the launch of the single market in 1993." In http://esharp.eu/jargon/cassis-de-dijon/

"It is established by the case-law beginning with **Cassis de Dijon** that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 34 [TFEU]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

The Cassis-judgment also said that:
In the absence of harmonisation, measures which are applied without distinction to domestic products and products imported from other Member States are capable of constituting a restriction on the free movement of goods (§8)." In http://lepo.it.da.ut.ee/~yana/kaubad/case_cassis_de_dijon.html

- Following the dispute concerning shopping on Sundays raised by powerful trade operators, national rules on trade, the so-called selling arrangements, which do not directly regulate products but other issues such as *who, how, where and when* to sell goods were excluded from the prohibition of article 34 by the ECJ in *Keck and Mithouard* case, 1993.

"*By contrast, contrary to what has previously been decided, […] national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment […], so long as those provisions apply to* ***all relevant traders*** *operating within the national territory and so long as they affect in the same manner, in law and in fact, the* ***marketing*** *of domestic products and of those from other Member States. (§16) – Thus, since Keck, the application of national provisions restricting or prohibiting "****certain selling arrangements'*** *to products from other Member States falls outside the scope of the prohibition laid down by Article 34 TFEU, so long as those*

provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States. (§ 12)

Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports. (§13)". In http://lepo.it.da.ut.ee/~yana/kaubad/case_keck.html

- Hence, selling arrangements that do not directly refer to products can be regulated by the Member States without infringing article 34 TFEU.

- Derogations to the prohibition of measures of equivalent effect, article 36 TFEU
  - Close list on the grounds for derogation
  - Restrictive interpretation of those reasons
  - Effects of EU approximation of laws on these derogation
  - Need for proportionality of national measures

. Purity of **beer case**, *Commission v. Germany*, 1987:

"In view of the uncertainties at the present state of scientific research with regard to food additives and of the absence of harmonization of national law, articles 30 (now 34 TFEU) and 36 of the treaty do not prevent national legislation from restricting the consumption of additives by subjecting their use to prior authorization granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses.

However, in applying such legislation to imported products containing additives which are authorized in the member state of production but prohibited in the member state of importation, the national authorities must, in view of the principle of proportionality underlying the last sentence of article 36 of the treaty, restrict themselves to what is actually necessary to secure the protection of public health. Accordingly the use of a specific additive which is authorized in another member state must be authorized in the case of a product imported from that member state where, in view, on the one hand, of the findings of international scientific research, and in particular of the work of the community' s scientific committee for food, the codex alimentarius committee of the FAO and the world health organization, and, on the other hand, of the eating habits prevailing in the importing member state, the additive in question does not present a risk to public health and meets a real need, especially a technical one. The concept of technological need must be assessed in the light of the raw materials utilized and bearing in mind the assessment made by the authorities of the member state where the product was manufactured and the

findings of international scientific research."…

"In so far as the German rules on additives in beer entail a general ban on additives, their application to beers imported from other member states is contrary to the requirements of community law as laid down in the case-law of the court, since that prohibition is contrary to the principle of proportionality and is therefore not covered by the exception provided for in article 36 of the EEC treaty .In view of the foregoing considerations it must be held that by prohibiting the marketing of beers lawfully manufactured and marketed in another member state if they do not comply with articles 9 and 10 of the Biersteuergesetz, the Federal Republic of Germany has failed to fulfill its obligations under article 30 of the EEC treaty [34 TFEU]." (§53-54)

. In the **Pasta case**, concerning the Italian obligation to use *durum* wheat on the making of pasta, the Court of Justice (*Glocken GmbH*, 1988) declared:

"The extension to imported products of a prohibition on the sale of pasta made from common wheat or from a mixture of common wheat and durum wheat, effected by national legislation on pasta products, is incompatible with Articles 30 [now 34 TFEU] and 36 of the Treaty.

Such an obstacle cannot be justified by the requirement of protecting consumers, since that requirement can be satisfied by less restrictive means such as the compulsory indication of the precise composition of the products marketed or the introduction of a special description confined to pasta made exclusively from durum wheat. The same considerations apply to the need to ensure fair trading.

Similarly, such an obstacle cannot be justified on the grounds of the protection of public health unless there is evidence to show that pasta products made from common wheat contain chemical additives or colorant. In any event, such a general marketing prohibition is contrary to the principle of proportionality."

The Pasta war decision viewed by the *Los Angeles Times*: "Italy's Law on 'Pasta Purity' Is Overturned" (14/7/1988):

"Italy's "pasta purity" law was overturned today, opening the door to imports from other European countries and touching off warnings of an invasion of mediocre macaroni.

The European Economic Community's Court of Justice in Luxembourg ruled that Italy could not ban imports under its 1967 law requiring that all pasta be made with durum wheat.

Pasta made of durum wheat is firmer--but also more expensive--than that made from other kinds of wheat.

"In the coming weeks, Italians will have to say goodbye to their beloved firm pasta," said the left-leaning newspaper La Repubblica in an article headlined "Pasta Without Durum Will Soon Invade Italy if the EEC Has Its Way."

"That flavorful and firm macaroni, the product of our able pasta makers, will be challenged, and maybe even replaced, by the gluey and insipid pasta from Germany or Holland," the newspaper said.

Even with the current emphasis on eating less, Italians consume an average of 55 pounds of pasta a year. It is always cooked al dente, or firm.

The case, dubbed "Pasta Wars" by the Italian press, was brought to the court by the West German pasta producer Drei Glocken. The firm was blocked in 1985 from bringing pasta made with mixed wheat into Italy. According to the ruling, Italy can still require its own pasta makers to use only durum wheat."

Free Movement of Goods and the case of Medicinal Products*

- **A medicine must be authorised before it can be placed on the market**.
- **Protection for human health** is at the center of public health policy.
- Although pharmaceuticals are regulated at the national level by the Member States, there is a large body of EU legislation in the field.
- In the EU regulatory system, there are certain ways for **obtaining authorisation**: either at **European level (the centralised procedure**) ***or*** **at national level (the decentralised and the mutual-recognition procedures).**

- Under the centralised procedure, **EU authorisation** is granted by the European Commission via an application to the European Medicines Agency (EMA).
  - The centralised procedure, Regulation (EC) No 726/2004, introduces a **single scientific assessment procedure** for the medicinal products, with the aim to ensure the effective operation of the internal market in the pharmaceutical sector.
  - The centralised procedure results in a **single marketing authorisation** that is **valid in all Member States** and offers direct access to the EU market.
  - The centralised procedure is **mandatory in a number of cases**, such as:
    - medicines containing a new active substance not authorised in the EU before May 2004 and that is intended for the treatment of acquired immune deficiency syndrome (AIDS), cancer, diabetes, neurodegenerative diseases, autoimmune disorders, as well as for viral diseases;
    - medicines derived from biotechnology processes, such as genetic engineering;
    - advanced-therapy medicines, such as gene therapy and somatic cell therapy or tissue-engineered medicines
  -

* Nicole Scholz, "Medicinal products in the European Union The legal framework for medicines for human use", In-Depth Analysis, *European Parliamentary Research Service*— PE 554.174, 2015, Cfr: https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554174/EPRS_IDA%282015%29554174_EN.pdf

- **National authorisations are granted by the Member States** through the national competent authorities, except for medicinal products that fall within the scope of centralized procedure.
- **National authorisations** for more than one Member State can be obtained through the decentralised procedure and the mutual recognition procedure.
  - It applies to medicines that have not yet been authorised in any Member State and are not eligible for the centralised procedure.

- **Mutual recognition** applies to **medicinal products** that have **already been authorised** in a Member State
- **The mutual recognition procedure**[†] is similar to the decentralised procedure: both procedures are based on the principle that Member States rely on each other's scientific evaluations, and mutually recognise existing national authorisations
  - A marketing authorisation or the assessment in one Member State (the so-called *reference Member State*) ought in principle to be recognised by the competent authorities of the other Member States (the so-called *concerned Member States*), unless there are grounds for supposing that the authorisation of the medicinal product concerned may present a potential serious risk to public health.
  - If a concerned Member State is requested to recognise a marketing authorisation granted or an application assessed by the reference Member State it can raise grounds that the medicinal product presents a potential serious risk to public health. Such grounds would have to be fully justified in order to ensure that they do not act as an indirect and artificial obstruction to the free movement of goods within the European Union
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[†] European Commission, *Procedures for marketing authorisation ,CHAPTER 2 Mutual Recognition*, ENTR/F2/ SM(2007), Cfr: https://ec.europa.eu/health//sites/health/files/files/eudralex/vol-2/a/vol2a_chap2_2007-02_en.pdf

Free movement and Intellectual Property Rights

"*Intellectual property (IP) refers to creations of the mind*, *such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.*

IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.

- ***Copyright*** *is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture and films, to computer programs, databases, advertisements, maps and technical drawings.*
- *A* ***patent*** *is an exclusive right granted for an invention. Generally speaking, a patent provides the patent owner with the right to decide how - or whether - the invention can be used by others. In exchange for this right, the patent owner makes technical information about the invention publicly available in the published patent document.*
- *A* ***trademark*** *is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Trademarks date back to ancient times when artisans used to put their signature or "mark" on their products.*
- *An* ***industrial design*** *constitutes the ornamental or aesthetic aspect of an article. A design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or color.*
- ***Geographical indications*** *and appellations of origin are signs used on goods that have a specific geographical origin and possess qualities, a reputation or characteristics that are essentially attributable to that place of origin. Most commonly, a geographical indication includes the name of the place of origin of the goods.*
- ***Trade secrets*** *are IP rights on confidential information which may be sold or licensed. The unauthorized acquisition, use or disclosure of such secret information in a manner contrary to honest commercial practices by others is regarded as an unfair practice and a violation of the trade secret protection.*

***By striking the right balance between the interests of innovators and the wider public interest**, the IP system aims to foster an environment in which creativity and innovation can flourish."*[‡]

EU Directive 2019/790, on **copyright** and related rights in the **Digital Single Market**:

With the rise of Big Tech companies in digital economy, how is the right balance between the interests of authors/creators and the wider public settled by the EU Copyright Directive? See: https://www.ft.com/content/233528e2-4cce-11e9-8b7f-d49067e0f50d

- art. 17 EU Copyright Directive, Primary liability: "*platform providers shall be directly liable for copyright infringements committed by their users. Hence, they must check all content before publication and block it if they consider it illegal.*
  - *The aim was to oblige powerful platforms, in particular YouTube, to conclude license agreements with equally powerful companies from the entertainment industry, as well as collective rights management organizations (CMOs).*
  - *Hence, platform providers must "upload filters", based on algorithms that distinguish between legitimate and illegal uploads. What they do not recognize as licensed or at least obviously legal they will block or delete."* See: http://copyrightblog.kluweriplaw.com/2020/01/22/the-eu-copyright-directive-and-its-potential-impact-on-cultural-diversity-on-the-internet-part-i/?doing_wp_cron=1586777011.4955499172210693359375

- art. 11 EU Copyright Directive, Neighboring right, allows publishers to charge platforms for featuring more than short excerpts of news articles.
  - The objective of the EU is that the editors are better paid when they negotiate the use of their articles which largely benefit the platforms through the advertising revenues.
  - Ex: French Competition Authority ordered Google to negotiate " with French publishers and news services over the licensing fees it should pay for press content." See: https://www.politico.eu/article/french-publishers-win-decisive-battle-against-google/

[‡] From: *World Intellectual Property Organization, WIPO*, https://www.wipo.int/about-ip/en/

FREE MOVEMENT OF [EU] PERSONS

- Free movement in the Treaty of Rome: free movement of economic production factors
- Unlike free movement of goods, free movement of persons was confined to European Community nationals
- Who is in charge to decide on national citizenship, Case *Micheletti*
- Material scope of free movement of persons (FMP): the exercise of economic activities
- Territorial scope of free movement of persons: pure domestic situations are excluded from the benefit of FMP; need for a transnational link
- FMP *strictu sensu*; FMP *lato sensu*
- FMP in the Treaty of Rome:

Free movement of workers, article 45 TFEU

- Concept of worker
  - The exercise of a subordinated activity, under the direction of the employer

Right of establishment, article 49 TFEU

- The exercise of an independent activity on a permanent basis: self-employed persons
- It includes both establishment of natural persons/individuals and establishment of legal persons/companies and firms

Article 49 TFEU:

> *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.

- Primarily establishment, and secondary establishment: agencies; branches and subsidiaries offices

Article 54 TFEU:

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.

Freedom to provide services, article 56 TFEU

- The exercise of an independent activity on a temporary or occasional basis
- Free movement of providers
- Free movement of recipients: recipients of healthcare services; students and tourists in the case law of the ECJ
- Non-discrimination on grounds of nationality *or residence*, art. 61 TFEU
- Remit to the legal regime of the right of establishment, art. 62 TFEU.
- However, provider of services remain attached to the country of origin, unlike self-employed person established in another member state which should conform to the legal requirements of the host nation
- **Services Directive** aimed to remove legal and administrative barriers to trade on services: Directive 2006/123:
  - Services covered: retail; regulated professions; construction; real estate; business services; tourism; leisure; information; education and training; rentals; household services
  - Services not covered: financial services; communications; transports; healthcare; audiovisual; social services; private security; gambling, temporary work

- Derogation to freedom to provide services: **Posting of workers**
  - The case of posted workers: Worker sent by his employer to perform a service in another Member State on a temporary basis (up to 30

months). Posted workers differ from EU *workers'* notion – those moving to another Member State – because the former remain in the host State on a temporary basis.

- Posted workers EU legal status: Directive 96/71, [amended by Directive 2018/957], and Implementing Directive 2014/67:
  . Posted workers should benefit from the labour law of the host country, namely on equal pay.
  . However, employers pay social contributions in the country of origin, which can reduce labour costs.
- Macron's political battle to reform Directive 96/71:

Quoting *EU Observer*, 24-10-2017: "*EU employment ministers struck to reform the 1996 directive on posted workers.*

'The new deal, based on a 2016 European Commission proposal, aims to modify current rules and allow people who work temporarily in another member state to earn as much as workers in the country where they are posted. The issue has divided the EU down the middle, with Western member states backing a change and Eastern countries supporting the status quo, which gives them a competitive edge - due to their cheaper labour force. The reform was strongly backed by French president Emmanuel Macron, with support also coming from Germany, Belgium, Luxembourg, the Netherlands and Austria.

[…] Ministers agreed to set the duration of posting to 12 months, with a possible six-month extension, in specific cases and when notified to authorities. Member states have been divided between those who supported the commission's proposal of 24 months, instead of 30 under the current rules, as a good compromise, and others like France, which considered 12 months, or even less, to be more adequate.

[…] Ministers also backed a proposal for a four-year transition period to introduce the revised directive into their national legal systems. In a separate package on social security, which was quickly adopted late in the evening, they also supported a reinforcement of controls, to fight the fraud on posted workers rules.

Hungary, Lithuania, Latvia and Poland voted against the compromise, with the UK, Ireland and Croatia abstaining over concerns that the new rules would hurt their transport industries. On Twitter, Macron welcomed "an ambitious agreement," which will mean "more protection" and "less fraud."

- The revision of the Posting of Workers Directive was formally approved by Directive 2018/957. Member States had to transpose It into national law by mid 2020. The main changes introduced by the revised Directive were:
  - application to posted workers of all mandatory elements of remuneration (instead of e "minimum rates of pay");
  - application to posted workers of the rules of the receiving Member State on workers' accommodation and allowances or reimbursement of expenses;
  - for long-term postings (longer than 12 or 18 months), application of an extended set of terms and conditions of employment of the receiving Member State.

MAIN PRINCIPLES ON FREE MOVEMENT OF [EU] PERSONS

Non-discrimination on the grounds of nationality:

- Articles 45(2); 49 and 56 TFEU.
- Direct Effect of non-discrimination
- General provision of article 18 TFEU.
- Legal derogation to non-discrimination on *employment in the public service*, article 45(4); as well as to activities connected with the *exercise of official authority*, article 51 TFEU
  - Concept of employment in the public service delivered by the ECJ: functional interpretation of Treaty derogation to free movement.

Right of residence:

- Right of residence as the corollary of free movement of persons. Right of exiting the country and to enter in another member state and then establish legal residence.
- It includes family members (spouse or registered partner, descendants until 21 and dependent relatives in the ascending line)
- Initial understanding of the beneficiaries of the right of residence. Broad interpretation delivered by the ECJ.
- Right of residence as part of European **Citizenship rights**, article 21 TFEU
- Directive 2004/38, (*OJ L 158, 30.4.2004*)
  - Right of residence up to 3 months, to be applied to all EU citizens, without conditions (article 6)
  - Periods longer than 3 months, there is a distinction between those that exercise an economic activity; and economically non-active people;
  - *Economically non-active people* should prove to have sufficient economic resources to live in another EU member state, not to become a burden for social assistance system of the host country, and have a comprehensive sickness insurance cover in the host member state (article 7).
  - EU Citizens economically inactive, and 'tourism benefits', ECJ on *Dano* case, C-333/13, 2014:

    According to the Court, *"Article 7 [Directive 2004/38] seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence," (§76)" … "A Member State must therefore have the possibility, … of refusing to grant social benefits to*

economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence (§78)."

- Besides, in the 2015 *Alimanovic* case, the ECJ stated that EU citizens that worked in the host Member State for less than a year can lose any social benefits granted, after six months unemployed.

- Limitations to the right of residence, article 45(3) TFEU, on grounds of public policy, public security or public health

- Measures aimed to facilitate the exercise of free movement of persons, article 53 TFEU: directives on mutual recognition of diplomas:
  - Vertical harmonization: health sector professions, architects.
  - Horizontal approach launched by directive 89/48
  - Directive 2005/36 on the recognition of professional qualifications, which revoked previous directives on mutual recognition of diplomas. It was amended by Directive 2013/55

AREA OF FREEDOM, SECURITY AND JUSTICE

[THIRD-COUNTRY PERSONS]

The Schengen agreements

- Area without border controls at the internal frontiers: free travel area
- Need for European common rules on visa policy and for asylum seekers.
- **Non-EU citizens' entry** in the Schengen area, based on common visa rules:
  - Third-country persons from the so-called *white list* of nations (some 60 countries like USA, Japan, Canada or Brazil), **do not need a visa** to enter the Schengen area (up to 90 days);
    - Those persons soon will need **ETIAS** [**European Travel Information and Authorization System]**, an electronic system which allows and keeps track of visitors from countries who do not need a visa to enter the Schengen Zone, inspired in the U.S Electronic System for Travel Authorization (ESTA).
    - The cause for ETIAS authorization is security.
    - The legal procedure to pass the ETIAS began in 2016 and will come into force by the end of 2022, being mandatory for all persons who are Schengen visa-free.
  - Instead, citizens from the so-called *black list* of countries (ex: China, Russia, India or Angola), **must require a short-term visa to enter** the Schengen area (up to 90 days).
  - Visits over 90 days are regulated by each EU member state
  - *White and black lists* are to be found in EU Regulation 539/2001

Migration from third-country nationals

- *Long term residents* in a EU country (person that lived legally in an EU member state for an uninterrupted period of five years. This is however dependent upon the person having a stable and regular source of income, health insurance and, when

required by the hosting country, having complied with integration measures) have the right to move across the EU. They also have the right to family reunification
- EU *blue card* for researchers and high-skilled workers
- Admission for students and exchange students
- For other non-EU citizens is up to each Member State to decide on the status of these persons, unless they come from countries which have a special agreement with the EU
- *Golden visa* programs, aimed to attract non-EU foreign investors.

- In the case of Portugal (from: http://www.goldenvisa-portugal.com/):
  - "*The Golden Visa Programme launched by the Portuguese Authorities is a fast track for foreign investors from non-EU countries to obtain a fully valid residency permit in Portugal ("Golden Visa").*
  - *Under the Golden Visa programme, non-EU citizens simply need to carry out one of the investments set out in the law to qualify to obtain a residency permit in Portugal. This residency permit will allow the investor and his family members to enter and/or live in Portugal and to travel freely within the vast majority of European countries (Schengen space).*
  - *Qualifying investments: Property purchase* [1/2million €]*; Capital* [from ¼ m€]; *job creation* [10 jobs]
  - *Possibility of Permanent Residency after 5 years and nationality after 6 years*
  - *Access to all Portuguese Public Services, including health and education*"

Since October 2012, there were some ten thousand Golden visa delivered with a global investment of €6 billion, mostly in real state. Among the total Golden Visa delivered, there were 5000 Chinese persons, 1000 Brazilian, followed by Turkish, Russian and South African citizens (https://getgoldenvisa.com/portugal-golden-visa-program)

- According to *Financial Times*, 22-1-2019, "Brussels urges crackdown on wealthy 'golden visa' investors":

"Brussels is set to tell EU member states to tighten security checks on wealthy investors applying for "golden visas", warning that the schemes have opened the bloc to money laundering, corruption and organised crime. The European Commission will make its first recommendations to countries on how to protect investment-for-status schemes — in which governments offer residence rights or full citizenship in exchange for investment — from abuse.

The move comes in the wake of high-profile scandals over money laundering in the past year, such as the Danske Bank case, in which the Estonian branch of Denmark's biggest lender is suspected of laundering €200bn, mainly from former Soviet states. The advice is contained in a report, in which Brussels examines "citizenship for sale" schemes worth billions of euros run by Malta, Cyprus and Bulgaria. The schemes allow wealthy individuals to buy EU passports, which carry benefits such as free movement inside the bloc. Anti-

graft campaigners have warned that a lack of transparency on awarding passports has opened the door to criminals from countries with a high level of corruption to operate in Europe.

About 20 EU governments, including the UK, Portugal and Spain, also offer more limited residency rights to wealthy non-EU citizens in return for investment in property, government bonds, or sometimes directly into a government's budget.

"Investor citizenship and residence schemes create a range of risks for member states and for the union as a whole: in particular, risks to security, including the possibility of infiltration of non-EU organised crime groups, as well as risks of money-laundering, corruption and tax evasion", says a draft version of the report seen by the Financial Times. The report, the commission's first looking into the schemes, identifies a number of concerns, including governments having varying standards on security and background checks for applicants and the sources of their wealth. Brussels also highlights that private investment companies — which work in conjunction with governments in Cyprus and Malta to run the schemes — are under no legal obligation to carry out security checks in line with EU anti-money laundering rules.

The EU's 28 member states have won about €25bn of foreign direct investment over the past 10 years from schemes that offer residence rights or full citizenship in exchange, according to research from Global Witness and Transparency International. Although Brussels has no direct power to police the schemes, it will urge governments to agree on common security checks for all applicants and push for mandatory lists of the number of applications made and rejected every year, along with their countries of origin. The report does not single out countries. EU officials said the findings were designed to avoid sparking conflicts between Brussels and member states over rule of law ahead of European Parliament elections."

From:https://www.ft.com/content/db673b94-1dad-11e9-b126-46fc3ad87c65?fbclid=IwAR1ijVqJEF5MDNsNdiGcUEWJs_uP0JqiSGD8f-sLF6Ejjn7IVJ80YVUb3SE

Irregular Migration

- Any non-EU worker without residence card or other authorization
- External border control: EU Border and Coast Guard Agency (*Frontex*)
- Smuggling. Trafficking of Human beings.
- *Return Directive* of non-EU nationals staying irregularly in the EU

Common European Asylum System:

- *Asylum Procedures Directive*: quicker and better quality asylum decisions. Asylum seekers receive support to explain their claim, and protection of unaccompanied minors and victims of torture.
- *Reception Conditions Directive*: material reception conditions (such as housing) for asylum seekers across the EU and fundamental rights of the concerned persons are respected. Detention as a measure of last resort.

- *Qualification Directive*: grounds for granting international protection and make asylum decisions more robust.
- *Dublin Regulation*: enhances the protection of asylum seekers during the process of establishing the State responsible for examining the application, and clarifies the rules governing the relations between states; system to detect early problems in national asylum systems, before they develop into fully fledged crises.
- *EURODAC Regulation*: law enforcement access to the EU database of the fingerprints of asylum seekers under limited circumstances to prevent the most serious crimes, such as murder, and terrorism.
- *Return Directive* – readmission agreements with non-EU countries

- The refugee crises and the agreement with Turkey

Refugee crisis: basic international law concepts (https://www.unrefugees.org/refugee-facts/what-is-a-refugee/)

- *"A **refugee** is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries. More than half of all refugees worldwide come from just three countries: Syria, Afghanistan and South Sudan.*

- *When people flee their own country and seek sanctuary in another country, they apply for asylum – the right to be recognized as a refugee and receive legal protection and material assistance. An **asylum seeker** must demonstrate that his or her fear of persecution in his or her home country is well-founded.*

- *People forced to flee their homes but never cross an international border. These individuals are known as **Internally Displaced Persons**, or IDPs. These individuals seek safety anywhere they can find it—in nearby towns, schools, settlements, internal camps, even forests and fields. IDPs, which include people displaced by internal strife and natural disasters, are the largest group that UNHCR assists. Unlike refugees, IDPs are not protected by international law or eligible to receive many types of aid because they are legally under the protection of their own government."*

EU migration policy in the Mediterranean sea [and Libya] have been strongly condemned by UN agencies, humanitarian organizations, as well as by human rights groups. It is estimated that more than 15 000 migrants died while crossing the Mediterranean Sea since 2014.

The EU was even charged in the International Criminal Court in 2019 by human rights activists. According to an *Associated Press* script on that legal action:*

'*More than 40,000 people have been intercepted in the Mediterranean and taken to detention camps and torture houses under a European migration policy that is responsible for crimes against humanity, according to a legal document asking the International Criminal Court to take the case.*

[…] The first crime, according to the document, was the decision to end the Mare Nostrum rescue operation near the end of 2014. In one year, the operation rescued 150,810 migrants in the Mediterranean as hundreds of thousands crossed the sea.

The operation cost more than 9 million euros a month, nearly all paid for by Italy. It was replaced by an operation named Triton, financed by all 28 EU nations at a fraction of the cost. But unlike the earlier operation, Triton ships didn't patrol directly off the Libyan coast, the origin of most of the flimsy smuggling boats that were taking off for Europe.

Deaths in the Mediterranean then soared. In 2014, around 3,200 migrants died in the sea. The following year, it rose to over 4,000, and in 2016 peaked at over 5,100 deaths and disappearances, according to figures from the International Organization for Migration.

[…] the EU quickly realized its mistake in ending the Mare Nostrum operation and tripled its rescue capacity in 2015, helping save the lives of 730,000 since that year. […] But EU countries leaned heavily on the Libyan coast guard to do so, sending money and boats and a degree of training to units of the loosely organized force linked to various factions of Libya's militias.

*available on: https://apnews.com/998475228a944e6ea7f4b005f9e1c293:

Recently, the UN High Commissioner for Human Rights, Michelle Bachelet, urged Libya and the EU and its Member States to protect migrants in central Mediterranean Sea:* #

"UN High Commissioner for Human Rights Michelle Bachelet has **called** on the Libyan Government of National Unity **and the European Union and its Member States** to **urgently reform their current search and rescue policies and practices in the central Mediterranean Sea that too often rob migrants of their lives, dignity and fundamental human rights."**

"The real tragedy is that **so much of the suffering and death along the central Mediterranean route is preventable**," […]. "Every year, **people drown because help comes too late, or never comes at all**. Those who are rescued are sometimes forced to wait for days or weeks to be safely disembarked or, as has increasingly been the case, are returned to Libya which, as has been stressed on countless occasions, is not a safe harbour due to the cycle of violence," the High Commissioner said.

According to the report, evidence suggests that the **lack of human rights protection for migrants at sea "is not a tragic anomaly, but rather a consequence of concrete policy decisions and practices by the Libyan authorities, the European Union (EU) Member States and institutions,** and other actors that have combined to create an environment where the dignity and human rights of migrants are at risk."

The report, which covers the **period from January 2019 to December 2020**, notes with concern that the **EU and its Member States have cut back significantly on their maritime search and rescue operations, while humanitarian NGOs have been obstructed from carrying out their life-saving rescue operations**. In addition, private commercial vessels increasingly avoid going to the aid of migrants in distress because of delays and stand-offs over their eventual disembarkation in a port of safety.

The EU Border and Coast Guard Agency (FRONTEX), the **EU Naval Force** for the Mediterranean (Operation IRINI) **and EU Member States have encouraged the Libyan Coast Guard (LCG) to take on more responsibility for search and rescue operations in international waters**. However, this has happened **without sufficient human rights due diligence and safeguards**, leading to an increase in interceptions and returns to Libya, where migrants continue to suffer serious human rights violations and abuses. In 2020, at least 10,352 migrants were intercepted by the LCG at sea and returned to Libya, compared to at least 8,403 in 2019.

The European Commission and EU Member States should ensure that all agreements or measures of cooperation on migration governance with Libya are consistent with Member States' obligations under international law, including international human rights law, the report urges. All EU coordination with the Libyan authorities over search and rescue should be conditional upon assurances that migrants rescued or intercepted at sea will not be disembarked in Libya and will be designated a port of safety.

Despite a significant drop in the overall number of migrants arriving in Europe via the central Mediterranean route in recent years, **hundreds of people continue to die – at least 632 so far in 2021.**

For those rescued, delays in being disembarked in a place of safety have caused further suffering, with migrants sometimes left for days or weeks on board vessels poorly suited to long-term accommodation. The report notes that such delays became more acute during 2020 as a result of the COVID-19 pandemic, with some migrants forced to quarantine aboard vessels at sea. […].

"We can all agree that no one should feel compelled to risk their lives, or those of their families, on unseaworthy boats in search of safety and dignity," Bachelet said. "But the answer cannot be simply preventing departures from Libya or making the journeys more desperate and dangerous."

[…] "Until there are sufficient safe, accessible and regular migration channels, **people will continue to try to cross the central Mediterranean**, no matter what the dangers or consequences," she added. **"I urge EU Member States to show solidarity to ensure that frontline countries, such as Malta and Italy, are not left to shoulder a disproportionate responsibility**."

* GENEVA, 26 May 2021 – available at:
https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27113&LangID=E

Bold passages added.