Notes on
EUROPEAN UNION LAW

Written and edited by Francesco Mauri and Francesco Fernando Annese

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IUS@B

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WE NEED YOUR HELP!
"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity": this was for Europe but the same is for this handout! There may be some errors, inaccuracies, or misuse of the language throughout the following pages so if you notice them, please advise us. You'll help us improving our notes and making them more and more effective.
Thanks!
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This handout has been written with no intention to substitute study from the official materials, indicated in the Class syllabus. Its only purpose is to help students feel more comfortable with the course contents.

1. Institutional Europe

History of European Integration and Treaties

The birth of the EEC

First, we will focus on a bit of history (and then we'll proceed with what the institutions are and how do they act: competences, instruments and law-making). How and why have we got where we are? The WW2, incredibly traumatic for Europe, undoubtedly provided a strong **push** to the continent: after the trauma, **hope** and need for **reconstruction** (especially in Italy and Germany) arose among Europeans. These three components (hope, trauma, and reconstruction) determined one of the biggest pushes in our history to try to build **international institutions**, treaties and organizations that would **secure peace**: shortly, a big push for ***international cooperation***.

In thirteen years, a lot happened:

- **1945** the **UN** was created
- **1948** the United Nations enacted the **Universal Declaration of Human Rights** (coming straight from the horrible experience of concentration camps). In the same year, the **Organization for European Economic Co-operation** (now, OECD) was established in order to organize the Marshall fundings for European Countries (that allowed Europe to rebuild).
- **1950**, after a year since its creation, the **Council of Europe** signed the **European Convention on Human Rights** and Fundamental Freedoms (that entered into force in 1953
- **1952** the **European Coal and Steel Community** was founded

- **1958,** with the **Treaty of Rome** the **European Economic Community** and **Euratom** were created

It is extremely interesting to look at the ***preambles*** of the various treaties that established such international institutions: a common feature is the **need for cooperation** and the **rejection of war**.

Just consider the **UN Charter**:
WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- *to* ***save*** *succeeding generations from the* ***scourge of war****, which twice in our lifetime has brought untold sorrow to mankind, and*
- *to* ***reaffirm faith in fundamental human rights*** [here, rights are seen as means to avoid what happened in WW2]*, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and*
- *to establish conditions under which* ***justice and respect*** *for the obligations arising from treaties and other sources of international law can be maintained* [The idea of creating institutions to ensure also that Nations who signed treaties actually abided by their content was crucial]*, and*
- *to promote social progress and* ***better standards of life*** *in larger freedom […]*

In the meantime (1946), in Europe, another push was rising: **Winston Churchill** made a pivotal speech in **Zurich**, advocating for a **United States of Europe** (without considering the UK being a part of it, though: he was referring to continental Europe:

Under and within that world concept we must recreate the European family in a regional structure called, it may be, the ***United States of Europe****, and the first practical step will be to form a* ***Council of Europe****. If at first all the States of Europe are* <u>*not willing*</u> *or able to join a union, we must nevertheless proceed to assemble and combine those who will and who can. The salvation of the* ***common people of every race and every land*** *from war and servitude must be established on solid foundations and must be created by the readiness of all men and women to* ***die rather than to submit to tyranny****. In all this urgent work,* ***France and Germany must take the lead together****.*

The Council of Europe and the ECHR

After the Churchill's speech, the **Council of Europe** was actually created (**1949**) as the *first* push towards **regional European integration** (and the UK was one of the first signatories). The recurring words of its charter[1] are the extremely similar to the UN one: *peace*, *justice*, *international cooperation*, *economic and social process*, *unity*. Again, another institution (that – please keep in

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[1] Consider this extract from the preamble:
"Convinced that the pursuit of ***peace*** *based upon* ***justice*** *and* ***international co-operation*** *is* ***vital for the preservation of human society*** *and civilisation;*
Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of ***individual freedom****, political liberty and the rule of law, principles which form the basis of all genuine democracy;*
Believing that, for the maintenance and further realisation of these ideals and in the interests of ***economic and social progress****, there is a need of a* ***closer unity*** *between all like-minded countries of Europe;*
Considering that, to respond to this need and to the expressed aspirations of their peoples in this regard, it is necessary forthwith to create an organisation which will ***bring European States into closer association****,*
Have in consequence decided to set up a Council of Europe consisting of a committee of representatives of governments and of a consultative assembly".

mind – has nothing to do with the EU) was created with the same idea of **international cooperation securing peace**. It has its own aims (i.e., to **promote the rule of law**, fundamental **rights,** and **democracy**) and started with 10 Contracting Parties (now, it has 47 member states); but most importantly, it enacted the *ECHR*, which was enforced by the revolutionary **European Court of Human Rights**: prior to that, there was no concrete focus on *protecting* human rights at a supranational level.
Indeed, it was the first time that a person could **bring a case** before an international court: States accepted that supranational judges could have a say on what they were doing. After WW2, everybody distrusted that States could really ensure fundamental rights, if left completely on their own and without any external limitation (after all, just think of fascism, but also of Orban in Turkey): a change in a single constitution would not have changed their obligations from the ECHR.

The European Coal and Steel Community

Another (slightly "smaller", but not less important) process was forming in the same years, and it had to do with European unification, which had become really pressing. One of the most important steps towards the creation of the **ECSC** was the ***Schuman declaration*** (9 May 1950), written by Jean Monnet and Robert Schuman, the French Minister of Foreign Affairs. What Schuman said is a piece of genius: Europe was <u>not</u> to be **made at once** (it wouldn't have worked!); instead, it would have been built step by step through **concrete achievements** (such as the ones happening right now: through the creation of the Recovery Plan, the bankruptcy of – at least – three member States was avoided). That was in order to make sure that "*the age-old opposition of France and Germany*" was eliminated, to ensure lasting peace in the European continent.

This way of proceeding, through little pieces, was theorised as the ***Neo-functional*** theory of European Integration. Hence, the first step was taken, and the ***European Coal and Steel Community*** was established in **1951**. The underpinning reasoning for its creation was indeed ingenious: there were two industries that were absolutely needed for war, and those were **energy** and **steel**. Therefore, as the most important industries of those goods were in France, Germany, Italy and in BENELUX Countries, a "basket" (i.e., an **institutional structure**) was established: the countries **renounced** to their **sovereignty** so that the exploitation of coal and steel would be regulated by a supranational entity with its institutions, that would allow a control outside the remit of the States. The *preamble* of the ECSC Charter[2] is self-explanatory: the aim was ***avoiding a new war***. What was also new about the EEC was the **need for institutions** in order to make it work: a ***Commission*** was established, which had **power of enforcement** so that it could ensure that State parties would abide by the treaties.

EURATOM and the EEC

In **1957**, **EURATOM** was created. Remember the post-war context in which these treaties emerged: everybody wanted to ensure that exploitation of **atomic energy** was <u>only</u> linked to **peaceful purposes**. The ingenious solution was ***interlocking*** *the economies* of the member states so much that war would become <u>not only</u> difficult (mainly due to the ECSC), but also extremely **economically inconvenient**: once the economies are interlocked, then going to war is economically disastrous. In the same year, the Countries of *Italy, Germany, France, Luxembourg, the Netherlands, and Belgium*

[2] *"Resolved to* ***substitute for age-old rivalries*** *the* ***merging*** *of their* ***essential interests****; to create by establishing an economic community, the basis for a broader and deeper community among people long* ***divided by bloody conflicts****; and to lay the foundations for* ***institutions which will give direction to a destiny henceforward shared****"*

decided to ensure that the **factors of productions** could move freely between the member States. To do so, the **European Economic Community** was established (with the *Treaties of Rome*, signed in 1957 and entered into force in 1958). In the preamble of the treaty, a broader aim emerges:

- […] *DETERMINED to lay the foundations of an **ever-closer union** among the **peoples** of Europe* [that is also something new: usually, treaties are among States; here, instead, people are directly mentioned: this reference to the peoples of Europe would become remarkably important in some decisions of the European Court of Justice, as an instrument to push forward a rather unique vision of the European integration],
- *RESOLVED to ensure the economic and social **progress** of their countries by **common action** to **eliminate the barriers which divide** Europe* [note the ever-recurring theme: the desire to eliminate divisions and maintain peace],
- *AFFIRMING as the **essential objective** of their efforts the constant **improvement of the living and working conditions** of their **peoples*** [again, another reference to peoples rather than States],
- [now, they are stating *how* they will achieve it:] *RECOGNISING that the **removal of existing obstacles** calls for concerted action in order to guarantee steady expansion, **balanced trade and fair** competition* [remember that this happens together with the efforts to reconstruct Europe after WW2],
- *ANXIOUS to **strengthen the unity of their economies** and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favored regions,*
- *DESIRING to contribute, by means of a **common commercial policy*** [that is: a common external policy, towards foreign Countries, to have a deeper integrated internal market[3]; in other words, EEC Countries would have to cooperate when signing commercial treaties with external Countries], *to the progressive abolition of restrictions on international trade* […]

Hence, in short, the keywords of the treaties, as far as the *means* are concerned, are **balanced trade**, **competition law** and **common commercial policy**. Moving to the **article 2** of the Treaty of Rome, we find the *objectives* of EEC. Whereas the preamble simply states the intentions of signing parties with nice and dreaming words, the provisions that can be found *inside* the treaty (i.e., articles) are **legally binding**. Art. 2 of EEC Treaty states:

*The Community shall have as its task, by **establishing a common market** and progressively* [progressively not by chance: remember the Schuman declaration] ***approximating the economic policies** of Member States, to promote throughout the Community a **harmonious development** of economic activities, a continuous and balanced expansion, an **increase in stability**, an accelerated raising of the standard of living and closer relations **between the States belonging to it***

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[3] To understand the difference between *internal* commercial policy and *external* commercial policy, consider the following example: a bottle of Coke – with an internal common market – could be produced in Italy and moved to France in the same way as doing it vice-versa or between other Countries. Similarly, when products (or parts of them: consider, for instance, the components of a laptop) come from outside Europe (rectius, the EEC), we want to ensure that those products, once they have entered a member State, can continue circulating. Suppose, for instance, that a made-in-China processor is imported in Italy, where it is used to build a laptop that would be sold in France: this can be done only if external treaties are signed all together. Moreover, the **same conditions of entry** shall be applied in all member states of EEC (now, of EU): imagine, as way of example, that Italy applies a tariff on Coke of €1 per bottle; if, at the same time, France applies one of €0.5 per bottle, Coca Cola would be surely export to France first, and *then* sell its drinks to Italy (remember: there's always a single internal market), as it would be much cheaper.

In art. 2, we can see the clear ***functionalist approach*** of EEC. These objectives could be achieved only through a well-conceived and **revolutionary institutional structure**. Firstly, **permanent** institutions (rather than *ad hoc* meetings), with buildings, employees, secretariats, competences, etc.: those were the ***Commission***, the ***European Court of Justice*** (henceforth, ECJ), the ***Council***, the ***Assembly*** (later renamed as European Parliament). This last institution, at the time it was formed, was made of **parliamentary delegations** of National MPs (the direct election of its members would have been introduced only in 1979).

- In order to effectively *approximate* the members' economic policies (i.e., to *bring legislations close*), they gave themselves a **law-making power**: the power to take *directly* (and this was the crucial innovation) **binding decisions**.
- Moreover, they were extremely aware of the possibility that States would later ignore European obligations and sign treaties that would be distant from the European policies. Therefore, they created an **autonomous system of *enforcement***: they gave the **European Commission** (and other States) powers to bring uncomplying States before the ECJ.
- Moreover, the ***Preliminary Reference Procedure*** was established, taking inspiration from the Italian and French judiciary systems. The treaties wanted a *law-based* system to work, and so they needed a Court that would give the so-called **authentic interpretations** (as our *Cassazione*); otherwise, each of us might interpret norms and principles in a different way (the concept of *freedom of expression*, for instance, is interpreted in Europe much more narrowly than in the US[4]). Therefore, they created the **ECJ**, that would give *one* interpretation of European Law that would be applied throughout the member States: with this procedure, the internal Courts could *ask questions* to the ECJ concerning the interpretation of European treaties and provisions; the ECJ interpretation would therefore be the *only one* to be applied by all the European Courts from that moment on. We must also point out that another important revolution of this procedure was the **empowerment of national Courts** as for rising questions directly to the ECJ.
- Finally, the treaty confirmed its *functionalist approach* **limiting and defining competences** of the European Institutions: they would act <u>only</u> with powers they have been conferred by the treaty (i.e., **principle of *conferral***).

The Treaty of Rome and its tools to achieve integration

Therefore, the Treaty of Rome creates a (partly) completely new legal framework in order to effectively establish a **Common Market**. But what were its features for achieving economic integration?

1. Firstly, a ***Customs Union***: being the first and most *basic* form of economic integration, it consists of undertaking <u>not</u> to put **tariffs** (i.e., charges) on the goods circulating *within* the territories (this, by having *common customs tariffs*). But the treaty goes beyond: it also prohibits **quotas** <u>and</u> measures that would have *equivalent effect* (thus, leaving the floor for the ECJ to define this extremely broad concept: potentially everything could have the same effects as quotas). This would be able to promote the second means: free movement of goods.
2. Then, the Treaty affirmed the **free movement of *factors of production***: i.e., *goods*, *services*, *capital* (realized il 1992) and *workers* (i.e., no visas, no discrimination on workplace). Namely, this idea of free movement comes from **economic efficiency**. Just think about goods: if Fiat produces a car sold at €20.000, and Volkswagen produces an *equivalent* one sold at €10.000,

[4] Or consider also the issue related to the *right to health*, which was used in the US as a way to protect both the right of abortion and its prohibition.

in order for the market to be efficient, the latter must be put in the conditions of selling its car to Italy (so that it could compete with Fiat). This creates a *push towards efficiency*: Fiat will then be forced to reduce its prices and/or become more effective. What's more: there would be a **more efficient exploitation** of resources. The same works for the freedom of ***establishment***: i.e., the possibility for a company to settle everywhere in Europe (and exploit so-called ***passporting rights***: setting their activities in a single Country and then sell their services everywhere in Europe, as it happened with financial companies in the UK before Brexit). As for **services**, it is the same: services can be sold and bought between different States (just think about those that are sold on the Internet). And likewise for **workers** (an innovation that was pushed by Italy in particular: we had high unemployment, whereas Germany had the opposite problem).

3. Common ***Competition policies and State Aid laws***. Imagine, for instance, that Fiat has fallen into a financial crisis, due to the cheaper Volkswagen cars that are being sold in Italy. The first reaction of an "incompetent" Prime Minister would arguably be **giving subsidies** to the company: the PM would *pay Fiat to be inefficient* (indeed, it would be able to lower its prices, although without turning to something more efficient). Therefore, founders of the EEC wanted to ensure that both the **conditions of competition** (i.e., how companies behave with one another) *and* **state aid** are under control: they gave this competence to the **Commission**, Otherwise, States would always to be tempted to help their own companies with those kinds of subsidies. As for the conditions of competition, the issue was preventing **collusion** between companies (e.g., an agreement between Fiat and Alfa Romeo to stop the possibility for Volkswagen to come in).
4. Finally, they needed **common commercial policies** with third Countries, as we mentioned earlier.

This can be effectively summed up with the ***<u>Four Freedoms</u>***: **goods, workers[5], services** and freedom **of establishment**. To make all of this work, the drafters provided a **duty <u>not to discriminate</u>** on grounds of nationality, whether that concerned goods, people, or companies.

Two crucial decisions: Van Gend en Loos and the direct effect

Now, let's move to **1963**. Martin Luther King Jr. makes his most notable speech *"I have a dream*", J. F. Kennedy is murdered, and the **European legal order** is created, with the ECJ ruling ***<u>Van Gend en Loos</u>* (26/62)**.

First, let's consider some *background information*. As we said, in order to create the common market, it was crucial to **eliminate customs duties** (i.e., taxes placed on imported products). In order to make it easier, a *transition period* was established, within which the member States undertook the duty (before eliminating every duty) <u>not to</u> increase the existing ones. This obligation was provided by **Article 12 EEC** (now article 30 TFEU)[6]. However, completely ignoring the provision, the Netherlands decided to increase duties on a *chemical product* (from 3% to 8%). **Van Gend en Loos**, a company affected by such increase, questioned its validity, claiming it went against article 12 EEC.

[5] And this is pretty much **unprecedented**: the main thing that is protected by governments is employment, also preventing foreigners to work in their Countries. Oppositely, the EEC Treaty <u>not only</u> allowed free movement, <u>but also</u> **prohibited *working visas*** (i.e., job permits for foreigners that also *specify which job* could be done) for member countries. And this brings also the prohibition of **discrimination** on workplaces and **equal social protection** for citizens of member States.

[6] *"**Member States shall refrain from introducing,** as between themselves, any new customs duties on importation or exportation or charges with equivalent effect **and from increasing such duties** or charges as they apply in their commercial relations with each other".*

Hence, the Dutch Court agreed that the Parliament's decision was against the Treaty; nonetheless, the problem was understanding the **value** of this treaty as for its relationship with internal law, thus deciding:

*"Whether article 12 of the EEC Treaty has **direct application** within the territory of a member state, in other words, **whether nationals** of such a state **can**, on the basis of the article in question, **lay claim to individual rights which the courts must protect**".*

In other terms: do National Courts have to directly apply the Treaty? Can individuals be directly protected on its basis? As the **interpretation** of the Treaty of Rome was at stake, that was clearly a matter that could be deferred to the ECJ through the extremely innovative – as we have mentioned – **Preliminary Reference Procedure** (the ECJ, indeed, had **interpretive monopoly** over EEC provisions).

Arguments of the parties:

1. **Netherlands**
   a. the Treaty of Rome was nothing more than an **international treaty**: the only way they could enforce the obligations contained in it was through an ***infringement procedure*** started by the Commission (and not, oppositely, through its direct applied by National Courts).
   b. The issue, according to the government, was not on the *interpretation* of the treaty, but rather on its *application*.
   c. Moreover, the Treaty (again, considered as nothing but an international treaty) did not contain any indication that the parties intended this Treaty to have these effects in domestic legislations.
2. **Belgium:** a matter of **national constitutional law** (it is the Constitution that determines the effects of an international obligation on the legal system – i.e., to establish a situation of *dualism* – that requires ratification before application – or *monism*): it was not for the ECJ to decide the case.
3. **Germany** claimed the Treaty only represented an **international obligation** that should have been implemented *by national authorities*.

Long story short, three out of six member states were on the same side, against the direct application of the EEC treaty, committed to a ***traditional*** approach. According to this theory, treaties are a matter for State Parties and have to be resolved amongst States (with the only exception being the possibility for the Commission to raise infringement proceedings). That being so, effects of international law were to be determined by national constitutional law.

On the other hand,

1. **Van Gend** argued for:
   a. the ***direct effect*** in the Dutch legal system. The provision of the treaty was, indeed, clear: a **negative obligation** (i.e., not to engage in a certain conduct) that was so **directly effective**.
   b. The fundamental freedom of movements of goods needed to be protected against the **infringements**, and that was only possible through rulings of the ECJ; moreover, because of this, there is an obligation for national courts to set aside the national contrasting norms at stake in their reasoning.
2. **The Commission** (which intervenes in *every* case brought before the ECJ) claimed that:

a. *this* provision in particular had **direct effect**,
b. it consists of a *clear prohibition* that was **complete and self-sufficient**. Hence, there was nothing left to be interpreted by national Courts and/or implemented by national legislation.
c. *crucial importance* of this issue for the whole legal order.

In response, the Court ruled, in a revolutionary way, as follows[7], thus establishing a ***new legal order***:

*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, […] 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* [now 267 TFEU]*, 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**. 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 reasoning of the Court was indeed revolutionary, also because when the Treaty was written, the drafters *had not thought* about it having direct effect. When the Court decided the case, it had two possible ways to do it, also according to the position of the parties:

- It could have treated the case as a matter of ***international law***, the application of which, as we know, concerns **domestic constitutional law**: the same treaty could be hence applied in very different ways between contracting parties. This would not assure *uniformity*, which instead is what a treaty aimed at an internal market needs.
- It could have established – as it eventually did – a ***new legal order***. The Court was aware it was doing something totally new: it could not pretend that was only a matter of interpretation of *international law*. And the Court explains itself from the really beginning of the abovementioned extract. The Treaty of Rome was not an international treaty as those they were used to know, and this is because, first of all, the **preamble**[8] is referred not only to States, but (for the first time) also to **peoples**. Moreover, this is also confirmed by the European **institutions** being endowed with **sovereign rights** whose applications ***directly affect the citizens***: as a way of example, consider that the Regulations of EEC such as provisions on competition law have *direct applicability*. In fact, the drafters created

[7] Note that the ECJ doesn't allow its judges to write ***dissenting opinion***, in order for them not to be as *political* as, for instance, the American judges are.
[8] This is indeed curious, as the Court does not base its reasoning on *preambles* very often: they are not the legally binding part of a Treaty. However, the Court did it in this case due to the importance of the matter. Moreover, it strengthened its reasoning by underlining the peculiarity of the EEC institutional structure.

permanent institutions that had **law-making powers**, thus automatically implying that individuals are directly affected by what institutions do (unlike in usual international law). We are not dealing with "ordinary" international law because the drafters have given themselves *huge power*, and this affects the citizens, imposing obligations on them. Then, the Court stresses the **relevance of the individuals** that emerges from the treaty: namely, mentioning the *European Parliament*, an assembly that **represented the people** (though indirectly), whereas ordinary international relationships are **intergovernmental** (i.e., they occur between governments, and not with parliamentary representatives of the people). However, the strongest legal argument comes at the end, with a ***teleological interpretation*** (i.e., the Court reasons also referring to the **aims** of the treaty): what would be the point of having an ECJ jurisdiction if Community law could not be invoked in front of national courts? What would be the point of ECJ interpreting the treaties, if its decisions could not bind the national courts?

Hence, the striking conclusion: a **new legal order** had been established: it was nothing like things they were used, as it was neither domestic law nor a pure international law treaty. And this new legal order, as we will see in a moment, needed its **constitutional principles**: the very first decisions were indeed aimed at building and refining that legal order. For the first time ever, citizens and people were to be *directly* benefited by the Treaties: the first pillar of the new European legal system was indeed the ***Direct Effect***.

Two crucial decisions: Costa v. Enel (6/64) and the Principle of Supremacy

Now, we will move to another landmark case, especially for us Italians. First of all, we must always remember we are studying a **composite system**, made of member states (with their institutions and Courts) *and* the European Community. Of course, it is ok for the ECJ to affirm that a new legal order has been established, but it must not be taken for granted that the National (Constitutional) Courts would accept it straight away. Indeed, the relationship between the Courts has always been quite complicated: the **hermeneutical monopoly** that the ECJ is endowed with has subverted the National judicial hierarchies[9].

This is what happened in ***Costa v. Enel***, first decided by the Italian **Const. Court** (**14/1964**) and later by the **ECJ** (**6/64**). A lawyer in Milan, after receiving an electricity bill by ENEL, which was then the only energy provider in Italy (in a condition of **public monopoly**) challenged it, claiming that the Italian legislation that allowed that situation was incompatible with the Treaties. The legislation at stake had been passed ***after*** the creation of the Treaty of Rome: this particular is crucial, due to the *chronological principle* according to which *"lex posterior derogat priori*". It was extremely relevant that the nationalization of ENEL had been passed after the ratification of the treaty: from an ordinary perspective, that would have repealed any former piece of legislation (the Treaty included). However, that was not the case, because of the peculiarities of the *new legal order*.

The case ended up at the **Italian Constitutional Court**, that affirmed that the violation of the EEC Treaty might have created **international liability** for Italy, but it did **not deprive of its full effect the law conflicting** with the Treaty. The Italian Constitutional Court, indeed, interpreted the Treaty according to the ordinary theory of international law, thus **going against the *Van Gend* ruling**. What is more, the Court held:

[9] An example of how huge the extent of the matter is could be the following. The Treaty prohibits salary discriminations based on gender; however: does this refers also to transgenders?

There is no doubt that the State must honour its commitments; however, ***the legal principle pursuant to which the most recent laws take precedence over the earlier ones must prevail*** *so that there cannot be any question as to a potential (indirect) conflict with the Constitution of said laws* [i.e., those commitments exist and have effects only at an international level, without affecting the validity of internal legislation]*.*
However, the referring national tribunal was not persuaded by the answer of the Constitutional Court: therefore, it also made a ***preliminary reference*** to the ECJ (how it dared!), arguing only on the basis of the Treaties and not on the National law at stake (as the ECJ could not do otherwise).

The **Italian Government** pleads the ***inadmissibility*** of the Case, in order for the case not to be discussed in front of the ECJ: it was simply none of its business. In other terms, the dispute did not concern EU law because the Milan tribunal only had to apply domestic law. Furthermore, Italy argued it was not possible to use the preliminary reference procedure in order to **ascertain a violation** of EU law by national law: indeed, in the treaty itself a specific and (according to the Italian government) *exclusive* ***infringement procedure*** was provided. Otherwise, it would be circumventing that procedure.

Conversely, Mr. **Costa** used a so-called *catch-22 argument* (i.e., a particularly ingenious and circular argument): the Treaty clearly stated that a National Court could freely ask for a preliminary reference; therefore, if the national court says there is a question of interpretation of EU law, then *there is* a question of interpretation of EU law. The Commission agreed with Mr. Costa, claiming that the ECJ must not be concerned with the *reasons* why a national Court raises a preliminary reference: it is not for the court to assess the reasons that have determined the national court to refer.

However, the position of the **Commission** was closer to the Italian one: indeed, in that case it seemed rather an *action for infringement* than a question of interpretation.

The Court, finally, delivered the second pillar of the European Member States: The ***Principle of Supremacy*** of EU law:

By contrast with ordinary international treaties, the EEC Treaty has created its ***own legal system*** [i.e., more than just a new legal system!] *which* […] ***became an integral part*** *of the legal systems of the Member States and which their courts are bound to apply.*

Therefore, not only there are *individual rights* granted by the Treaties, but also an **obligation** for National Courts to **give effect** to the European Law. The decision follows as such, giving *reasons* for its strong statement:

By creating a Community of ***unlimited duration****, having its own institutions, its own* ***personality*** [for the EEC can enter into agreements with third parties as an autonomous subject of international law]*, its own legal capacity and capacity of* ***representation*** *on the international plane and, more particularly,* ***real powers stemming from a limitation of sovereignty*** *or a transfer of powers from the States to the Community, the Member States have* ***limited their sovereign rights****, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves* [here, the Court is building new arguments on the Van Gend case].
The integration *into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it* ***impossible for the States****, as a corollary,* ***to accord precedence to a unilateral and subsequent measure over a legal system***

***accepted by them on a basis of reciprocity**. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law **cannot vary** from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty* […].

The Courts tried to find grounds for its reasoning, and it did it by an almost self-evident truth: it is **impossible** for the member States to **give precedence** to a rule that is **subsequent** to the treaty. Otherwise, there would not be uniformity: we would have 27 different legal systems. The only solution to this problem, then, is saying that if the national legislation conflicts with EU law, the latter takes precedence. What's more: the national Courts must apply the European law instead of national law. Then, the Court continues with a logical consequence:

*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.*

Woah. That's it guys. It cannot be otherwise: member states have entered into European obligations and therefore they're bound to it. Otherwise, it would **deprive the Community of its very meaning**. Also, direct effect and supremacy go hand in hand: it wouldn't make any sense to have direct effect if member States could easily circumvent the rights granted by the Treaties.

And again, this is not how international law normally works. In an ordinary situation, we would have the domestic constitutional system deciding the value of the international treaty within the national legal order. Thus, its value could vary between one State and the other (depending on the Constitutional framework at stake) and, as far as individuals are concerned, whether they are granted with the rights written in the Treaty would depend on *how international law is incorporated* in the domestic system. The EEC treaties, of course, have a value because the domestic Constitutional systems allowed them; however, *once* the States have *entered into* the treaties, their legal value and effect are **determined by the treaties themselves**. Now, we as individuals can simply see the application of the treaty on our situations: in a case covered by the European treaties, whether I am litigating in Italy, or in Poland, or in Germany, etc., I should have exactly the same outcome.

From the 70s to the Covid crisis

We will now continue looking at the history behind EU integration. As we shall see, integration is not a straightforward "growing" path, from light to strong integration: actually, the big ***pushes*** towards it always came from moments of **crisis** or of big historical events. This path, however, was very difficult: indeed, there was (and is) no uniform agreement as to what we really want, i.e., about what should be the objectives of the EU. In this respect, we have a constant debate and struggle between

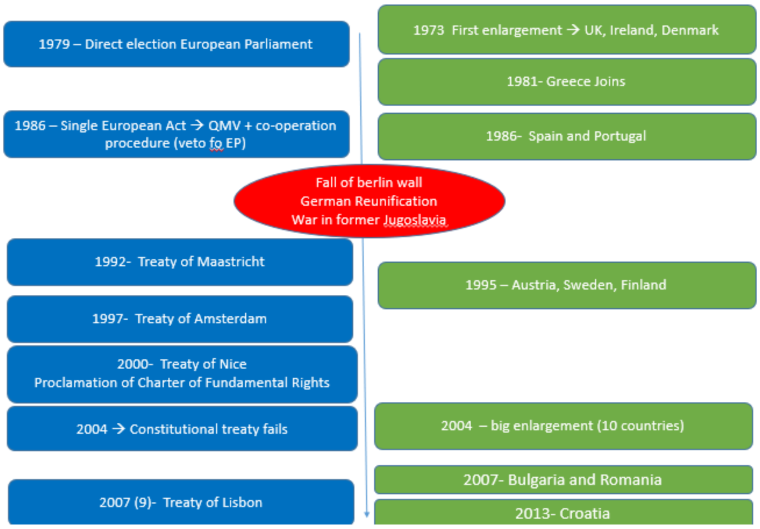
- those who would like **deeper integration** (towards a *federalist Europe*)
- those, whose biggest representative was **Margaret Thatcher**, who wanted **only economic** integration, without any *European politics*.

And this debate is still here today: just consider, for instance, the debate concerning the **fiscal integration**, promoted by the so-called *frugal States*.

We always have to remember that EU integration significantly reacts to (or, sometimes, is even driven by) ***geopolitical pressures*** (consider, for instance, the role of the EU in the Afghan crisis) and to ***internal pressures*** as well: indeed, as far as the period we will now focus is concerned, the most important events that triggered an integrationist push were, indeed, the German reunification in 1990, the War in former Yugoslavia during the 90s, the 2008 Economic Crisis, Brexit and the Covid crisis.

And note that, besides the German unifications, we are always referring to crises. As we said, there is a constant of a **lack of an underlying shared vision** concerning the role of the EU. This is however no surprise: the actions and ideas of "our" 27 member States also reflect what is happening there, at the *domestic level*; indeed, the European directions also reflects **national priorities and politics**.

To sum up, the Chart on the right is extremely helpful, as it contains the main events that occurred during the years (in the green boxes and in the red circle) and the main steps of European integration (in the blue boxes).



The 1970s

To be more precise, we shall now focus on the **70s**, when a **big *recession*** hits the West, and the European Countries stopped the European integration towards a more **protectionist approach**, due to the desire to protect domestic economy, without any possible interference from outside.

Of course, this goes against the very principle of the European Economic Community, one of whose main purposes was actually *to abolish protectionism*. As a result of this, we experience a **stall** in the European project (i.e., very little law-making from EEC institutions), after it had been already hit by the consequence of the so-called **Luxembourg compromise** (an agreement which gave Countries the possibility to disagree with EEC policies *if a vital interest was at stake*).

Because of this protectionism, the **ECJ** stepped in, as it started *interpreting the provisions of treaties* so that companies and individuals can rely on the rights provided in them (thanks to the aforementioned *direct effect* principle) and **overcome protectionist tendencies**. Say that, during the crisis, we have a **big unemployment issue**: the government could decide to favour the employment of domestic citizens. Helena, an Italian citizen who lives in France, can go in front of a Court, challenging the French protectionist approach that prefers nationals over other European citizens. This can happen also ***without precise legislation*** by the EU: the treaties are perfectly sufficient to trigger the action of the ECJ. We will later analyse this phenomenon (i.e., integration occurring even *without* integrated legislation) under the name of ***negative integration***. Without this case law, we would not have reached an **internal market**: for a long time, States did not provide *secondary European legislation*. Instead, with four essential rulings (*Ugliola*, *Dassonville*, *Cassis de Dijon* and

Van Bisbergen), the ECJ established the fundamental principles of the internal market: **mutual recognition**, **broad and teleological interpretation of *discrimination***.

Furthermore, it is worth mentioning that in **1975** the ***Trevi Group*** was formed, which allowed cooperation in the field of **security**, and which would have been later absorbed in the Third Pillar of the EU with the Maastricht treaty. A few years before., in **1973**, the **UK**, **Ireland** and **Denmark** joined the EEC. Finally, in **1979** we have the **first direct election** of the **European Parliament**: for the first time, citizens are able to directly elect their representatives in a *supranational body* (usually, conversely, it is the governments who cooperate at an international level, and not people). This means considering people as **direct stakeholders** of the European policies.

The 1980s

In the 80s, **Greece** (1981) and later **Spain and Portugal** (1986) joined the EEC, after coming out of dictatorship. In **1985**, the so-called ***White Paper*** was signed[10], and the year after, in **1986**, the first treaty modification happened, with the ***Single European Act***, which introduced the ***Qualified Majority Voting*** in the Council (i.e., decisions amongst member States can be taken even without unanimity): this is indeed a huge development, as before one single State (even a small one like Luxembourg) could impose a *veto* over a bill, making legislation *de facto* almost impossible. Instead, with Qualified Majority Voting, a member State can be easily outvoted: with the Single European Act, member States agreed that they would be *bound to EEC policies* even if they voted against them (obviously, if QMV was reached).

Remarkably, this does not happen in ordinary international relations: indeed, States have *all* to agree. This time, instead, States accepted that sometimes they would do something they did not want. This slowly became the *normal way* of legislation in the EU, in order to **avoid the dictatorship of the minority**. Moreover, with the Single European Act, a new legislative procedure (the so-called ***Cooperation procedure***), that basically gave the European Parliament a veto power over certain topics, was established. This is, of course, a result of *direct election* of the Parliament: in order to make citizen representation more effective, the participation European Parliament was made mandatory in order to make (some) new decisions (by **tacit approval** or **rejection** of legislative proposals). Finally, in the **substantial** respect, the **competences** of EEC were increased (and, as we will see, this would have been a constant of every treaty revision and modification).

Then, in 1989, the **Berlin wall** falls in a very emotional moment, and this changes everything: due to German unification first, but also (and most importantly) due to the **new constituency** acquired by the EEC (i.e., States that before were under the influence of USSR). Thus, from the very beginning, EEC started considering **enlargement**. Moreover, in the same years, we experience another **genocide** within the European territory: the war in former Yugoslavia.

The 1990s

The same years are also marked by changes in **national political level**. First, the **Thatcher** Government falls (over the Maastricht treaty): curiously, every Conservative PM in the UK since her has fallen over issues related to European integration. His successor, **John Major**, managed (although with difficulty) to get the Maastricht Treaty ratified by UK Parliament. At the same moment, in Italy, **Mani Pulite** changes the political scenario. Finally, in **1997** Mr. **Tony Blair** gets

[10] This document was a political and legislative agenda with the aim of completing the single market. For more references see the role of the *white papers* within the Eu Institutions.

elected in the UK, becoming the first PM who is not Eurosceptic. This would have allowed to further proceed in European integration. Finally, in **1998**, the civil war in Northern Ireland ended with the so-called ***Good Friday Agreement***, between Protestants and Catholics. By the way, one of the reasons why *Brexit* is still a problem is the situation of Northern Ireland.

But let us go back for a while to the **German Reunification** in **1990**: Germany would become the *biggest member* State: indeed, many States feared that a Greater Germany would lead to an excessive weight of Germany in the process of EU integration. As a result, however, the political debate on the future of the EEC **starts afresh**: immediately, an extraordinary **European Council** (the meeting that is deputed to decide the *political direction* of the EEC) was held in Dublin to decide the **political direction** of the Community. Again, the division between the "***federalists***" and those who simply wanted an **economic union** emerged (and this will be even more clear in the Preamble we will see in short).

The Treaty of Maastricht (1992)

Out of this, we got to the **Treaty of Maastricht** in **1992**, the very first huge change in the process of European Integration: in fact, it *created* the **European Union**. As always, the **Preamble** of the treaty is self-explanatory:

> *This Treaty marks a **new stage** in the process of creating an ever **closer Union** among the **peoples** of Europe, in which decisions are taken **as closely as possible to the citizen**.*

A big **federalist push** clearly emerges from the very first words: the compromise, though, was the principle according to which decisions were to be taken *as closely as possible to the citizen* (i.e., **principle of *Subsidiarity***), as some States (e.g., the UK) did not want an "European Superstate". What's more: the treaty, reiterating the idea of *people of Europe*, introduces the **European citizenship**, providing a brand new "European Passport" to every citizen.
Also, for the first time, it mentioned the ***national identities*** of its Member States, due to the always present will to *limit the extent of integration*, and the principle of ***democracy*** (in the perspective of **enlargement**: potential countries that wanted to join the EU were not democracies, or were very young ones; therefore, member States wanted to restate that the countries that wanted to join needed to be based on that crucial principle). Then, for the same reason as before, we find an *explicit reference* to the respect of ***fundamental rights***[11] that, after several rulings of the ECJ that were based on those, were finally codified. Finally, we find the idea that (of course, within the limit of very defined competences) the EU could use all the **necessary means** to achieve its objectives (i.e., the principle of ***residual competence***); indeed:

> *The Union shall **provide itself with the means necessary** to attain its objectives and carry through its policies.*

The Treaty dramatically **changes** the integration, creating the EU and changing the "*form*" of the EEC, making it "***European Community***" that goes beyond mere *economic* integration. The three communities that existed before (EURATOM, EEC and ECSC) are ***merged*** into one. The Treaty, then,

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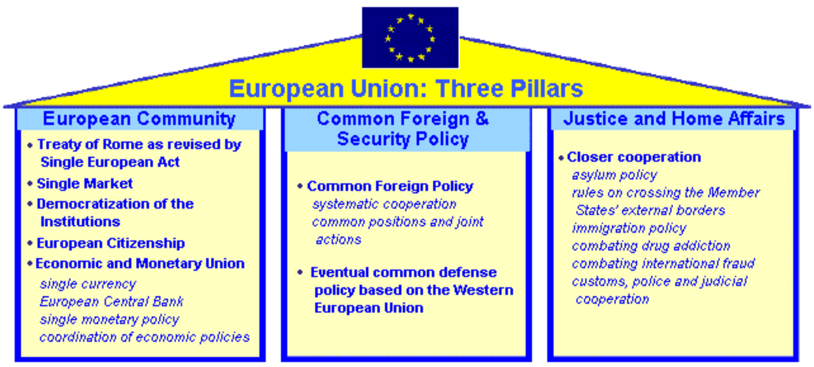
[11] Indeed, the Treaty went on: *"The Union shall **respect the national identities** of its Member States, whose systems of government are founded on the **principles of democracy**.*
*The Union shall **respect fundamental rights**, as guaranteed by the **ECHR** and as they result from **the constitutional traditions** common to the Member States, as general principles of Community law".*

put the basis of what would have become the **Economic and Monetary Union**. Furthermore, it **recognized the role of co-legislature** to the European Parliament: indeed, the EP becomes at the *same level* of the European Council in most areas of law-making: no law shall pass without the approval of the EP. Finally, as a result (again) of geopolitical changed, the drafters **changed the *ambition*** of the European project, adding two more fields in which it was possible to have European action:

- the ***Common Foreign and Security Policy*** (referred to as the S*econd Pillar*). Despite recognising the need for **cooperation in foreign policy**, States were still very jealous of their sovereignty and role in international relations: the Second Pillar remained governed by an **intergovernmental method** (i.e., simple coordination *amongst the governments*); this means deciding by ***consensus***, without possible intervention of the ECJ (that would have been an accelerator of integration) and with small involvement of other EU institutions (whether Commission or EP). The effects of this approach are still visible today: reactions to the Afghan crisis are being taken with governmental coordination (with even contradicting statements among European leaders), and not at an institutional European level.
- and the ***Cooperation of Freedom Security and Justice*** (as the *third pillar*), meaning new cooperation between areas such as **civil law**, **criminal law** and **asylum policies**.



Thus, the structure that is created by the Treaty is characterised by these ***three pillars*** (the European Community, Common Foreign and Security Policy and Justice and Home Affairs), underpinning the (highly rhetorical) European *Union*.

Maastricht treaty really changed European ambitions. Moreover, after Maastricht, we have two treaties whose main purpose was to prepare the EU for enlargement. In **1993**, the Copenhagen European Council provided the ***criteria*** the States had to meet in order to join the EU. Of course, this was not enough: the EU also needed a **change in the institutions**. For instance, Member States had to decide *how many MPs* each new Country would have, *how to vote* policies, etc.

The Amsterdam Treaty (1999)

Unfortunately, these *institutional reforms* **fail** in the first place, at the **Amsterdam Treaty** in **1999**. Nevertheless, some important **changes** occur, continuing the path of European integration. After a comprehensive debate about the **legitimacy of the EC** – as the more power States gave Europe, the more power was needed by the EP in order to secure democratic accountability –, a **new *sanctioning procedure*** for Member States with *"serious and persistent breaches*" of the values of the EU (that is, *rule of law*, *democracy,* and *fundamental rights*). This procedure still exists, despite not working very well. Moreover, we witness another **strengthening of the EP** role (through *co-decision* and *Commission election*), in order to **increase competences** of the EU without experiencing a lack of democratic accountability. Namely, the **Schengen** and **Area of Freedom Security and Justice** (i.e., cooperation in civil, criminal and asylum law), with the possibility for

Denmark, the United Kingdom and Ireland to ***opt in*** in respect of some decisions[12]. **Anti-discrimination** (beside the one based on nationality: i.e., gender, sexual orientation, disabilities, etc.) policies were enacted. Furthermore, Members started to go beyond mere economics and thought about the social aspect of Europe, with the sign of the ***Social Charter*** (that, for instance, provided coordination of policies related to employees: e.g., 48 working hours per week maximum). It is from this moment on that we start to see the so-called ***Multi-Speed Europe***: in order not to stop European integration because of few dissenting member States (guess who, the UK), the drafters gave the possibility for them to ***opt out*** (or *opt in*) from the Treaties. Finally, European treaties got **renumbered** (and this would happen again in 2009, after the Lisbon Treaty).

The Nice Treaty (2000)

In **2000**, the Nice Treaty made **institutional amendments** (that had failed to be done in Amsterdam) to prepare the EU for the 2004 enlargement. Indeed, the institutions were conceived for 6 MS, which in that moment were going to be 15. The idea was *reducing the number of countries participating in the Commission*, but this was not reached (due to Ireland who might find itself without a commissioner). Despite so, they made **substantive changes.**

The **European Charter of Fundamental Rights** is *solemnly proclaimed*. Generally, we can find the proclamation of fundamental human rights in national constitutions. But in this case, it had **not official legal value.** There is a change in the article 7 too, but we will see that later. The new millennium started with a big shock for the world, after the attack at the Twin Towers. In 2002 the EURO becomes legal tender.

From the 2004 enlargement to today

In 2004, after the so-called **big enlargement** (where more than 10 countries joined the union), we find a first stop to the process of European integration with the failure of **European Constitutional Treaty** due to the referendum in France and the Netherlands. In 2005 Angela Merkel became German Chancellor.

In 2007 the **Treaty of Lisbon** was signed, then coming into force in 2009. Substantially this is very similar to the European Constitution: it was indeed the result of a minor redrafting. It changes the structure established by the previous treaties. There is the Treaty on the European Union (**TEU**), the Treaty on the Functioning of the European Union (**TFEU**)[13] and the **Charter of Fundamental rights**. After that the world entered in a long period of crises, starting from the economic crisis in the USA in 2007. It also affected Europe, where between 2009 and 2010 the sovereign debt crisis in the EU began. In 2009 the Treaty of Lisbon enters into force. To face the crisis a new treaty was signed, the **ESM Treaty**, a hybrid EU instrument outside the European Institution. This was due to the change of government in UK.

In 2015 another crisis started, the refugee crisis, that challenged the Dublin System. In 2016 the UK decided to leave the Eu. It happened with a referendum, with a great turnout of people. Almost 52% of people voted for leaving Eu, which happened formally on 31 December of 2020. There was a transition period until that moment, but this created an unprecedent constitutional crisis in the UK.

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[12] Those Countries (of course, the UK now excluded) can decide *measure by measure*, after being notified by the Commission, whether to agree or not.

[13] The former TEC.

Both UK and Europe have negotiated their future relationship, but not all the issues are settled, and it is not going very well.

What could the future bring for the European Union? On the one hand, further enlargements are becoming a more concrete possibility: there are now 8 candidate countries and 2 potential candidates. On the other hand, the recently presented Draghi report offers new insight into potential measures to further integration, from the issuing of new common debt to finance investments, to the possibility of Treaty revision and changes to the Union's decision-making procedures.

The European institutions

Before analysing the European institutions, we should recall some key concepts in the EU context.

1. The first one is ***intergovernmentalism***, which means that national governments take the decisions following the principle of **consensus**, according to their domestic constitutional requirements. Usually, it is the ***executive*** which is in charge that takes part in this decision-making process.
2. The other concept is *supranationalism. In* our context, it is also referred as the ***Community method***: it is when you go *beyond* international cooperation and the concept of Nation-State. It is indeed based on an international treaty (i.e., the Treaty of Lisbon); however, member states **confer power to institutions** that are <u>not exclusively</u> made by representatives of the governments. So, the member states agree to give some powers to someone else who will exercise these powers. In the Eu context the decision making is delegated. Mostly, there is <u>no</u> unanimity (possibility of being outvoted), plus a directly elected European Parliament and a **Commission** as an **independent body of officials**. On top, we have a **Court** which sits at a supranational way (an ***instrumental role*** in ensuring EU integration, as we've already seen).

We should consider the **purposes of an institutional structure**. In every system (from companies to little States), the institutional structure **allows** the systems to carry out its **functions**: indeed, it seeks to **balance different interests**.

1. For instance, the representation of different constituencies (i.e., the representatives *of students*, the ones *of teachers*, etc.);
2. moreover, we need to guarantee **effective decision-making**. If we decide everything by *direct voting* (for instance), it might be very ineffective (it would take too much time and effort).
3. Finally, we need to think about **checks and balances**: it is normal, for instance, to have judiciary power balancing the legislative power; a specific role for minorities in the Parliament; etc.

If we think about the institutional structure revolving around EU, which are the different interests we need to bear in mind in order to balance them? Firstly, **national interest *v.* community interest** (sometimes they are different indeed!), but also **geographical representation v. democratic representation**.
What's more: the **interests of the citizens** (as part of *democratic representation*) and the fact that States that make up the EU have very **different needs**.
At this purpose, besides the ECJ, we will consider:

- The **European Council**, formalized with the Lisbon Treaty: it is formed of the **heads of States and Governments**, and it provides the ***political impetus*** to the EU, meaning that the Council decides the **direction of powers** (i.e., where can we find an agreement to move forward?)
- The **Council of the EU**: it is made of Member States representatives at a **ministerial level**. For instance, consider **ECOFIN** (made of financial ministers), or **Home Affairs** (made of the ministers of home affairs). The Council aims at deciding about *budget and co-legislation*.
- The **European Parliament**, which is directly elected by the "peoples of Europe". It acts as **co-legislator**.
- Finally, the **European Commission**: it is made of "independent" officials (a member per country) and **pursues the collective interests of the EU** (it acts only in the interest of the EU) using its wide powers (including the sanctioning procedure and the power to **initiate legislation**, which is not delegated to the Parliament that hence cannot initiate legislation).

INSTITUTIONAL PRINCIPLES

There are some principles contained in the treaties that relate to the institutions. First of all, we shall remember that Europe is made by states founded on the principle of **democracy.** For this reason, the EU institutions are built on these principles:

- ***Democratic accountability*** *(Art. 10 TFEU)*
- ***Institutional balance*** *(Art 13(2) TEU)*
- ***Loyal cooperation*** *(Art 13(2) TEU + 295 TFEU interinstitutional agreements), so as not frustrate the decision-making process.*
- ***Autonomy***
- ***Transparency*** *(15 TFEU; T-540/15, De Capitani)*

The article 10 TFUE expresses the principle of ***direct democratic accountability*** of the members of the European Parliament, due to the fact that citizens are *directly represented* in it. Moreover, the article clarifies why the EU Council, and the Council of Ministers are **legitimate**: due to ***indirect democratic accountability***. These representatives of governments are **themselves democratically accountable** *at a national level*: usually, the Government is responsible either to the Parliaments, or directly to citizens.

How is democracy best protected at EU level? **Can you think of reasons why the Council might be perceived as not so democratic**?

- It might be due to the **lack of transparency** (its sessions, in fact, are not public).
- We might have though decisions that are **blocked by representatives we have not chosen**. For instance, in 2004 the "*Citizens' directive"* was in discussion: the EP voted in favour of recognition of same sex marriages; however, the Council of EU blocked the decision due to the veto of some states. Possibly, it could be a bit problematic.

Provisions regarding EU institutions

TEU– Title III	**TFEU – Part VI – Title I – Chapter I**
Art. 13 Institutional Framework	Section 1 European Parliament (Art. 223-234)

Art. 14 European Parliament	Section 2 European Council (Art. 235-236)
Art. 15 European Council	Section 3 Council (Art. 237-243)
Art. 16 Council	Section 4 Commission (Art. 244-250)
Art. 17 Commission	Section 5 CJEU (Art 251-281)
Art. 18 High Representative for FASP	Section 6 European Central Bank (Art. 282-282)
Art. 19 Court of Justice of the European Union (CJEU)	Section 7 Court of Auditors (Art. 285-287)

Principles concerining the institutions

- Democratic accountability (Art. 10 TEU)
- Institutional balance (Art 13(1) TEU)
- Loyal cooperation (Art 13(2) TEU + 295 TFEU interinstitutional agreements)
- Autonomy
- Transparency (15 TFEU; T-540/15, De Capitani)

Article 13 (1) TEU → provides the institutional framework
*The Union shall have an **institutional framework** which shall aim to promote its values and advance its objectives, serve its interests, those of its **citizens** and those of the **Member States**, and ensure consistency, effectiveness and continuity of its policies and actions.*
The Union's institutions shall be:
- the European Parliament,
- the European Council,
-the Council,
- the European Commission,
- the Court of Justice of the European Union,
-the European Central Bank,
-the Court of Auditors

Art. 13 (2) TEU
*Each institution shall **act within the limits of the powers conferred on it in the Treaties**, and in conformity with the **procedures, conditions** and **objectives** set out in them. The institutions shall practice mutual sincere cooperation.*

Art. 10 TEU → Democratic accountability

*1. The functioning of the Union shall be founded on **representative democracy**.*
*2. **Citizens** are **directly represented** at Union level in the **European Parliament**.*
***Member States** are represented in the **European Council** by their **Heads of State or Government** and in the **Council** by their **governments**, themselves democratically accountable either to their national Parliaments, or to their citizens.*
*3. **Every citizen** shall have the right to **participate in the democratic life of the Union**. Decisions shall be taken **as openly and as closely as possible to the citizen**.*
*4. **Political parties** at European level contribute to **forming European political awareness and to expressing the will of citizens of the Union**.*

EUROPEAN COUNCIL (ART. 15 TEU)

- formalized with the Lisbon Treaty
- formed of the HEADS OF THE STATES AND GOVERNMENTS
- provides political impetus to the EU → it decides the direction of powers
- it is the **most intergovernmental institution**
- it decides the **number of seats of the EP**

Art. 15 TEU
*1. The European Council shall provide the Union with the **necessary impetus** for its development and shall define the **general political directions and priorities** thereof. It **shall not exercise legislative functions**.*
*2. The European Council shall consist of the **Heads of State or Government of the Member States**, together with its **President** and the **President of the Commission**. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.*
[…]
*4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken **by consensus**.*

<u>COMPOSITION & NATURE</u>

- Meeting of **Heads of State / Government**
  - + President of the European Council
  - + President of the European Commission;
  - + the High Representative for Foreign Affairs and Security Policy shall take part in its work → we live in an interconnected world, so the political direction has also an **external influence**
- **NB European Council is different from the Council of Ministers of the EU and from the Council of Europe (ECHR not EU)**
- It meets at least **twice every 6 months**, more if required
- It was only codified in the **Treaty of Lisbon** which also created the President of the European Council

<u>FUNCTIONS</u>

- It sets the **political agenda of the EU**, and it provides "**impetus**" to the EU → it is a body of **political direction**
- It is **not a legislative body**
- High level **conflict resolution**
- Responsibility in sensitive areas (CFSP)
- **Quasi-constitutional** role

PRESIDENT OF THE EUROPEAN COUNCIL

- Elected by European Council (**QMV**), for **2 and half years renewable once**
- **Chairs and drives work of European Council**
- Prepares and ensures continuity with Commission President and General Affairs Council
- **Builds consensus,** talking to different leaders seeing if an agreement on specific action is possible → e.g.. crucial in relation to the negotiations for Next Gen EU where there were significant differences amongst Member States and especially between "frugals" (no grants **only loans**) and others
- Reports to EP after Council meetings

The President was Charles Michel until 30th Nov but from 1st Dec he is **António Costa**.

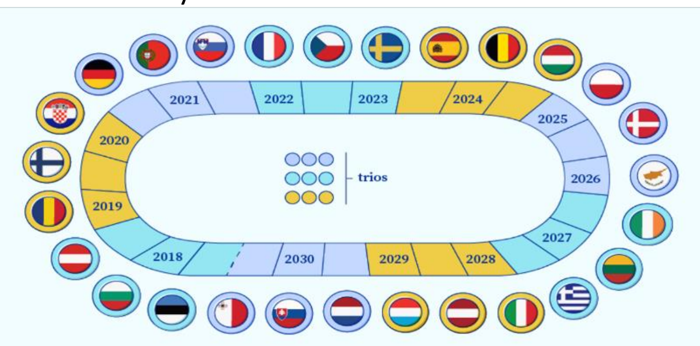
N.B. The President of the European Council is a **supranational figure** since he has the task to achieve consensus among the members of the Council, even if he is the leader of the an intergovernmental institution.

COUNCIL OF THE EU/COUNCIL OF MINISTERS OF THE EU (ART. 16 TEU)

- made of MSs representatives at a ministerial level (e.g. ECOFIN gathers the financial ministers; Home Affairs is made of ministers of home affair ecc.)
- **Decision on budget and co-legislature**

COMPOSITION AND NATURE

- A **representative of each Member State at ministerial level**, who may commit the government of the Member State in question and cast its vote
- **Different configurations depending on the matters to be considered** (e.g. Ecofin etc)
- 2 configurations of the Council are mentioned in the Treaty:
    - **General Affairs Council** → composed by the **ministers for Europe**,
        - co-ordinates **works of "Council"**
        - and prepares the **works for European Council**
    - **Foreign Affairs Council** → composed by the **foreign affairs ministers chaired by HR**,
        - it deals with **EU external action** on the basis of the guidelines laid down by the European Council
        - and ensures that the **Union's action is consistent**.
- **Rotating Chair** (6 months each MS, in group of 3 to try and provide strategic vision and consistency in priorities) → currently held by **Hungary;** starting from January 2025 it will be held by **Poland.**



- Voting usually by **QMV** (proposal from **Commission** or **HR**):
    - **55% of Members** (15 out of 27)

        - representing **65% of EU population**
            - **Double majority** → to balance **geographical representation and national interest**
- **Blocking Minority**:
    - at least **4 reps of MSs**
    - representing **35% of the population** → the 3 biggest states (IT, DE, FR) cannot block a proposal despite having 47.2% of population since it is required at least the opposition of 4 MSs
    - **abstention counts as vote against**
- In very few areas **unanimity** → abstaining MS does not count
    - In relation to disbursement of Recovery Instrument funds there was a heated discussion; the Commission had first proposed that it would decide alone this was unacceptable to MSs; Eur Council agreed that Council would decide by QMV yet some Member States wanted unanimity.
- When proposal does not come from Commission or HR, the **QMV is enhanced**
    - **72%** of MSs
    - representing the **65% population**

<u>FUNCTIONS</u>
- **Co-legislator** (with the EP) → and the **meeting is public**
- **Approves the budget** of the EU together with the EP
- It enters into **international agreements** (including Brexit withdrawal agreement) **on behalf of the EU**
- Co-ordinates **economic policies** → Important role in the EMU (Economic Monetary Union) and Eurozone
- It represents **interests of MSs**

EUROGROUP AND EUROSUMMIT
- **"Non-institution" of the EU** → see Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, Council v Dr K. Chrisostomides &Co LLC
- **Eurogroup** → meeting of:
    - all finance ministers of the € area -Eurozone- (**20**)
    - + President of the Eurogroup (Paschal Donohoe)
    - + the Commission VP
    - + the President of the ECB
    - it takes place **the day before Ecofin** and the meetings are **not public** even if the decisions taken within it have a huge effect
        - Article 137 TFEU and PROTOCOL (No 14)
- **Eurosummit** → after the European Council.
    - heads of State /Gov € area
    - + President Eur Council
    - + President Commission
    - + if necessary, President ECB
    - + President Eurogroup
    - + President EP;
    - again, those meetings are **not public**

Eurogroup decisions cannot be reviewed by ECJ since Eurogroup is an **informal configuration of the Council** so it is **not an institution of the EU → it is not accountable for the decisions it makes.**

HIGH REPRESENTATIVE FOR FOREIGN AFFAIRS AND SECURITY POLICY (18 TEU)

FUNCTION

- **Responsible for CFSP** (Common Foreign and Security Policy) + **External Relations** of the EU, including commercial policy
- **Represents EU externally**
- **Chairs Foreign Affairs Council**
- *de iure* **Vice President of Commission**

Art. 18 (1) TEU: *The **European Council**, acting by a **qualified majority**, with the **agreement of the President of the Commission**, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The **European Council** may end his term of office by the **same procedure**.*

He is referred as **double hatted** figure since it has important roles in both European Council and in the European Commission.

EUROPEAN COUNCIL/COUNCIL	COMMISSION
• Appointed by **QMV** (**European Council**) • Responsible for CFSP; • Takes part in the works of European Council • Chairs Foreign Affairs Council	• With **agreement of Comm Pres** • Vice President ex officio • Responsible for external relations • And consistency of EU external action

EUROPEAN PARLIAMENT (ART. 14 TEU)

- **SUPRANATIONAL INSTITUTION →** it represents the interest of the citizens
- made of representatives of the people of Europe/of MSs → direct election since 1979
- Co-legislature

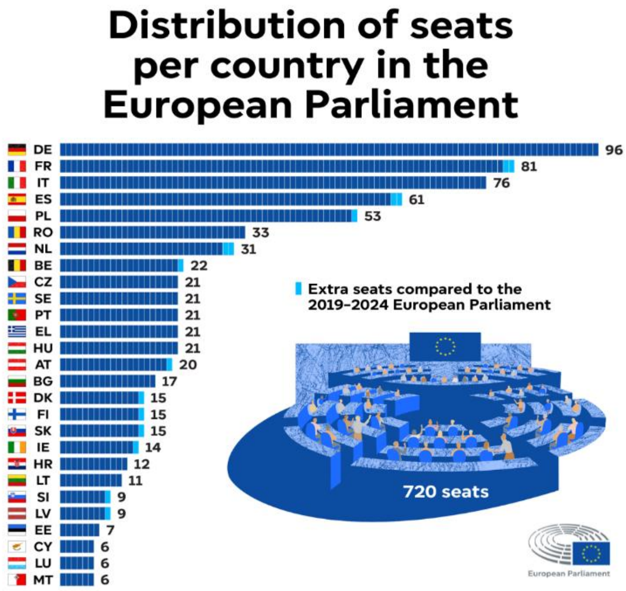
Art. 14 TEU:
*1. The European Parliament shall, <u>jointly with the Council (of Ministers)</u>, exercise **legislative and budgetary functions**. It shall exercise functions of **political control and consultation** as laid down in the Treaties. It shall **elect the President of the Commission**.*
*2. The European Parliament shall be composed of **representatives of the Union's citizens**. […]*
*The **European Council** shall adopt by **unanimity**, on the **initiative of the European Parliament and with its consent**, a decision establishing the **composition of the European Parliament**, respecting the principles referred to in the first subparagraph.*

COMPOSITION AND NATURE

- **Directly elected** – 751 members pre-Brexit, after Brexit 705 → in Sep 2023, number of seats increased by 15 → **720 for the 2024-2029 legislative term**
- Elected pursuant to **national franchise (passive electorate)** and according to **national rules** but with some **sort of proportionate representation**
  - both the **passive franchise** (i.e., requirements needed to be elected) and the **active franchise** (i.e., requirements needed to vote) for the European Parliament and the local Administrative Elections are granted **to every eligible EU citizen** regardless of the Country they are living in (thus, an Italian who lives in Paris is eligible to vote for – and be elected as – the Paris' Major and for the EP). From a conceptual viewpoint, this is quite an important provision, strengthening the idea of a **transnational democracy**: the Treaty actually gives voting rights to constituencies that usually are decided by the States in the sovereignty. Indeed, the fact that States agreed (within the Treaty of Maastricht) that European and local franchise could be determined at treaty level, was a very big step.
  - Despite the MPs being elected according to the national franchise and to the national rules (in Italy for instance, those who can vote for Local elections, can vote also for the EP), the **elections influence the composition of a European supranational institution**: that is why a number of rulings have **restricted the discretion of Member States**.
    - ECHR ruling in ***<u>Matthews</u>*** **→** Ms. Matthews was a Brit living in Gibraltar (part of the British territory), which is a highly contested territory. At that time, an agreement between Spain and the UK provided that residents in Gibraltar could not vote for the European Parliament (despite most of EU law being perfectly applicable there). Then, Ms. Matthews raised the case before the ECtHR[14], complaining this was not democratic, and the Court agreed, basing on the fact that both the EP and, more in general, the EU are based on democratic principles: the UK could not disenfranchise citizens in Gibraltar.
    - Later, the ECJ also decided on these kinds of issues: for instance, considerC-300/04 ***<u>Eman and Sevigner</u>*** (non-discrimination) and C-650/13 ***<u>Delvigne</u>*** (prisoner's voting rights).
      The former was a case in which the application of national rules on franchise related to territories had the effect of disenfranchisement from the EP elections: the Court ruled that even if franchise for the EP is for MSs to be determined, people who have the nationality of a MS can still rely on the Treaty so the MS must respect the principle of non-discrimination between own nationals (unless the differential treatment is justified).
      In the latter case the Court ruled that franchise for EP falls within the scope of EU law since it is an implementation of EU law for purposes of the Charter, which applies; more specifically, the Court made it clear that only the Court itself or EU law can decide whether the exclusion of prisoners from franchise is compatible with the Charter and EU law.
  - **<u>There is no EU law for the election of the Parliament</u>**

[14] Ms. Matthews could not do it before the ECJ, as she was challenging a piece of primary legislation (i.e., a Treaty), whose validity cannot be disputed before a Court according to European Law.

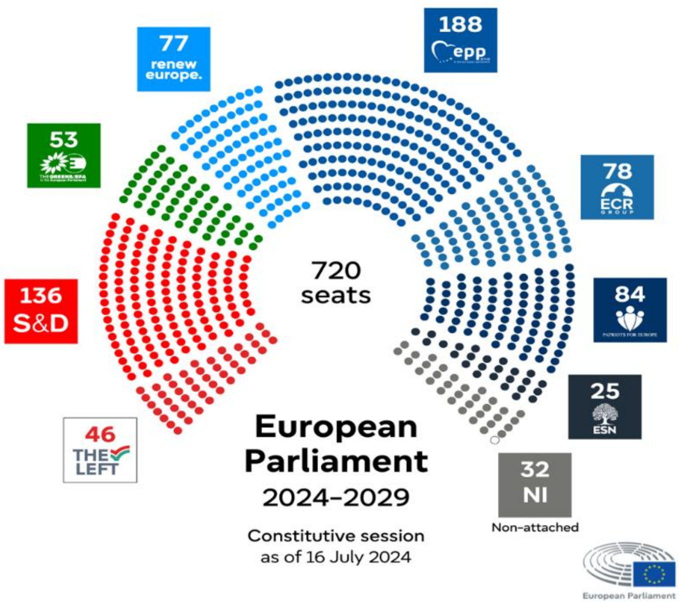
- Nationals of a Member State resident in another MS can stand for elections and vote for the EP in that State → due to EU citizenship and the importance of free movement for EU: a sort of transnational democracy in action
- **Digressively proportional representation**, in order to rebalance the disparities in population between EU Countries (and balance **demography** and **democratic principles**) → minimum 6 MEPs max 96.



Smaller states have fewer representatives than larger ones: Cyprus, Malta, Luxembourg only have 6 while the larger states cannot exceed 96.
The ratio is the huge difference between the sizes of individual Member States. If you distributed the number of seats in proportion to the population, the seats would be thousands; indeed, if Malta and Germany had to be represented purely proportionally, the former would have extremely few MPs, whereas the latter would be overrepresented. For this reason, the Treaty establishes a minimum floor (6 MPs for Malta) and a maximum ceiling (96 MPs for Germany). Within these thresholds, however, the representation is **proportional**.
The size of the country is taken into account but with corrections: **smaller countries are slightly over-represented** and **larger countries slightly under-represented** to avoid a spread, an excessively large gap.
With a proportional criteria the smaller States would not be represented.

- Sits according to **political grouping**, NOT Member State → A political group must be composed of at least **23 MEPs from at least one-quarter of Member States** (at least 7 different MSs must be represented in the group)

- the EP is located both in **Strasbourg** (once a month, for a plenary session, as planned originally in the Treaties) and **Brussels** (because the EP needs to work close to other institutions).



FUNCTIONS

- Acts as **co-legislator** (jointly with the Council) → in fact, the EP must agree basically on everything to pass a piece of legislation. We then have pretty much of a **bicameral system**: the Council of the EU and the Parliament have to agree on the same draft before it can become law.
- Approves **budget** (jointly with the Council) → the budget is administered and proposed by the Commission
- Powers of **political control**
    - Elects **Commission's president** (upon proposal by the **EuCo**) → European Council should take "into account" results of EP but in 2014 the EP preempted the European Council by having a **Spitzenkandidat** (leading candidate) for each group. When the Juncker commission was formed, the EP tried to get more power: the two main political groups (that are EPP and S&D) of the EP decided to have the Spitzenkandidat before the election. In this way, the Commission's President would have had **indirect democratic accountability**. This was not provided in the treaties actually, but, after all, the EU Council could do nothing to stop it: reluctantly, it was practically forced to nominate Juncker (the leading candidate of the most voted party). But in 2019 the European Council chose a different candidate (Ursula von der Leyen) because there was no clear winner, thus ignoring the parties' Spitzenkandidat. In 2024, there was a convergence between European Council and EP in the Spitzenkandidat process since Ursula von der Leyen was the leader of the EEP, the main political group.
    - **Approves Commission** + **motion of censure** make it resign as a "body" (<u>never used</u> as majority very high) → **2/3 majority of votes cast**, representing majority of MEPs
        - The **EP auditions potential Commissioners** put forward by President of the Commission and Council (as a power that the EP has allocated for itself)→ this led to the Buttiglione debacle since he said that *gay people were sinners* (a curious position for a Human Rights Commissioner). That being the case, it is noticeable that Treaties and actual politics differ a lot: the EP has been eager and capable to exercise its powers in a broad and effective way
- **Supervisory powers**
    - It can **trigger Article 7 TEU proceedings against a Member State when there is a serious risk of violation of Art 2 values** (Hungary) or **persistent and serious breach thereof.**

Art. 7 TEU

1. On a reasoned proposal by one third (⅓) of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths (⅘) of its members after obtaining the consent of the European Parliament, may determine that there is a ***clear risk of a serious breach by a Member State of the values referred to in Article 2****.*

Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third (⅓)of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine ***the existence of a serious and persistent breach by a Member State of the values referred to in Article 2****, after inviting the Member State in question to submit its observations.*
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

EUROPEAN PARLIAMENT AND ITS CITIZENS

The EP is the place where things are debated (if not necessarily decided) **publicly** and criticism voiced:

- Citizens and residents can **'petition' the EP** → this leads to important issues making it to a public debate; Indeed, during the Brexit negotiations, the EP had a vital role to give a voice to European citizens residing in the UK.
- **Citizens' initiative** (a bottom-up approach)**→** citizens can ask the Commission to propose legislation (not terribly successful so far, due to really strict requirements: at least 1 million citizens from at least 7 MSs are needed).
- **Importance of public debates** for public scrutiny and EP becoming better at using its own democratic credentials.

COMMISSION (ART 17 TEU)

- made of independent officials (one member per country)
- It acts in the collective interests of the EU
- wide powers, such as:
    - **sanctioning procedure**
    - **initiating legislation**

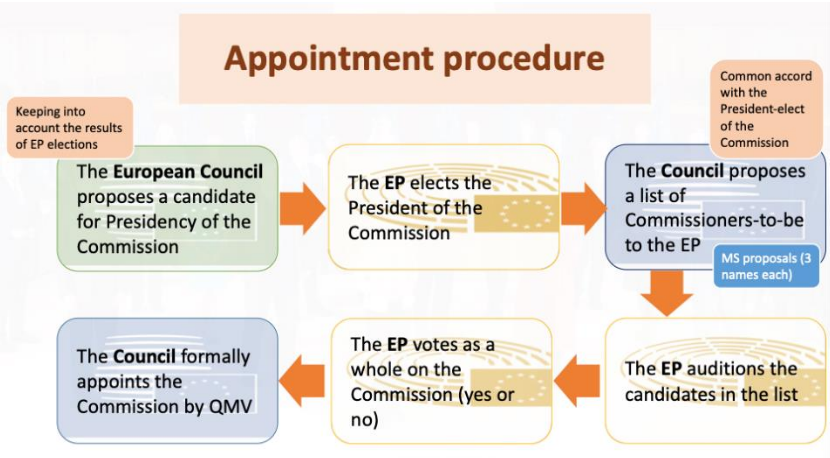
Art. 17 TEU

1. The Commission shall promote the ***general interest of the Union*** *(it is a* ***supranational institution****) and take appropriate initiatives to that end. It shall* ***ensure the application of the Treaties****, and of measures adopted by the institutions pursuant to them (Commission as the* ***"watchdog" of the correct application of EU law****). It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall* ***execute the budget*** *and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the*

*exception of the common foreign and security policy (that is done by the **High Representative for Foreign Affairs and Security Policy**), and other cases provided for in the Treaties, it shall **ensure the Union's external representation**. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.*
*2. **Union legislative acts may only be adopted on the basis of a Commission proposal** (**it initiates most of EU legislation**) , except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.*

COMPOSITION

- President
- College of Commissioners (in the outgoing college, 13 – including the President – out of 27 were women; gender balance problem in the new college)
- Civil Service (EU officials and national officials posted to Commission)



All the EU institutions are involved in the Appointment Procedure:
EU Council (QMV, although it usually happens by consensus) → EP (majority voting) → Council (in its General Affairs composition) → EP → Council (QMV)

PRESIDENT OF THE COMMISSION

- Proposed by **European Council** (**QMV**) to the **EP** taking into account electoral results (**accountability**) → European Council should take "into account" results of EP but in 2014 the EP preempted the European Council by having a Spitzenkandidat (leading candidate) for each group; in 2019 the European Council chose a different candidate because no clear winner. In 2024, convergence btw European Council and EP in the Spitzenkandidat process
- EP must approve by **majority**
- S/he directs Commission including internal organization.
- Can request **resignation of Commissioners** → introduced after the so-called **Santer commission scandal**. The Commissioner Edith Cresson, in fact, had given her dentist a lot of important jobs: however, at that time, Santer could not force her to

resign, thus causing the forced resignation of the Commission as a whole (1999). Therefore, when the Treaty were reformed, the President was finally given that power. Thanks to that, in 2020 Ms. Von der Leyen was able to make the Irish commissioner **Phil Hogan** resign after he had broken the Covid isolation rules.

- **Agenda setting** for the Union, presented to the EP during the State of the Union Address (See the State of the Union speech)

The current President of the Commission is **Ursula von der Leyen.**
In 2024 she changed the structure of the Commission, with 5 executive VP and the HR is VP ex officio.
The President is the expression of the winning party.

COLLEGE OF COMMISSIONERS

- For the time being, **1 Commissioner per MS** → in theory there should 2/3 of MSs so 18 commissioners only; however, none of the small member states agreed not to be represented (so-called **Irish Concession**). Actually, this is quite contradictory: whereas the EC should only represent the Union as a whole, it is still composed by one Commissioner per State, making the Commission more distant from a pure Supranational body.
- **5 Executive VP**, and **1 ex officio (HR FASP)** → each VP heads a team of Commissioners
- Commissioners have to be **independent** experts → Commissioners do not represent their MS and their independence must be undisputable
- Term of office: **5 years**
- Removal:
  - **Collective removal** → **EP motion of censure** requiring extremely high majority: **2/3 of votes cast and the majority of MPs**
  - Resignation (as it happened to the Santer Commission)
  - Inability to fulfill the conditions for the job (Art 245-247 TFEU)
  - Serious misconduct
  - **Resignation upon request by the President of the Commission** (Art. 17(6) TFEU) + special procedure for the HR FASP

FUNCTION

- **Legislative initiative**: It has the **monopoly** over the legislative initiative
- **Political role**: Sets the **agenda** and develops **policy strategies** of the EU
- **Executive role**:
  - enacts **EU norms in specific fields**
  - manages the **EU budget →** this endows the Commission with huge powers, also in relation to the **Recovery Fund**; indeed, in order for States to get the funds, they have to propose a plan to the Commission, who has the power to approve or reject it.
  - adopts implementing measures and delegated acts (delegation by EP and Council)
  - **negotiates with third-countries**
- **Supervisory role**: oversees the **correct application of EU law** by MS and by private parties in the field of competition law
  - it is up to the EC to decide whether to initiate **infringement proceedings** against the Member States in front of ECJ

A question that could be raised in relation to the very nature of the Commission, on whether it is a **democratic or a technocratic institution**. Although Members of the Commission are proposed by Member States (through the Council), it is in theory **technocratic**. Back when it was created, it surely was: the idea was that a technocratic Commission (rather than a political one) could really do what was the best for the EU; the Parliament (i.e. the European democratic institution par excellence), in fact, was not even involved in the appointment procedure of the Commission. Now, instead, the Parliament, is involved, although with a limited role. Hence, the nature of the Commission is now a **bit of a mix**: whereas in theory it is a technocratic institution, it has also a strong element of political influence (for instance, the European Council has to choose the President taking into account the results of EP elections, pursuant to TEU). That being said, is the Commission democratic?

1. Well, it is not democratically elected, but it is rather **approved by a Democratic Body**. However, this is based on the principle of **take it or leave it**;
1. moreover, the Parliament cannot make a single commissioner resign;
2. thirdly, the **Commission should represent the EU**, and not its citizens (who are represented, instead, by the Parliament); indeed, there is not the usual relationship between people and elected bodies.

Therefore, we could say the Commission is **not as democratic as normally Governments are**. **Neither it is indirectly accountable**, as this is a feature that is recognised to the Council and the European Council, which are formed by members of the Government who are accountable to their national Parliament. Of course, this comes with drawbacks: whilst it is supposed to be technocratic, it is de facto asked to make **political decisions** (for instance, approving or rejecting the Recovery Plans cannot be just a "technical" issue, but is endowed also with political elements); moreover, a technocratic Commission can also be seen as **distant** from the citizens. Conversely, a concretely more political Commission would be considered as a move towards a **federal State**.

Focus On: The State of the Union Address (2021)[15]

As every year, in September, the President of the European Commission Ms. **Ursula Von der Leyen** addressed the European Parliament with the ***State of the Union***, in a debate over **priorities** (what they intend doing) and **achievements** (what they have done) of the Commission. It is a key occasion to hold the Commission to *account* before the Parliament. Not surprisingly, Ms. Von der Leyen mentioned some achievements concerning **vaccination**, the **recovery fund**, the **green deal,** and **social rights**. Then, as for the priorities, of course the *health emergency* (namely, speeding up European and global vaccine roll-out) remains a key priority for the Commission, as well as the **economic recovery** of the Member States (as always, some aspects about economy are mentioned). Most importantly, though, Ms. Von der Leyen spoke about the main challenge for the future: making Europe fit for the **digital** revolution. Moreover, she addressed the theme of the European **social dimension** (a strongly debated topic[16]), referring to some raising policies (such as the European *minimum salary*). Of course, the **climate crisis** was also touched by the EC President (with the *European Green Deal* and the *Social Climate Fund* to fight energy poverty), as domestic legislations and policies are clearly not effective. Obviously, the **Afghan crisis** was also one of Von der Leyen's main points: EU has indeed to define its policies, basing on its values and on what it wants (better, *we* want) to be, and one of the main concerns is whether to establish or not a **European Defence Union** (i.e., equipping the EU with some sort of military forces)[17]. This last issue is also connected with the role of the EU as a **global actor**, thus involving *strategic autonomy*, *stability,* and *cybersecurity*. Furthermore, the theme of **migration** was once again present in the speech: the EU has not found an agreement yet (although – according to the Treaties – migration is a topic that can be decided with QMV, a subsequent political agreement has established that it would have been

[15] It is possible to read and hear it at: https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en

[16] Indeed, J. C. Juncker (former president of EC) started the debate over what he referred to as the ***social pillar*** of the EU: there is a clear **disconnect** between the European citizens and institutions. The aim was (and still is) bridging this disconnect and involving the ***social sphere*** of European citizens (i.e., working rights, social rights, etc.), which undoubtedly the EU now lacks.

[17] Of course, the theme is quite problematic due to the many political and strategical implications of having a supranational army (just think about potential diplomatic conflicts with NATO, or about issues related to its *democratic accountability*).

decided by unanimity and consensus). Finally, the last big challenge of the EU is the **Rule of Law crisis**: at the moment, two member States (i.e., Poland and Hungary) are going – by their own definition – towards **autocracy**, sliding off the democratic scale. What causes the challenge to be that hard is the impossibility to kick a Member State out of the EU. The only possibility would be Poland voting in favour of sanctioning Hungary (and vice versa), which obviously will not happen. This also has practical implications as for the single market: if a State has a corrupt judiciary, (economic, as far as the EU is concerned) controversies will not have a solution, as they cannot be brought before a Court. The Von der Leyen commission, nevertheless, tried to circumvent this problem by holding the Recovery Fund money reserved for Poland and Hungary, trying to force them to comply with the European rules (although they are, by the way, conditions *to join* the EU and not to *stay in* the EU).

The Competences of the EU

Kinds of Competences

We will now analyse the **competences** of the EU: that is to say, ***when the EU can act*** and adopt certain measures. To do that, we will consider the **principle of conferral** of powers (*when* the EU can act), the **types** of competences (*which means* the EU can act with) and the **legal basis** (*why* the EU can act), so as to understand the existence and the scope of EU competences. Finally, we will mention two crucial other principles: ***Subsidiarity*** (an action taken at the EU level is **necessary**) and ***Proportionality*** (a certain action is **proportionate to the aim** it pursues), that define *how* the EU can act: in other terms, whether and how should competences be exercised.

But first, by ***competence*** we mean the **power to act**. On the one hand, Member States have indeed the so-called **inherent competence**: indeed, as they are *sovereign* States, they basically have competences in every field that can be regulated. On the other hand, the EU is a system based on the **principle of *conferral***: indeed, the EU only has those competences that the Member States have conferred upon it, for the Member States are the "Masters" of the Treaties. The reason behind the *principle of conferral* can be found in the very legal basis of the EU: an **international treaty**. Thus, there are Member States that come together and consensually yield some of their sovereign competence to the supranational institution (bit by bit, according to the **functionalist approach** we have mentioned). EU Competences can be divided into different **types**:

- ***Exclusive* competence**, for subjects where only the EU can act.
- ***Shared* competence**, when both the EU and the Member States can act.
- ***Co-ordinating* and *Supportive* competence**, when the EU can only coordinate measures decided directly by the States (as it happened a lot of times during the Covid crisis).

After identifying a competence, it is necessary to refer to a **legal basis** (i.e., to the *Treaties*) that provides the **procedures** (how, what majority is required, by which acts, etc.) that EU institutions have to follow to act in a certain area of competence.

To go deeper, let us start by stating **Art. 5 TEU**:

*1. The **limits** of Union competences are governed by the **principle of conferral**. The **use** of Union competences is governed by the principles of **subsidiarity** and **proportionality*** [and then, the article explains what the principles mean].

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

In other terms, under the ***Principle of Conferral***, if a competence is not conferred upon the EU by the Member States in the Treaty, then the Union cannot act; moreover, within these terms, the

objectives must be **compatible** with the overall objectives of the Treaties. The principle can be funnily exemplified with two *fruit bowls*, one of which is full of fruit (it is the one of the States, that are sovereign and so they have *inherent competences*, i.e., all the fruit) and the other is empty (which is the EU) until the moment when each State decides to put *one piece of fruit* (i.e., one competence) in the EU bowl. Only at that moment, the EU will have competence to act in that certain field. Competence is usually ***explicitly*** conferred in the Treaties (for instance, with a provision stating that the *EU can harmonise the rules of the single market*); however, it can sometimes be also ***implicit***. Indeed, it can happen that, in relation to a certain competence, there is not explicit conferral of a power in the Treaties, and yet that power is **necessary to achieve one of the aims** established in the Treaties. Thus, as a way of the example, consider the case of the *environmental crisis*: the EU has explicit competences in *environmental protection* and *harmonization of criminal law*. All of a sudden, the Council decided to adopt a ***framework decision*** (i.e., a piece of legislation) in the criminal law field, that provided **criminal liability for environmental damages**. Now, the Commission brought judicial review proceeding (case ***C-176/03***, ***Commission v. Council***) for the annulment of that framework decision[18]. The Court agreed that the environmental protection legal basis did not mention any need for criminal liability, and that the EU did not have an explicit power to impose criminal sanctions. Yet, it was necessary to consider the *objectives* of the provision at stake, which indeed aimed at protecting the environment, thus falling under the competence of environmental protection, even without an explicit power to impose criminal sanction. In other terms, criminal sanctions were indeed **implicitly permitted** as a *way to achieve* the aim of protecting the environment, even though no provision in the Treaties allowed it explicitly. Thus, the Court concluded that the appropriate legal basis for the provision at stake was *environmental protection* and not criminal law coordination. The issue was indeed crucial: a specific legal basis would indeed mean different participations of institutions and different legal effects.

Once we have found a competence (whether implicit or explicit), it is necessary to understand *what type* of competence the EU does have. We have already mentioned them, but a deeper analysis of those is necessary. According to **Art. 2 TFEU**, EU competences can be:

- ***Exclusive*** competence, when **only the Union** may legislate and adopt legally binding acts: indeed, the Member States have **renounced to their sovereignty** in these fields and for the aims (thus, the Member States can act only in fields and to the extent that the EU empowered them). For Member States, to act would be inconsistent to the meaning of the competence. Article **3(1) TFEU** than specifies the fields in which the EU has exclusive competence: ***customs*** *union*, ***competition*** *rules necessary for the functioning of the internal market*, ***monetary*** *policy* for Member States in the Euro area, *marine biological resources* under the common fisheries policy and *common* ***commercial*** *policy* (i.e., commercial deals with other Countries). Furthermore, art. **3(2) TFEU** confers exclusive competence for ***international agreements*** when its conclusion is provided for in a *legislative act* of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope. This very last principle can be considered as a codification of the so-called **ERTA principle**, that stands from the *case law* of the ECJ (thus being an implied competence then codified in Lisbon): if an international

[18] The Council enacted a Framework Decision under what was the Third Pillar *(Police and Judicial cooperation in criminal matters*), Title VI TEU, that required Member States to prescribe criminal penalties for certain environmental offences. The Commission argued that the measure should have been enacted under Article 175 EC, since it was concerned with the environment. The ECJ found that the principal aim of the Framework Decision was to protect the environment, and that it should have been made under Article 175. It accepted that, as a general rule, neither criminal law nor criminal procedure fell within Community competence. But the reasoning did not stop here, as specified in the subsequent lines.

agreement **affects common rules** or their scope, then the EU must have exclusive competence over it (otherwise, the choices of a single State could impact on internal rules – and so on other EU Countries as well).

- ***Shared*** competence, which is – as far as we are concerned – the most important competence of all. When the competence is shared, the EU can adopt **legally binding acts**, whereas:
  *The **Member States** shall exercise their competence if the Union has not exercised its competence. The Member States shall again exercise their competence to the **extent that the Union has decided** to cease exercising its competence.*
  The idea of shared competence is that, as a matter of principle, **both** the Member States and the Eu are competent to regulate a certain area. However, in practical terms, Member States can only act to the extent that the **EU has not acted** (the so-called ***Principle of Pre-emption***), or it has stopped acting. Moreover, whereas the Exclusive competence is a *closed list*, **art. 4 TFEU** provides a crucial ***presumption***, according to which, when the Treaty grants the EU a competence which is neither exclusive nor coordinating/supportive, that competence is (presumptively in absolute way) **shared**. As an example, suppose that we are dealing with *drinking water*; in mineral water, we have all sort of minerals, including salt; for health security purposes, the (minimum and maximum) quantity of salt that can be in the water needs to be regulated. At European level, if shared competence did not exist, it would be possible to have 27 different regulations on the permitted amount of salt in drinking water. It would be a huge mess: I might not be able to sell my water in France due to a slight difference in the regulation! Having 27 different systems (for something we all agree needs to be regulated) would be very ineffective: as the competence over ***internal market*** is indeed shared, the EU decides to regulate the matter at a supranational level, with a *common framework* drafted also by experts; otherwise, we would not have a common (i.e., internal) market for water. Therefore, the Commission proposes a regulation or a directive for those purposes, establishing a common minimum and a common maximum for the amount of salt in drinking water *in all the EU*. This way, I will be able to sell my Italian water (provided it is compatible with the EU regulation) in France, Germany, …, and even in Poland. However, for this to work, it is necessary to **pre-empt** Member States from introducing their own regulations: the idea behind it is that if the EU has exercised its shared competence, it is because rules at the EU level *are needed*, and the aims pursued by the legislation can be **better achieved** if enacted at the EU level. Hence, there is no space for the Member States to exercise their own competence, as the matter has already been regulated. Now, suppose that the EU (permanently or even momentarily) withdraws its regulation: of course, the Member States reacquire their power to regulate the subject because the field is no longer occupied by EU law. In short: until the EU intervenes (or as long as its regulation is withdrawn), the competence remains to the Member States; once the EU has regulated, then the field is occupied, and Member States cannot introduce their own legislation. **Art. 4 TFEU** lists the areas covered by shared competence, and they are several: *internal* ***market*** (everything that might represent a barrier to free movement is regulated at EU level); ***social*** *policy* (but only for aspects specifically defined in the Treaty), *economic, social and territorial* ***cohesion*** (regional policy); ***agriculture*** *and fisheries* (except conservation of marine biological resources); ***environment***; ***consumer*** *protection*; ***transport****; trans-European* ***networks***; ***energy***; *area of* ***freedom, security and justice*** (which, before Lisbon, used to be the "third pillar" of the EU; note that Ireland opted-out from this competence); *shared safety concerns in public health matters, limited to the aspects defined in the TFEU* (basically, blood products); *research*, ***technological*** *development*, *space* (even though, according to Art. 4(3) and 4(4) TFEU, in these areas Member States can act even if the EU has already acted),

development cooperation and ***humanitarian aid***. In these fields, the EU can introduce **legally binding** acts, including **harmonising legislation**.

- ***Coordinating and Supporting*** competences, when the EU coordinates and supports the acts of the Member States, without harmonizing the matters (i.e., the EU cannot impose *one rule* which is valid in all the internal market). Policy areas in which the EU has coordinating and supporting competence are, according to **art. 6 TFEU**: *Protection and improvement of* ***human health****;* ***Industry****;* ***Culture****;* ***Tourism****;* ***Education****, vocational training, youth, and sport; Civil* ***protection****;* ***Administrative*** *cooperation.*
- Finally, **Art. 5 TFEU** provides a sort of "non-defined" competence, according to which **Member States** can coordinate their **economic policies** (indeed, the Council has the power to adopt coordination measures), whereas the **Union** has to **coordinate** the ***employment policies*** and the ***social policies*** of the Member States. Technically, those are not shared competences (indeed, the EU cannot harmonize internal regulations), neither are they coordinating, supporting or supplementary competences.

Competence over ***common foreign and security policy*** should be dealt with specifically. It was originally introduced in the Treaty of **Maastricht**, when it was referred to as the *Second Pillar*: Member States were jealous of their foreign policies, and therefore they had decided to act as a non-supranational institution (i.e., no involvement of EP and the Commission, the ECJ cannot rule on the subject but for one particular area). Hence, also after Lisbon, the EU has competence to **define and implement** common foreign and security policies (**Art. 2(4) TFEU**), but within the **limits** set in **Title V TEU**. Indeed, this competence has a **special nature**: just like in a **typical intergovernmental** model, policies are decided *by consensus* directly by the Member States, whereas (most importantly) the EU **cannot** adopt legislative acts in this field, without direct effect and with a very limited jurisdiction of the ECJ (according to **Art. 24 TEU**, which was introduced in Lisbon after the western reactions to 9/11, the Court has jurisdiction only over the legality of those policies that **affect individuals**, i.e., over the personal sanctions).

Finally, **Art. 352 TFEU** confers a ***residual competence*** to the EU:

"If action by the Union should ***prove necessary****, within the framework of the policies defined in the Treaties, to* ***attain one of the objectives*** *set out in the Treaties, and the Treaties have not provided the necessary powers, the* ***Council****, acting unanimously on a* ***proposal from the Commission*** *and after obtaining the* ***consent of the European Parliament****, shall* ***adopt the appropriate measures****"*

It might happen that, in order to achieve one of the objectives set out in the Treaties, it is necessary to act in ways the drafters had not imagined, and so in ways that are not considered in the articles related to competences. Therefore, the Treaty itself provides that the EU can nonetheless act; however, it can do it only by **unanimity** and with the **consent of the EP**: basically, we must prevent the use of residual competence from *undermining the principle of conferral*. Moreover, according to the **subsidiarity protocol** (which we will later analyse), the Commission must **alert** national parliaments on the use of residual competence (as national parliaments, from that moment on, will not be able to enact new legislation on that subject), in order for them to – possibly – **object**: by doing so, it is assured that the residual competence is used only if it is **strictly necessary**. In this respect, it is worth mentioning that the ECJ gave a crucial opinion on the matter (***Opinion 2/94***, on the *accession to ECHR 1*[19]), according to which the residual competence **cannot be used beyond** the

[19] ***Opinions*** are given by the ECJ when the EU is about to **enter an international agreement**, and one of the Institutions asks the Court whether that agreement is **compatible with the Treaties** or not. Indeed, the EU does not want to enter into an agreement with third parties and then find that it had no power to do so. In the specific case, the Commission requested an opinion as to whether the EU could become part of the European Convention of the Human Rights (ECHR); there was no provision that either allowed or prohibited it, and so it was a matter of **residual**

aims of the Treaties, in order not to take too much power away from National Parliaments (even if all the EU governments agree).

Subsidiarity and Proportionality

We will now look at subsidiarity and proportionality: we will ask ourselves, once the EU has a competence, *whether* it should act and *how*. According to **Art. 5 TEU**, the **exercise** of Union competences is based on two key principles: Subsidiarity and Proportionality. As for the ***Principle of Subsidiarity***, the article states:

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

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

According to the article, indeed, it is not sufficient for the EU to have competence (besides the exclusive one) in a certain field in order for it to be able to enact policies: action at Union level also **must be required**, as act ion at local level would not be able to achieve the same aim. Take, for example, the EU competence in *environmental protection*: could the Commission propose a piece of legislation regulating waste collection in every Member State (such as, *waste shall be collected every Monday morning*)? Actually, considering the aim of *ensuring that waste is collected*, that would not comply with the principle of subsidiarity: by reason of scale or effect, this subject would not be better regulated at the EU level rather than at local level. Indeed, waste collection is way more effectively regulated at a local level! For instance, where it is very hot, we need waste to be collected more often than in other places. In this case, it is clear that those type of rules should be adopted at *local level* (and not even at State level), because every community has its particular needs. Now, instead, consider a rule which sets out the *maximum number of emissions* that cars can produce. This would indeed comply with the principle of subsidiarity due to the **scale of effects** of the proposed measure: in fact, if we had different thresholds of emissions between different Member States, a car produced in a country would not be sellable in another country (similarly to what we have seen with the "water" case). To prevent this from happening, the EU would be the only institution that could **effectively regulate** the subject in order to protect the internal market: otherwise, if every Member State regulated the subject in a different way, internal market would be negatively affected by it.

Furthermore, as we will see in depth, Art. 5 TEU mentions **National Parliaments**: they must **ensure compliance** of the EU with the principle of subsidiarity. This is because once the Union regulates (besides fields in which EU has exclusive competence, where the principle at stake obviously does not apply), Member States cannot longer do it, and therefore National Parliaments lose their power. That is why National Parliaments need to exercise their scrutiny in order not to be harmed by an improper use of the principle of subsidiarity.

But **why** do we need the principle of subsidiarity, and a method to ensure that the EU complies with it? To get it, we need to go back to the **Maastricht Treaty**, during the debate in order to balance an **ever-closer Union** and the principle according to which decisions should be taken as **close to the citizens** as possible, in order to make the regulator **more democratically accountable** (with a *strong*

competence. The Court denied that the EU had that competence, as the EU had nothing to do (in the aims of the Treaties) with human rights protection.

link between the regulator and those who are regulated). Moreover, there were (as there are also now) **concerns of over-centralization**, i.e., the EU doing too much; these concerns, were also visible within the debate on **democratic deficit**, and the EU 'power grab': the EU competence seemed (especially for States like the UK) to be increasingly expanding, also due to the wide and generic competence of *regulating the internal market* and the many rulings of the ECJ that, using teleological interpretation , de facto spread EU competence in unimagined fields (take, for instance, the case *Commission v. Council*), causing the so-called ***spill-over effect***: the aim of protecting the internal market could potentially justify whatever measure the EU would like to adopt. Later in time, during the Constitutional Process which took place in **2004** (namely, the *Convention on the Future of Europe*), a crucial debate took place on whether the principle of subsidiarity could really be **better checked** by a *Court* such as the ECJ (through the process of judicial review) or by *Political Institutions*. Would the Court be in a good position to be the watchdog of the principle? To answer, we must keep in mind that, as it happens with every EU piece of legislation, the proposal is made by the Commission, it is then debated and voted in the EP and finally within the Council, between the delegates of Member States. This means we already have three bodies that have considered a piece of legislation to be *compatible with the principle of subsidiarity* (i.e., that the regulation is more effective if taken at EU level). If we were the ECJ, we would not feel comfortable telling political institutions, that have already exercised their legitimate regulatory powers, that they were wrong. The problem is clear: political institutions have already decided as for the principle of subsidiarity. There is indeed a thin line for Courts, whether national or supranational, between a simple check of compliance with "constitutional" principles (such as the one of subsidiarity) on the one hand, and **exercising de facto legislative functions** (i.e., challenging a legitimate assessment by political institutions) on the other. For this reason, in the context of the debate concerning a potential EU Constitution, it was decided that the ECJ was not a reliable judge on subsidiarity: by the time the legislation reached the Court, a political assessment had already been done. Instead, it was decided that the best way to ensure that the principle would be respected by political institution was **involving other political institutions** that had everything to lose with an improper exercise of EU legislative powers (given that, in shared competence, once the EU legislates, the related competence is taken away from national level): the **National Parliaments**. Therefore, **Art. 12 TEU** clarifies the **role of National parliaments**, that would become **part of the dialogue** of legislation at the EU level. Indeed:

*National Parliaments **contribute actively** to the good functioning of the Union:*

*a) through **being informed** by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union.*

*b) by seeing to it that the **principle of subsidiarity is respected** in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality.*

The **formal role** of national Parliaments is then regulated by ***Protocol*[20] *2 on subsidiarity***. It works like this: National Parliaments first need to be **informed** of new legislation coming up. Therefore, the Commission is **obliged**, when it puts forward a legislative proposal which is not in the sphere of exclusive competence (as soon as it *finalizes the proposal*), to **send the draft** to all of the 27 National Parliaments. In the *preamble*, the draft must **state *how*** the proposal complies with subsidiarity and proportionality (i.e., why that act is necessary at EU level)[21]. Once the proposal has reached the

[20] ***Protocols*** are **annexes** to the Treaties which have their **same legal value**: they contain sort of **detailed rules** that cannot be put in the Treaties, as well as declarations of opt-ins and opt-outs.

[21] Sometimes, the Commission does something pretty smart: it states that the subsidiarity principle is satisfied as a self-evident truth, such as by saying "this act is about the internal market, so action at EU level is needed".

National Parliaments, they have **8 weeks to object** it (although they can only do it ***on subsidiarity grounds***, and not for other reasons, for instance – and this is highly contested – on grounds of proportionality), issuing their own **assessment** on why EU action is not more effective and therefore not needed in that subject. However, the 8 weeks deadline represents the very first problem of the procedure, as it is an extremely **short period**, considering how much work Parliaments have to do even in normal conditions: in such a period, the Parliaments have to decide whether it complies or not, *and*, as 1/3 of the National Parliaments are needed to initiate the objection procedure, they also have to communicate to other Parliaments. Each Parliament has **two votes** to adopt the objection decision, in order to favour the bicameral systems like the Italian one (therefore, each Chamber can vote on the matter at stake). Then:

- If *at least **1/3***[22] of National Parliaments (i.e., nine) object the proposal on subsidiarity grounds, the Commission "simply" has to **give reasons for maintaining** the proposal as it is (i.e., ***duty to review***, which is not a "substantive" duty). This is what scholars refer to as the ***Yellow Card Mechanism***, which was triggered – for the sake of information – with the so-called "Monti II Regulation", which was then abandoned.
- If *at least **half*** of the Parliaments objects the proposal, then it **must be reviewed**; however, this does not mean that the proposal has to change instead, the Commission simply must **give a *reasoned opinion*** on why subsidiarity is complied with. Moreover, it has to **alert** the EU legislators on the objection of National Parliaments (and its subsequent reply). If the Commission decides not to withdraw the proposal, the ball passes into the hands of the EP and the Council, which must finally **consider whether** it actually complies with the principle or not, and which might decide to **abandon the procedure** altogether (with a 55% majority in the Council or simple majority in EP).

However, many have objected that this mechanism could not be effective enough, in the absence of a ***Red Card Mechanism*** (i.e., an ability for National Parliament to stop the proposal in the first place). Nonetheless, the Yellow Card Mechanism has its own advantages, considering how **indirect accountability** of the Members of the Council works. Indeed, they are ministers of National Government, who are therefore responsible to National Parliaments. If the latter vote *against* a proposal by the Commission, Ministers of National Government are unlikely to vote in its favour once gathered in the Council. Indeed, this system **gives visibility** to the Parliament's dissents, as an **enhanced political mechanism**, where *de facto* what the Commission does to motivate is proposal is not relevant: if several National Parliament have expressed against a proposal, it is unlikely to be approved anyways. Therefore, it usually happens that the Commission, that is perfectly aware of the mechanism, withdraws its draft before it reaches the Council.

Furthermore, many scholars and politicians claimed that having only a subsidiarity check could be **not enough**: with subsidiarity, National Parliaments, can only comment whether an act is more effective at EU level, but cannot comment on whether they like the proposal, whether they think the **balance between competing interests** has been struck in the right way (i.e., compliance with the ***Principle of Proportionality***).

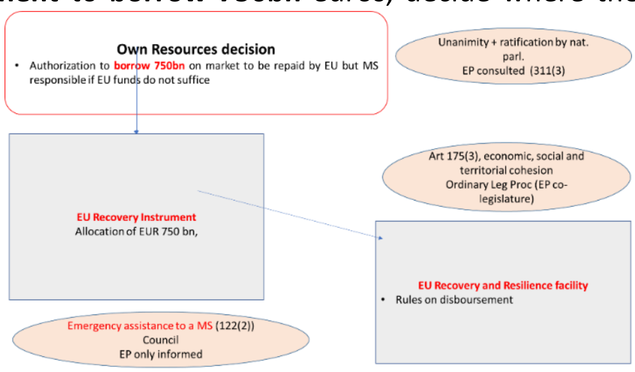
The second incredibly important principle that regulates *how* the legislation is drafted is just that: the ***Principle of Proportionality***, as stated in **Art. 5(4)**. In most domestic constitutional systems, we would have that principle, especially in the field of criminal law (i.e., the sanction must be proportionate to the committed crime[23]). According to the principle, the action undertaken must be **proportionate (or commensurate) to interest pursued**: it basically acknowledges that each time

[22] Apart from the area of **freedom, security, and justice**, where just ¼ of National Parliaments is required.

[23] As the Brits say: *don't kill a fly with a gun!*

a regulation is passed, someone's rights are limited[24]. Actually, proportionality is a highly contested concept, as it is possible that deciding on the rightful use of the principle of proportionality could step over a *political evaluation*, interfering with an assessment made by the legislator. Still, it is a **codified principle** in the EU law: *"the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"*. Proportionality is remarkably relevant in cases concerning fundamental Rights: one of the few pieces of legislation that was **annulled by the ECJ** for breaching of the proportionality principle was the ***Data Retention Directive***, which provided that everyone who held data had to retain them for two years in case security authorities of the Member States wanted to access them for terrorism prevention purposes. Of course, the aim of the measure was justified; however, the Court (in ***C-594/12***, the so-called ***Digital Rights Ireland*** ruling) identified a huge burden for providers and a potentially huge invasion in the privacy of individuals: the provisions were indeed **too broad**, **not sufficiently detailed** and without any judicial oversight. So, it is evident that proportionality can be more easily adjudicated in **Court**, that nonetheless has to be careful not to step out of the judicial function and interfere with legislation, deciding its *merits*.

To understand the importance of having an EU competence in certain cases, we shall give an example. In early 2020, it was pretty obvious that a huge injection of cash to recover European economies after (rectius, during) the Covid-19 Crisis was needed; it was also clear that some Member States (Italy included) did not have either the fiscal capacity or the ability to get money elsewhere because of the (already too high) interest rates. In May, the **Commission** formalized the need for money that all Europe had and planned the so-called ***Recovery Instrument***. The only way the EU could get enough money to face the economic (and sanitary) crisis was **issuing debt** (i.e., putting bonds on the market, with low interest rates) and then having a **redistributive policy**. In short, the Commission was perfectly aware of *what to do*; however, it could not do it because no competence existed (nor it does now) over that subject. Nonetheless, they tried hard to find a **legally sound way** to get the money. They did it through its ***Own Resources decision***, i.e., the management of the **5-year-budget** of the EU, which falls indeed within the competences of the Commission: then, it created a **Recovery Instrument** to **borrow 750bn** euros, decide where the money would have been allocated and finally established a **EU recovery and resilience *facility*** in order to define rules on disbursement (i.e., how much as loans, how much as grants, …). We are in front of three pieces of legislation: one authorizes the funding, the other one establishes *where* money should be allocated and the last one *how* it should be done, as shown in the chart on the right.



One thing that we immediately notice is that these three actions were made with three different legal bases upon which each instrument was established. Moreover, each of the instrument was created through a different law-making process, with a different grade of involvement of the EP. Indeed, the ***Own Resources decision*** was taken (pursuant to **Article 311(3) TFEU**) in the **Council of the EU** by ***unanimity*** (that is where the debate about the so-called *frugal* Countries happened). The decisions, moreover, had to be **ratified by each National Parliament**. At this level, the EP was **consulted**. At the second stage (i.e., the adoption of the **EU Recovery Instrument**) the Commission relied on **Art. 122(2)** to ensure **Emergency assistance to Member States**. The decision was – again – taken by the **Council**, the Parliament being only

[24] Just consider a banal example: if polluting cars are banned, someone's right to drive extremely polluting cars is limited.

informed, without <u>no</u> direct democratic legitimacy. It is interesting to see how *interpretation of the Treaties* played a considerable role in giving the European institutions power to enact such emergency provisions; indeed, Article 122(2) – which was created in order to **deal with momentaneous difficulties** (e.g., fires, natural disasters, earthquakes, …) of *single* Member States – provides:

*Where **a Member State** is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or **exceptional occurrences beyond its control**, the Council, on a proposal from the Commission, may grant, under certain conditions, **Union financial assistance** to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.*

It was indeed an ingenious interpretation, for the provision was aimed at facing problems other than those caused by the pandemic. Instead, the Commission thought that, apparently, the provision did <u>not</u> rule out the possibility of *all member States* having difficulties, as it was the case. Moreover, the pandemic actually was an **occurrence beyond anyone's control**, and so Art. 122(2) was found to be ingeniously suitable for the aim, and so the Council was able to create the EU Recovery instrument. However, the EP was not completely excluded from the negotiations and the enactment of the emergency provisions. Indeed, at the last stage, the **Recovery and Resilience facility** had to be enacted (according to **Art. 175(3)** *on economic, social, and territorial cohesion*) by **Ordinary Legislative Procedure**, that sees both the EP and the Council as co-legislators. The extensive reading of art. 175(3) was another piece of genius: it was created to regulate the so-called ***cohesion funds** for development* (so, something really different from the recovery facility used to fight 2020 economic crisis), used for – say – high unemployment and similar issues:

*If **specific actions prove necessary** outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee and the Committee of the Regions.*

It is worth mentioning that those measures were adopted under three **different legal bases** (in a hard struggle to find the power to act in that circumstance); moreover, **all levels** of decision-makers are involved (i.e., National Parliaments, National Governments and EP) in the different instruments. And so, the Recovery fund was created.

To conclude our analysis on ***EU competence***, we shall recap the fundamental elements to consider where trying to find *whether* the EU can (or cannot) regulate a certain subject and, if so, how and to what extent it can do it:

- ***Is there competence?*** To find whether the EU can act on a certain subject, we must find an **appropriate legal basis**; and this is because we are working in a system based on the **Principle of Conferral**.
- ***Principle of Subsidiarity***, that answers the question "*Should* the Union be acting?", i.e., "Can Member States attain a result in as effective way?". This is indeed another crucial question, even though sometimes the Commission answers in a circular way: *We are acting, so it means that our action is needed*.
- ***Principle of Proportionality***, that answers the question "Is there a *less restrictive* way to achieve the desired aim?".

These issues are not only Constitutionally crucial, but they might also lead to the **annulment** of a measure through ***judicial review***: a piece of legislation could, indeed, be challenged on the basis of *lack of competence* or of *wrong legal basis*, or due to a misuse of the *principle of subsidiarity*[25], or, finally, on grounds of *proportionality* (especially in relation to fundamental rights), as it happened

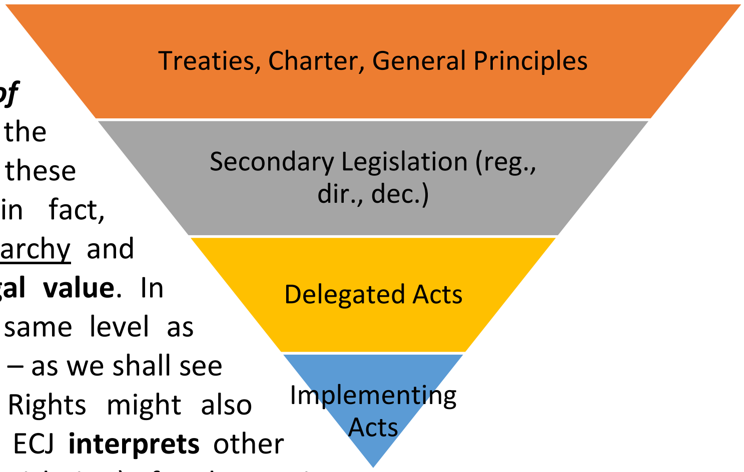
[25] However, although subsidiarity might be justiciable by the ECJ, issues revolving around it are rather **political**: indeed, we have very few cases that brought to the annulment of a measure on grounds of subsidiarity.

in *Digital Rights Ireland*. Finally, it is worth mentioning that judicial review can be also based on the *infringement of an essential **procedural requirement*** or *of the **Treaties*** or *of any rule of law relating to their application*, or on ***misuse of powers***. But we will get to that later.

The Instruments of EU Law-making

Hierarchy, regulations, directives, and decisions

We will now look at ***the instruments*** the EU uses to legislate and regulate; we will consider the **sources** of EU law (conceived as a ***hierarchical system***) first, and then the **decision-making process**. We have already said that, especially with *Van Gend* and *Costa* rulings, the EU represents a **new legal order**, that is (of course) based on international treaties (the TFEU and TEU), but it can also be seen as a **constitutional order**. As such, it has different legal sources (some with primary status, some others with secondary status), and there is a clear ***hierarchy*** between them, made effective by ***judicial review***. But what are these sources?



- The **primary** sources are (obviously) the ***Treaties*** (**TFEU** and **TEU**), the ***Charter of Fundamental Rights***[26] and the ***General Principles***[27] of the EU. All these legal sources are **horizontal**: in fact, between them, there is no hierarchy and they have exactly the **same legal value**. In other terms they all sit at the same level as constitutional principles, although – as we shall see – the Charter of Fundamental Rights might also **condition**, *de facto*, the way the ECJ **interprets** other provisions (even ones of primary legislation) of EU law, as it usually happens in every legal system. Still, the ECJ **cannot annul treaty provisions** and other sources of primary law whatsoever, because the ECJ derives its authority directly from the treaties and, so, it cannot declare a primary law provision invalid. Indeed, through the Treaties, Member States have conferred part of their sovereign rights to the EU, and so they represent the **source** of and the **limit** to EU powers. As to the general principles, it is worth

[26] The **Charter of Fundamental Rights of the European Union** was proclaimed in Nice in **2000** and acquired full legal effect in virtue of **Article 6 TEU**.

[27] **General Principles** were of fundamental importance *before* the Charter: before, indeed, we had a legal system (the EEC) with law-making power that, however, had no system of fundamental rights. Nonetheless, in the post WWII period, national Constitutional courts were incredibly sensitive to the issue, and were not very keen on the EEC risking harming fundamental rights. The ECJ, then, knowing that there was not a codified system of fundamental rights, asserted that the **fundamental rights represented the *general principles*** of EU (then, EEC) law, identified as the **common constitutional traditions** and the **ECHR**, which both bounded the Institutions that exercised their law-making and policy power. However, once the Charter was enacted, the General Principles became quite useless and now they are not often relied on. Nonetheless, two of them are still considerably important: the ***principle of proportionality*** – which is now also codified –, the ***Principle of Equality***, and the ***Principle of Legitimate Expectations***, which is, despite of not being codified, crucial in order to the behaviour of Institutions that act in their *administrative capacity*, that often create expectations which they should abide by. More in general, those principles **ensure internal coherence** of the system, act as **interpretive tools** and function as **criteria for judicial review**; however, although they are primary sources and so they sit above legislative acts, they are considered to be slightly less important than the Treaties and the Charter.

saying that they are mentioned in **Art. 6(3) TEU**, which lets the Charter of Fundamental rights acquire its full effect (as a result of the stratification of Treaties):

1. The Union ***recognizes*** [the word choice is of primary importance: it stresses that the rights are not conferred by the EU but pre-exist and can only be recognized to the individuals] *the rights, freedoms and principles set out in the* ***Charter of Fundamental Rights*** *of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the* ***same legal value as the Treaties*** [i.e., pure horizontality]. *[…]*

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

In short, it is the primary sources that determine *what* can be done at EU level and *how*.

- Then, we have **secondary law**: i.e., the ***legislation*** that the EU adopts, divided in **specific types** of legislation (*regulations*, *directives,* and *decisions*). **Article 289 TFEU**, referred to *legislative acts*, states that "*legal acts adopted by* ***legislative procedure*** *shall constitute legislative acts"*. In the project of the Constitution, there was an attempt to change the name of directives and regulations into *European (framework) laws*; however, this became politically toxic because it was too much resembling what we have at State level. Therefore, article 289 remains one of the last references we have to something related to "law".
- We then have ***delegated acts***, that are adopted when a legislative act (i.e., a secondary piece of law) **gives power** to (i.e., it delegates) the Commission do adopt a specific act ***within the limits*** of the delegation, according to the usual theory of delegation. According to **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.*
- Finally, we have ***implementing acts***, mostly adopted by the Commission (and usually by expert committees within that institution): for instance, they could be needed to keep an extremely technical directive up to date with new scientific discoveries, in order to *complete* the legislation. As it happens with delegated acts, also here it is crucial that the Commission remains **within the boundaries** set by the legislative acts that empowers it (and that cannot, by the way, give the Commission too much of discretion); otherwise, the implementing act would be invalid. Indeed, **Article 291 TFEU** states:

  Where ***uniform conditions for implementing*** *legally binding Union acts are needed, those acts shall* ***confer implementing powers*** *on the Commission.*

After considering this strict **hierarchy**, we shall answer to the question: *how* does the EU act? The Treaties (**Art. 288 TFEU**) provides **different legal instruments**:

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* [i.e., once it enters into force, it applies the same to all the 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* [i.e., decisions can apply to everyone, or to very specific parties, e.g., Microsoft shall pay…].

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

- First of all, consider ***<u>Regulations</u>***: they are **binding** (i.e., *mandatory*) in their entirety. Theoretically, then, when a regulation is adopted, it becomes **directly applicable** (i.e., it becomes law) in all Member States: there is <u>no</u> filter between the EU and the citizens. Of course, as a legislative instrument, it needs to be of **general application** (for instance, a regulation <u>cannot</u> be addressed to Mr. Gianmario Verona). Directly applicability, in particular, is indeed crucial: in ***<u>Variola</u>*** (Case **34/73**), the Italian Authorities had **transposed** the Regulation in the Italian legal order (i.e., made a domestic piece of legislation that replicated the EU regulation). Mr. Variola challenged the law at stake and the ECJ upheld his claim: as directly applicable, the Regulation not only does <u>not</u> need an implementing measure at national level, but an implementing **must not** be adopted by national authorities; otherwise, people affected by it might think that it is simply a matter of domestic law. That would "**hide its nature of EU law**" of the piece of legislation at stake; conversely, as domestic law is subjected to EU law, the ***principle of supremacy*** must always act (even with legislation adopted after the EU act, oppositely to the general chronological principle that applies at national level). Therefore, it is vital that the addressees of a piece of law know that it is European in nature. Moreover, it might also represent a **breach of EU law**. Nonetheless, whereas this means that Regulations are **legally complete** (no space for discretion is left), this does <u>not</u> mean they are always *factually* complete, as they might need **execution** at national level: say, for instance, that an environmental regulation provides those national authorities must prosecute environmental crimes; it is clear that, in this case, the regulation must be executed by national (police) authorities. Indeed, EU law is always **given effect by Member States' authorities**.
- As to the ***<u>Directives</u>***, they are **binding as to the result** to be achieved but leave **discretion** to Member States as to the **form and method** to achieve it. Therefore, they are *less intrusive* than regulations: here, EU legislation tells us the *aim* to be achieved but then leaves some discretion to the Member States as to *how achieve it*. To get it right, consider this simple example: Professor Spaventa says "we will meet at 8PM in front of Leoni"; in that case (an **obligation of result**, just as), we could freely choose how to get there, from where to get there (by train, by bus, on foot, laying on a flying carpet, …); it would be very different if Prof. Spaventa said "we will meet at 8PM in front of Leoni, coming from Velodromo where you have to be at 7:30PM, and rigorously on foot" (that, instead, would be like a regulation: we would have no discretion left). Hence, Member States **retain some discretion** as to the means and the forms to achieve the aims pursued by the directive, in order for the States to adapt the objectives to their own reality. Moreover, directives comply more with the **Principle of Subsidiarity**: if the EU adopts a Directive, it is *less intrusive* than a regulation, giving Member States the possibility to decide the forms and the means of measure, and then to enforce it, the way they want to do it. Member States have "just" a **duty to enforce** the directive in an effective manner. Naturally, because of this, it **needs implementation** (i.e., the directive needs to be *transposed* into national law, unlike a regulation) by a given date: failure to implement within the deadline is an *automatic* **sufficiently serious breach of EU law**. In practice, it could happen that Member States fail to implement the directive (this being particularly problematic if the directive at stake confers *individual rights* to EU citizens and/or companies): this could lead to the so-called ***<u>Francovich</u> liability***, i.e., to potential damages granted to people whose rights were not implemented. Typically, Member States will reproduce certain provisions of the directive, and then give *details* to complete the other ones, where they can exercise discretion. Normally, directives are **addressed to *all*** Member States (as they represent the main form of legislation of the EU); nonetheless, they potentially could be addressed just to *single member States*. In theory, Directives **might have**

direct effect: indeed, as an individual, I should be able to *rely on the Directive* despite its implementation at national level.

- Finally, ***Decisions*** are usually **administrative acts**. They may be addressed to **one or more Member States** as well as to **individuals** (e.g., the Commission may take a Decision to *fine* a Company for breaching competition law); however, they can also be of **general application**. As to their **binding value**: they are legally binding only for the addressee.
- The other two types of acts that the EU can adopt (i.e., ***Recommendations*** and ***Opinions***) are not legally binding: they are however very commonly used by the EP (that issues Recommendations) and by the Commission (that issues Opinions). Therefore, they cannot be challenged before a Court (as, on a theoretical level, only legally binding acts can be subjected to judicial review).

The Ordinary Legislative Procedure (OLP)

Lastly, we shall look at *how in practice* legislation is made. The so-called ***Ordinary Legislative Procedure*** is the main legislative procedure used in the European Union, although it is not the only one. Indeed, we have **Special Legislative Procedures** in some very specific cases (as it happened – we have seen it – with the Recovery instrument, pursuant to Article 122(2) TFEU): they might provide for **different majority** or/and for a **different role** of EU institutions. Luckily, the Treaty of Lisbon established the OLP, that made the law-making process way simpler and standardised (i.e., *unless otherwise specified, the OLP shall be applied*).

The OLP is a ***co-decision procedure***: in fact, after the Commission submits a proposal, the European parliament *and* the Council decide. The Commission's power, in this respect, is immense, up to the point that, after disposing a proposal, the Commission can freely **withdraw** it when it feels that the EP and the Council amended it so much as to distort it. What's more: although, in theory, the **citizens** can ask the Commission to propose a certain piece of legislation when they reach **1 million** altogether from at least **¼ Member States**, the Commission has such great powers that it has only the **duty to respond**, but it does not have to act and submit the proposal.

In the way it is structured, the co-legislature procedure is like a table tennis match. The **EP** and the **Council** are involved in a **constructive dialogue**, since both of them have eventually to agree on the same, final text. In the OLP, unanimity is not required, since **QMV** is sufficient. First, the Commission sends the **final draft** to the Council, to the EP and to the National Parliaments: the latter, as we have mentioned before, have to check that the principle of subsidiarity has been respected (otherwise, they might rise their **objection**). The EP adopts a **position** (i.e., votes in favour of or against the proposal). If then the Council approves the EP position without modification, then the act is **approved**.

Oppositely, if the Council does not agree, it adopts its *own* position, which is then sent back to the EP. In this case, in order to ensure that the legislation does not die in the corridors of Brussels, if the EP does not expressly reject the modified draft (nor it approves it) for **three months**, the act is taken for **approved**. If, instead, the EP rejects the act by ***majority***, it is not adopted. Lastly, if the EP proposes amendments (again, by majority), it sends the modified draft to the **Commission** (who has the duty to check if the amendments are **coherent** with its proposal) and to the **Council**. After that, the Commission and the Council delivers their opinions on the amendments. If the Council agrees within *three months*, the act is adopted. If the council does not agree then it goes to a **Conciliation Committee**, convened within **6 weeks** and composed by 28 representatives of Council, European Parliament and one representative of the Commission, that has 6 weeks to decide on a **joint text**. However, in practice, lots of negotiations happen before, in what has been called a **Trilogue**, where representatives of the Commission, the EP and the Council sit together and decide on a joint text even before the proposal goes to the formal stage. This is indeed very efficient, but it is not so democratic. Indeed, since we are dealing with the legislative procedure, every part of it should be public (even the meetings of the Council), whereas trilogues are *de facto* informal meetings, held behind closed doors.

2. Constitutional Europe

2. Constitutional Europe

Effects of the EU law

We will now consider what are the ***effects*** of EU legislation, and the issues thereof. The main effects of EU law are the:

- Direct effect (*Van Gend en Loos*)
- Supremacy (*Costa v. Enel* and *Simmenthal*)
- Indirect effect (duty of consistent interpretation)
- State liability (Francovich doctrine).

Direct Effect and Supremacy

The direct effect and the principle of supremacy are considered to be the **pillars of the EU legal framework**.
These two general principles of EU law **originate from the Case Law** of the ECJ: in ***Van Gend*** the Court established the principle of **direct effect** by stating that the EEC (now EU) established a ***new legal order*** of international law.
The Court held:
*"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** (…) These rights arise not only where they are expressly granted by the Treaty but also by reasons of obligations which the Treaty imposes in a **clearly defined** way upon individuals, MSs and institutions".*
It is of paramount importance highlighting that those obligations have to be "*clearly defined*", otherwise, it would not be possible to **ascertain** the right at stake.
The current article 30 TFUE "contains a clear and unconditional prohibition which is not a positive but a negative obligation" which is not qualified and the nature of this provision makes it adapted to produce "**direct effects in the legal relationship between Member States and their subjects"**.

To summarize, the direct effect is **the ability for a provision of EU law to be relied upon (invoked) directly in front of a national court, without it needing to be transposed into national law**. Which is to say that **individuals** can invoke EU rights directly (i.e. in front of national courts).
The main example is from *Van Gend*, where there is a clear prohibition which MSs must respect.

Why does the EU need the DE?

The EU needs direct effect because otherwise **it would be difficult to ensure effective application of EU rights**.
Every Member State would act with **discretion**, letting the respect of the norms to their goodwill.

The other key principle is **Supremacy** of EU law, affirmed in **Costa v. Enel**, where the Court ruled that, according to the ECJ's view, **EU law takes precedence over conflicting national law**, of **whatever rank** and whether **adopted before or after** the entry into force of EU law.

Indeed, the terms and spirit of the treaty "*make it impossible for States (…) to accord precedence to a unilateral and subsequent measure over a legal system accepted (…) on a basis of reciprocity*". Otherwise, the effect of Union law would vary from one Member State to the other.
In the **Simmental case (106/77)**, the ECJ added that the **national court** has the **duty to give full effect to EU law** and **disapply** (set aside) if necessary, any contrasting law without waiting for the intervention of national law or constitutional court to declare the invalidity of the contrasting domestic norm.

Why does the EU need Supremacy?
The EU needs the principle of supremacy:
- to grant individuals a **remedy** against violations of EU law,
- and to ensure **uniformity** in the application of EU law.

Nevertheless, we should not forget that some national constitutional courts draw boundaries to the supremacy of EU law, like the Italian Constitutional court who elaborated the so called "***teoria dei controlimiti***", according to which EU law cannot prevail over the basic and fundamental principles of the Constitution (*Granital, case 170/1984 of the Italian Constitutional Court*)

Direct Effect: key concepts[28]
We gave a definition of direct effect, but **different types of rules might have different legal effects** depending on:
- the **legal source** (Treaty, Charter, Regulation, Decision and Directive),
- and the **characteristics** of the rule, which must be capable of granting rights to individuals.

For these reasons we will see that it is not always possible for an individual to invoke direct effect, because **it depends on the situation in which the EU norm is invoked**.

There are two kinds of Direct Effect:
- **Vertical DE** = the ability to rely on EU law against the **State** (or an emanation of the State)
- **Horizontal DE** = the ability to rely on EU law against a **private party**.

In order to have direct effect a provision must satisfy certain conditions:
- It must be intended to grant a **right**
- it must be **self executing**, which means to be
  - **clear** = not ambiguous or obscure
  - **unconditional** = without conditions attached
  - and **sufficiently precise** to ascertain a right.

[28] Remember that direct effect is different from "**effect**". It is indeed something specific, because **EU law has effect also if it does not have direct effect**, like the duty of consistent interpretation and the Francovich damages

For instance, in Van Gend the Court said that there was a *clear negative obligation*, so also for this reason that provision had direct effect.

The Court stated what follows:
"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.
The implementation of article 12 does not require any legislative intervention on the part of the states . The fact that under this article it is the member states who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation".

Direct Effect of the Treaties: from Van Gend to Defrenne

If Van Gend established the vertical direct effect of the Treaty, in ***Defrenne 43/75 case*** the Courte recognized the **horizontal direct effect** of **Treaty Provisions**.

The facts
Ms Defrenne was a flight attendant in Belgium, and she invoked the application of art. 119 CEE (now 157 TFEU), granting the right to an equal pay between men and women. Indeed, she was a flight attendant, and since she was a woman, she earned less than a man.
The article 157 TFEU states that:
"Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied"
The treaty provided an obligation for the Member States, which had to "ensure" (in an indeterminate future) an equal pay for male and female workers.
How does this affect an airline private company?

Arguments against the direct effect

- The UK stated that "*the obligation imposed on the Member States by article 119 does not satisfy the criteria of clarity and precision evolved by the court*"
- and that "*the use of the word principle indicates that it is concerned with a concept of **very general nature***" which requires to be implemented by Member States and Belgium, in this case, did not adopt implementing norms.
- Morevoer, it is clear that this provision is addressed to MSs and not to individuals.

Arguments of the Court

- The European Court of Justice stated that the word principle in this case is referred to the **fundamental nature of certain provision**, among which the one of equal pay.
- Moreover, in relation to the issue of implementation of norms, the Court added that in case of **prohibition of direct discrimination there is no need to *implement* the provision**.
- And the fact that it is addressed to Member States does not actually means that it does not confer rights to individuals. Indeed, they can demand to Member States to respect their duties imposed by the Treaty (as stated in VGEL).

The Court stated that:

*"Since Article 119 is mandatory in nature, **the prohibition on discrimination between men and women applies** not only to the action of public authorities, but also extends **to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals**.*
*The reply to the first question must therefore be that **the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals**, […] as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."*

The court, with this important ruling, stated that **Treaty provisions can have direct effect even in horizontal situations if conditions for direct effects are fulfilled**. So, we can see that the DE works as shield in certain situations.

Looking at the canons of interpretation used by the parties:

- the UK gave a very **literal interpretation** of the Treaty,
- while the Court adopted a ***teleological-functional interpretation***: it interpreted the norm in order to achieve the aim embodied in the provision. And in this case what the provision wants to achieve is clear: *equal pay for men and women*. So, the obligation of equal pay was directly applied.

The other thing worth mentioning is that, in this case, the ECJ is imposing the direct effect not only on the private company at stake, but also on **National Courts**, that have to ensure the link between community law and national law in order to maximize the compliance with EU law. Therefore, if a right is provided by EU law, national Courts have a ***treaty mandated duty*** to give effect to it: otherwise, EU law would be simply useless.

We have seen that the provisions embodied in the Treaty can have direct effect, vertical or horizontal, <u>depending on the provision at stake</u>: for instance, the **free movement of goods** is only **<u>vertically applicable</u>**.

Direct Effect of Regulations and Decisions

We should give a look at **regulations** and **decisions**.

- **Regulations** → The article **288 TFEU** states that regulations are **directly applicable** (*Amsterdam Bulb*), plus **Member States must not disguise EU law nature of regulation** (*Variola*).
    - If conditions for direct effect are satisfied, they naturally might have **vertical and horizontal direct effect**.
- **Decisions**, those instruments binding on the addressee, have **direct effect if the conditions are met.**

The real mess: directives and direct effect

<u>The real mess</u> comes when we start looking at **directives**.
We have already said that directives are **binding on the results to be achieved**, leaving to Member States discretion as to forms and ways to achieve them. Those directives need **implementation** by the Member States by a **stated deadline**, through an **appropriate (national) legal instrument** (say

– a piece of legislation) that *transposes* the directive into the national dimension and if **directive is properly implemented**, the claimant relies can rely on **national law.**

Now, why is it crucial to understand whether directives are directly effective or not?
Leaving the Member States free as to decide which are the best means to reach the given aim, undoubtedly leaves them a sphere **discretion**. If there is a directive, concerning – say – the achievement of a certain result in the framework of work discrimination on grounds of sexual orientation, the States have to implement it in national law. As a consequence, individuals rely on national implementing legislation (assuming that the implementation is made correctly, of course).

But if the directive is not implemented, or it is implemented improperly, how can individuals rely upon their rights?

The first case in which this happened is ***Van Duyn v. Home Office 41/74***, concerning the church of Scientology.

Vertical Direct Effect of Directives: Van Duyn

Facts
Van Duyn was a Dutch national and she was going to the UK to work in the Scientology church. When she was at the border they said, "*actually go back to Netherlands because we do not like particularly Scientology*". The UK indeed was a little bit suspicious about Scientology. They justified their restriction on a public policy ground because of this aversion to Scientology.
Ms Van Duyn wanted to rely on a directive, because at the time there was a directive which detailed when the member States could invoke public policy. They could invoke a restriction on public policy ground only having regard to the personal conduct of the person involved.

Now, her argument was that the UK was not excluding her because she was a bad person, but just because they didn't like Scientology. On this ground the directive was not respected according to her view.
The Court was asked to decide whether an individual can rely on a directive which has not been implemented by a Member State.

Arguments

- The United Kingdom observed, with a ***textual argument***, that, since article 189 of the Treaty (now 288 TFEU) distinguishes between the effects ascribed to regulations, directives, and decision, it must therefore be presumed that the Council (at that time there was not the *co-decision* procedure), in issuing a directive rather than making a regulation, must have intended that *the directive should have an effect other than that of a regulation and accordingly that the former should not be* ***directly applicable.*** *Indeed, why have different instruments if effects are the same? And in fact directives need implementation while regulations do not so it follows that directives are not capable of direct effect.*
- The Court did not agree with the UK and stated that:
If, however, by virtue of the provisions of article 189 ***regulations*** *are directly applicable and consequently may by their very nature have direct effects, it* ***does not follow*** *from this, that other categories of acts mentioned in that article can* ***never*** *have similar effects* [then, oppositely to UK's argument].

*It would be incompatible with the **binding effect** attributed to a directive by article 189 [now 288 TFEU] to **exclude**, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.*

Furthermore, according to the Court **the focus should be on the provision**, despite the fact that the rule comes from a directive, which is not a direct applicable act.

But after all, what would be the point of having directives (that are indeed **binding on the Member States**), that cannot be relied on by the citizens, who instead are those concerned by the Directives? The ruling continues:
*In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the **useful effect** of such an act would be **weakened** if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.*

Here the Court, by a **functional argument**, deals with the theory of **effect utile** of EU law:

- it is necessary to always maximize the **usefulness** of EU law and **compliance** with EU law in the national sphere (and this would be possible by providing the directives with direct effect);
- moreover, it would be an incentive for Member States to implement the directive since even if they do not implement them or do it unproperly, individuals concerned by the directive could still rely upon the rights conferred to them by the directive and invoke it directly in front of national courts.

By a **teleological interpretation**, the Cour further states the other key constitutional argument built by the ECJ in its first cases (namely, in <u>*Van Gend*</u>): if directives could not be invoked, what would be the ratio of the *Preliminary Reference* (i.e., national Courts asking the ECJ for the interpretation of EU laws – directives included)? Indeed:
Article 177 [267 TFEU], which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.
It is necessary to examine, in every case, whether

- ***the nature,***
- ***general scheme***
- ***and wording***

of the provision in question are capable of having direct effects on the relations between member states and individuals [i.e. Vertical Direct Effect].

The same conclusion is reached through a **literal argument**, considering that Art 267 TFEU makes no distinction between acts so it is possible to ask a preliminary ruling on directives too and this means that directives can be invoked by claimants in front of national courts.

But what are the ***conditions*** for a directive to be directly effective?:

- **Time limit must have expired** (obligations for MS and rights only arise after time limit has expired), and <u>even before MS must refrain from undermining end result of Directive</u> → First

of all, we must again underline that, pursuant to art. **189 TEU**, directives are **binding as to the aims** to be achieved *in a certain amount of time* but leave **discretion** to Member States as to the *means* to use. Now, the way it works in practice is that the Directive, in the last provision, establishes a **time limit** for the Member States to implement it. This due date can vary from **2 years** (as it usually happens) to **5 years**, depending on the *complexity* of what the directive is doing, and, so, on what time is considered appropriate for the law system to adapt itself.
The directive, however, only **displays effects *after*** the time limit has expired: until then, the Directive has no effect whatsoever (thus including direct effect), for Member States need to adapt their legislation to the aims of the Directive.
Nonetheless, it is worth mentioning that Member States, *pending* the implementation of a Directive, cannot adopt new legislation as to **frustrate the aims** of the Directive: that is to say, if a Directive against *discriminations on grounds of sex* must be implemented within two years, a Member State that (at the time of the enactment of the Directive) has a conform legislation cannot change it against the aims of the directive (i.e., the Parliament cannot adopt a piece of law that prevents women from – say – being paid equally as men).
Besides this, the obligations imposed in the Directive only materialize at the time of expiry of the due date.[29]

- **MS has not transposed or not transposed correctly →** If the MS has correctly transposed the Directive, the **individual can invoke the application of the national transposition law** without being in need of direct effect. Furthermore, *after* the time of expiry, for the direct effect to be applicable it is necessary that the Member State has either **not transposed** (i.e., implemented) the Directive or has done it **incorrectly**: this is so that citizens do not rely on national legislation that contrasts with the directive.

- What's more: the provision contained in the Directive must satisfy the same criteria as regulations: indeed, it must be
    - **sufficiently *clear***,
    - ***precise***,
    - and ***unconditional***: i.e., the reader must be able to ascertain the right granted by the Directive.

  Thus, always keep in mind that **not all provisions of a given Directive can be directly effective**. The example is, again, the fictitious *non-discrimination directive*, which **clearly grants a right** (indeed, not to be discriminated on grounds of sex); as well as – say – an *employment directive* establishing maximum working hours.

- Be aware that *if* the Member State needs to **take positive action** (i.e., do something active, have some discretion), then the Directive cannot have direct effect!
  This point will be deeply discussed when analysing *Francovich*: in that case, there was a Directive providing that Member States should have created a fund so as to guarantee employees their salary in case of the employer's bankruptcy. Now, the Directive was clearly intended to *grant a right*; however, **Member States needed to do something** (i.e., creating the fund) – something that Italy had not done at the time of the case. Therefore, despite the right endowed in the directive being clear and precise, the Directive could not be directly

[29] Hence, the very first question to ask ourselves in a problem question would be: has the time limit for transposition expired? If not, the directive cannot display any effect.

effective, since there was not a fund from which money could be drawn. Indeed, in the creation of the fund, **the State had the right to exercise its discretion as to the ways to get the money and the functioning of the fund**[30].
To be clearer on the point, it is worth making a similar example. The EU enacted a Directive that prohibited work discrimination on grounds of sex and established that Member States would have provided a way of compensating victims of sex discrimination at work, *choosing between alternatives* (for instance, monetary compensation or reintegration at work); when a case was raised at a National Court (a woman being rejected at a job interview "because she was female"), the decision was against of the directive having *direct effect*, since the State had *discretion* as to the means of compensation for the victim (something that the State at stake – Italy – had not done).

- Finally, a Directive can be invoked only **against the State** or one of its "**emanations**" (again, this is a very controversial point, and we will get back to this later). This crucial condition is referred to as ***Vertical Direct Effect***, and it is due – as an interpretive choice by the ECJ – to the fact that Directives are (according to art. 188 TEU) binding only on Member States, and not upon individuals. That is why that Directives cannot have ***Horizontal Direct Effect*** (i.e., between two private parties): **that would mean that one of the parties would be bound to the Directive**.
  Actually, it does make sense: otherwise, we would have a problem of **legal uncertainty**. Say – for instance – that a directive aimed at ensuring accessibility for physically impaired people: companies, despite agreeing with the principle of the Directive, would anyway have to wait until the implementation by the State. If the EU were to impose on them a duty to comply with the Directive, this would create legal uncertainty: companies would start building – say – wheelchair rams just to discover, in a later moment, when the national implementing legislation passes, that the ramps had to be made in a particular material, with a particular gradient, etc. It would become extremely difficult and precarious for private parties.

It is also worth mentioning that **vertical situations** occur only when an individual brings a case *against* the Member State (or its emanations), and not vice versa, as those are considered the same as **horizontal situations** in which the beforementioned principles are applicable (scholars refer to it as ***inverted direct effect***).
So VDE is **unilateral** → individuals against MSs and NEVER the contrary (MS against individuals) since directives impose obligations only on the MSs.

Ratti and Marshall

Indeed, in a ECJ case, known as ***Ratti***, Italy had not implemented a directive about environmental damages but still, the Italian prosecutor tried to rely on the Directive *against* a private party, namely, Mr. Ratti.

The Court could not help but stating what has become known as the ***estoppel argument***[31]:

[30] Instead, if the Directive had said, for instance, *"the State shall pay the employees' salaries in case of bankruptcy"* and full stop, it would probably have had direct effect.
[31] In Italian: *principio di preclusione*.

*A **Member State** which has <u>not</u> adopted the implementing measures required by the directive in the prescribed periods **may <u>not</u> rely**, as **against individuals**, **on its own failure to perform** the obligations which the directive entails* [i.e., **the State cannot rely on its own failure to grant some rights**].

The principle was later clarified in the ***<u>Marshall</u>*** case (**152/84**), which is one of those cases that leaves us a bit uncertain about what has been ruled.

<u>Facts</u>
It happened that a lady that was discriminated against on grounds of sex, due to detrimental treatment in relation to pensionable age and rights. This difference in treatment was therefore incompatible with an EU sex discrimination directive. The problem was *defining the situation*: the estoppel argument worked in cases which the *State* was involved in. However, Ms. Marshall worked at a (public) **hospital** which was part of the National Healthcare System.
What **the issue was, then, concerned the possibility – for Ms. Marshall – to rely on a direct effect of the directive**.

<u>Arguments</u>

- The UK was – guess what – clearly against it: of course, it was a *public* hospital, but this does <u>not</u> mean that the case is against the State. The hospital – indeed had not regulatory power and therefore it was not his fault that the directive had not been implemented
  Hence, according to the UK government, the hospital actually *could* deny the right granted in the directive *on the ground that the Directive had not been implemented*.
  To put it differently: the directive did **<u>not</u> bind** the hospital administration.
- The Court **disagreed**.
  *According to Article 189 of the EEC Treaty, the **binding nature** of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to **'each Member State** to which it is addressed'. It follows that a directive may <u>not</u> of itself impose obligations on an individual* [here, the Court simply restated the <u>impossibility</u> of **horizontal direct effect**].
  *It must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State, he may do so **regardless of the capacity in which the latter is acting**, whether employer or public authority. In either case it is necessary to **prevent the State from taking advantage of its own failure** to comply with community law.*

In these very last lines, we see in clearer terms the ***estoppel argument*** from *<u>Ratti</u>*.

It is, indeed, a **revolutionary decision**.
We are in a case against a *hospital* yet dealing with *pensions rights* (how can the hospital be held responsible for lack of implementation?!).
Still, the Court considered it as an ***emanation* of the State**: according to this interpretation, for example, Bocconi itself could be considered an emanation of the State and hence subjected to direct effect of directives, even though Bocconi has <u>not</u> regulatory power.

The aim of the Court is indeed clear: it is *de facto* **expanding as much as possible the possibility for individuals to enjoy the rights of EU** (then, EC) law. It does this by considering the State <u>not only</u> as its formal institutions and powers (i.e., the Parliament, the Government, etc.), but as **everything** which has a **public dimension** (hence, also a hospital). Doing so, the Court is making the incentive for Member States to implement EU law *even greater*: the entire public sector could be indeed affected by mis-implementation, making it for the State more or less economically unsustainable.

Marshall did raise a debate:

- public institutions did not like the possibility to be held responsible for something that was not their fault (i.e., mis-implementation of EU directives);
- moreover, the ruling at stake also created **discrimination**: indeed, if Ms. Marshall had been in the exact same place *except* for working in the private sector (even – say – in a *private* clinic), she would have been treated completely differently. Therefore, employees in public sector are given more rights than those in the private sector: it is for this reason that some argued that, if the Court had wanted direct effect, **it should have applied it *also* on horizontal situations,** i.e., not making that artificial distinction that actually brought more disadvantages than benefits. Indeed this case proves that the **lack of HDE of Directive**s has a **disadvantage** which is the risk to create **discrimination**.
- Also, there were already several cases of (treaty) provisions that, despite being *addressed to the Member States*, had been considered by the ECJ *applicable to individuals* as well (consider, for instance, the interpretation of art. 157 TFEU in *Defrenne*).

What the Court does is **making the notion of State broader** and broader: indeed, tries to get *into* the definition of State as many institutions and parties as possible.
With time, this ***extensive interpretation*** of the notion of "State" would have gone so far as to include:

- *regional and local authorities* (see Case 103/88, *Fratelli Costanzo*),
- the *police* (see Case 222/84, *Johnson*),
- *fiscal authorities* (see Case 8/81, *Becker*), and so on.

Foster

The broadest (and creative) definition of all was indeed reached in ***Foster*** (Case **C-188/89**). It was – again – a sex equality case: Ms. Foster was employed in the British Gas Corporation – that had been **privatized**. The issue was the same as always: was she in a vertical or in a horizontal situation?

The Court held that, since gas is an essential utility, the Company had **public law duties** regardless of its formal qualification, and hence it was part of this remarkably **broad definition of State**. Indeed:
*A body, **whatever its legal form**, which has been made **responsible**, pursuant to a measure adopted by the State, for **providing a public service** under the **control of the State** and has for that purpose **powers beyond** those which result from the normal rules applicable in relations between individuals is **included** in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.*

In this sense, as we mentioned before, Bocconi (as well as – say – any professional order) would definitely be considered an emanation of the State, for it has indeed special powers and special duties (e.g., the power to award degrees with legal value) beyond those resulting from "ordinary" rules.

Such broad definition of State is the result of the estoppel argument, which can be seen as the main justification for DE (i.e. **the State cannot rely on its own failure to grant some rights**), and the reasons behind it are many:

- to grant more rights as possible to the individuals → maximize the effectiveness of EU law provisions (specifically, of directives)
- to maximise the compliance of national law with EU law → DE as decentralized enforcement of EU law
- It was a strategy to circumnavigate the lack of Horizontal DE for directives, especially considering *Foster*.

Of course, many **criticisms** were raised, since the entire point of *privatizing* Companies is to make them distant from the State. After all – scholars argued – it would have been simple (and definitely more straightforward) to consider *every* directive as directly applicable.

Vertical versus *Horizontal Effect: the role of General Principles and Charter*

We shall now continue analysing the differences between (and the solutions created by the ECJ on) vertical and horizontal direct effect, in relation to EU directives.

This **distinction** in treatment was – as we said – highly criticized both by the **Advocates General**[32] of the Court and scholarship: once you interpret *emanation of the State* so broadly, the distinction between vertical and horizontal effect does not make sense anymore.

Faccini Dori and AG Lenz's opinion

So, in ***Faccini Dori*** (C-91/92) a student signed up to an English language course, except wanting to withdraw from the contract in a later moment. At that time, a Directive **granted the right** to *withdraw from contracts* that were signed *off the business premises* (which was exactly our case). However, Italy had not implemented the directive and, of course, this was clearly a *horizontal situation* (i.e., between two private parties, without any public element whatsoever). Faccini Dori raised the case before the ECJ, claiming for the directive to have direct effect anyway, thus making her able to withdraw from the contract without having to pay damages.

Advocate General Lenz gave an ***opinion*** for this case, analysing the distinction between horizontal direct effect and vertical direct effect.
He argued that an **expansion of direct effect**, so as to include also *horizontal* direct effect, was in fact needed:

- this was, first of all, because there was **no rationale** for maintaining the distinction between the two types of effects. Furthermore, this distinction was **artificial** that it ended up **giving**

[32] An ***Advocate General*** is a judge of the ECJ whose role is advising the Court on what path it should take, through an *opinion* which is not binding yet rather influential.

random results and, hence, **arbitrary discrimination**: whether you would be protected by EU law or not, depended on something really accidental (i.e., whether you are employed by a private or a broadly "public" company). To put it differently, two people in the exact same working conditions – except for one is employed at British Gas Corp. and the other at a purely private company – are differently protected by EU law.

- In this way **even the distinction between State and private parties is artificial**, considering the broad interpretation of emanation of the State (see *Foster*).
- AG Lenz then addressed the problem of **legal certainty**, arguing that actually that was no longer true: from the Maastricht Treaty on, Directives were published in the **Official Journal** of EU (the equivalent of our *Gazzetta Ufficiale*), and therefore private parties could know the obligations they were imposed on.
- Furthermore, Lenz dealt with the argument that is constantly – still now – made by the Court, according to which, after all, *Directives are addressed to Member States and not to individuals* (a merely ***textual argument***). However – Lenz noted – the Court was <u>not</u> always so formal in applying EU law: for instance, just consider <u>*Defrenne*</u>, in which a provision addressed to Member States was actually **made applicable to individuals** by the ECJ. That is why that this strictly textual argument is not really credible, due to the rather extensive use of ***teleological argument*** by the Court (even to interpret the notion of State) To put it differently: why such a strict textual interpretation of the addresses of Directives and a so broad teleological interpretation of the notion of State?

Hence, according to AG Lenz, this **artificial distinction** had to be **abolished**, in order to give ***full effect* to Directives in both vertical and horizontal situations**.

However, the Court did <u>not</u> follow AG Lenz's opinion and **maintained the distinction** between vertical direct effect and horizontal direct effect. This created a huge problem of **discrimination**, and the way the Court dealt with it was rather unsatisfactory.
To understand it, we have to remember that **fundamental rights** – even though not codified in the Treaties at that time – were nonetheless **recognised as general principles** of Union Law by the ECJ (that is to say, the general principles derive from the ECJ ***case law***); later, they were codified in the Charter of Fundamental Rights and acquired formal legal effect in 2009 with the Treaty of Lisbon.

Now, the Charter is an instrument that is supposed to apply *primarily* to the EU institutions (in order to **bind law-making** bodies to the general standard of fundamental rights). Still, the Court started applying the Charter also **towards Member States *when implementing*** *EU law*, establishing a principle that was also later codified, since Member States were acting, during the implementation of EU law, as **agents** of the EU and therefore had to respect constitutional principles.
Of course, this was also valid in relation to the implementation of directives: i.e., **the *discretion* left to Member States had to be exercised having regard to EU fundamental rights**. How does this apply with our problematic distinction?

<u>Mangold</u>
In the famous <u>***Mangold***</u> case (C-144/04), a lawyer was dismissed by his employer on *grounds of his age* (meaning that a different contractual provision applied because of his age: i.e., *discrimination at work*). Just before, in 2000, a ***Framework Discrimination Directive*** and an ***Employment Directive*** were enacted, the latter of which **prohibited discrimination** also on grounds of *age* in the field of employment. As we mentioned, the case was raised between two lawyers: again, a **horizontal situation**.

What's more: the **time of implementation** had not expired (this makes Mangold really peculiar).

The Court held that, whereas the Employment Directive was not to be considered due to this second matter of fact, there was another one (i.e., the *Framework Discrimination Directive*) that could play a crucial role. The ***existence*** of that directive meant that the situation at stake (i.e., discrimination at work on grounds of age) **fell within the scope** of EU law: i.e., the situation was ***under the umbrella*** of EU law.
Moreover, the Court recognised the existence of a **general principle of *non-discrimination*** on grounds of age.

Now, whereas a directive cannot apply in a horizontal situation, the **general principles** (now, fundamental rights) ***can***.

To make it more general, according to the Court:
- *If* there is a ***General Principle*** (now, a fundamental right recognised in the Charter) that could be applied to a certain situation,
- *And* the **situation falls *within the scope*** of Union Law by **virtue of a Directive** (i.e., there is a Directive related to that particular subject and the **content of the right of the Charter is detailed in the Directive**, whilst it has not been implemented yet or it has been mis-implemented),
- *then* the **general principle** can apply in ***horizontal situations*** → the **Charter imposes obligations on private persons**.

The ratio for this principle (that has been transposed into **Art. 51 CFREU**) is clear: it is not possible to have any discrimination whatsoever *in introducing*, applying, and interpreting EU law.

The Court, here, realizes that there is something problematic in keeping the distinction between vertical direct effect and horizontal direct effect when considering directives that provide for **rights *not* to be discriminated** against: the interpretation of the Court itself, indeed, created an artificial discrimination that ended up being quite problematic especially in relations to anti-discrimination rights.
To put it in practice, the Court had created a situation in which Mr. X could not be fired by a private university because of its sexual orientation, whereas Mr. Y could be fired – on the exact same grounds – by the Café in front of the university. And when it comes to fundamental rights, this is totally unacceptable.
Since the Court was not willing to give horizontal direct effect to Directives anyway, they came up with the abovementioned principle: *if* a **Directive** provides for a **right** that it is ***also* contained in the Charter**, the situation *falls* within the scope of EU by virtue of the Directive (the State is implementing EU secondary law) and the **Charter can** be **invoked horizontally** → so the **DE of the Charter is a way to circumnavigate the lack of HDE of Directives.**

The end result of this is that *some* of the rights recognised in the Charter have direct effect, and the content of those are *determined* by the provisions of the Directive.

Max Planck
This was made even clearer in ***Max Planck*** (C-684/16), that involved the famous German research institution (precisely, Max Planck). A researcher at the end of its contract claimed that he should have had a compensation for the time off that he had not done. However, **Directive 2003/88**

provided for the **right to a paid annual leave**, which could be substitute by an **allowance** (i.e., a compensation) in case of termination of employment *without* having taken the annual leave. When the researcher's contract was terminated, he asked for the allowance in lieu of the annual leave; Max Planck, however, denied it, because of the way the directive had been implemented: if he had wanted the allowance he would asked it in advance.

It was a case of **litigation between private parties**. Whereas the directive *did* establish a **clear right**, it was **mis-implemented** by the Member State. The ECJ did exactly the same as in *Mangold*: it relied on **Art. 31(2) of the Charter**[33] and considered the situation as falling under the **umbrella of EU law** due to the existence of the Directive (and what is regulated by a Directive automatically *is* within the scope of EU law), and therefore the right provided for in Art. 31 was **directly effective** also in that (horizontal) situation.

Now, Art. 31 of the Charter is not very defined, as it is natural for fundamental rights: to understand the **content** of that right it was necessary to **consider what the Directive** provided. To put it differently: we need to have a Directive that gives effect to the right recognised in the Charter and ***gives substance*** to that right.
First reaction: shock. Shock because this really **undermines *legal certainty***: it would have been way simpler to hold that the particular type of Directives (i.e., *non-discrimination directives*) had also horizontal direct effect.

Instead, the Court preferred arguing that, when certain conditions are met (i.e., there is a *directive providing for an individual right* and *that individual right is also contained in the CFREU*), the **Charter imposes obligations on individuals** (and, hence, it applies in horizontal situations).

Vertical versus *Horizontal Effect: Von Colson and the Consistent Interpretation*

But this is not the end yet.
When a directive is neither directly effective nor supported by a Charter provision, the ECJ came up with the so-called **duty of *consistent interpretation***, which is also referred to as ***indirect effect*** of EU law.
According to this principle, the National Courts, in applying EU, must, ***in so far as possible***, **interpret national law consistently with EU law**, regardless of the (in)existence of direct effect.

Von Colson

This is exactly the same duty any Court would have in relation to the national Constitution: they cannot interpret a source of law in a way that is inconsistent with a higher source, **if it is possible to avoid that**. This principle clearly emerged in ***Von Colson 14/83***, a case in which a woman was not employed in a prison on grounds of her gender (and was compensated only in relation to her train journey to get to the interview). In that case, despite being a **vertical situation**, the directive was not directly effective since it gave discretion to the Member States as to *defining the effective remedy* (but Germany had done it incorrectly). However, the Court held:
In applying the national law […]*, national courts are required to interpret their national law* ***in the light of the wording and the purpose of the directive*** *in order to achieve the result referred to in the third paragraph of Article 189* [now 288 TFEU].

[33] *"Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an* ***annual period of paid leave****."*

To put it differently: wait a minute, this is EU law, and EU law always **takes precedence** over national law. Therefore, it must be given effect as much as possible. Even in cases where a directive is not directly effective, **National Courts** have to consider if *any provision* of the national legal system can be **interpreted so as to give effect to EU law**. In this way National Courts act as **gatekeepers** of compliance of national law with EU law and **maximiser** of the effectiveness of EU law (i.e. the effect utile theory, *see above*).

In the specific case, supposed there was a piece of law that prohibited work discrimination on grounds of *age*: as a judge, national Courts had to interpret that provision, by **analogy**, to cases of discrimination on grounds of *gender*.

The **rationale** behind indirect effect is the **duty** imposed on **National Courts** to **give full effectiveness to EU law** (which of course includes directives).
But how far does this duty go? What is the extent to which the judge has to push him/herself in order to give effect to EU law?

The ECJ gave a **broad interpretation** of the duty (***Marleasing***): *in so far as possible* means

- **regardless of temporal relationship** between national legislation and the directive at stake
- and considering the **whole body** of domestic law (and <u>not only</u> implementing legislation), so as to see if there is something that will give effect to the directive.

Moreover, since this duty is vested in national Courts, <u>no</u> distinction is made between vertical and horizontal situation: when the provision of the directive cannot have direct effect (e.g., it implies discretion), the duty is applicable **both** in **horizontal** (*Marleasing* and *Pfeiffer*) and **vertical** situations → another way to circumnavigate the lack of HDE of Directives.

However, always keep in mind that, when considering a **directive**, this duty applies <u>*only*</u> **after the time limit** to transpose the directive has **expired** (*Adeneler*).
Furthermore, the ECJ recognised **two limits** of this duty:

- Firstly, National Courts may <u>not</u> provide a ***contra legem* interpretation**: indeed, when interpreting a legal text, Courts have an **outer limit**, as they <u>cannot</u> go *against* the very words of legislation. So, for instance, if a legal provision states that everyone is allowed to be paid the same and national Courts have always interpreted the provision as applicable to *full time* employees only, but a Directive is enacted, giving the same right to *all* employees, then the Courts have to extend their interpretation also to *part-time* employees. Conversely, if the provision is explicitly (by words of the legislator) applicable <u>only</u> to *employees who work at least 40 weekly hours*, the Courts will not be able to interpret the provision in a way that is consistent with the Directive.
- The other limitation consists in the guarantee – arising from the general principles of criminal law – according to which consistent interpretation can **never be used to *aggravate criminal liability*** (see Case C-387/02, <u>*Berlusconi et al*</u>).

To sum up everything we did so far as to the effects of EU law, we can have:

- The ***Treaties***: a provision contained in them is directly effective *if* it is **self executing** → sufficiently **clear**, **precise,** and **unconditional**. In that, it has vertical direct effect and potentially horizontal direct effect.
- The ***Charter*** and **general principles**, which potentially have **both** vertical and horizontal direct effect *in so far* the situation **falls within the scope of the EU**.

- ***Regulations*** and ***Decisions***, whose provisions potentially have **both** horizontal and vertical direct effect.
- ***Directives***, which have direct effect only in vertical situations (broadly interpreted) and can also rely on **indirect effect**.

EU LAW PROVISIONS	**VDE**	**HDE**
Treaties	Yes → *Van Gend en Loos*	Yes → *Defrenne*
General Principle and Charter	Yes	Yes → *Mangold and Max Planck*
Regulations and Decisions	Yes	Yes
Directives	Yes	No → *Marshall and Faccini Dori*

The last resort: Francovich Liability

What happens, now, if:

- a Directive is **intended to grant a right** *but*
    - it is either not directly effective
    - or I am in a horizontal situation?

Do I remain without any kind of legal protection whatsoever?
The answer is called ***Francovich* Damages**.

We have already mentioned the facts that gave rise to the case before the ECJ: Italy had not implemented a directive, according to which Member States would have created a fund to protect employees in case of employer's insolvency. Mr. Francovich (and lots of other claimants) found himself exactly in that situation: he remained without his wages just because Italy had not implemented the Directive. Clearly, the EU Directive intended to **grant a right** (i.e., *compensation for employees in case of insolvency of the employer*), but in this case it was not directly effective, as it was both a **horizontal situation** *and* the right granted in the provision was not **unconditional**, meaning that an **action at State level** was, indeed, required (i.e., the creation of the fund). As a result, Francovich and his colleagues were left empty-handed, in a clearly *unfair* situation: the only reason why they could not have their compensation was because Italy had failed in its duty to implement the directive.

The Italian Court made a **preliminary reference** to the ECJ, that held in favour of **Italy's fault**: therefore, Italy had to **pay the compensation** anyway. Actually, there is no explicit principle of **State liability** in the treaties; however, the Court relied on the principle of **non-contractual liability *of EU institutions***:

*The **full effectiveness** of Community rules would be impaired and the **protection** of the rights which they grant would be weakened if individuals were **unable to obtain redress** when their rights are **infringed by a breach** of Community law for which a Member State can be held responsible* [i.e., the only reason why Francovich could not get his wage!].

Again, the Court makes a **teleological interpretation**, aiming at giving ***full effect*** to EU provisions and ensure ***compliance*** with EU law. In this respect, the ECJ establishes a **general principle**: a **redress** is due for **breaches** of Community Law by the Member States.

Then, the Court specifies *when*, in particular, States are required to redress for the breach:

*The possibility of obtaining redress from the Member State is particularly **indispensable** where, as in this case, the **full effectiveness** of Community rules is **subject to prior action on the part of the State***

and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
To justify the principle of State liability, the Court claims that it could be drawn from the system of EU law as a whole, it being ***inherent*** to the Treaty (also basing on the EU non-contractual liability, as we have said).

However, some **conditions** were established:
The first of those conditions is that the ***result*** *prescribed by the Directive should* ***entail the grant of rights*** *to individuals* [i.e., the provision at stake must be intended to confer rights]*. The second condition is that it should be* ***possible to identify the content*** *of those rights on the basis of the provisions of the Directive* [we must be able to ascertain what the individuals would have got if the Directive had been (correctly) implemented]*. Finally, the third condition is the existence of a* ***causal link between the breach*** *of the State's obligation* ***and the loss and damage*** *suffered by the injured parties* [i.e. if there was not breach of the State's obligation there would be no damage].

Conditions for State liability
In a later case, ***Brasserie-Factortame III***, the Court establishes a proper **test** in order to hold a Member State liable for breach of EU law, basing on **three conditions**:

1. The provision at issue must be intended to ***confer rights*** that can be **ascertainable** from the provision itself; otherwise, there would not be a **cause of action**[34].
   We must remember, though, that the intention to confer rights is **different** from the provision having *direct effect*: the *Francovich* case itself entailed non-direct effective provisions. Indeed, as we mentioned, Italy needed to establish a fund in order to grant wages in case of employer's bankruptcy (and the loss which Francovich was subjected to was caused precisely by this non-implementation): the directive at issue was not unconditional and, hence, could not be directly effective. Still, clearly it was intended to *confer rights* (i.e., to *recover unpaid wages*).
   - The converse is also true: indeed, a Member State might be **in** (a sufficiently serious) **breach**, and then subjected to Francovich liability, even when the provision is *Directly effective*. And this is so because, even if a provision is directly effective (which is itself a **remedy**, since it ensures that a right provided for in the provision is correctly enforced), **damages** would anyway be needed, had the individual incurred in a loss anyway before the right was recognised at court.
     So, in Francovich direct effect was not possible but **State liability is a self-standing cause of action → Francovich damages are available even when a provision has direct effect.**
     It is exactly the case of ***Factortame III***: Spain had just joined the EU; once in the EU, fishing vessels could fish wherever they wanted because of free movement. The UK, however, did not like it at all, as Spanish fishermen would go into British territorial waters: it was for this reason that Ms. Thatcher prevented them from coming there, imposing discrimination on grounds of nationality between fishing companies. From that situation, three cases were brought before the ECJ, the third one of which was particularly about Francovich liability. A **directly effective** right (i.e., *non-discrimination on grounds of nationality*) was at stake (from which we can infer that Francovich liability is applicable *also* in case of directly effective rights). However, the

[34] I.e., technically, a set of facts sufficient to justify suing to obtain money, property, or the enforcement of a legal right against another party.

Spanish fishermen were not able to fish till their right was enforced by the ECJ (otherwise they would have risked jailtime), and they in fact suffered an economic loss from it.
Also, in the German ***Brasserie*** case, the issue was whether a certain beer could be sold in Germany: even though the right at issue was directly effective, the party suffered a great loss between the time the right was provided for in the Directive and the end of the Court trial.

2. Not any breach may give rise to State Liability: instead, the breach of EU law must be ***sufficiently serious***. This balances the interest in **providing a remedy to the individual** and **not overwhelming the legal system for every single little breach**.
In the ***BT*** case (C-392/93), the Court established several **criteria** to ascertain whether the breach was sufficiently serious or not, that is to say, whether the Member State has ***manifestly disregarded*** the **limits of the discretion** left them (the so-called ***BT test***):
    a. First, the Court must consider the **clarity** and **precision** of the rule infringed (it could be that it leaves much more discretion than usual, for instance).
    b. Moreover, the Court must also look at whether the infringement was **intentional** or **involuntary**, the latter case being a cause of non-liability. Instead, for instance, in *Factortame* the British Government exactly knew it was infringing EU law.
    c. Also, whether the error was **excusable** or **inexcusable**, whether the **Commission** has given interpretive or executive indications or not, etc. The same provision at stake, for instance, could have been interpreted just a very few times: a recent provision, indeed, might lead to various different opinions in relation to its very meaning. Conversely, a 20-year **case law** about the principle of non-discrimination on grounds of sex, Member States cannot be longer excused.
    d. Moreover, it could be the case that the **position taken by an EU institution** may have **contributed** towards the adoption or maintenance of national measures contrary to EU law. Indeed, in lots of instances, the Member States must notify their implementing legislation to the Commission; if the latter does not object it, Member States could actually be in the ***bona fide* impression** that it had correctly implemented the directive.

    This is, however, a list of **non-exhaustive criteria**; basically, we are looking at whether the Member State is ***at fault*** or not. More precisely, in *BT* the Court made clear that **it was necessary to look at how good the State exercised its discretion**.

    However, note that:
    - if there is **no discretion** (as in the case at hand) the **mere breach** of EU law might lead to *Francovich* liability, as it happened in ***Hedley Lomas*** (C-5/94, a case in which the UK was imposing export restriction on cows to Spain, due to the pression of environmental activists; however, the treaty was very clear: UK had no discretion whatsoever in order to do that)
    - and **failure to implement directive is automatic sufficiently serious breach** as the Court held in ***Dillenkofer***: in fact, whereas Member States have discretion on *how* to implement a directive (i.e., discretion only concerns the means), they have none on *whether* to do it or not.

Lots of commentators considered this ruling as a powerful tool to force Member States to implement a directive otherwise, they would *automatically* be considered liable of Francovich Damages (of course, in presence of the other two conditions). Again, we can see a way to **maximise effectiveness and compliance with EU law**.

3. There must be a ***causal link*** between the breach and the damage. Indeed, had the Member State implemented the directive (*correctly*, of course), damage would not have existed. However, it is for **national law to determine the *existence*** of the causal link, pursuant to the principle of ***national procedural autonomy***: national courts have to ascertain the existence of a causal link basing on national law. This particular is of outmost importance.
   Say, for instance, that Mafalda decides to break John's leg. John then has an accident to his arm going to the hospital to have his leg fixed. Whether Mafalda is considered liable also for John's arm depends on the **principle of *proximity*** (that establishes causation). In this respect, each national system may have different tools to establish where the proximity (and hence, liability) ends.
   Similarly, the amount of **compensation** is **determined by national law**; however, this is subjected to:
   a. the principles of ***effectiveness*** (i.e., national law cannot grant a compensation of 10€ for an extremely serious breach)
   b. and ***equivalence*** (i.e., a claim in EU law must not be less well treated than a claim in national law: procedural rules must not treat EU rights – including Francovich liability – less well than national ones).
   c. Finally, it also must be ***adequate***.

Scope of State liability
Given that *Francovich* liability can be accorded against the **State** and not private parties, the usual question arises: *who* is to be considered as State? Obviously:
- the **Legislature** (as decided in *Brasserie-Factortame III)*,
- the body that takes **executive decisions** (the Government, for instance, as in *Hedley Lomas)*,
- **National Supreme courts** (as ruled in ***Kobler***[35]*)*,
- **Regional and local authorities** (as in *Konle)*

[35] Kobler was a rather controversial decision. The facts of the case. Mr. Kobler took up an employment in the Austrian civil service, except later discovering that the periods of work that he had done outside Austria were not considered for seniority purposes: his pay was much lower that what was due. There had been already a case that had established the opposite principle, as a corollary of free movement of workers. Mr. Kobler complained about it and went before the national court, that made a *Preliminary reference* to the ECJ. While it was waiting for a reply by the ECJ, a parallel case on exactly the same issue was decided by the European Court. Then, the registrar sent back the Kobler instance to the Austrian national court, asking whether the ruling itself could be acceptable for them as an answer (this, in order not to waste judicial time). Austrian Supreme Court decided to do by itself: not only it did not wait for the ECJ Preliminary reference, but it even decided not to apply what the ECJ had ruled in that similar case, not recognised Mr. Kobler's right not to be discriminated against. Since it was the Supreme Court, no way of appealing was feasible. However, Mr. Kobler was arguably unhappy about the decision: he *started another trial*, claiming that the **Supreme Court** had **breached the EU law**: according to him, the Court should have either maintained the Preliminary Reference, or they should have recognized his right. Hence, he asked for *Francovich damages*, and the first instance court asked the **ECJ** about that possibility: did Francovich damages applied to Supreme Courts? Yes: EU **needs national courts to cooperate** in order to ensure rights granted by the EU. This way, the ECJ is warning the national courts of the risk of paying damages. However, at the same time, the Courts sets a very **high threshold** in order to find a **balance** between ensuring compliance with EU law and not undermining the principle of *res iudicata*. That is why this decision was so contested by scholars and national courts: the **risk** of never-ending proceedings is always present, undermining legal certainty.

- o And **autonomous public law bodies**[36] (as it happened in ***Haim II***, where the dentists' association was involved).

In this way, the scope of State liability mirrors also the idea of **emanation of the State** that we have considered in relation to *vertical direct effect* of Directives.

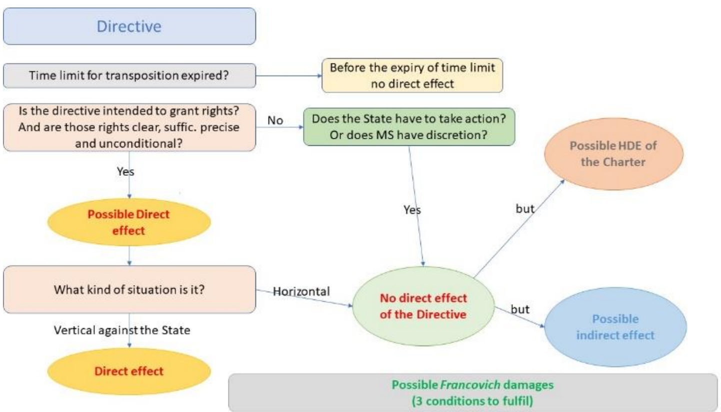
National Procedural Autonomy

Now, it is worth dwelling on the fact that EU law is **applied at national level**: this means that the **rules of procedure** to ensure Francovich liability (i.e., how the case is run before the national court: rules, for instance, like the ones on the *burden of proof*, *discovery request*, *time limits*, etc.) are determined by *national law*, pursuant to the abovementioned principle of ***National Procedural Autonomy***.

That is why, when we want to enforce our EU law right, we must go to a national court and respect *our* national rules of procedure: there is not harmonization at EU level (nor could we have it). As we have mentioned before, national procedural autonomy is subjected to two principles:

- ***Equivalence***, according to which an EU claim cannot be treated in a *less advantageous way* than comparable national claims (for instance, providing two different time limits for two comparable rights). As a way of example, equivalence would not be met if the limit to enforce the right of non-discrimination on grounds of sex (provided for in EU legislation) would be shorter than – say – the one to enforce the right of non-discrimination on grounds of regional belonging (provided for in national legislation).
- ***Effectiveness***, that ensures that national rules of procedure do not deprive EU law of its effectiveness. For instance, if the time limit to enforce the right of non-discrimination (regardless of its equivalence) was of just 48 hours, it would be impossible to set up a court challenge within that time: effectiveness would not be ensured. Consider ***Emmot*** as a way of example. Ms. Emmot was discriminated on grounds of sex and brought a claim before a national court; at the same time, a similar case was to be decided by the ECJ and the Irish Court had Ms. Emmot wait till the end of the Trial at EU level. By the time the ECJ issued its ruling, the time limits for Ms. Emmot's action had expired.

In relation to **quantum of damages** in Francovich cases, quantum is decided by national law (according to National Proc. Autonomy) subject to **equivalence and effectiveness**.



As we may imagine, *Francovich* is so important because it is a way to **solve the inequality** inherent to the absence of horizontal direct effect (although obtaining compensation is usually very different to being able to exercise a right).

[36] For instance, the well-known ***Consob***.

Problem Question: "Smoking does not kill" (part 1)

First of all, consider a fictitious **Directive 2010/36**, providing:

Article 1

Smoking shall be prohibited in all workplaces.

Article 2

Member States shall provide effective and proportionate sanctions for breach of the smoking ban. Employees who complain about smoking are fully protected and cannot be dismissed or be made to resign.

Article 3

Employees who are unlawfully exposed to cigarette smoke in their workplace shall have a right to at least one month salary by means of compensation.

Puritania, a fictitious EU Member State, introduces legislation prohibiting smoking in all workplaces employing less than 20 employees. The smoking ban does not apply to larger workplaces and government buildings.

Two cases are brought before a national Court:

- ***Case 1.*** *Philip Porris is a cigarette manufacturer employing 2000 workers; it encourages employees to smoke whilst working. Jane, who does not smoke, works for Philip Porris; she suffers from asthma, and having been seriously ill, complains. Jane is told that she can either resign or learn to cope with the passive smoke.*
- ***Case 2.*** *Vera, instead, works for the Puritanian Parliament, where everyone smokes; when she falls pregnant and complaints about the smoke, she is fired. Vera then decides to sue the Parliament, but her action is dismissed on the grounds that the Puritanian legislation is clear in allowing smoking in Parliament buildings.*

Let's solve the problem applying the **IRAC method**.

ISSUE: The issue is whether Jane and Vera can rely on the Direct Effect of provisions from Directive 2010/36 to invoke and enforce their rights directly in front of the national courts.

RULES: The rules applicable are

- Expiration of time limit to implement the Directive (*Ratti* and estoppel argument)
- Conditions for Direct Effect of Directives (*Van Duyn*)
- Vertical or Horizontal Situations → Directives do not have Horizontal Direct Effect (*Marshall* and *Faccini Dori*) but the ECJ developed a broad interpretation of the notion of State (*Marshall*, *Foster, Fratelli Costanzo, Johnson, Becker*).
- Direct effect of General Principles and Charter (*Mangold* and *Max Planck*)
- Indirect effect (*Marleasing, Adeneler, Pfeiffer*)

APPLICATION: Suppose that the time limit to implement the directive is expired and the MS did not implement it or implemented it incorrectly, then the directive's provisions can have direct effect since the State cannot take advantage from its own failure to perform the obligations which the directive entails (*Ratti*).

In this case, after the time limit the State enacted a legislation that did not implement the directive correctly so it is a case of mis-implementation and the Directive's provisions are liable to have direct effect.
Furthermore, in order to have DE the provisions must be clear, sufficiently precise and unconditional (*Van Duyn*) and the Member State does not have to take positive actions or have a certain degree of discretion (i.e. the provision must be unconditional as said before).
In light of this:

- *Article 1* does grant a right in a clear, precise, and unconditioned way, without any degree of discretion left for the national legislator. We know exactly what it entails, and hence Article 1 is capable of having direct effect.
- *Article 2*, at least in its first part, asks the Member States to act somehow and using discretion: it is for the State to provide the sanctions. Until the State exercises its choice on what those sanctions are (for instance, between closing down the premises for a certain amount of time and a fine), we cannot know what they will be. Hence, since the first part of the provision is <u>not</u> unconditional, direct effect shall be excluded.
  <u>However</u>, the *Second Part* of *Article 2* states something different: again, a clear, precise, and unconditioned right, that thus is capable of having direct effect. Indeed, the Directive provides a right that is complete by itself.
- *Article 3*, finally, makes us capable of ascertaining the right it provides. Of course, the State, in implementing the Directive, could provide a more protective discipline. Still, the provision is capable by its own capacity to have Direct Effect.

Now, we should check if we are in a vertical or horizontal situation:

- Jane is in a ***horizontal situation*** (i.e., between private parties) but Directives do not have Horizontal Direct Effect since they impose obligations on MSs and not on individuals (*Marshall* and *Faccini Dori*). In this case, if the Directive details the content of an individual right provided by the Charter then the Charter applies since the situation falls in the scope of the EU law due to the Directive. As a result, the Charter imposes obligation even on private parties (i.e. horizontal situations). This was ruled in *Mangold*, and restated in *Max Planck*, even if Mangold is a particular case considering it concerns discrimination and in that case the time limit was not expired yet.
  If the possible HDE of the Charter cannot be invoked, the national judge has anyway a duty to interpret national law in a way consistent with EU law, as far as possible (*Marleasing)*: this means regardless the temporal relationship, considering the whole body of legislation and after the time limit to implement the directive is expired (*Adeneler*). If possible, indirect effect applies also to horizontal situation, like this one (*Marleasing, Pfeiffer*). However, duty of consistent interpretation would not be possible it the interpretation is *contra legem*.
- Vera is clearly in a ***vertical situation*** (i.e. an individual against the State, and not vice versa because inverted direct effect is not possible). Indeed the Parliament is an emanation of the State since it is a public authority so the caselaw of the Court about the broad interpretation of the notion of State applies (*Marshall, Foster*, *Fratelli Costanzo, Johnson, Becker*).

CONCLUSION:

- Jan cannot rely on the DE of the provisions because she is in a horizontal situation and Directives lack HDE, so she can rely only on the possible HDE of the Charter and, if not, on the indirect effect.
- Vera is in a vertical situation so she can invoke the VDE of the directive's provision. Because of this, then we can identify the relevant rights that Vera could claim:

- Vera could not have been fired (pursuant to the second part of Art. 2).
- Moreover, she can ask for compensation (pursuant to art. 3).

Problem question: "Bumps in the road"

We shall now consider and analyse a new problem question. Later, we will also finish answering to the problem question we have faced some passages ago. First, preliminary advice: while reading the question, do not panic. Directive **100/93** is a (fictitious) measure designed to *increase the protection of the health* of taxi drivers and the safety of their passengers and of other road users. It includes these provisions:

Article 1.

*No taxi driver **shall work** continuously for more than 8 hours.*

Article 2.

*The Member States shall **take the necessary measure** to ensure that: wilful failure to comply with the requirements of this Directive is punishable as a **criminal offence**; there is **strict civil liability** for physical harm to persons resulting from such wilful failure* [i.e., it is not required to establish fault: if someone drives more than 8 hours and this causes physical harm, damages are automatically due]*".*

Article 1 clearly provides for a **clear prohibition**, without any degree of discretion left to Member States: as it is unconditional (and sufficiently precise and clear), it undoubtedly has (vertical) **direct effect**. Also Art. 2, notwithstanding the action required to Member States, is capable to have direct effect: the degree of discretion left to them is really low, as the Directive clearly specifies the remedies Member States have to provide for. It is also worth noting that *criminal offence* is a considerable particular, due to the fact that EU law cannot have direct (or indirect) effect to **create** or **aggravate criminal liability** (as ruled in *Berlusconi et al.*): to do so, we always need a *transposing act* because of legal certainty. Also, *strict liability* is particularly important, since it comes automatically with the event, without any need to establish fault.
Now, consider the following events, which occur **after the date for the implementation** of Directive 93/100 has expired:

- ***Case 1.*** *Armando is a **taxi-driver** in Rome. Exhausted after working continuously for **9 hours*** [i.e., one hour more than the time limit imposed by Art. 1 of the directive!]*, he falls asleep at the wheel and crashes his cab, seriously injuring his passenger, Bruno. Bruno, then, hopes to recover substantial damages for his injuries.*
  Although article 1 alone is potentially capable of having direct effect, we must determine if it really is so in the specific case: i.e., whether Armando, the taxi-driver, can be seen as an "**emanation of the State**" or not (instead, it is clear as water that Bruno is a private party). In this respect, we need to check with the ***British Gas Test*** whether this is a horizontal or a vertical situation: i.e., whether taxi drivers have **special public law duties or rights** conferred upon them by the State. Actually, in the case at issue, we do not know which type of taxi driver (private or public) Armando is: in this way, we must address both cases. If it was a ***vertical situation*** (i.e., publicly regulated taxi service with special public law duties), the directive would be (as for Art. 1 and the second part of Art. 2) **directly effective**. Therefore, Armando would automatically have to pay damages to Bruno, as the former drove more than 8 hours continuously. Conversely, if it was a ***horizontal situation***, the Directive would not be directly effective and, in the absence of any national provision that could be interpreted in conformity with the directive, the Charter would not help, thus excluding also indirect effect. However, ***Francovich damages*** could help. Indeed, the directive *is intended* to confer rights (pursuant to Art. 1 and Art. 2 as read together), the breach *is sufficiently serious* (Italy is likely not to have implemented the directive) pursuant to *Dillenkofer*, and the

causal link can be easily established (i.e., had Italy implemented the Directive, Bruno would have immediately had his damages paid).

- ***Case 2.*** *Eric, who is going to Scotland for a fishing holiday, hires the taxi* ***owned and driven*** *by Fred to take him from Exeter to Inverness. After 9 hours' continuous driving, Fred is involved in a multiple motorway pile-up. Eric is unharmed but* ***too shaken to continue*** *with his holiday, which has already been paid for. The United Kingdom has* ***fully implemented*** *Directive 93/100. However, the implementing legislation provides for an* ***exception*** *from the 8-hour rule in Article 1, in the case of journeys of over 500 miles. The legislation has been* ***notified to the Commission****, which made* ***no comment*** *on the exception to the 8-hour rule. Eric now wants to recover the cost of his* ***lost holiday****.*

  A particular is worth mentioning. We have no idea whether the **exception** made by the implementing British legislation was compatible or not with EU law, since the Commission **made no comment**. Thus, the condition of **sufficiently serious breach** must be questioned. Recalling the *BT* case (and the related **BT test**), the behaviour of the EC might have been **material** in establishing the sufficiently serious breach: indeed, UK government might have thought that their exception was ok. Furthermore, the kind of **right** claimed by Eric (i.e., recovering the cost of his lost holiday) is not provided for in the Directive, which instead grants only damages for *physical arm*. Hence, even if the directive was directly effective, Eric would not have such a right. For the same reason, **causality** between mis-implementation and the denial of that particular right cannot be, indeed, established.

Problem question: "Smoking does not kill" (part 2)

We can now go back to our very first case, related to the smoking ban directive. When the Parliament of Puritania was involved, direct effect was applicable, and the solution was quite straightforward. However, when he dealt with the cigarette manufacturer (i.e., a private company), Jane was affected by the fact that the smoking ban could not be applied to the company, pursuant to national legislation (since it was a **horizontal situation** and direct effect was not feasible, there was not space for **consistent interpretation**, nor there was for the **Charter**).
However, we can now finally consider also **Francovich Damages**. In this respect, the Directive was **clearly intended to grant right**: i.e., *constructing dismissal*[37] and *compensation* in case of exposure to cigarette smoke. Then, as for the **sufficiently serious breach** of EU law, we can look at the implementing legislation of Puritania, that greatly differs from the Directive. Moreover, the provisions of the Directive are very *clear* and *precise*. Therefore, after conducting the **BT test**, this case of **mis-implementation** can be easily considered as sufficiently serious. Finally, although **causation** is a matter of national law, we can surely claim that, had the directive been implemented on time and correctly, Jane would have had her compensation of one month salary.

[37] According to which, no-one cannot be dismissed for complaining – in the case at issue – about the cigarette smoke.

The European Court of Justice

In this section we will delve into:

- the composition of the European Court of Justice
- the *preliminary reference* procedure
- the *enforcement* procedure of EU law against Member States,
- and the *judicial review*[38].

Firstly, the ECJ is made up of **two Courts**:

1. the **General Court**
2. the **Court of Justice**

Secondly, all EU languages are "official", but the working language is **French** and the European Court of Justice is located in **Luxembourg** (≠ ECHR, located in Strasbourg).

The General Court

The ***General Court***, is somehow a lower court, like a first instance court (but this is not properly correct).
The GC is bigger in its composition: indeed, according to the Treaty, it must have "***at least*** **one judge per Member State**" (currently, **two judges per State**).
The General Court deals with

- ***Direct Actions*** → there is a suit directly in front of the General Court:
  - Actions for **annulment** of an EU act brought by natural/legal **persons**. For instance, if Google wanted to challenge a fine for an alleged breach of the EU competition law, the case would be assigned to the General Court. Then, if necessary, Google will appeal the first instance ruling before the Court of Justice.
  - Actions for **compensation for damage** caused by **EU institutions** and/or their staff (pursuant to Art. 268 TFEU).
- **Requests for preliminary rulings transferred by the Court of Justice in specific areas** (this a Novelty starting from October 2024).
  The **six specific areas** in which the Court of Justice can transfer preliminary references to the General Court are the following (art. 50-ter of Protocol n.3):
  1. the common system of value added tax;
  2. excise duties;
  3. the Customs Code;
  4. the tariff classification of goods under the Combined Nomenclature;
  5. compensation and assistance to passengers in the event of denied boarding or delay or cancellation of transport services;
  6. the scheme for greenhouse gas emission allowance trading.

  They are technical issues rather than questions of principle: with this procedure it is possible to reduce the work of the Court of Justice and to short the time of the proceedings, considering they are "easier" to be solved
- **Staff Regulations** → disputes between the EU and its **staff**. This was a former competence of the Civil Service Tribunal, dissolved in 2016.

[38] Just to remind, *Judicial review* occurs when someone **challenges the validity** of an act of a public authority – say, a fine – and sometimes, also of a piece of legislation.

Moreover, General Court's decision can be **appealed** before the *Court of Justice*, but only on a **point of law** and, if the latter upholds the appeal, the case will be sent back to the General Court which will decide taking into account the CJ's ruling.

The Court of Justice

The ***Court of Justice***, is somehow a **higher** court and is made of **1 judge per Member State** and **11 Advocates General** (as for the latter, large States – i.e., Germany, France, Italy, Spain and Poland, have a permanent one, the others rotate).

Advocates General are judges (hence, they as well are covered by the Statute of the ECJ in relation to privileges and immunity) whose job is to **advise the Court** on a path to be taken, and so on which decision should be taken for a specific case.
For instance, suppose there is a case in which the question is whether same-sex marriage counts as *marriage* for the purposes of EU law: when the case is brought before the ECJ, it will be **assigned to a Chamber** (or to the Full Court if it is particularly important) and to an **AG**, who studies the Case in depth (e.g., he looks at national legislations, EU case law, etc.) and produces an ***opinion***.
This, albeit not **binding** on the Court, often times is followed by the judges, and lets the reader understand the real reasoning behind the decision.

The Court of Justice mainly deals with

- requests for ***Preliminary Rulings*** pursuant to **Art. 267 TFEU**, which occur when a national court asks a question about the **interpretation** of the Treaties or the **validity** and **interpretation** of EU law acts to the Court of Justice. The Court then gives a ruling on the interpretation or the validity of the provisions in question.
- **Appeals** → as mentioned before, the CJ is also the **appellate judge** for the decisions of the General Court and can set aside the decision of the General Court (only on **points of law**).
- ***Direct Actions***, namely:
    - Actions for **annulment** of an EU act only when brought by a **Member State** or an Institution (privileged and semi-privileged applicants).
    - **Infringement procedures** started by the Commission against Member States:
        - for *failure to fulfil obligations* under EU law
        - and also to impose a *financial penalty* in case of the so-called **twofold failure** by Member States.
- **Opinions**, when either a Member State or an Institution asks so, concerning the **compatibility of an international agreement** with the Treaties. *For instance, consider the famous* ***opinion 2/13*** *over the accession of the European Union to the European Convention of Human Rights.*

The Preliminary Reference Procedure

Looking at the European history, we can easily understand how the *preliminary reference* allowed a **dialogue** between national courts and the ECJ[39]: therefore, it is a crucial instrument, without which there would not be much of the EU law we have today. Indeed, it can be considered as the main

[39] This has been said by the ECJ itself, in ***Cartesio*** (C-210/06): "*The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary*"

tool used for the "**integration through law**", in cases such as *Van Gend and Loos*, *Costa v Enel*, or *Francovich*.
As said before, **it is not a direct action but a dialogue between national courts and the ECJ:** the parties can ask for the preliminary reference, but it is up to the national judge to decide if it is necessary for giving the judgment.

Article 267 TFEU is fundamental to understand its principles:
*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 **<u>any</u> 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 **<u>shall</u> 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*** [i.e., in jail]*, the Court of Justice of the European Union shall act with **the minimum of delay**.*

<u>What questions</u>
Questions that can/should be referred are:

- **Interpretation** of
  - Treaties
  - Acts of EU institutions, bodies, offices, agencies
- **Validity** of Acts of EU institutions, bodies, offices or agencies

Note that Treaties can be <u>only</u> interpreted by the Court, and <u>not</u> annulled (differently from other acts), since the Treaties are **primary law** (similarly to the Constitution in national law), whereas any act of an EU institution must **comply** with the Treaties and can be therefore annulled.

<u>Who can refer</u>
As to who can bring a preliminary reference before the ECJ:

- **any national court** or tribunal of a MS ***may*** ask the ECJ for a preliminary ruling, when a question of EU law is needed in order to determine the dispute at issue. However, if that question is raised before a Court or Tribunal whose decision is <u>not</u> appealable, the *preliminary reference* is **mandatory**.
- The CJEU controls which courts can refer questions under Art 267 TFEU

<u>How it works</u>
So, how does the preliminary reference procedure work in practice?

1. Say that two individuals are arguing and end up in front of a **national court**. Within that argument, it turns out there is a **relevant provision of EU law**. For instance (and considering a real case), the question could relate to whether the term *spouse* – included in Dir. 2004/38 – includes the **same sex** married partner.

If there is <u>no</u> case law about it, and the national court dealing with it is a **first instance court**, it *may* raise a **doubt** over the **validity** or (in this case) **interpretation** of EU law, if it determines that interpretation is <u>needed to solve the dispute at stake</u>.
This is because the ECJ has, pursuant to the Treaty, a ***hermeneutic monopoly*** over EU law and Treaties: it is <u>only</u> for the ECJ to determine and interpret EU law. It is also because of this that, if the first instance Court does not refer, neither does so the second instance court, the national Court of last instance is **obliged** by art. 267 to raise a preliminary reference.

2. Once the Case goes to the ECJ, the registrar looks at the case and, if a similar one has already been decided, it resends it to the national court (that can be referred to as the ***referring court***). Otherwise, the President of the Court **assigns** it to one of the **Chambers** (or, if the case is of outmost importance or concerns constitutional questions, to the *Grand Chamber*), each of which is made of 3 to 5 judges. The case is also assigned to an **Advocate General**.
3. At this stage, parties make their ***pleadings*** and are **heard** before the Court. Then, the AG writes his/her ***opinion***, considering both legislation and scholarship, and sends it to the judges, who might decide the case also rejecting the AG's conclusions. Also, even if the Court decides in the same sense as the AG, there might be huge discrepancies between their two reasonings. This is because the ECJ does <u>not</u> allow **dissenting opinion**, and so complex rulings are always a *mediation* between different positions and opinions, even very distant ones. For instance, we will consider the ***<u>Carpenter</u>*** case when talking about Free Movement, where the compromise is clearly visible.
4. Anyway, the Court then gives a **ruling** (interpreting <u>only</u> EU law, and <u>not</u> national law or the facts of the case) and sends that back to the referring court, which is **bound to it**, under penalty of Francovich Damages (as it happened in *<u>Kobler</u>*).
5. It is finally the **national court** that **rules on the case**, applying EU law as it has been interpreted by the ECJ. It might also happen that the ECJ is not sufficiently clear, and the national judge **refers again**.

To sum up, it is worth mentioning that the **ECJ <u>only</u> interprets EU Law**, it does <u>not</u> rule on the case at issue, nor does it rule on national law (the latter are powers of national Courts).

Now, if one of the parties argues that a provision of (**secondary**) EU law is **invalid**, **<u>the only Court that can indeed annul it is the ECJ</u>**.
Thus, if the national court considers act invalid it shall refer to the Court of justice. In fact, the principle of ***legal certainty*** makes it <u>impossible</u> to have a **diffuse judicial review** and hermeneutic power. This was made explicit in the ***<u>Foto-frost</u>*** case:
[National courts] *do <u>not</u> have the power to declare acts of the Community institutions invalid* […] ***Divergences*** *between courts in the Member States as to the validity of Community acts would be liable to* ***place in jeopardy the very unity*** *of the Community legal order and detract from the fundamental requirement of* ***legal certainty****.*

So national courts do not have the power to declare EU acts invalid because of the necessity of legal certainty: the EU Law would be jeopardized if an EU act could be valid in a MS and not in another one.
Hence, **the power of declaring an EU act invalid resides <u>only</u> in the ECJ jurisdiction**.

<u>Structure and CILFIT Doctrine (C-283/81)</u>
Then, what's the detailed procedure for the preliminary ruling?

1. A national court or tribunal stops the proceedings and **refers a preliminary ruling *request*** to the ECJ. Be careful: as we have seen, lower national courts are treated differently from the highest national court. In fact, whereas a lower court *may* (but also *may not*) submit a preliminary request to the ECJ in case a question of interpretation/validity is raised by a party, a national Court whose decisions are not appealable is **obliged** by Art. 267 to refer to the ECJ.

   But things, as always, are not so simple. In this respect, an issue raised in ***CILFIT*** was whether a Court should refer to the ECJ even if the last instance national Court *already knew* the answer. Article 267, in fact, does not specify whether last instance Courts may not refer in case the ECJ has already ruled on a particular subject. In that case, it seems that a second preliminary reference on the same question would be a complete waste of money and time. The ECJ, in *CILFIT*, tried to balance the main interest safeguarded in Art. 267 (i.e., **uniform interpretation** of EU law across the Member States) and the basic issues of judicial experience; it ruled:

   Art. 177 [Art. 267 TFEU] *does not constitute a **means of redress** available to the parties to a case pending before a national court or tribunal*[40]*. Therefore, the **mere fact that a party contends that the dispute gives rise** to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is **compelled** to consider that a question has been raised within the meaning of Art 177* [Art. 267 TFEU]. *On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its **own motion**.*

   To put it differently, the fact that a party asked for a preliminary reference is not enough to compel the national judge to do it. In this sense, national courts can be also seen as **gatekeepers** who must verify whether there is an actual doubt or not: otherwise, the ECJ would be overwhelmed by inadmissible cases. In *CILFIT*, the ECJ considered the specific **discretion** of last instance courts as to whether raise the question or not. In this respect:

   ***A court against whose decisions there is no judicial remedy has the duty to refer a question raised before it to the Court** unless it has established that the question raised*

   - *is **irrelevant***
   - *or that the Community provision in question has **already been interpreted** by the Court*
   - *or that the correct application of Community law is **so obvious as to leave no scope for any reasonable doubt**.*

   *The existence of such a possibility must be assessed in the light of the **specific characteristics of Community law**, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.*

   Again, the Court balanced the two conflicting interests. In fact, whereas it has granted national courts some amount of **discretion**, in the second paragraph the ECJ establishes some criteria that need to be considered, concerning the very peculiar aspects of EU law. *Consider, for instance, the fact that the same EU provision may raise a doubt over its interpretation only in some of the EU languages: national courts simply do not have the resources to ascertain that, and so it would be necessary to refer the case to the ECJ.*

[40] The decision to refer is for the national judge alone, not a judicial redress

Therefore, national last-instance courts may **refrain** from referring, only as an **exception**[41], in case:

d. The question is **irrelevant** to the actual case.
e. Of ***Acte éclairé*** (*clarified act*): i.e., lots of case law by the ECJ on the same issue is available.
f. Of ***Acte clair*** (*clear act*): i.e., there is no doubt about the interpretation of a provision, since it is clear (*èclair*) and unambiguous.
   In all other cases, the last instance national court **must** submit a reference (*Köbler:* failure to respect duty to refer might give rise to State liability)

2. (If the request is declared admissible) parties are invited to send **written submissions**. It is worth noting that only the parties involved at the national level can intervene during the preliminary reference procedure.

3. The **Commission** (and potentially other Member States) **intervene**. However, no other third-party interventions are admitted.

4. In most cases, an **oral hearing** is held in Luxembourg.

5. The Advocate General submits his/her ***opinion*** to the Court.

6. Finally, the Court issues its **ruling**.

Value of Preliminary Ruling

An interesting question revolves around the *value* of the Preliminary Ruling.

- Of course, pursuant to the Treaty, the national ***referring court*** is **bound** to the ruling. Moreover, the EU law system is a **case-law-based** system: hence, the rulings of the Court of Justice have a ***precedential value***.
- In this respect, once the ECJ has issued its ruling over some EU legislation, other institutions, and Member States (both Courts and public authorities) shall interpret EU law in light of these rulings (i.e., the ***legally authoritative*** value of the Court's rulings).

Order of inadmissibility

Sometimes, very rarely, the Court may **refuse to give an answer** and issues the so-called ***order of inadmissibility***.

This could happen when:

- The preliminary reference **lacks *essential information*** about the **facts** of the national proceedings (inadmissibility).
- The issue is **purely hypothetical** or **irrelevant** (as it happened in ***Foglia, 244/80***).
- The Court has **already ruled** on the issue (inadmissibility).
- The Court **lacks jurisdiction**, as it usually happens in cases concerning the Common Foreign and Security Policy and the validity of primary law.

[41] Some scholars, such as Craig and De Burça, argue that *CILFIT* is a **judicial policy decision**. That is to say, the ECJ has a difficult relationship with the national highest courts; in this respect, *CILFIT* is seen as an ingenious way, used by the ECJ, to *pretend* to give some powers to the national courts ("You can avoid referring…"), without actually doing it ("…but only if…, if…, if…"). Thus, *CILFIT* seems much of a political ruling. However, some other scholars (prof. Spaventa included) disagree.

Enforcement of EU law: the Infringement procedure

Now, how can the EU make sure that Member States **comply** with their obligations? The main answer is called ***Decentralized EU law enforcement***, according to which *national* Courts and individuals are the "guardians" of the correct application of EU law at national level.

This happens with a variety of legal instruments, namely:

- ***Direct Effect and Supremacy*** of EU provisions, as ruled in *Van Gend and Loos, Costa and Simmenthal*
- ***Indirect Effect*** (or **duty of consistent interpretation:** to interpret national legislation in light of EU law), as ruled in *Von Colson*
- ***Member State liability*** in case of sufficiently serious breach of EU law, as ruled in *Francovich*

This decentralized system is of outmost importance, given that the Commission – deputed to the "centralized" enforcement of EU law – would not have the means, alone, to find every violation to the EU law. Therefore, it is crucial not only for individuals to see their rights recognized, but also to transform each individual in *potential enforcer*, with a **diffused scrutiny**, rather than only having one institution to do it.

However, this is not enough: the Treaties provide also for the "institutional" ***infringement procedure***, through which the **Commission** brings proceedings against the **Member States**.

As we have seen, **Art. 17 TEU** provides:
*The Commission shall **oversee the application** of Union law under the **control of the Court of Justice** of the European Union.*

Hence, whereas the Commission is like a "policeman", it is only for the Court of Justice to decide whether there actually is a breach or not → The Commission detects the infringement and start the proceeding, but the CJEU has the final say.

So, how does it work in practice? **Art. 258 TFEU** states:
*If the **Commission** considers* [see discretionality] *that a Member State has failed to **fulfil an obligation** under the Treaties, it shall deliver a **reasoned opinion** on the matter after giving the State concerned the opportunity to **submit its observations**.*
*If the State concerned does not comply with the opinion within the **period*** [usually, two months] *laid down by the Commission, the latter may* [discretionality again] ***bring the matter before the Court** of Justice of the European Union.*

We could therefore look at the infringement procedure as a **dialogue** between parties that – however – have not the same powers.
So, first of all, the **Commission** has **discretion** on whether to start the infringement procedure or not: indeed, it is not obliged to deal with every single violation of EU law (it would not be possible anyway). To put it differently, **it is for the Commission to determine whether to pursue an infringement procedure**. This might be rather problematic: this decision might be tainted by **political reasons**. Also, the discretion remains after the Member States has not complied with the reasoned opinion issued by the Commission: indeed, the latter ***may*** (but does not have to) bring the case before the ECJ.

In practice, given that there is not an investigation unit, the Commission might **detect a violation** relying on other kinds of sources, such as:

- **Individuals' complaints**, sent through an online form. Note that, whereas individuals participate in the enforcement procedure through alerting the Commission, this is not a form of redress (therefore, **they have no right to force the institution to bring the case before the Court**).
- The **Press**.
- **Another Member State**, which has the power to do so pursuant to **art. 259 TFEU**.
- A Member State's **failure to notify** the implementation of a Directive or other obligations arising from the Treaties.

In any case, the Commission always has **discretion** on bringing an infringement procedure before the Court.
Once the "tip-off" has been made, the procedure starts, and it has **4 stages**:

1. First, the ***Pre-contentious stage***, where the Commission gives the Member States the opportunity to reach an **informal solution**.
2. Then, the ***Formal Notification*** occurs with a public **letter** in which the Commission asks the Member State to **answer by a deadline**.
3. If the State does not give an appropriate answer (and anyway, if it does not comply), the Commission issues a ***Reasoned Opinion*** in which it sets the **grounds** for infringement clearly, giving a new **deadline** for the Member State to remedy the alleged breach.
4. Finally, if the State still does not comply, the ***Referral***: the matter is referred to the ECJ (precisely, to the Court of Justice of EU).

The Commission has also created an "informal" tool, the "**Pilot Procedure**", i.e. a sort of pre-infringement dialogue.
Where the Commission, despite its preventive efforts and support to Member States, identifies a possible breach of EU law, it may decide to use a pre-infringement process, known as EU Pilot.
EU Pilot is an **instrument of cooperation and dialogue between the Commission and the Member States** related to **issues of (potential) non-compliance with EU law**. The Commission's use of EU Pilot is set out in specific internal guidelines, revised in July 2020.
This tool is used when it offers an added value: in 2021, out of 302 infringement cases opened by the Commission after own-initiative investigations or following complaints, 33 were preceded by an EU Pilot process.
This is a tool that can be used where it is likely **to lead to swifter compliance than a formal infringement procedure**. It allows the Commission to resolve a number of cases at the EU Pilot stage without the need to move to an infringement procedure.
*This may be the case, for example, if the issues at stake are of a **technical nature**. It can also prove useful in cases where the Commission wishes to collect factual or legal information needed to carry out its assessment. It is not used where the breach is well evidenced, obvious or self-acknowledged, nor is it used for more sensitive issues where discussions at technical level are less likely to lead to a successful outcome.*
The Commission also has to guard against the risk that such a process causes **unnecessary delay**: if the procedure becomes excessively lengthy without substantial progress, or if there is a lack of cooperation from the Member State, **the Commission terminates the EU Pilot process and switches to an infringement procedure.**
Over time, the EU Pilot process has proven its value. It has used an approach of harnessing openness and mutual trust between Member States and the Commission to bring about compliance more

quickly. In 2021, over 80% of EU Pilot processes were resolved satisfactorily. **Where it does not succeed, recourse is made to infringement proceedings.**

Two problems about the infringement procedure must be addressed.

1. The first, already mentioned, concern the **highly discretionary nature** of the institute, that may leave place for **political reasons** behind the decision of the Commission to pursue an infringement procedure in some cases rather than in others.
2. The second problem is that, at stage 4, the Court of Justice can **ascertain** the violation but it cannot **impose sanctions** (art. 258 TFEU): this is just a ***declaratory mechanism***, thus having only a **limited deterrent force** towards Member States. To solve this, a new ***Pecuniary Penalty*** was introduced with **Art. 260 TFEU** in the Maastricht Treaty. However, as it only follows the violation (not of the EU law, but) of the ECJ ruling that declares the violation, it can be an extremely long procedure and, in practice, can take up to two years. Indeed, Art. 260 TFEU provides:
   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.*

To deal with this problem of length (at least in cases of **non-implementation of Directives**), the **Lisbon Treaty** added paragraph **3** to **Art. 260** which now provides:
*In case the MS does not **notify the transposition** of a Directive, the Commission can **immediately seek a pecuniary penalty*** [thus, by skipping the first stage of the procedure, it becomes much more effective].

In this last case, differently from other cases, the Court may not exceed the **sum proposed** by the Commission. In the other Art. 260 cases there is **no upper limit for the pecuniary penalty**, which is always **decided by the ECJ**.
The criteria used by the ECJ to calculate the penalty are:

- the ***Seriousness*** of the breach
- the ***Duration*** which the breach continued for
- and the ***Deterrent effect*** the sanction may have.

To sum up:

- the EU complex and composite legal system is characterized by the **interaction between national and EU law**.
- In this respect, the **Preliminary ruling** procedure plays a crucial role, establishing a *direct line of communication* between national courts and Court of Justice.

- To ensure the viability and sustainability of the system, the Court has elaborated **two key constitutional principles**: namely, ***direct effect*** and ***supremacy***.
- In this way, it built a "**new legal order**" where individuals have rights which can be directly enforced in front of national courts, and, in this way, it also ensures **uniformity** in the application of EU law across Member States.
- What's more, these two principles also ensure a **"diffuse" scrutiny** over MSs compliance, so that individuals become also ***agents*** of the EU.
- This, together with ***Francovich*** damages, does not only reduce the injustices of the distinction between vertical and horizontal direct effect, but also **pushes Member States towards compliance**.
- Finally, the Commission can also bring **infringement proceedings** and eventually request the imposition of a fine.

Judicial Review of EU law

We have seen different mechanisms to enforce EU law:

- **Direct effect and Supremacy** → individual /company enforces EU Law in front of national Court
- **Preliminary ruling** → National courts enquire about meaning/validity of EU Law
- **Enforcement proceedings** → Commission ensures that MSs comply with EU Law

But what happens if **EU law/regulatory act/ administrative act** is **invalid**?
The answer is in the ***judicial review*** → it is based on a principle that is present in any democratic legal system (actually, also in some non-democratic ones): i.e., the **principle of *legality***, according to which *any* act must be **compatible** and must comply **with hierarchically superior** norms. For instance, a piece of national legislation has to comply with the Constitution, or any act issued by an Administrative Agency of the EU has to comply with Directives, Regulations, the Treaties, the Charter and General Principles.
To make sure that the principle of legality is effective, legal systems in general (EU included) provide for mechanisms to **review the legality** of acts before a Court, or a Tribunal. Each legal system determines its own rules as to *who* can challenge *which* act and *where*.
Therefore, we always must be aware of:

- *which types of acts* that can be challenged (for instance, the Italian Constitution cannot be challenged),
- *by whom*,
- in front of *which court* (some legal systems allow judicial review in front of any Court, some others in front of specific Courts),
- and *on which grounds*.

Now, it is essential to introduce the concept of ***standing***, which is the **right** to go in front of a Court to "***act" to challenge*** an act of an authority (whether administrative, regulatory, or legislative); to put it differently, it is the ability to **go and stand** in front of a Court.
In order to prove standing, in most cases it is necessary to prove the so-called **interest in action**. For instance, if Altiero gets a fine for exceeding the speed limit, Eleanor cannot challenge Altiero's fine, since she has no interest – legally speaking – in doing it.
In any system, the principle of legality – and, especially, the issue of *standing* – is **balanced** with the need to **avoid paralysing decision making** and **wasting judicial resources**; for instance, just imagine if any person who does not like a piece of legislation could challenge it before a Court! It would be

overwhelming and paralysing for the system. That is why legal systems have **coherent ways** to ensure that all the interests at stake are well balanced.

But how does this work in the extremely peculiar EU system? **Article 263 TFEU** provides for the ***action for annulment of EU acts***, that is the only way in which **individuals** can challenge the validity of an EU act, before the General Court (first) and (then) the CJEU in appeal. In fact, remember that national courts do <u>not</u> have the power to (interpret and) annul EU law provisions, since that power is only vested in the ECJ.

<u>Who</u>
As to *who* can act, the Article provides **different rules** according to who brings the challenge:
- some for the **three main institutions** (i.e., Council, Commission, European Parliament) and **Member States**
- some others for **"special" institutions** such as the European Central Bank, the Committee of Regions and the Court of Auditors
- and still some others for **private parties** (i.e., *individuals* and *companies*).

<u>When</u>
Also,art. 263 (6) TFEU states there is a mandatory **time limit** of **2 (<u>calendar</u>) months** from:
- 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.

<u>What</u>
This first part of the Article clarifies which acts can be challenged: those **acts that are intended to produce legal effects vis-à-vis third parties**; indeed, <u>it would be pointless to challenge acts that could not display any (legal) effect</u>. For instance, if the EP issued a recommendation so as to induce the Commission to bring proceedings against Hungary, that recommendation would not be binding (it would produce only political effects, and not legal ones) and thus it would not be challengeable. As a result, the only acts that cannot be reviewed are **recommendations and opinions**: this is because they are not legally binding.
Furthermore, challengeable acts are those that are **adopted by institutions that are listed in the article itself, and only those**.

<u>Grounds</u>
Grounds for review are listed in the Treaty itself: art. 263 (2) TFEU (*infra*)

<u>Admissibility</u>
Before a Court can look at a review of legality (in any system), it has to determine whether the action is ***admissible*** or not. To do that, the Court will ask three crucial questions:
1. Does the claimant have ***legal standing***?
2. Does the act fall in a category of acts that ***can be reviewed***?
3. Was the act challenged ***within the time limit***?

Only if the answer to the three is positive, the Court will be able to analyse the *merit of the case*.

Privileged and Semi-Privileged Applicants

More in depth, **Art. 263 TFEU** provides:

*1. 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**, <u>other than recommendations and opinions</u>, 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.*

To sum up, the first paragraph of Art. 263 TFEU introduces some key concepts: first of all, the acts of *which body* can be challenged, and then *which kind of acts* can be challenged (underlining also that recommendations and opinions, *by virtue of their nature*, cannot).

Then, in **paragraph 2**, it provides:

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

The paragraph lists the **grounds** upon which acts of the EU can be challenged:

- Lack of competence
- Infringement of an essential procedural requirement
- Infringement of the Treaties or of any rule of law relating to their application
- Misuse of power

Moreover, it identifies certain **applicants,** known to be ***Privileged Applicants***:

- Member States
- the Council
- the Commission
- the European Parliament.

These can be seen as ***Privileged Applicants***, since the article does not require any specific qualification of them to establish standing. To put it differently, Member States and such institutions have ***inherent standing***: the Treaty takes for granted that such applicants always have a **legitimate interest** in bringing an action so **they do not have to prove their interest in action but automatically have legal standing** .

Provided that the act challenged is intended to produce legal effects, and that they act within 2 months from the enactment, they **always** and undoubtedly have standing. This is because they are seen as guarantor of **institutional balance**, conferral of competences, the legality of acts issued by one another. Often cases, when the challenge is based on ground of a ***wrong legal basis***, it is brought by another institution or by a Member State.

Conversely, it is not the same for other categories of admissible applicants. Indeed, paragraph 3 provides:

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

The article identifies *special categories* of EU agencies and institutions, referred to as ***Semi-Privileged Applicants***:

- The European Central Bank
- The Court of Auditors
- The Committee of the Regions

The article is **limiting the possibilities** for them to challenge EU acts: unlike those seen in para. 2, they cannot challenge EU acts in any case, but only in order to **protect their own prerogatives**. If an EU institution act *violates the prerogatives* of one of those institutions (for instance, the EP enacts a regulation without consulting the ECB when consultation is required by law), of course they have interest in challenging that act.
As a matter of fact, **they do not need to establish standing if protecting their prerogatives**.

Non Privileged Applicants

However, the most challenging part of judicial review at the EU level relates to the **standing of individuals and companies**, which is addressed at paragraph 4:
*4. Any **natural** or **legal person** may […] institute proceedings against an act **addressed to that person** or which is of **direct and individual concern** to them, and against a **regulatory act which is of direct concern** to them and does not entail implementing measures.*

What clearly emerges from the article is that, unlike the institutions and agencies, these ***Non-Privileged Applicants*** **need** to **establish standing** (i.e., an **interest in acting**) in order to access the Court to have their case heard.
The treaty itself determines *when* individuals may have *standing*. The difficult part concerns, here, assessing whether an individual is actually entitled to act or not.
This **stringent condition**, again, comes from the balancing of **ensuring the legality** and not **overwhelming** the system. In this respect, the article **divides acts** in different types.
Indeed, we have:

- Acts that are ***addressed*** **to a person/company**
- Acts that are **of *direct and individual concern*** to a person/company.
- **Regulatory acts** which are of **direct concern** and not in need for implementing measures.

Acts addressed to them

In this case, this is sufficient for an individual to go before the ECJ, and he/she does not have to prove anything else beside the fact that **the act *has legal effect***.
There is no need to prove anything else as claimant has an obvious interest in challenge; in fact, the basic principles of **legality** and **rule of law** imply that anyone must be able to **challenge** an act **that identifies** him/her specifically[42] (in the sense it *singles him/her out*) - say, for instance, "Jean Monnet must do etc"- otherwise else authorities could do whatever they wanted.
This usually happens with **acts of the Commission** especially in *competition law*, as to the fines that are imposed to companies and individuals. In those cases, the claimant has an obvious interest in challenging the legality of the act: his/her **interest in acting** is automatically implied in the identification contained in the act. It works pretty much as in national context: the person whom a fine is imposed to (and only him/her!) can challenge it before a Court.

Acts not addressed to them

[42] Provided they do so within **two months from notification**

Things are a bit more difficult when the act is <u>not</u> addressed to the applicant: in this case, he/she has to **prove the interest** in bringing the action to have ***standing***.
Now, in determining when individuals (who wants to challenge an act that is not addressed to them) have standing or not, different legal systems have different ways to deal with the issue. For instance, several legal systems restrict the possibility to directly challenge legislative acts.
It is for this reason that we seek to determine who might have an interest in challenging a legal act; in doing so, the legal system tries to **balance** the main interests at stake:

- that an act should be always **lawfully adopted**,
- the need for **effective and democratic** decision-making (which also implies avoiding the judiciary substituting itself for the legislature),
- the need for **limiting waste of judicial resources** and **avoiding clogging** in the system.

The way in which the EU makes this balance is to limit challengeable acts into those that are **of *direct and individual concern*** to the individuals/companies that want the Court to review them. But what does this mean?

- As to ***Direct Concern***, it means that:
    - the EU measure **affects** the applicant's **legal position *directly***
    - there is a **causal relationship** between the *challenged act* and the *interest affected*
    - there must be <u>no</u> discretion by any implementing authority (i.e. who is the act ascribable to?).

  To put it different, it is necessary that the individual's legal position is affected *by virtue* of the EU act <u>only</u>, and not through an implementing measure.
  As way of example, consider Directives, which *always* leave a space for discretion to Member States. In this respect, if a Member State exercised its discretion, the concerned individual should rather challenge the **national implementing act** before a National Court. For instance, it is the decision made by an authority to impose a fine on someone that must be challenged, and not the piece of legislation that empowers that authority to do that. However, if the same piece of legislation obliged that authority to impose a fine on *every individual* that does something, leaving no discretion for that authority to decide which cases should be actually fined and which cases should not, it is the legislation that *directly concerns* the fined individuals. Therefore, **we must be sure that our legal position is affected directly by the EU act, and not by the discretion legitimately exercised by the Member State**.

  In ***<u>International Fruit</u>*** (1970) the Court clarified the principle.
  The facts were as follows: in the Common Agricultural Policy there were lots of rules about importing agricultural products from foreign countries, in order to protect European farmers. In this context, a regulation **limited the imports** of apples into the EU; the Member State would communicate to the Commission the number of licences it required for its traders, but it was actually the Commission which would decide how many licences to issue. The importer International Fruit challenged the Commission's decision, claiming it was negatively affected by the number of granted licences. The decision was, in fact, taken by the Commission: therefore, International Fruit was actually directly concerned. To sum up, *Direct concern* simply requires looking at ***where the decision has been taken*** (i.e., who the act is ascribable to).

- As to ***Individual Concern***, it implies that the individual has to be in a **special situation** unlike any other person/company. Individual concern is a bit more complicated issue than direct

concern. It was not defined in the Treaty, but rather by the ECJ with a considerably restrictive interpretation in ***Plaumann*** (Case 25/62 decided in **1963**) → the Court's interpretation gave rise to the so-called ***Plaumann test***, still applicable nowadays.
First, as always, the facts: Germany requested the Commission, on behalf of its traders, to suspend *duties on clementine* coming from extra-EU Countries. The Commission, however, refused to do so *addressing its decision to **Germany***. Plaumann, one of the (few) importers of clementine in Germany, argued they were affected by the decision and brought action for annulment. In this case, although the decision clearly **economically affected** the company, it was not addressed to it (but rather to Germany) and therefore it applied to *every* clementine producer and did not singled one producer out. Thus, when Plaumann tried to challenge the Commission's decision, it had to **prove** direct and ***individual concern***. So, the Court needed to decide whether Plaumann was in fact individually concerned or not: it gave us a **test** to do so.

The Court ruled that there is individual concern when:
that decision affects [individuals or companies]

- *by reason of **certain attributes** which are **peculiar** to them*
- *or by reason of **circumstances** in which they are **differentiated** from all other persons*
- *and by virtue of these factors **distinguishes them individually** just as in the case of the persons addressed.*

Hence, it must be proven that an act affects you **as if you were the only individual** affected. This follows from the basic **principle of *legality***, according to which if a decision is addressed to someone, he/she can challenge it.
If the decision is not specifically addressed to someone (by naming him/her), yet it defines the addressees in a way that it is so precise that identifies someone, it *de facto* ends up having the same effect[43], affecting *that* someone and only him/her. It can be indeed seen as a way to escape judicial review and the principle of legality.

In *Plaumann*, the Court give an extremely **narrow** interpretation, holding that this is the *only* possibility for an individual to challenge an act that is not addressed to him/her.
To put it different, the claimant must demonstrate that he/she is in a ***closed class* of applicants**, meaning that an act addressed to *another person* or of *general application* affects him/her in a "special way", as if it were addressed to him/her.
That was not the Plaumann's case.

A very good opposite example is ***Codorniu*** (1989), when the Court established that the test might be satisfied *even if* the act is of ***truly* general application** (such as a **legislative act**). In that case, a regulation established some rules concerning the production of a particular type of wine. Codorniu, a Spanish company, has been the only producer for ages to have used that particular denomination for its wines. It is for this reason that they were considered **individually concerned**, even if the regulation was actually of general application.

However, the definition of *individual concern* gave rise to some problems.

[43] As way of example, it is easy to single the addressee out of this provision: *The Commission shall impose a fine on every person who is enrolled in class 20, was born in 2003, has written a handout of Public Comparative Law for Ius@B, and is now writing notes about EU law.*

- Such a **narrow interpretation** of who can challenge acts of EU may not be justified: if an act is not addressed to someone, it would be very difficult for an individual to challenge it. Indeed, the *Plaumann* test has been widely criticized as being **too narrow** and excluding too many people from the possibility to challenge what might potentially be unlawful acts of EU.
- In particular, it is almost **impossible** to challenge an act **of general application** such as Regulations and Directives: indeed, in certain cases, such acts might **affect us in a very direct way**, and yet, by their very nature, they might not create a close class of applicants.
  For instance, it is **impossible to challenge instruments that might affect in a negative way most of us**; this debate has been particularly felt as for what are considered to be **diffused interests**, such as *environmental protection*: a way of example is the ***Greenpeace*** case, concerning an **environmental** piece of legislation that addressed [44]*pollution*, something that affects an **open class** of individuals by definition. In important cases such as this one, it would be impossible to single a closed class out.
- This has mainly two detrimental effects:
  - firstly, the right to **effective judicial protection (art. 47 of the Charter)** is **compromised** (i.e., an unlawful act might remain in the legal system);
  - secondly, also **effective democratic protection** might be harmed by this approach, especially if we consider an institutional context where there is no such direct link as in Member States.

Criticisms to the Plaumann test and alternative solutions

However, the Court's response to these criticisms has been rather definite:

1. the Court ruled on several occasions that changing such interpretation would imply **changing the Treaty** itself → but the Court does not draft the Treaty so it is a power that is not conferred to the ECJ.
   a. Nonetheless, this reasoning seems quite contradictory since the ***Plaumann test*** **is not in the Treaty**, but yet it has been used by the ECJ.

2. The second (and more persuasive) argument of the Court is that there is anyway an **alternative route** for individuals to challenge potentially unlawful acts: i.e., the ***Preliminary Ruling procedure***.
   Indeed, a private party who claims to have been unlawfully affected by an EU act, can go in front of a **national court**, and ask for a preliminary ruling concerning the validity of that act, as it in fact happened in *Digital Rights Ireland*.
   But why is the Court so keen in asking individuals to go in front of National Courts rather than bringing a case directly before the ECJ? This is because, in this way, National Courts have a **gatekeeping role** as to whether a case deserves to be brought at EU level with a **preliminary check** on the grounds of the application. Now, if everyone could go in front of the ECJ for whatever rule they did not like, businesses would challenge every single rule, overwhelming the Court practically for no reason: it is the same ratio underpinning the obligations for individuals to prove standing.

[44] Greenpeace was actually arguing in order to be *able to challenge the act*, not to win the case: the problem with standing is that, having the EU institutions all participated in the formation of an act, as well as the MS (through the Council), they don't have an interest in bringing a proceeding: as judicial review is all about checks and balances, if *standing* is narrowly conceived, you may allow a potentially illegal act to survive. Instead, the EU should not: even with total agreement between the legislators, one must not breach the Charter of Fundamental Rights or the Treaties. The problem highlighted by this case is very important: **the lack of public interest litigation at EU level**.

Therefore, National Courts have the crucial role of **ensuring** both **the legality** of EU system as a whole and the fact that judicial resources are well spent: only once a national judge is persuaded by the argument of one party, and therefore has **doubt** in relation to the validity of an act, the action can be brought before the ECJ.

Yet, there was a problem with this reasoning: it became apparent in the early 2000s, in two cases: **UPA (C-50/00) and Jégo-Quéré**

UPA (Unión de Pequeños Agricultores)

In ***UPA*** there was a Regulation (i.e., an *act of general application*) which prohibited fishing of a certain kind. The Regulation was **self-implementing** and provided a straightforward **criminal liability** for any breach.
This was particularly problematic. Indeed, as there is no implementing act of national authority that could be challenged, the only way for an individual to bring the Regulation in front of a Court would be **breaching** the regulation itself and *de facto* taking the risk of **criminal liability**. But if he/she got it wrong, and the Regulation was actually lawful, he/she would go to jail, which is something not very nice indeed.

In this way:

- There is no possibility to challenge Regulation in front of national court without violating its provision, breaking the law and risking potential criminal liability → **no effective judicial protection**
- **Unlawful acts** might stand and remain in the legal order due to the absence of a realistic opportunity to go in front of a National Court and challenge them → **breach of legal certainty and rule of law.**

In *UPA*, **AG Jacobs** wrote an extremely influential **opinion** about this problem:

- **National route through Art. 267 is not always effective or feasible** (self-implementation / criminal liability) → once the preliminary route is not available – he claimed – individuals are **deprived of an effective judicial remedy**. According to AG Jacobs, the idea that the Preliminary Ruling procedure is a way to *rebalance* the narrow interpretation of *individual concern* is not persuasive at all.
- What's more: the preliminary ruling procedure is not **controlled by private parties**, but it is rather a *dialogue between the Courts*, and *whether* a question for preliminary ruling will be raised and *what* will be its content depend on the **National Court**, on which the applicant has obviously no power[45].

To sum up, the *preliminary* route is **not as effective** as the direct judicial review. Therefore, AG Jacobs proposed to **reconsider the notion** of individual concern, since it actually affected a crucial right provided for in the Charter (i.e. the right to an effective judicial remedy) and left out many deserving applicants.

He proposed an **alternative solution** instead, according to which:

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[45] In short, we could explain why **preliminary ruling** is not in the hands of the parties because
  a. The national court may **decide not to refer** if it deems there is no issue of validity;
  b. National courts may **withdraw/amend** preliminary references;
  c. Parties have **no control over what is asked** by the referring court.

A person is to be regarded as individually concerned by a Community measure where, by reason of ***his particular circumstances****, the measure has, or is liable to have, a* ***substantial adverse effect on his interests****.*

That's all very well, but – actually – the problem of Art. 263 is still present. This definition is extremely **broad**: what does *substantial* mean? And does *any* adverse effect count? AG Lenz actually admitted this flaw, but reassured the Court that, with time and case law, it would become easy and clear how to define *substantial adverse effect*.

Jégo-Quéré

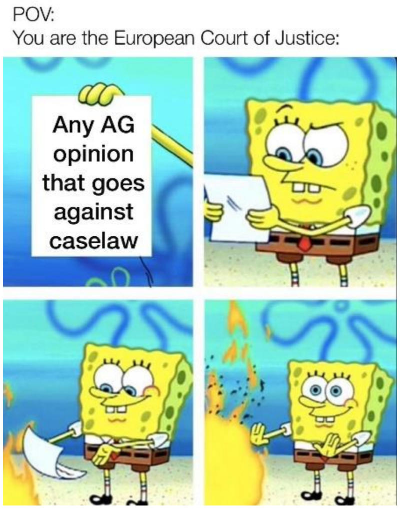
Before *UPA* was ruled, another case was brought at the attention of the ECJ: ***Jégo-Quéré*** concerned, again, a self-implementing Regulation that, despite not creating criminal liability, created the exact same problem as the one in *UPA*, i.e., there was no preliminary reference route for the applicants, and this would create an incredibly unfair treatment for the Company. The **General Court changed the standard**, broadening the test of individual concern in order to allow private applicants to challenge a generally applicable act. In fact, the Court held that:

"A natural or legal person is to be regarded as **individually concerned** by a Community measure of **general application** that **concerns him directly** if the measure in question

- ***affects his legal position****, in a manner which is both* ***definite*** *and* ***immediate****,*
- *by* ***restricting*** *his rights or imposing* ***obligations*** *on him.*

The number and position of other persons who are likewise affected by the measure, or who might be so, are of no relevance in that regard".

However, ironically, the **Court of Justice** in ***UPA*** finally ruled the opposite, and with the exact same argument as usual: the Court remained with the **Plaumann test** because "the Court does not change the Treaty", even though (as we mentioned) the *Plaumann test* is not in the Treaty.



The Lisbon novelty*: Inuit* and *Telefonica*

These two cases were fundamental in changing the Treaties, as they have been ruled just before the drafting of the European Constitution. They indeed demonstrated that there was a real possibility of the preliminary ruling procedure not being available to applicants. During the Constitutional convention, in fact, a specific *working group* addressed the issue of judicial effectiveness, especially towards individuals.

Hence, the **Treaty of Lisbon** added a third possibility to **Art. 263 (4) TFEU**:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings […]against a ***regulatory act***[46] [i.e., not any act!] *which is of* ***direct concern*** *to them and does* ***not entail implementing*** *measures.*

This way, the Treaty is trying to incorporate those situations in which, due to the lack of a national implementing measure, individuals cannot go in front of a national court and ask for a Preliminary reference.
In fact, when a ***regulatory act*** which does not entail **implementing measures** (i.e., it is ***self-executing***) is at stake, the individual will have to prove only **direct** and not also **individual concern** (Plaumann test does not apply).
The Lisbon addition aimed at making it easier for applicants to challenge acts such as those in *UPA* and *Jégo-Quéré*.
However, the drafters did not define **what a regulatory act is** but this definition is crucial to understand the actual impact of the reform.

Two interpretations are possible:
1. according to the former, *any self-implementing legislation* is a regulatory act (so that any regulation which is immediately applicable would be challengeable);
2. instead, according to the latter, which could be deduced looking at the history of the Treaty of Lisbon[47], a regulatory act is an *administrative act* that is self-implementing.

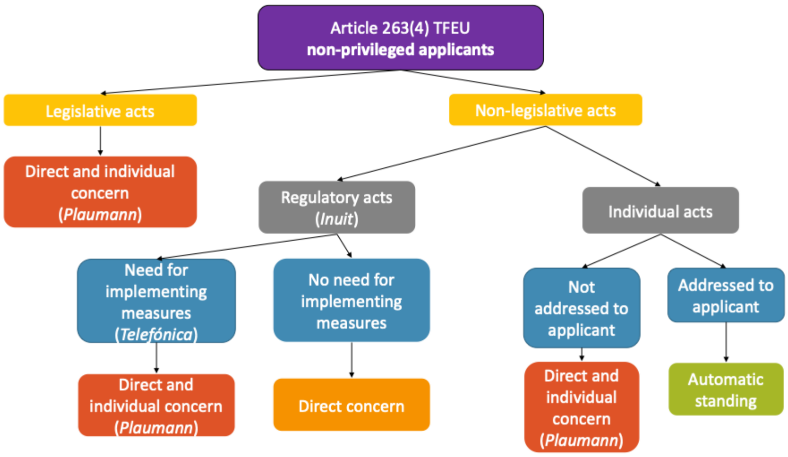
The choice was made by the ECJ in the ***Inuit*** case (C-583/11 P), back in 2011.
The case related to a regulation, aimed at protecting seals. In Greenland, the Inuit community based their economy on seal hunting, that had been prohibited by the regulation, and so decided to challenge the regulation, arguing that the new wording of Art. 263(4) had to be interpreted as meaning *any* self-implementing act, so that the Inuit community would not have to prove individual concern.

The Court disagreed and held that regulatory act stood for **all acts of general application apart from legislative acts** (in fact, it followed the second possible interpretation). Hence, according to a *procedural criterion*, to determine whether act is “regulatory” we must look at procedure → if an act is adopted with **ordinary legislative procedure** it is **not a regulatory act**.
Indeed – the Court reasoned – it is not necessary to have a way for individuals to challenge acts coming from legislative procedure, since those acts originate from a **debate** and a **democratic process**. Thus, the interests of the concerned parties have been already heard.

Later, in ***Telefónica***, the Court clarified the meaning of *not entailing implementing measures (i.e. self-executing measure)*[48]. The case had risen in Spain, following an episode of tax exemption in favour of a company, which was seen by the Commission as an illegitimate state aid. Thus, the Commission had decided that, despite being addressed to Spain and not to Telefónica, badly affected the private company, that would have to repay for the exemption. Thus, Telefónica brought a case to the ECJ. The issue concerned the definition of *self-implementing* acts.
The Court found that actually the sentence “*not entailing implementing measures*” clearly referred:

[46] Examples of regulatory acts are **implementing and delegated acts**
[47] Indeed, the Treaty was born after the failure of the Constitutional Project. There, two types of acts were imagined: *legislative* acts (that we now know as Directives and Regulations) and *regulatory* acts. Too deepen, see *travaux préparatoires* of the Constitutional Treaty.
[48] In Telefonica the ECJ provided a broad interpretation of “implementing measures”

- not only to **EU implementing measures**
- but also to **national implementing measures** → otherwise, if there were national implementing measures, it would be easy to directly challenge them in front of a national Court (and, in case, request a preliminary ruling).



To sum up the whole topic, pursuant to **Art. 263 TFEU**:

- In case of ***Privileged Applicants***, *standing* is not a problem, since it is automatic.
- In case of ***Semi-Privileged Applicants***, *standing* is not a problem if the EU agencies are acting to defend their prerogatives.
- Finally, in case of ***Non-Privileged Applicants***, we must distinguish:
  - *If* the act is **addressed to a person** (or company), that person has **automatic standing**.
  - *If* the act is not addressed to a person + it is a **legislative act**
    - → the individual has to establish **direct** (i.e., no discretion to national authorities, so that the legal effect on the individual directly comes from the EU act) *and* **individual** concern (i.e. the act establishes a *closed class* of applicants, who are applicants different from all others). If direct and individual concern cannot be proven, the Preliminary Reference is the only way feasible.
  - *If* the act is not addressed to a person and is a **regulatory** (i.e., non-legislative) act which **requires no implementation** either at EU or at national level, only **direct concern** has to be established.

APPLICANTS	STANDING	WHERE
Privileged Applicants	Automatic	Directly to Court of Justice
Semi-privileged Applicants	Automatic → if they act to defend their prerogatives	
Non-privileged Applicants	Automatic → addressed act	To General Court, and then appeal on point of law to Court of Justice
	Direct concern (*International Fruit*) + Individual concern (*Plaumann test*) → not addressed act + legislative act	

	Direct concern → regulatory act (*Inuit*) + no implementing measures (*Telefonica*)	

That being said, it seems that the problem of *UPA* has not been solved. Still, should it be? In fact, in almost every legal system (especially in European ones), it is extremely difficult to challenge legislation, in order to **balance judicial protection** and **effective and democratic decision-making**: hence, there is no convincing reason to claim that within the EU it should be different.
Moreover, as the Court itself held, we must also look at **Art. 19(1) TEU**, according to which ensuring judicial protection is not only up to the ECJ: also, Member States *shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*.
Hence, **it may be appropriate for Member States to change their rules on *standing* in order to ensure that the preliminary route is concretely available**.

Grounds and Standards of Review

Once it has been established that you can argue before the Court, you must **persuade** the Court that the challenged act is, in fact, **unlawful**. This can be done basing on different **grounds**:

- Since we are dealing with a system of **conferred powers**, a ground for annulment could be the ***Lack of Competence***, as happened in *Tobacco Advertising* (the parties argued that the EU could not prevent companies from advertising tobacco products with a directive since that was claimed to fall within the *public health* sector, in which the EU lacks competence; instead the Commission argued that it fell within the *internal market* competence. At the end, the Court annulled the directive).
- Secondly, the ***Infringement of essential procedural requirements***: the procedure established by the Treaty concerning the formation of an act must always be followed. However, only an infringement of an ***essential*** procedural requirement (e.g., **mandatory consultation** of bodies, national parliaments, institutions, etc. is disregarded) can bring to the annulment of an act.
- Furthermore, we have a general ***Infringement of Treaties*** or ***of the rule of law***. In this respect, the most important rules that must be respected (and, therefore, are the most common grounds for review of EU law) are:
    - Those concerning **fundamental rights** contained in the Charter (as happened in *Kadi I*)
    - The **principle of proportionality** (as ruled in *Digital Rights Ireland*), according to which the (legitimate) aim and the means have to be commensurate (Art 52 Charter)
    - **Legitimate expectations**, i.e. the behaviour of an EU institution has created a "legitimate" expectation of a certain conduct that however is not followed.
- Finally, ***Misuse of powers***, that occurs when a power is used for an aim which is different from the reason why it was conferred (e.g., in case of corruption).

Establishing the **Standard of Review** is also a crucial question in every legal system, as Courts must be careful not to substitute their judgement for that of the legislature (and this often occurs with *proportionality* tests). As a general rule, the **wider is the discretion** of the decision maker, the **less likely is the success of the challenge**.

Problem Question: "The EU CARes!"

Now, let's try and solve a problem question.

*The EU adopts a new **Regulation** 123/**2024** prohibiting the use of diesel cars across the territory of the EU within **2027**.*

- ***Case 1.** PIAT is **car manufacturer** that also produces diesel cars, and it estimates that the new rules might put it out of business as it has no capacity to produce more non-diesel cars and it does not have sufficient reserves to modify its production plant from diesel to non-diesel. Advice PIAT on how to challenge the Regulation.*
- ***Case 2.** The **German Government** is also worried about the Regulation, as it believes its industry will be particularly badly affected. Advice the German Government on how to challenge the Regulation.*

Let's solve the problem using the IRAC method.

- ***Step 1: ISSUE*** → The issue revolves around judicial review and, more specifically, it concerns action for annulment of the regulation. So we have to prove (if necessary) the legal standing of the claimants: PIAT and Germany.
- ***Step 2: RULE AND APPLICATION***[49] → Since the case is a matter of judicial review, we must deal with **art. 263 TFEU**.
    - First of all: is the act reviewable? The act at stake is a **Regulation**, that is <u>not</u> included in the acts that cannot be judicially reviewed since they lack legal effects (i.e., opinions and recommendations). Furthermore, it is a legal act and not a regulatory one.
    - Secondly: are we in time to challenge the act? Infact, something that immediately strikes our attention is *timing*: the Regulation had been enacted in **2024** and produced its legal effects in **2027** (at the latest). Therefore, the **time limit** to challenge the validity of the act (i.e., two months) has expired and we are therefore **time-barred**. Now, suppose that, instead, the time limit had not expired yet.
    - Thirdly: who are the applicants and which kind of applicants are they? Since PIAT is a private company, it is part of the category of ***Non-Privileged Applicants***, who need to **establish standing** in order to bring an action before the Court. According to Art. **263 TFEU**, a Non-Privileged Applicant has an interest in acting (and hence, standing) *either* if the act is **directly addressed** to it (it is <u>not</u> the case, here) *or* the company is **directly and individually concerned** by the act. PIAT is in the second condition so the Plaumann test must applies.
        - As for the *direct concern*, the test (*International Fruit*) is satisfied:
            - The measure affects applicant's legal position
            - There is a causal relation between challenged act and interest affected: the business risks to end because of the obligation imposed by the Regulation
            - There is no discretion of implementing authority: the Regulation provides for an absolute prohibition (i.e., no discretion left) and, by its nature, does <u>not</u> need implementation at national level.
        - However, the test of *individual concern* is <u>not</u> satisfied, since PIAT would have needed to be affected like no one else, as a **closed class of applicant**, pursuant to what the Court ruled in ***<u>Plaumann</u>***. Instead, in this case, *any* manufacturer would be affected by this rule.

[49] You can split up this section in two parts: rule -where you show your knowledge- and application -where you apply the theory to the case at hand-.

Oppositely to PIAT, the German Government (being an agent of a Member State) is considered as a ***Privileged Applicant***, whose standing is taken for granted and therefore does not have to be proven, according to **Art. 263 TEU**.

- Which is the ground for review? [List and explain the grounds of review]
  The ground of review for PIAT would be the infringement of the fundamental right to conduct a business, established in the Charter, and the proportionality.The ground of review for Germany would be the proportionality of the measure.

- ***Step 3: CONCLUSION*** → PIAT fails the Plaumann test so it has no legal standing while the German Government has legal standing and it would challenge the Regulation on the ground of proportionality.

Would our answer be different if the Regulation was a **non-legislative act**? Only for PIAT, since the act would be a regulatory one (*Inuit*): art. 263 (4) TFEU applies → PIAT has direct concern and Regulations do not require implementing measures (*Telefonica*) so PIAT would have legal standing. For the German Government rules do not change.

Problem Question 2: "Advise Nigel"

Step 1: ISSUE → The issue is about judicial review and, in particular, it concerns action for annulment of the Regulation and the Directive. So we have to prove the legal standing of the claimant.

Step 2: RULE AND APPLICATION → Both the Regulation and the Directive have legal effect so their reviewable pursuant to art. 263.

Supposing that the time limit of 2 months is not expired, the claimant is a non privileged applicant so we must prove legal standing, depending on which of 3 scenarios of art. 263 she is in.

Concerning the Regulation, it is a non-legislative act since it has been adopted following a special legislative procedure and it is of general application so it is a regulatory act, according to *Inuit*.

As a result we could apply Art. 263 (4), introduced with the Lisbon Treaty, but it requires no implementing measures, even at EU level, according to the broad interpretation provided in *Telefonica*. As a matter of fact art. 263 (4) is not applicable and if Nigel wants to challenge the Regulation, she should prove direct (*International Fruit*) and individual concern (*the Plaumann test*)

As for the Directive, it is a delegated act (so a regulatory act) and it does not entail implementing measures so Art. 263 (4) applies and Nigel has to prove only direct concern.

The ground on which Nigel would challenge the act is the lack of competence.

The problem is that Nigel's legal position is not directly affected by the Regulation and the Directive so there is no direct concern.

Step 3: CONCLUSION → Nigel fails to prove direct concern so he has no legal standing and the only way to challenge the act would be a preliminary reference, if feasible (e.g. the directive has been implemented so Nigel challenges the national act in front of a national court asking for a preliminary reference but then it depends on the Court to decide if going through the procedure ecc. [show knowledge about the topic]; Nigel breaks the law so to challenge the acts in front of the Court ecc.).

ACTION BEFORE THE CJEU- RECAP			
ACTION	**ARTICLE**	**MAIN ELEMENTS**	**DIRECT/INDIRECT ACTION**
Infringement procedure against MSs	258-260 TFEU	**Breach of EU law by MSs**	Direct action

		• Initiated by the Commission/ in rare cases MSs (259 TFEU) • Four-steps procedure • Possible pecuniary penalty → twofold failure to fulfil obligations	
Annulment of EU acts	263 TFEU	**Annulment of EU acts** • Different classes of applicants (privileged, semi-privileged, non privileged) • Acts of the EU having legal effects • Grounds for review • Time limit → 2 months from publication/notification	Direct action
Preliminary ruling	267 TFEU	**Interpretation of Treaties; Interpretation of secondary law; Validity of EU secondary law** • Dispute pending before national court/tribunal • Question for preliminary reference raised by national court • Power/duty to refer	Indirect action

The Charter of Fundamental Rights[50]

Origins and structure

We will now consider the issues related to **Fundamental Rights**. Remember that fundamental rights are very important, especially when seeking to challenge EU legislation (as happened, for instance, in *Digital Rights Ireland*): if EU law is not compatible with fundamental rights, then it can be **annulled**.

How did we deal with fundamental rights before the enactment of the Charter?
When the Treaties were created (ECSC, EEC, Euratom) there was no mention of Fundamental Rights in the Rome Treaty, because the three communities were supposed to be completed by a **political community**, where Fundamental Rights would have been contained. As we said at the very beginning, the European Defence Community failed to gain the approval of the French assembly, and therefore both the EDC and the European Political Community failed to come to existence. For this reason, there was no mention of Fundamental Rights in the European original treaties. And the EU has **limited competence** on Fundamental Rights still nowadays.
Of course, a problem immediately emerged, because of the **historical context**: it was a post war situation, where especially some Member States and the Courts therein were very mindful of the fact that Fundamental Rights had to be respected.
The problem arose because the EEC, from the very beginning, had **law-making powers** and could therefore enact *regulations* that were directly applicable. Indeed, since Fundamental Rights were not in the Treaties, it was possible to have an act of the European institutions might impact on Fundamental Rights.
The problem was made more urgent by the **Principle of *Supremacy***, pursuant to which, in theory, an act of an EU institution, even in case it violates Fundamental Rights, **takes precedence** over **national Constitutions and national foundamental rights** (in the EU perspective).
The problem gets solved through the ***case law*** of the ECJ, which pretty early on, in the 1969 case of ***Stauder*** *(Case 28/69)*, held that Fundamental Rights were **general principles** of EU (then EEC) law that applied in the EEC context.
In *Stauder* the Verwaltungsgericht doubts whether such a condition (i.e. the supremacy over national foundamental rights) accords with the law and considers it in any case contrary to the German concept of social welfare and to the German system of protection of fundamental rights which must, at least in part, be guaranteed equally by the Community institutions as part of the protection afforded by the provisions of a Community law which has a superior status.
This would also have been restated in the ***Internationale Handelgesselschaft*** *(Case 11/70)* case.
The Court ruled that, notwithstanding the absence of *written* Fundamental Rights, those were protected anyway as they formed part of **general principles** of EU law.
Moreover, the ECJ would have clarified that, in order to decide which were these Fundamental Rights, the Court would have referred to:

- the **common constitutional traditions** of Member States
- and, in time, to the **ECHR**[51].

As we have mentioned, the most important case in this respect is the ***Internationale Handelgesselschaft*** *(Case 11/70)*, where the German Administrative Tribunal asked the ECJ whether a provision of EEC law was **compatible with the national constitution**. The court first restated the

[50] The Charter is available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf
[51] The ECHR is available at: https://www.echr.coe.int/documents/convention_eng.pdf

Principle of Supremacy, so that the German Court could <u>not</u> look at its national constitution to scrutinize the EEC law. However, the ECJ affirmed the existence of ***analogous guarantee inherent*** in Community law:

(2)[…] «According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law […] to the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2 (1) and 14 of the Basic Law."
(3) ***Recourse to the legal rules or concepts of national law*** *in order to judge the validity of measures adopted by the institutions of the Community would have* ***an adverse effect on the uniformity and efficacy of Community law****.* ***The validity of such measures can only be judged in the light of Community law****. […]*
(4)However, an examination should be made as to whether or not any ***analogous guarantee inherent*** *in Community law has been disregarded. In fact,* ***respect for fundamental rights*** *forms an integral part of the* ***general principles of law protected*** *by the Court of Justice.*

So, the Court held that Fundamental Rights formed **part of the General Principles** of the EEC, that had to be protected by the ECJ. Therefore, what was first a condition of vacuum was rearranged so as to make sure that Fundamental Rights were indeed protected.

- In order to decide which were the relevant Fundamental Rights, as well as which was the content of those values, the Court would have looked at the **common constitutional traditions** of Member States.
- Moreover, in a later stage, the Court also stressed the importance to look at the **international treaties** in which **Member States were signatories or parties**. In this regard, of course, the most relevant of these international treaties was the **European Convention of Human Rights**, which also consisted in an ingenious way to solve the identification problem of Fundamental Rights: simply, all the European Countries were either signatories or parties of the European Convention of Human Rights. So, it would have been very easy to affirm that the rights contained in the ECHR were part of *common constitutional traditions* of those States. In time, the Court would have used the ECHR to identify those rights that were to be protected also at EU level. Also, this was significant in relation to the very peculiar European situation: indeed, keep in mind that a European Member State were (and still are) subjected, at the same time, to national Constitutions, General Principles, the ECHR, and now also the Charter. Now, even though the EU – at that time – was not part of the ECHR, the ECJ <u>never</u> went **below the standards** of the ECHR, because it considered it as the **absolute minimum applicable** in the European Union as for Fundamental Rights.

Most importantly, do not forget that also, if and when the ECJ does <u>not</u> protect Fundamental Rights in a way that National Constitutional Courts consider *effective*, then the Constitutional courts would rebel and **disapply the principle of Supremacy** → importance of FRs protection to ensure national constitutional courts would uphold / respect principle of supremacy.
For instance, just consider the ***<u>Taricco</u>*** case, in which the ECJ stated that a shorter time-barring did not apply when that had effect on financial interests of the EEC. This caused a huge problem in relation to *certainty of Criminal Law*. The Italian Constitutional Court, then, sent the case to the ECJ arguing that there would have been a problem if the European judge had confirmed its first interpretation. The ECJ was receptive of the problem and agreed with the national Courts. As we may notice, Fundamental Rights are also the grounds where we see the **tensions** between the National Constitutional courts and the ECJ, as the former are very protecting of their role, and of

the core of Fundamental Rights: thus, although they are willing to give some ground to the ECJ, they will not leave the entire situation unchecked. Besides the complex situation with Poland, the Courts have managed to avoid direct conflicts.

To sum up, this development of Fundamental Rights as *general principles* happened through the **case-law of the ECJ**.
This does not mean, however, that the **political institutions** were not **aware** of the problem.
Already in **1977** (slightly after *Stauder* and *Internationale*), as the Court was developing its case-law, the European political institutions (i.e., Parliament, Commission, and Council) issued a **joint political declaration** in which they endorsed the case law of ECJ on fundamental rights and committed themselves to respect FRs arising from national constitutions and ECHR (relying upon German Constitutional Court in *Solange II*).
From that moment on, each and every Treaty revision includes Fundamental Rights "elements" culminating with full codification in Charter of Fundamental Rights.
Just to mention the most crucial treaty amendments that have been made:

- **Maastricht** introduced **Art. 2** on the ***core values*** of the European Union (Liberty, Democracy, *Rule of law,* fundamental rights).
- Immediately after that, in **1993**, the **Copenhagen criteria for accession** of third countries were established by the European Council, one of which being that the perspective Member State had to respect the values of Art. 2, including Fundamental Rights.
- Moreover, in **Amsterdam** (and then in Nice) a possibility to **sanction Member States** for (risk of) serious and persistent breach of the values in Art. 2 was provided. In the same occasion, Member States gave competence to the EU to enact **anti-discrimination legislation** on grounds other than nationality and sex, which were the only available till then.
- Finally, with the **Nice Treaty** in 2000, Member States signed the **European Charter of Fundamental Rights**, that was given full legal value in **Lisbon**, where Member States also provided an obligation for the EU institution to **accede to the ECHR**.[52]

Why "more" FRs?

Before directly looking at the Charter, we must understand why there was the need for **expansion of Fundamental Rights** in the Treaty.

- Most importantly, from Maastricht onwards, we see the EEC transforming itself and its own competences; **the EU acquires competences in fields that are very *sensitive* from a Fundamental Rights perspective:** from market only, to encompass criminal law, judicial co-op, asylum, immigration. Indeed, one thing is worrying about rights of corporations in competition law, something else is when the result of EU action might be – say – to transfer a person between Member States, to put them in jail, or to determine rights for asylum seekers. This are indeed very sensitive fields from this perspective, because EU measures have effect on the **freedom of individuals**. So, the more you expand the competences of the EU, the more urgent it becomes to have an **effective way to protect individual fundamental rights**.
- The other reason why there was this pressure towards the Charter is related to the **disconnect** between what the EU was **preaching *externally*** and what it was doing ***internally*** (i.e. consistency between external and internal action). As we might remember, the Common Commercial Policy was an exclusive competence of the EU: this implied that the

[52] The EU is not part of the ECHR up to now.

EU is an incredibly powerful international actor, since it is the EU that enters into the international trade agreements. As part of this external action, the EU would include in the agreement the so-called ***Fundamental Rights Conditionality Clauses***, whereby that agreement is conditional upon – say- the State meeting certain standards of human rights protection. **The criticism related to this was that the EU, despite imposing that standard outside, was not bound to the same standards inside**, since it had no Charter of Rights.

- Moreover, the need for codified Fundamental Rights also arose from a **dialogue with National Constitutional Courts**. In particular, the German Constitutional Court was incredibly watchful in relation to the matter (*e.g. Solange I and II*).
- To sum up, it was clear that it was necessary to do something at the EU level, with ***internal* effects**, in relation to Fundamental Rights. The debate in the 90s was articulated between two parties:
  - those who argued it was time, in the Constitutional development of the EU, to have a **Charter of Rights**,
  - and those who, instead were pushing for the **accession to ECHR**, as a means to make the system *coherent* from a constitutional perspective.

Eventually, **both** things were done:

- In **2000** the Charter was declared, and in **2007** (with the **Treaty of Lisbon**) it acquired full legal value on par with Treaties.
- In the same treaty, **the obligation for the EU to accede to ECHR was also provided**.

Article 6 TEU

Now, we shall analyse the matter as it is now, starting from **Art. 6 TEU**:

*1. The Union **recognises** the rights, freedoms and principles set out in the **Charter** of Fundamental Rights of the European Union* […]*, which shall have the **same legal value** as the Treaties. The provisions of the Charter shall **not extend in any way the competences** of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be **interpreted in accordance with the general provisions*** [in Title VII of the Charter] *governing its interpretation and application and with due regard to the **explanations** referred to in the Charter* […].

First of all, we notice that the Charter is treated as ***primary law***, since it has **the same value as Treaties**; primary law is the parameter for scrutinizing the legitimacy of the acts of the Union and its laws so any act of an EU institution can be declared **unlawful** if it is incompatible with the Charter.

Moreover, it is clear from the article that the EU is supposed **not to acquire competences**: art. 6 clearly states that the Charter must not extend the competences of the Union. In fact, the EU does not have competence over Fundamental Rights, due to the Member States' anxiety that the Charter might become a sort of Constitution and give more competence to the EU. For the same reason, as we shall see, this principle is restated also in **Art. 51(2) Charter**: the Charter is not a document upon which a piece of EU legislation can be based[53].

[53] And this is quite a problem now, since Art. 6 TEU makes it difficult to enforce Fundamental Rights against Hungary and Poland.

Thirdly, Art. 6 provides how the Charter **should be interpreted**. Again, this is a sign of the same **anxiety** that the Charter could be used in an **expansive way** (indeed, Fundamental Rights Documents are **dynamic** in nature, otherwise they would not be of real use).

Lastly, pay attention to the term used in the very first line: that Union ***recognises*** Fundamental Rights, instead of *establishing* them, because they **exist** by themself and are not positively established by the Treaties or the Charter.

Art. 6 continues:
*2. The Union shall **accede to the European Convention** for the Protection of Human Rights and Fundamental Freedoms. Such accession shall **not affect the Union's competences** as defined in the Treaties.*
*3. Fundamental rights, as guaranteed by the **European Convention** for the Protection of Human Rights and Fundamental Freedoms and as they result from the **constitutional traditions** common to the Member States, shall constitute **general principles** of the Union's law.*

As it is evident, Art. 6(3) **safeguards all the case law** that the ECJ had established before the enactment of the Charter.
This relationship between *general principles* and the Charter was not apparent in the first place, but basically it represents another **safety net**: it also means that if there is a fundamental right that the ECJ had recognised, yet that has not been codified in the Charter, it is *still* existing, recognised and effective, making sure there is no regression with the enactment of the Charter.

The Charter of Fundamental Rights of the EU: drafting and structure

But more specifically, how did we get to the Charter? How was it drafted?

In **1999** the EU Council provided the so-called ***Cologne Mandate***, for the drafting of a Charter: "*At the present stage of development of the EU, the fundamental rights applicable at Union level should be **consolidated** in a Charter and thereby made **more evident***".
Also, the mandate specified which rights had to be included:

- FRs guaranteed by **ECHR** and **common constitutional traditions** (basically, those that were recognised in the ECJ caselaw)
- and **EU citizens' rights** (i.e., Free Movement and Citizenship rights).
- Moreover, the Drafters should also have taken into account **economic and social rights** contained in EU Social Charters and as emerging in the Council of Europe.

Thus, the Charter would have been an extremely comprehensive body.

The drafting body of the Charter was also innovative: for the first time in history of the EU we had a ***Convention*** (that would be used in the same format also for drafting the European Constitution) which included **representatives** of both *national* and *European* **parliaments** - that are directly elected assemblies – so to increase the **democratic legitimacy**.
Hence, we notice that there was the will not of intergovernmental negotiations, but rather **participatory** ones. Also, to this aim, all the documents and drafts were put on the internet so that civil society and Non-Governmental Organizations could participate to the drafting by making comments and suggestions.

As for the *structure* of the Charter, it adopts an **innovative approach** to Fundamental Rights: it adopts a so-called ***horizontal*** **approach**, based on the assumption that Fundamental Rights can only be effective if they are **enjoyed as a whole**. Therefore, the Charter **rejects** (at least in theory) any kind of **hierarchy** between Fundamental Rights and departs from the **traditional dichotomy** between civil and political rights on the one hand, and social rights on the other hand.

Because of this horizontal approach between rights, rights in the Charter are grouped in relation to **six *values***:

- besides the Preamble we have
- **dignity** (1-5)
- **freedom** (6-19)
- **equality** (20-26)
- **solidarity** (27-38)
- **citizenship** (39-46)
- and **justice** (47-50)
- The Charter ends with four ***General Provisions*** (the so-called **horizontal provisions** by the literature: 51-54), on which we will particularly focus.

As we will see, then, it **distinguishes between *rights* and *principles***; the latter only direct the action of EU institutions and are not free standing rights.

As we have seen in Art. 6 TEU, the Charter is sided by **explanations** of paramount (and legal) importance to better understand the content of the rights endowed in the Charter, since most of those rights had already been interpreted either by the ECJ, or by the ECHR or, also, by national constitutional courts.

It contains a **general limitation clause** rather than a right by right limitation (ECHR).

Finally, and crucially, the Charter makes clear that the protection of Fundamental Rights can never go **below** what is granted in the ECHR, which remains the *minimum common denominator* in the EU territory and the minimum standard of protection for FRs.

The "Horizontal Provisions", art- 51-54

We shall now focus on the so-called ***Horizontal Provisions***, i.e., the rules that tell us *when* and *how* the Charter applies, thus determining its **scope of application** and its **limits**.
They are:

1. ***Art. 51***, which provides for the ***Scope of Application*** (so, *when* does the Charter applies and *to whom*) and a limitation which assures **no extensions of competences to the EU**. We shall deeply analyse it in a later moment.

2. ***Art. 52***, which provides a **general limitation clause** to the Rights contained in the Charter (**derogation clause**). In fact, whereas in the ECHR each right also contains a clause that regulates its limitation (with different rights having different limitation clauses), in the Charter every right can be limited pursuant to a *single*, *general provision*. As we should know by now, **any** fundamental right can be limited to a certain extent (but the one not to be tortured, as specified in ECHR): otherwise, society simply wouldn't work. For instance, my right to freedom of expression is limited by your right to private and family life.

The Article states:
*1. Any **limitation** on the exercise of the rights and freedoms recognised by this Charter must be **provided for by law** and **respect the essence** of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are **necessary** and genuinely **meet objectives of general interest recognised** by the Union or the need to protect the rights **and** freedoms of others.*

Hence, in order for the limitation of a Charter right to be compatible with Art. 52, it needs:

1. to be **prescribed by law** (and this is already problematic: which measures can be defined as *law* in the EU context? Actually, the term has not been interpreted yet),
2. to **respect the essence** of the right limited
3. and, most importantly, it needs to be **necessary and proportionate** to meet the objectives of general interests of the EU (or to protect the rights of others).

   In this respect, a case of outmost importance is the already mentioned ***Digital Rights Ireland*** case, where the Court recognised that, in theory, the pursued aim of the Directive 24/2006 was actually legitimate (i.e., fighting terrorism); however, the way the aim was to be achieved was ***disproportionate* and excessive**: there were, in fact, less restrictive means to achieve the same aim.

Moreover, **Art. 52(2)** states:
*Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European **Union shall be exercised under the conditions and within the limits defined by those Treaties.***

So when a right in the Charter corresponds to rights in the Treaties, «*it shall be exercised **under the conditions** and the **limits** defined by those **Treaties***».
Here, the Charter refers in particular to the **EU citizens' rights**, since that they find their grounds in the Treaties: i.e., the *right to free movement*, the *right to petition*, etc. Clearly, they existed also *before* the Charter, in the Treaties. Notwithstanding the *general limitation* clause in Art. 52(1), however, those rights can only be limited, **in accordance with the Treaties**, under certain circumstances. For instance, the right to *Free movement* can only be limited for reasons of public policy, security, and health (and no other reason is allowed). Basically, Art. 52(2) invites the interpreter **to go and look at the TFEU in order to understand whether a Citizenship right can be limited or not in a particular occasion.**

Art. 52 (3) continues:
*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same as those laid down by the said Convention**. This provision shall not prevent Union law providing **more extensive protection**.*

It is also worth mentioning that, since in the **ECHR** limitations for some rights are *narrower* than others, the Charter clarifies in **Art. 52(3)** that the Charter can never **fall *below*** the protection provided by the ECHR (thus, the ECHR works as a ***safety net***); therefore, limitations of Art. 52 must be **interpreted differently** according to the right in question.

To put it differently, **Art. 52 does not apply in the same way to each right of the Charter**: instead, it will be interpreted more or less narrowly according to the protection that the ECHR grants to the right at issue.
For instance, despite Art. 52 providing no exceptions in theory, the *right not to be tortured* cannot be limited in any way. Likewise, the *right to life* can be limited only insofar as the precise conditions set in the ECHR are met.
Art. 52(3) also specifies that it's possible for the **EU** to **provide for more *extensive* protection** than the one granted both in the Charter and in the ECHR.
This, though, might raise some issues of particular difficulty in *horizontal* situations; indeed, whereas it is easy to define the highest possible protection in a *vertical* situation (i.e., the individual vis à vis the State), in ***horizontal*** situations (i.e., between private parties) it is not. As way of example, if I assert my freedom of expression against you, your right not to be defamed will be limited (and vice-versa).

Finally, in **2007**, **four paragraphs** have been added due to the insistence of the UK (thanks again, Tony Blair!):

- ***Art. 52(4)*** states (again, as a sign of the anxiety about national sovereignty) that if a Charter right corresponds to a **common constitutional tradition**[54], then it must be given a so-called ***harmonious interpretation***. Even scholars have no idea of the true meaning of this provision.
- ***Art. 52(5)*** provides a crucial[55] distinction between ***right*** and ***principle***:
    - the latter, as it happens also with national Constitutions, **needs legislation** to be given effect and are used **to interpret** EU acts and for **challenging** their validity (but do not apply to national law). As way of example, the right (or rather, the *principle*) to *environmental protection* (Art. 37 Charter) does not imply one can go and challenge the *Municipality of Milano* for allowing polluting cars to circulate; instead, it simply means that when the EU legislates, it needs to have due regard to environmental protection (and that EU legislation must be interpreted accordingly to the principle).
    - the former have **free standing** if Charter applies and can be therefore **enforced against the EU legislature** (and against **national law**, when the Charter is applicable).

      As it is clear, this distinction was not needed in practice, since it states an obvious implication of Fundamental Rights law: **not all rights have free standing and can be enforced by themselves.**
- ***Art. 52(6)***, again, refers to **national laws and practices**, that have to be taken in ***full account***:

  *"Full account shall be taken of **national laws and practices** as specified in this Charter".*

  Certain rights in the Charter, indeed, explicitly refer to national law because of competence issues between EU law and Member States: e.g., *collective bargaining* and *family law*.

[54] The common constitutional traditions have not been codified but can be derived from the jurisprudence of the ECJ.
[55] And also rather **problematic**: since Art. 52(5) has been added *after* the first Charter drafting, the rights therein are not originally divided in *rights* and *principles*. Instead, it is the interpreter that needs to operate this distinction. Moreover, there are even some cases where principles (for the purpose of Art. 52(5)) are referred to as rights, and where rights are referred to as principles: the drafters had obviously not thought about the implications of such naming.

- ***Art. 52(7)***, contains the **Explanatory Memorandum (Explanations)** to the Charter that need to be given "**due regard**", which basically means everything and nothing.

3. ***Art. 53*** mentions (indeed, it does not really regulate) the **relationship** between the Charter and **other fundamental rights Charters**, including the ECHR and constitutions. Art. 53 is another example of a not particularly successful drafting. For the umpteenth time, it shows this anxiety about the Charter being a document that might become an **accelerator for *competence creating*** by the EU, as an ***expansive*** way. This comes straight from the fact that Fundamental Rights are always relevant: there is <u>not</u> a single field of Law where they are not relevant.
It states:

__Nothing__ in this Charter shall be interpreted as __restricting or adversely affecting human rights__ and fundamental freedoms as recognised, <u>__in their respective fields of application__</u>, by __Union__ law and __international__ law and by international agreements to which the Union or all the Member States are party, including the __ECHR__, and by the __Member States' constitutions__.

The article regulates the **level of protection** and gives the impression of the Charter being piece of legislation at an ***intermediate level***, at the same level as other sources of Fundamental Rights.
It establishes that the Charter should not be read in a way to restrict the FRs as protected, , **in their respective fields of application**, by:

- Union law
- International law
- MSs constitutions or International Treaties signed by the EU or all MSs (e.g. the ECHR)

Well, art. 53 seems to **call into question** the principle of **primacy of EU law**[56]. Indeed, does this reference to the Member States' constitutions mean that the latter would *take precedence* over the Charter? If that were so, that it would be the end of our European legal order.
However, if we read the article more carefully, we understand that it simply does <u>not</u> mean anything; indeed, with the expression *in their respective fields of application*, the Article implies that national constitutions would apply when the EU has not competence, and that the Charter would apply when it should.
In fact, this is what the Court decided in <u>***Melloni***</u>, a case related to an Italian citizen that, fearing for the possibility of being convicted, flew to Spain, and was eventually **condemned *in absentia*** (despite being properly represented by a lawyer). After the end of the trial, Italy issued a *European Arrest Warrant*, in order to bring back Mr. Melloni and take him to jail. As Mr. Melloni was not so happy about this, once apprehended in Spain, he argued that giving effect to the *European Arrest Warrant* would **conflict** with the Spanish Constitution, as interpreted by the Spanish Constitutional court, whereby it was not possible to *extradite people that have been condemned in absentia, unless with the possibility of a re-trial*. Hence, the national court asked the ECJ whether Art. 53 Charter implied that Spanish authorities could refuse to give effect to the arrest warrant when doing it would be incompatible with the national constitution. There was an only way to solve the case: **the ECJ restated the**

[56] As we have seen in <u>***Costa v. Enel***</u>, EU law always has primacy over national legislation, and even over national Constitutions.

principle whereby EU law must <u>only</u> be subject to its own constitutional principles (and not to *national* ones), otherwise we would risk 27 different interpretations of EU law. Therefore, since in <u>*Melloni*</u> a Framework Decision (now, a Directive) was at stake, that could only be checked **under the lens of the Charter**: The European Arrest Warrant was found compatible with the Charter and was eventually given effect.

4. ***Art. 54***, finally, **prohibits the *abuse of rights***, i.e., using a right for a purpose that it was not intended to.

To sum up:
- the Charter actually **succeeded** in what it wanted to achieve: i.e., to **make rights more visible to the citizens**, especially in those fields in which the EU is acting. As a prove of this fact, the number of Preliminary References concerning Fundamental Rights and the Charter-driven annulments have dramatically increased after the enactment of the Charter.
- To a certain extent, it has also given "**false hopes**" both in terms of standards and in terms of scope of application (just consider, for instance, the number of petitions sent to the EP concerning Fundamental Rights): it gave the impression that the rights contained in the Charter could *always* apply.
- It is, unfortunately, an incredibly **complex** document (due to the fact that it comes from a system of **attributed powers**), and needs to be read alongside the *explanations*, *common constitutional traditions*, *ECHR*, etc.
- Furthermore, FRs can be limited but in respect of art. 52:
    - Principle of proportionality and essence of FRs
    - Not below level of ECHR
- The **distinction between rights and principles** might appear redundant and confusing

Overall, the relationship between national and EU Fundamental Rights is **far from having been solved**.

The Scope of Application: Art. 51

Art. 51 is way the most complex provision of the Charter: it regulates its **Scope of Application**, i.e., *when* does the Charter applies and *for whom*.

It provides:
*1. The provisions of this Charter are addressed to the **institutions** and **bodies** of the **Union** with due regard for the **principle of subsidiarity** and to the **Member States** <u>only</u> when they are implementing Union law. They shall therefore **respect** the rights, **observe** the principles, and promote the application thereof in **accordance with their respective powers**.*
*2. This Charter does <u>not</u> establish any **new power** or task for the Community or the Union, or modify powers and tasks defined by the **Treaties**.*

The first thing we notice is the difference the article provides between the **application** of the Charter **to the EU** and to the **Member States**:
- EU → the application of the Charter is ***absolute***, without any limit whatsoever
- MSs → the application to the Member States is ***qualified***: i.e., the Charter applies <u>only</u> **within the scope** of EU, and so when Member States are implementing Union law.

Moreover, it is interesting to notice presence of the ***principle of Subsidiarity***[57]; the article refers to it even though we are not dealing with law-making: how can subsidiarity play a role in respect to Fundamental Rights? The reason behind the inclusion of the principle in Art. 51 is, again, the same as usual (for instance, in Art. 6 TEU: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties"): the anxiety to avoid the Charter ending up conferring *new powers* to the EU, as a start towards a "federal Constitution". And the same principle is restated also in the last line of Art. 51(1), when stating "*in accordance with **their respective powers***" (as seen also in Art. 53), and in **Art. 51(2)**.
Thirdly, the article also makes a reference to the distinction between **rights** (that must be *respected*) and **principles** (that, instead, must be *observed*).

However, the most crucial point of the Article is what we have first said: the distinction on the application of the Charter between the EU and Member States.
Indeed, the extent to which the Charter *can* (or rather, should) apply to Member States is what is usually most debated both by Institutions, Scholars and Courts.
As for the **EU institutions**, the obligation is <u>not</u> qualified: Fundamental Rights provided for in the Charter apply to ***any* act** they issue, so that any EU act must respect fundamental rights.

- *Legislative* acts,
- *Executive* acts,
- *Decisions*,
- acts *in the international arena*,
- and even *non-Acts*[58]

Basically, the Charter bounds EU institution **whenever they act**, regardless of whether they do it in a **legal capacity** or in a **political capacity**.

However, in ***<u>Kadi I</u>*** (a case concerning an **act in the international arena**) the ECJ went a step beyond.
First, the **facts**: after September 11th, there was a big reaction at international level, including the decision to impose **sanctions** on individuals (in addition to entities) related to Al-Qaeda and Osama Bin Laden.
For this purpose, a **UN Security Council resolution** (so, an act of international law at the highest level possible) was enacted: it delegated a *body* at UN level to **identify** individual whose assets should have been frozen; in practice, any State could put forward the names of those people and no other State would challenge that identification.
But the Resolution **did not provide any right to judicial review and to be informed regarding the reasons of the listing**.

Anyway, the EU decided to implement the UNSC resolution through two instruments:

a. one in the **Common Foreign and Security Policy** area (with an instrument that has by its nature <u>no</u> direct effect),
b. and the other one in the context of (what was then) the **European Community**. The latter was in particular needed in order to **act as one** at the same moment: given that Free Movement of Capitals was a fundamental principle of the EC, not imposing sanctions at the

[57] I.e., when legislating, the closer to the citizen the better, in order for policymaking to be effective.
[58] I.e., acts that have <u>no formal</u> legal effects, such as guidelines of the Commission, recommendations and opinions (so called soft law).

same moment between Member States would have incredibly favoured terrorists[59]. In this respect, the ***regulation*** at issue provided the freezing of the funds of entities and individuals listed therein.

This, however, raised a problem: although those people had been identified through intelligence investigations authorised by the CFSP instrument without any guarantee of the respect of their Fundamental Rights, they were addressed by a regulation that, overnight, froze all their assets. Amongst these people there was also Mr. Kadi, an extremely rich Saudi-Arabian. He argued, besides that his fundamental right to **property** was violated, that also his right to an **effective judicial remedy** was compromised, since he had not been given *evidence* on which his inclusion within the UN list was based.

The case first went before the General Court (then, the Court of First Instance), where the Commission argued it was not its fault. Indeed, the limiting act was not substantially coming from the EU, but it was rather an ***implementation*** (without any discretion) of the UNSC resolution: therefore, if the Court had reviewed the EC regulation that implemented the resolution, it would have amounted to an actual review of the UNSC resolution itself → the General Court agreed that it had **no jurisdiction** on the UN act at issue. The only thing the GC could do was, instead, reviewing the regulation basing on the **general principles of international law** (and not on those of the EU, including FRs), i.e., the so-called ***jus cogens***.
However, the Case went on appeal before the ECJ, that ruled that it could not be so: as the EU was actually a ***proper constitutional system***, it always had to be **bound to the respect of Fundamental Rights, even when implementing international law**. There could not be any vacuum in the fundamental rights protection.

Indeed:
*281. […] It is to be borne in mind that the Community is **based on the rule of law**, inasmuch as neither its Member States nor its institutions can avoid **review of the conformity** of their acts with the basic **constitutional charter, the EC Treaty** , which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.*
*285. […] the obligations imposed by an international agreement cannot have the effect of **prejudicing the constitutional principles of the EC Treaty**, which include the principle that all Community acts must **respect fundamental rights**, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.*
Hence, the Court stated that there cannot be a gap: the EU could not use international law (or any other excuse) to avoid Fundamental Rights scrutiny → **EU FRs apply also to rules implementing provisions of international law**.
This principle had to be applied across **all of the actions** of the EU.

In ***Ledra Advertising***, a case related to the conditionalities imposed to the Member States that wanted bailouts in the context of the Euro-Crisis, a company challenged the acts of the Commission within the **European Stability Mechanism** (ESM). Although the Commission argued that, being the ESM a *parallel* treaty outside the EU context, it could not be scrutinized by the ECJ, the Court said

[59] Indeed, if a terrorist based in Italy had seen Italy sanctioning with a high degree of efficiency, he would have surely transferred his assets to another EU country that would not have imposed sanctions, and eventually outside the jurisdiction of the EU, straight to Al-Qaeda.

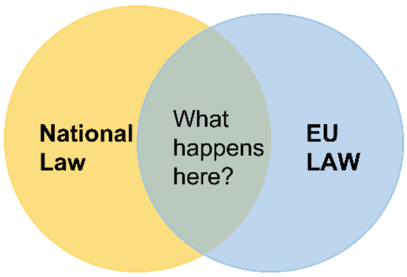
that ***every* EU institution is *always* bound** by fundamental rights, regardless of the capacity in which the Commission was acting (whether within the EU Treaties, the ESM, UN resolutions, etc.).

Application of the Charter to MSs

What is much more difficult is understanding *when* and *how* the Charter applies **to the Member States**.

Before analysing the problem in deep, we must bear in mind some basic information about the legal framework:

1. The EU is not a Human Rights organization: indeed, EU is a system based on **conferred powers**[60] and it does not have a general Fundamental Rights competence (besides some ***sectorial*** ones, related, for instance, to data protection, equality, etc.).
2. In this context, *all* the Member States have **their own system** of Fundamental Rights protection: in Italy, for instance, that would be guaranteed by our Constitution and Constitutional court; moreover, to complicate things even further, *all* Member States are **bound by ECHR**.
3. Finally, imposing an EU Fundamental Rights scrutiny on Member States might **affect the balance of powers** between the EU and Member States, and might also have an **indirect effect on competences** (which is the reason why the drafters provided Art. 51(2) Charter and Art. 6 TEU).



This very last consideration will become clearer once seen a bit of caselaw. It would be very easy if there were a *neat separation* between legal sources, that told us exactly what applied and when: i.e., Member States with their own system of protection and the ECHR as a minimum standard on the one hand, and the EU with its Charter and General Principles that apply only towards EU institutions on the other hand. Unfortunately, life is never so simple: there's a **huge area of overlap between National and EU law, also as to fundamental rights**.

So, the question is: *what happens* when EU law concerning Fundamental Rights *overlaps* with National laws on the same subject, in that area (that is becoming bigger and bigger) where there is a **mix of EU and national action?**

Just consider all those competencies that the EU has acquired also in relation to *criminal law*, *asylum*, *immigration*, etc., fields where human rights play a crucial role. What's more: Fundamental Rights are always deeply rooted in **cultural values** and have to be interpreted. Therefore, Member States are jealous not only of their "codified" Fundamental Rights, but also of their *hermeneutic monopoly* about them.

The issue arose out of **caselaw** → the ECJ decided (even before the enactment of the Charter) that MSs are bound by EU General Principles, FRs and Charter in two different situations (in relation to national action):

[60] I.e., the EU can only act to the extent to which the Member States have conferred upon it the power to Act: the EU has no general competence.

1. Firstly, when the Member State is **implementing secondary EU law** (for instance, when transposing a Directive or giving effect to a Regulation[61]).
   Indeed, when a National Authority makes a choice basing on the *degree of discretion* the EU act has left, it is **bound:**
   - **by the Charter →** it is because of the so-called **Delegation Theory** whereby the State, in making a choice, is acting **upon the instructions of EU institutions**: MS is delegated by EU to act in a certain way and it cannot breach **EU constitutional principles** (including the Fundamental Rights)
   - as well as by **National Constitutions** → as the State is making a choice, it has to respect also its own **Constitutional principles**. Suppose, for instance, that a Directive provides for the obligation to impose an *effective sanction* for polluting; a fictitious Member States, in giving effect to that directive, decides to chock the hands off of the polluter: that's pretty disproportionate and, in fact, both the Charter and national constitutional principles would be violated. Say, instead, that the State decides to impose proportionate fines for polluting; however, if the National Constitution (as interpreted by the national constitutional court) has strict indications on *how* to calculate penalties, those have to be respected.

2. Secondly, when the Member State issues an act that **limits *free movement* rights** (i.e., Free Movement of *citizens*, *capital, goods*, and *services*, also referred to as Freedom of Establishment), that, as we may remember, are **directly effective** and take **precedence over conflicting** national Law.
   - This duty for Member States to respect EU Fundamental Rights is due to the fact that a **limitation to a right** conferred by EU (primary) law is possible only *insofar* as that is **allowed by EU law**. To put it differently, Member States can only limit a *Free Movement* right in **circumstances prescribed by EU law** (e.g. public policy and public security), in a way that is **consistent** with the EU Constitutional Principles. Amongst those, we will find:
     - the principle of ***proportionality***
     - as well as all the **Fundamental Rights contained in the Charter** → Hence, whenever a Member State is limiting a Free Movement right, then the act of the National Authority has to **comply with** the EU fundamental Rights. And this is where it gets messy.

Carpenter and ERT

The problem arose in ***Carpenter (C-64/100)***, in which an English person got married with a third Country[62] national who, unfortunately, had **overstayed** her entry visa; British immigration laws are really strict, as they provided that even though the marriage was genuine, Mrs. Carpenter had to go back to Philippines and *only then* apply for a Family Reunion Visa. In practice, this would have meant the family would have been separated for at least six months: so, they decided to appeal Mrs. Carpenter's deportation order.
They had two possible routes:

[61] Say, as way of example, that a Regulation mandates sanctions for pollution. When a National Authority actually *fines* a company that has polluted the environment, it *is implementing* the EU law, and therefore it has, in the exercise of its **discretion**, to respect both EU and National Fundamental rights.
[62] i.e., coming from *outside* the EU

1. they could either rely on the *Human Rights Acts* (that is the act that, in British law, gives effect to the ECHR),
2. or rely on an ingenious argument before the ECJ. Since the ECHR route was unfavourable for them, the Carpenters opted to the latter option.

Actually, the case was a *domestic* one, and in theory it did not concern EU law[63]. However, the lawyers argued that the claimant had clients in other Member States, and so he was *providing services* across the UK borders. Hence, the right to ***Free movement of services*** applied. This way, Mr. Carpenter managed to make this situation fall *under* the EU "Constitutional Umbrella", also putting *supremacy*, *direct effect*, and *application of the Charter* in the game.

Arguments

1. Then, they claimed that the **deportation** of the wife was a **restriction** to the right to Free Movement of Services, arguing that the deportation would have prevented her from staying at home with the children while Mr. Carpenter was working in other Member States. Therefore, the wife's deportation would have **affected the conditions** under which Mr. Carpenter would have provided his services in France.
2. Moreover, because that was a restriction to a Free movement right, the deportation order had to **respect EU fundamental rights**.

The decision

The Court eventually left aside the argument about the importance of the wife staying at home with the children but agreed that her deportation might have **negatively affected** Mr. Carpenter's right. Therefore, it was then for the ECJ to scrutinize the order of the British Authority.
Crucially, the ECJ interpreted the **right to private and family life** (invoked by the Carpenters) in a much broader way than the ECHR would have done, and, for this reason, Mrs. Carpenter was allowed to stay in the UK.

Hence, we can understand how many implications Fundamental Rights could have, since in Carpenter, a domestic case about immigration was made fall under the EU umbrella and actually solved by the ECJ: one could have significant **procedural advantages** in claiming Fundamental Rights at EU level, due to the presence of:

- ***direct effect***,
- ***primacy*** (i.e., the EU law always takes precedence over national law)
- and ***diffused Fundamental Rights scrutiny*** (indeed, for instance in Italy, a judge cannot declare a piece of law unconstitutional, whereas under EU law *every* domestic judge has to **set aside** national provisions in contrast with the Treaties).

Conversely, relying on the National Fundamental Rights Charter (usually, the Constitution) and directly on ECHR might be sufficient, but there would not be *primacy*: you would have to either ask the domestic judge for a **"preliminary reference"** (in Italy, *questione di legittimità costituzionale*) in front of the Constitutional Court, or wait until the **exhaustion of any other national remedy** and only then challenge the State before the ECHR.

[63] This was also because the UK had not opt in as for immigration and asylum policies in the EU.

Another example related to the Free Movement right is the ***ERT*** case: Greece had very strict *licensing* rules that limited the possibility of providers from outer States to provide broadcasting services (i.e., television).

Arguments

1. The claimant argued that those rules were **limiting Free Movement of goods and services** in the European Union, which was actually true;
2. moreover, ERT claimed that the rules at issue, since they fell **within the scope of the Treaty**, had also to respect the ***Freedom of expression***, recognised in **Art. 10 ECHR**.

The Court

In looking at whether the rules were *proportionate*, the National Court was also instructed by the ECJ to **check** whether the rules complied with that Fundamental Right.
The point is that whenever a Member State does *anything* to limit a Free Movement right, then Fundamental Rights, as endowed in the Charter, apply → this means that the national Court has to check the compatibility of national rules not only with – say – the public interest, but also with Fundamental Rights.
Hence, the **scrutiny** becomes much **more intense**. Because of this, it might happen that a claimant (as happened in *Carpenter*), by bringing themselves *under the umbrella of EU law*, has a **better chance** to enforce their own Fundamental Rights: indeed, Mr. and Mrs. Carpenter managed to have their right recognised *because* they managed to make their issue fall within the scope of EU law (due to a **more extensive interpretation** of the Right to Private and Family Life than the one made by the ECHR).

The application of FRs to situations in which a **MS is limiting the right to move** of a citizen is very intrusive, affecting national sovereignty, esp. because of supremacy.
Because of primacy, **it might be more effective for claimant to rely on EU FRs than on equivalent national right,** as we have seen in Carpenter.

Generally, when Fundamental Rights are applied to *national law*, they might have an **enhancing effect**, meaning that the **highest standard** between EU Fundamental Rights and National law would prevail (exactly as it happened in *Carpenter*), with the only exception of criminal law.

Vertical situations

In vertical situations (i.e. individual against the State) EU FRs generally have a "**rights-maximising**" effect

Horizontal situation

The situation is a bit more complicated in ***horizontal situations*** (i.e., in litigations between individuals): if the Court enhances a party's fundamental right, that will reduce the other party's fundamental right. To put it differently, **the strengthening of someone's right might determine someone else's loss.**
In EU law this problem has arisen when **market freedoms / free movement rights have come to clash with (non-economic) FRs**; good examples of this problem are the ***Viking*** and ***Laval*** cases, that we will see in deep when talking about Free Movement.

- ***Viking*** (freedom of establishment vs. right to strike)→ a shipping company decided to reflag its vessels (i.e., change the boat's nationality) to a Country which had lower labour standards. The workers sued the company in an *international labour dispute*: they claimed the company was using Free movement just to lower the contractual standards applicable.
  Conversely, Viking contested that the international labour dispute limited its **Freedom of Establishment**, that so was contrasting with the workers' **Right to strike**.
  If the Court considered the latter prevailing, the Freedom of Establishment would be reduced, and vice-versa: in horizontal situations, the issue is just that someone wins, whereas the other(s) loses.

The EU and the ECHR: a gap in Fundamental Rights protection?

The next issue to consider when thinking about Fundamental Rights in the EU is the **relationship** between the EU and the ECHR. Now, remember that the ECHR is not part of EU law, although it is used as the **minimum standard applicable**: the EU is not party to the European Convention of Human Rights.
Crucially, the ***Council of Europe*** is a separate entity from the EU. Its main instrument is, again, the **European Convention of Human Rights**, that is enforced in Strasbourg by the *European Court of Human Rights* and not by the ECJ in Luxembourg.
Whereas the EU is not, ***all*** the Member States are **parties** to the ECHR: hence, the ECHR is usually referred to as the ***public law of Europe***. The ECHR is supposed to be our ***safety net*** across Europe: indeed, all the States *may* go **above** the protection of the Convention, but **not below** (and there are many historical reasons for that: just remember the historical background of the Convention). The way the ECtHR works is that an individual must have ***exhausted* all domestic remedies** before being allowed to go before the Court.

Now, what if the EU breaches ECHR? To put it differently, our question is whether EU law is actually *creating a **gap*** in our safety net, where there would be a **hole** related to the application of EU law.

We have already seen the reasons behind this problem when analysing the development of Fundamental Rights in the EU: the EU has **extensive law-making powers**.

Now, when the Member States **implement** EU law (*giving effect* to a regulation or *transposing* a directive), *if* they have **discretion**, then everything is fine: the ECHR **applies to the discretion** of Member States. Indeed, when implementing, the discretion *must* be exercised so as to comply with (*inter alia*) the ECHR. For instance, if a Member State has a choice between imposing a penalty without any right for the claimant for judicial review of the fine *or* imposing the same penalty but also providing that possibility of judicial review, the State at issue will have to choose the latter, thus **granting** an **effective remedy** to the individuals addressed by the provision. Indeed, since every EU State is party to the ECHR, the action of every EU Member State can be **reviewed under the ECHR**.

Instead, the problem arises in those instances in which the Member States have **no discretion**, meaning that every relevant choice has been made at EU level. For instance, suppose the EU enacts a regulation providing that every cheating student must be chocked their hands off: the fault for the HR violation is of the EU, and not of the States that clearly can do nothing but to give effect to the regulation as it is (i.e., they have no discretion). However, since the ECtHR **cannot review EU acts** (the Union is indeed not part of the Convention), this might lead to a **gap** in Fundamental Rights protection.

Of course, **Art. 53 Charter** (as we have seen) mentions the Convention as the *minimum standard applicable*, but:

- it does not give ECtHR jurisdiction over EU acts,
- nor it guarantees that the ECJ would not interpret a Fundamental Right in a more restrictive way than the Strasbourg Court does,
- nor it guarantees that a national tribunal would ask for a preliminary reference to the ECJ to check the regulation's compatibility.

Thus, the ECHR's role as a **safety net** might be seriously compromised at EU level (although, in theory, the safety net should not be necessary): through acting at EU level, EU law could potentially **fall below standard** of the Convention (and determine breach, either of its own accord, or through MS action).

Matthews (ECtHR case)

The first time in which we assisted to a significant opening of the ECtHR was in the ***Matthews*** case (that we have already mentioned when dealing with the EP's election).
Mrs. Matthews was residing in Gibraltar, which is part of the UK (despite being in Africa and just under Spain): it had been decided that citizens residing in Gibraltar would not have a right to vote for the EP. Hence, Mrs. Matthews claimed that her exclusion from EP elections was a **violation** of the ***Protocol on Democracy*** of the Convention.
Now, the problem was that the act at issue, that prevented Gibraltarians from voting for the EP, was a **collective act of Member States** at the EU level, thus being considered as **primary law**, and therefore it was not reviewable by the ECJ. For this reason, Mrs. Matthews brought the UK before the ECtHR.

- The UK contested that the act at stake had nothing to do with them: they, in fact, could not unilaterally change that rule.
- Therefore, since it was not an act issued by a party of the Convention, the UK claimed the ECtHR had no jurisdiction.

However, the Court did not agree and considered **the UK and *all* the other EU Member States** in violation of the Convention.
At the same moment, the ECJ was aware of the issue, and especially in the very few years, was very careful not to openly depart from the ECHR standard.
Now, of course, **Art. 52** and **53 of the Charter** impose ECHR as a **minimum standard**, but the problem has not been solved yet, due to the (still present) **lack of jurisdiction** of ECtHR over EU act: this might **weaken Fundamental Rights protection *in* Member States** through EU action. This is why, with time, the ECtHR gradually moved towards a **more intense scrutiny**: the adoption of an act at EU level does not exonerate the Strasbourg Court's jurisdiction, because, after all, **it is always the Member States which are acting, even if they do it through EU law**.

Therefore, the **doctrine of *equivalent protection*** (i.e., the EU is considered as granting equivalent protection of Human Rights as the Convention) now works as a **rebuttable presumption**, meaning that the claimant can **prove it wrong**, in two cases:

- When the ECJ **cannot exercise jurisdiction**: i.e., over *primary law* (as in *Matthews*) or in areas such as the *Common Foreign and Security Policy*. In those cases, the ECtHR will assert its own jurisdiction.

- Or when, in the *actual* case, EU **protection is *manifestly deficient***: i.e., when the EU has gone significantly below the standards of the Convention.

Bosphorus

This doctrine was established in the ***Bosphorus*** case, that concerned a **regulation** providing that Member States had to seize aircrafts if they were registered to one of the former States of Yugoslavia, as a way of *targeted sanction*. *Bosphorus* was a Turkish company that had nothing to do with the Yugoslavian conflict, but it had leased a plane from a company that was registered in Serbia. When the plane landed in Ireland, the authorities seized it.

Therefore, the company claimed a **violation of the right to property** in front of an Irish national court, that in its turn asked the ECJ for a preliminary reference. The Luxembourg Court, however, upheld the regulation, considering war prevention as a prominent interest over the company's right to property and thus that the regulation was *proportionate* and *legitimate*.
Then, *Bosphorus* went before the ECtHR against Ireland, that claimed in its defence that it had no discretion in implementing EU law measure, since it was a regulation. Nonetheless, the ECtHR held that:

> *If such **equivalent protection** is considered to be provided by the organisation, the **presumption** will be that a **State has not departed** from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be **rebutted if,** in the circumstances of a **particular case**, it is considered that the protection of Convention rights was **manifestly deficient**. In such cases, the interest of **international co-operation would be outweighed** by the Convention's role as a "**constitutional** instrument of **European public order**" in the field of human rights.*

Finally, there is one more thing that has to be considered. **Art. 6 TEU** provided for an **obligation to accede** ECHR. So, why has the EU not done it yet? After the Lisbon treaty, the Commission started negotiating with the Council of Europe to determine the modalities of accession. Before ratifying the Treaty that was reached from the negotiations (draft is dated 2013), the Commission requested an opinion to the ECJ, pursuant to **Art. 218 TFEU**, as to whether the accession was compatible with the Treaties. The Court, then, in its ***Opinion 2/13***, decided that the draft agreement was **incompatible** with the Treaties:

- *Inter alia* because of **institutional problems** (for instance, the one concerning the *Jurisdiction of ECJ and ECtHR* over the EU Charter of Fundamental Rights)
- and because it did not take into account the **principle of mutual trust** between Member States.
  Since October 2020, negotiations have restarted, but nothing has come out from them yet.

3. Substantive Europe

Citizenship

Foundational principles and rulings: evolution of Union Citizenship

We will now focus on **citizenship**.
The Union citizenship, as we now it today, is the result of an evolution that took place over years through Treaties' amendments, normative acts of the Union and the caselaw of the European Court of Justice.

We can distinguish four stages in the evolution of Union Citizenship:

- **I Market citizenship**: Embryonic EU citizenship, when only "economically active" and "mobile" MS nationals enjoy rights (but with an extensive interpretation of these concepts by the CJEU)
- **II Foundational stage**: Residence Directives, Maastricht Treaty and landmark CJEU rulings expanded and strengthened the Union citizenship status.
- **III Consolidation**: Directive 2004/38 codifies the Court case law and specifies secondary law conditions for free movement
- **IV Retraction phase?**: Recent case law suggest a change in the Court's approach to Union citizenship.

I. Market Citizenship

When the European project started, only **Economic Free Movement** was provided for: people were able to move around the European Economic Community as ***workers***, ***service providers***, and ***self-employed***.
In the Treaty of Rome, indeed, there was a connection between *economic activity* and *movement*, connection that has been interpreted by the ECJ in a very **broad** sense, so as to encompass – for instance – also **service recipients**, i.e., people that were *passively* economic actors (e.g., tourists).
In short, Nationals of Member States could **move** only insofar as they exercised an **economic activity** or as they did it to **receive services**.

- **Art. 45 TFEU**, indeed, provided for the ***Free movement of workers***: people could move in order to *work*, *seek* work, or could anyway work in a Member State and reside in another one (the so-called *frontier workers*).
- Furthermore, **Art. 49 TFEU** addressed the ***Free movement of establishment***, that applies to **companies** and to individuals seeking to work in a **self-employed** capacity in another Member States.
- Finally, in **Art. 56 TFEU** the ***Free movement of services*** was established: it applied to those who moved on a temporary basis to provide a service (e.g., a lecture) or receive it.

The inclusion of workers within the framework of Free Movement was **revolutionary**:

- in part, it was justified by **economic** reasons, in order to create an internal market for work.
- However, a **social** rationale was also present (if not predominant): this can be seen by the huge number of rights workers (but also *migrants* in general) were granted by the very

beginning (including, for instance, **equal treatment**, **welfare** rights and the right to **family reunification**[64]); hence, migrants have never been treated as mere factors of production.

- Moreover, as we have mentioned, the ECJ has, with its convincing **teleological interpretation** of the Treaties, demonstrated to be *pro*-integration and *pro*-individuals: it interpreted these economic free movement provisions in a very broad way, including also **work-seekers**, **tourists** (thus protecting those who wanted to travel between Member States without being *economically active*), and **part-time workers** (thus creating *de facto* a means of social solidarity towards nationals of other Member States).

However, until the 90s, rights in EU law were still **linked** (and conditional) to the **exercise of an economic activity**.
That is why, at the end of the 80s, there was a big **debate** on the **exclusionary effects** of this so-called ***market citizenship*** (since EU law excluded from its rights and benefits people who could not work – e.g., disabled people – or who did not want to move).

II. Foundational Stage and Union Citizenship

In **1990**, the EEC introduced three Directives, in which for the first time the right to **reside in another** Member State was granted to **non-economically active** people, crucially including *students*. Indeed, the EEC enacted the so-called:

1. ***General Residents Directive*** (also referred to as the **playboys** directive[65]),
2. the ***Pensioners Directive***,
3. and the ***Students Directive***.

However, the right to reside was *conditional* upon fulfilment of two conditions:

- Possessing **sufficient resources** → in order for the State not to pay **income support** (e.g., *Reddito di Cittadinanza*) to EU migrants, who therefore cannot apply for such core benefits.
- Having a **comprehensive health insurance** → Indeed, the main expenditure in any European budget is related to health provisions: now, the condition of having a comprehensive health insurance shelters the State of destination from having to pay for the migrant's healthcare. It is also aimed at ensuring people do not move between different States just to look for the best healthcare system, without having contributed to it.

The reason behind these two conditionalities is simple: Member States did not want EU migrants to become a **burden for the State** → these conditions were imposed so that citizens would not be a burden on the finances of the host State: indeed, although the Directive granted free movement also to *non-economically active* citizens, the right was very **limited**, since there was no **cross-border solidarity**. *De facto*, one could only move if he/she was wealthy enough to afford his/her health insurance.

In **1992**, with the **Treaty of Maastricht**[66], the EEC drastically changed towards a broader project: the **European Union**.

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[64] I.e., when a person moves, they have a right to bring their family with them.
[65] This funny denomination comes from the fact that the first conditionality (*sufficient resources*) was actually giving residence rights only to people who could afford it.
[66] The most crucial articles of the Treaty of Maastricht, in this respect, are (besides Art. 20 TFEU on citizenship):

- Art. **18 TFEU** (concerning *equal treatment* as nationals),
- **Art. 21 TFEU** (concerning the *right to move and reside freely*),
- Art. **22 TFEU** (concerning the *right to vote*)
- and Art. **23 TFEU** (concerning the right to *consular protection*).

As part of this rethinking, they introduced the new concept of ***European Citizenship***. This should have been a tool to make the citizens more invested in the European project, since the EEC had been only a capitalistic project, business-oriented but **not people-oriented**.
With the European Citizenship, the drafters hoped to create a sort of **feeling of belonging**.

In Maastricht (and now it has not changed significantly), the crucial **Art. 20 TFEU** stated:
*1. **Citizenship** of the Union is **hereby established*** [indeed, citizenship is a positive right, and as such it has to be established and not only recognised]*. **Every person** holding the nationality of a Member State shall be a **citizen of the Union**. Citizenship of the Union shall be **additional** to and not replace national citizenship.*

The first paragraph of the article establishes a sort of **dual citizenship** (or better, **additional** citizenship), as it must **not replace national citizenship**. This is very important:

- firstly, because Europe is not a Federal State (hence, the drafters wanted to make sure that EU citizenship would not take away the national citizenship);
- secondly, because it was something **unique**: usually, citizenship is connected to the idea of *Nation-State*. Instead, EU citizenship goes *beyond* the concept of Nation-State, in order to create a sort of **supranational citizenship**.
  Art. 20 TFEU continues with the rights granted to European Citizens, between which the first two are far more important and innovative:

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

*(a) the right to **move and reside** freely within the territory of the Member States* [but be careful! Look at paragraph 3 of the article]*;*
*(b) the right to **vote** and to **stand as candidates** in elections to the **European Parliament** and in **municipal** elections in their Member State of residence, under the **same conditions as nationals** of that State* [imagine how revolutionary it was: by means of an international treaty, this is determining active and passive franchise in the EU; however, the right to vote for *national parliament* is still missing[67]]*;*
(c) the right to enjoy […] *the **protection of the diplomatic and consular authorities** of any Member State on the same conditions as the nationals of that State;*
*(d) the right to **petition** the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.*

*3. These rights shall be **exercised in accordance with the conditions and limits** defined by the Treaties and by* [secondary legislation].

This very last paragraph becomes the reason why we have to understand what Union citizenship is really about. Both political scientists and law scholars have really struggled in this respect: the very concept of citizenship is really centred on the **concept of Nation-State** (for instance, on the *sense of belonging* to a community), and it is difficult to depart from that in order to conceive something as new and revolutionary as EU citizenship, which has in practice created a **multi-level sense of belonging**.

[67] Indeed, what the State perceives as the core of its democratic process (i.e., the national elections) is not included within the **electoral rights** of European Citizens.

So, how can we conceptualise a ***supranational*** citizenship, which is by definition not linked to a territory? What's more: the Treaty provisions are not very clear. Scholars have indeed questioned whether Art. 20 TFEU was purely *cosmetic* or rather *innovative*.

Now, two things of Art. 20 must be noticed in this respect:

- First of all, the use of the word ***citizenship*** is not random: this would have pushed the ECJ to give effect to the concept.
- Moreover, does Art. 20 TFEU meet the conditions to have **direct effect** (conferring rights that are clear, precise, and unconditional)?

Martinez Sala

What happens, then? Of course, cases before the ECJ appeared really fast: in 1996, the Court referred to the issues of citizenship in an *obiter dictum*[68].
The first preliminary references concerning citizenship were asked for in **1998**. These cases really formed the foundations of citizenship in the EU.

In ***Martinez Sala***, Ms. Sala was a Spanish national living in Germany under national law, and more precisely under a **bilateral treaty** between Germany and Spain, that let her stay in the Country. She had various residence permits that eventually had expired (so, she also had applied for an extension). She had a baby in 1993 and applied for **child-raising benefit**, but she was turned down on the grounds that, despite being *lawfully* (pursuant to the bilateral treaty) in Germany, she did not have a valid **residence permit**.
The national Court, however, asked the ECJ for a preliminary reference concerning:

1. Whether she was a ***worker*** for purposes of EU law: indeed, the Treaty specified that you could maintain your status of worker for a certain number of years after quitting your job. In case of positive answer, she would have been **entitled to *equal treatment*** in relation to **welfare provisions**. Indeed, it was a case of **indirect discrimination on grounds of *nationality***, since German nationals (obviously) did not need a residence permit to get the allowance (i.e. the benefit). However, the Court did not seem very interested in this part.
2. Whether she had the right to equal treatment anyway, for being a ***European citizen*** (pursuant to **Art. 18 TFEU**, that prohibits discrimination on grounds of Nationality within the scope of the Treaty). So, the question was whether the introduction of **Union citizenship** meant that Ms. Sala *fell within the scope of the Treaty* (as a so-called **personal scope**) and therefore could claim her right in relation to the benefit.

Art. **18 TFEU** stated:
*1.Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality shall be prohibited**.*
*2.The **European Parliament** and the **Council**, acting in accordance with the **ordinary legislative procedure**, may adopt rules designed to prohibit such discrimination.*

The Court answered *positively*: Ms. Sala was, indeed, a **union citizen** and was **lawfully present** in the host Member State, therefore she could **claim** the right to **Equal Treatment**.
This is a really big case, and in fact it was criticised by the incumbent Irish judge to the ECJ: she argued Member States had never really cared about who there was in their territory; however, once

[68] An *obiter dictum* is a paragraph of the decision in which the Court states it is not establishing law, but instead it is something said *passing* that **does not** have the power of precedent.

the EU imposed the Member States to provide benefits on equal terms with their own nationals, they might have started caring about it, since more people meant more money to spend. And Member States are not so keen on spending money on other States' citizens.
In common terms: letting people come and visit your private (huge!) gardens is something really different from having to invite them all to dinner! So, the Irish judge feared that, whereas before Sala Member States had no interest in controlling who was in their territory, *Martinez Sala* (that imposed **equal treatment** in relation to **welfare provisions**) was actually encouraging Member States to **start checking**.

Grzelczyk

The second crucial case was ***Grzelczyk***, concerning a French citizen in Belgium, where he studied Physical Education. To afford it, he had always worked during the first years of university. However, when he came to his last year, he was told by his own university not to work anymore: the University feared he would not have been able to do his dissertation excellently. So, he applied for the so-called **Minimex**, a Belgian economic measure (namely, a minimum income support) that helped students to get by after they finished University and before they found occupation. However, after he was granted the benefit, the Belgian authorities changed their mind, **excluded** him from the allowance and ordered him to give the money he had received back.

Arguments

- Mr. Grzelczyk then claimed that was **discrimination on grounds of nationality**, his case falling within the scope of EU. His claim was that if Ms. Sala was able to claim equal treatment in relation to her benefit, he also was a **European citizen** and then he should have been able to claim his Minimex.
- Belgium, instead, argued that citizenship is **subject to limits and conditions**, that were contained in those **Residence directives** from 1990 that we have mentioned before: those conditions were having *sufficient resources* and *comprehensive health insurance* so as not to become an unreasonable burden on the host State. The **Students' Directive** added, as an additional condition, the **exclusion from scholarships** and grants offered by the host State: Belgium argued that the limitations mentioned in **Art. 21 TFEU** actually referred to the ones' contained in the Directives, and therefore did not have a right to the Minimex, since it would have been a grant and would have meant that Grzelczyk had not sufficient resources.

Actually, both the arguments were extremely convincing: from the one hand, *Martinez Sala* made clear that **every union citizen, regardless of its conditions, should have been treated equally as nationals of the host Country**; from the other hand, however, it is true that the *literal* reading of the Treaty and of the Directives actually excluded Grzelczyk from the benefit at issue.

The decision

However, the Court held that:
*"31. **Union citizenship** is destined to be the **fundamental status of nationals** of the Member States enabling those who find themselves in the same situation to enjoy the **same treatment in law irrespective of their nationality**, subject to such **exceptions as are expressly provided** for."*

The acknowledgement of the ***fundamental status*** of Union citizenship would have become crucial for the following developments of the Court.

Then, the Court tried to balance this resonant statement of principles with the actual reality and made the *conditions* and the *limitations* explicit.

1. First, the citizen concerned should be **legally resident** in the host State.
2. Moreover, the Court admitted the fact that the Residence directive did provide for limitation to Free movement of Union citizens. However, the Directive's aim was for the Union citizen not to become an ***unreasonable* burden** for the State: hence, a ***reasonable* burden** is, in fact, admitted. In this way, the Court recognised that a "**certain degree of solidarity**" between nationals of one Member State and another was due and extended the applicability of certain national welfare provisions also to Union citizens.
3. Nonetheless, the Court also held that in case the Union citizen actually became an *unreasonable* burden, the host State could **terminate** his/her stay.

Furthermore, in relation to the Belgium's objection based on the Students' Directive, the Court replied that Minimex was not a scholarship, neither a grant: hence, **Mr. Grzelczyk was actually entitled to get it**.

This created a rather peculiar equilibrium:

- on the one hand, if you are **lawfully resident** in a Member State, you can access benefits;
- on the other hand, **if you access benefits**, you might become an **unreasonable burden** and **lose your residence** (and your benefits).

This brought many Union citizens to refrain from applying to other Member States' welfare measures and create **tension** on how to reconcile this two elements: the highly rhetorical statement on Citizenship and the reality of **national solidaristic community**[69], since benefits are paid using the resources of the Member States.

Baumbast

The last important case is ***Baumbast***. A German citizen living in the UK got his first residence status as a *worker*, but when his company failed, he started working for a German company in China and Lesotho. Hence, **could not be protected by Art. 45 TEU, since he was not working within the EU anymore**. In spite of this, he and his family kept residing in the UK.

- However, in January 1996, the British authorities **refused to renew** their permit on the ground he was no longer a *worker in* the UK.
- Moreover, his health insurance was not comprehensive, since it insured for health expenditures *in Germany* but not in the UK, and so **emergency treatment expenses** would have been covered necessarily by the UK.

- Mr. Baumbast, instead, claimed he was **protected** by **Art. 21 TFEU**, that may have let him invoke a right to reside in the UK on the basis of being a Union citizen: he claimed that Art. 21 TFEU had **direct effect**, and so, even though he missed the *comprehensive* health insurance, his right to reside in the UK directly derived from the Treaty.

[69] Also, remember that the EU has not competence over *taxation*, and so it has not redistributive power. No taxation, indeed, means no redistribution.

Art. **21 TFEU** stated:
*1.Every citizen of the Union shall have **the right to move and reside freely within the territory of the Member States**, subject to the **limitations** and **conditions** laid down in the **Treaties** and by the measures adopted to give them effect* [i.e. secondary legislation].
*2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the **European Parliament** and the **Council**, acting in accordance with the **ordinary legislative procedure**, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.*
*3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the **Council**, acting in accordance with a **special legislative procedure**, may adopt measures concerning **social security or social protection**. The Council shall act unanimously after consulting the European Parliament.*

In *Martinez Sala* and *Grzelczyk* the Court had not said anything about whether Art. 21 could have direct effect or not. Instead, it did it in *Baumbast*.

- Not surprisingly, the Court found that **Art. 21 TFEU** was, in fact, **directly effective**: it is granting a right in a clear, precise, and unconditional way. Hence, the Mr. Baumbast's right to reside did actually come directly **from the Treaty**: it no longer comes only from the Directive.
- Now, Art. 21 (as we have said) provided for the right of free movement and residence but subjected to the **limitations and conditions** from secondary legislation (and the Court admitted it). However, **limitations to rights conferred** by the Treaties must be interpreted accordingly to the ***Principle of Proportionality***.

The decision
This means, in that case, that if the UK limited the right to reside, it had to respect a proportionality balance in imposing that limitation. Of course, in the case at issue, denying the right to stay to a person who had never applied for any welfare provision, who was considerably wealthy, who had children in their education and a wife, who had health insurance except for it not being comprehensive, was not proportionate.
Hence**, the Court upheld his right to reside**.

It is important to stress how crucial it was for the Court to recognise that Art. 21 had direct effect. Before, whether one could be granted the right to resided depended on a mere correspondence with the conditions set in the Directives (either you had comprehensive health insurance and sufficient resources, or not); once a **right coming from the Treaty** is recognised, there's space for **EU Constitutional Principles** (among which there's also proportionality), that have to be applied by the Member States.
After *Baumbast*, even if one did not fulfil the conditions set out in the Directives, he/she might have had the right to reside in case the denial was **disproportionate**. Basically, this meant imposing on the National Authority a **duty to look at the specific case** and consider the individual at stake (for instance, if the individual has *family ties* in the host State, then kicking him/her out is incredibly punitive): the more you have stayed in a Country without accessing to welfare measure, the more it is difficult to kick you out.

In short, the Court recognised **the Treaty granted a right to stay, so that any limitation to that had to be interpreted in a way that respected the Constitutional principles of the EU**, including:

- the **principle of proportionality**

- and also **Fundamental Rights**.

Hence, citizenship acquired a real protection.

To sum up, three rulings were crucial in the so-called **foundational stage** of Union citizenship, always keeping in mind that the *tension* inherent to Union citizenship concerns how to reconcile **supranational citizenship** with the **national sense of belonging**:

- In ***Martinez Sala***, the Court held that **lawfully resident** union citizens have a **right to Equal Treatment** to nationals of the host State
- In ***Grzelczyk***, Union Citizenship was recognised (with really high rhetoric) as being a **fundamental status** of Union citizens, so as to establish the utmost importance of the principle of ***equal treatment*** in every case the Union citizen is a **reasonable burden** for the host state (otherwise, him/her **residence can be terminated**).
  This created an undesired effect as a *catch 22*: if you are lawfully resident then you can access benefits, but if you access benefits, you might become an unreasonable burden and lose your residence (and, of course, your benefits).
- Finally, in ***Baumbast***, the **direct effect** of Art. 21 TFEU was recognised: it could be relied upon by migrant Union citizens, and its limitations are subject to the principle of **proportionality**.

Overall:

- Union citizenship is still a very difficult concept to define. In particular, EU institutions (as well as the ECJ) struggle with this tension between the **sense of belonging** (that is highly rooted at national level) and the idea of a **supranational** citizenship.
- Furthermore, this system might have the effect of threatening the domestic **welfare state**, since it is completely funded at national level and the EU does not have the tax extraction power.
- Indeed, it is more and more *perceived* (despite not being completely true) that Union citizenship **might threaten the viability of national welfare states**: for instance, one of the reasons the UK held the *Brexit* referendum was that the Brits thought that European "migrants" came in the UK just to use (or rather, abuse) their welfare system (as part of the so-called phenomenon of ***welfare tourism***). This becomes a proxy to manifest a certain anxiety about losing control over who belongs to the community and who is out.

III. The Consolidation Phase: Directive 2004/38[70]

What happened after that? Starting in the early 2000s, and culminating in **2004**, the EU enacted the ***Directive 2004/38***, seeking to tidy up the matter and the instruments regulating it (indeed, at that time, there were three different directives that were all **repealed** with the new instrument).

The directive also sought to codify the case-law as it was when the directive was written.
In particular:

- the Directive details **who is entitled** to reside in a Member State other than that of nationality,
- it provides for the **right of equal treatment** and the one of **family reunification**[71],

[70] Here you can check the Directive: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038&qid=1730045535124

[71] I.e., the principle whereby the family members derive a right from the fact that their relative Union citizen has moved to another Member State.

- it details who can be **excluded from the territory** of the host State (namely, when one can be *denied entry* and when the State can expel them).

Be aware that the directive <u>only</u> applies in the relationship between the **citizen and the *host* State**, thus not regulating the one between the citizen and *his own* State[72].
It is also worth mentioning that the **Brexit Withdrawal** Agreement **maintained the rights** conferred by the Directive for EU and UK citizens who have moved in UK and in EU *before the end of transition* (i.e., December 31st, 2020).

<u>The Chen case</u>
Article 3 specified who is **protected** by the Directive (i.e. the **personal scope**), that is, **Union Citizens and Family members**.
As we have mentioned in relation to Art. 20 TFEU, all citizens of the Member States are Union citizens: hence, union citizenship is determined by **reference to national law** → The Court has clarified that it is <u>only</u> for the Member States to determine who are their own citizens.

For instance, in the case of ***<u>Chen</u>***, a pregnant Chinese woman was well advised to get her citizenship. She went to give birth (from China) in Northern Ireland, where she applied for a *residence permit* as the **carer of a Union citizen**. In fact, according to the rules applicable at that time, anyone who was born in the *isle* of Ireland (that is, both in the Republic of Ireland and in Northern Ireland) was entitled to **Irish citizenship**, without any other requirement.
When Ms. Chen applied for residence permit, the UK argued that, actually, the Chen family did <u>not</u> have any link to Ireland, and therefore it would <u>not</u> recognise the Chen family the rights pertaining to union citizenship.
However, the ECJ, restating previous rulings, held that it was <u>not</u> for the UK to challenge the rules whereby *Ireland* granted citizenship: giving that her child was, according to Irish law, a Union Citizen, Ms. Chen was then entitled to the rights deriving from that status.

However, whereas Union citizenship does <u>not</u> interfere with the decision to *grant* citizenship, it might affect the possibility of the Member State to **withdraw citizenship**: indeed, when a State does it, it also takes away Union citizenship from the person at stake, as we will see later.
This principle has led, in recent years, to the phenomenon of certain Member States **selling their citizenship** (with the so-called ***citizenship investors schemes***), like Malta and Cyprus: indeed, it is becoming more and more attractive for non-European citizens to *buy* their European citizenship so as to get all the rights deriving from it (including the one of *Free movement*), also for illegal purposes (i.e., money-laundering).

Art. 3 also **gives what is the material scope** of the application of the Directive.
In this respect, it states the Directive applies to the extent to which the migrant is relying on the Directive against a Member State *other* than the one of nationality. This is because the primary aim of the provision is to **codify the *right to reside***, that is (and has always been) *inherent* in national citizenships.
More precisely, the Article provides:
*This Directive shall apply to all **Union citizens who move to or reside in a Member State other** than that of which they are a national, and to their **family members** as defined in point 2 of Article 2 who accompany or join them.*

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[72] However, it might be applied by **analogy** also to the latter case (as we shall see later).

Moreover, the Court has also held that the **reasons** for moving between two Member States are **immaterial** to the enjoyment of the rights conferred by the Treaty and the directive.
This is crucial: indeed, in certain cases, citizens move from one Member State to the other just to benefit from the ***family reunification regime***, as it is more extensive *in the EU law* than in domestic law of Member States (most notably, the UK and Denmark).

CIRCULAR MIGRATION: SURINDER SINGH DOCTRINE
The Court has also found that some of the rights provided for in the Directive apply in cases of so-called ***circular migration***, that arises when a person goes to another Member State and comes back after having exercised free movement rights.

Except for this particular situation, the Directive does not apply in **purely internal situations**: i.e., when there is no *cross-border* element. Indeed, the rights connected to Free movement only apply, by their nature, when there is a border being crossed (either physically, as for individuals, or virtually, as for services).
Indeed, **EU citizenship is a transnational citizenship** and Union citizenship provisions do not apply in purely internal situations (at least in theory, as we will see).

The case of circular migrant is particularly interesting. The principle was stated in the very old ruling ***Surinder Singh***, where the issue was related to a British-Indian couple that had moved to Germany and then was willing to come back later to the UK.
The wife was British, and so had no problem. However, the husband was Indian, and the UK refused to give him a *residence permit* (for the purpose of family reunification), on the ground that the Treaty did not apply to its own nationals (the wife, in this case) coming back to the UK. In other terms, according to the UK, the Treaty only protected *foreigners*, and not its own nationals.

The Court found that the Treaty **applied** to the British citizens when *coming back* to the UK, and thus to **circular migrants**.
Because of this, Ms. Singh had the **same rights** as any other EU citizens going to the UK (including the right to family reunification). Otherwise, the citizen concerned would be **deterred** to go to another Member State if, coming back, he/she had not the same rights as those enjoyed by European peers or the same rights he/she could enjoy in another MS as a Union citizen.

The Court reasoned as follows, in a **teleological** and **functionalist** reasoning (that, as we now, is very common for the Court when it wants to expand the rights of Union citizens):
*19. A national of a Member State might be **deterred**[73] **from leaving** his country of origin […] if, on returning to the Member State of which he is a national [...] the conditions of his entry and residence were **not at least equivalent** to those which he would enjoy under the Treaty or secondary law in the territory of **another Member State**.*
*20. He would in particular be deterred from so doing if his **spouse and children were not also permitted to enter and reside** in the territory of his Member State of origin under **conditions at least equivalent** to those granted them by Community law in the territory of **another Member State**.*

[73] This reasoning has also its **flaws**: indeed, it sees individuals as perfectly **rational** actors who make decisions based on an extensive knowledge on the law and consequences. However, it is **correct** as it states a corollary of Free Movement: everyone should be able to come back to their own Member State without suffering from having moved.

This way, Mr. Singh could **derive** from his wife the **right to reside**, and the UK would not be able to impose stricter conditions.

The Right to Reside in Directive 2004/38 and the Retraction Phase (the Dano case)

Moving on with the Directive 2004/38, we shall now analyse the **rights** contained in it. To be precise, however, the Directive does <u>not</u> in itself confer rights: it simply **details** the rights conferred to Union citizens in the Treaties.

- First of all, obviously, it is inherent in the right to Free movement that a right to **entry and exit** an EU Country must be granted, **without need of *visas***. For the first time in our history, we saw this right severely limited during the pandemic, when the borders were shut. Nonetheless, as we shall see, these restrictions are actually justified on grounds of *public health*.
- Moreover, the **family members** of the Union citizen also have a **right to entry and exit**, which is **derived** from the exercise of the main right holder. If the family members are third-country nationals (which happens in all relevant cases), they might need a **visa** (if that is provided by national law); crucially, however, they have a **right** to obtain it[74] (except for reasons of public purposes and public security).

The Directive, then, regulates the **right to reside** and the **right to equal treatment**.
In doing so, the Directive **codifies** the case-law of the ECJ and adopts an ***incremental approach***, which means: the more you stay in a Country, the more *integrated* you become, the *more extensive* right may be enjoyed (at least in theory).
This incremental approach can be seen in the fact that the Directive provides **three types** of residence in the EU:

- The ***short-term*** residence, up to **three months**, regulated in **Art. 6**.
  This is what common EU citizens experience when they travel around the EU, for instance as tourists or in order to benefit from a certain service (e.g., fertility treatments in Spain).
  Crucially, it has <u>no</u> conditions attached: for the first three months, the EU citizen has nothing to do but having a **valid ID/Passport** for entry.
  A *short-term* residence can be **terminated** <u>only if</u> the EU citizen becomes an ***unreasonable burden*** for the host state; nonetheless, expulsion can <u>never</u> be an *automatic* consequence of recurring to social assistance in the host State (pursuant to the **principle of proportionality**: little benefits from the public sector cannot automatically lead to expulsion, as they do not imply being an unreasonable burden).
  It is worth mentioning that also **job seekers** fall within the concept of *short-term* residence for the first three month of stay: after that, they are fully protected <u>only</u> insofar as they are still looking for a job and have a genuine chance to find one.

  The reason why the right to *short-term* residence is **<u>not</u> subjected to conditions** is because the host State, in relation to this kind of stay, has **very limited duties**: crucially, the host State is **<u>not</u>** obliged to **confer equal treatment** *in relation to **social assistance*** (thus, the host welfare State is sheltered against undue claims). This is because, in only three months, the citizen has <u>not</u> established *any link* with the host community yet.

- The ***medium-term*** residence, from three months up to **five years**, as provided in **Art. 7**.

[74] As in the case of Mr. Singh

This right basically reproduces what were the **conditions** already present in the Treaty and in the *Residency Directive*: indeed, if one wants to stay more than three months, his/her residency rights are conditioned upon meeting certain criteria. Otherwise, the individual at stake **falls altogether outside the scope** of the protection conferred by the Directive.
In this respect, the right to medium-term resident is conditional:

- either upon being ***economically active***[75] (i.e., as a worker[76] or a self-employed),
- or upon being ***economically independent*** (i.e., a pensioner or a wealthy person),
- or also upon being a ***student***.

In the latter two cases, as it was before the Directive, the Union citizen needs to have **sufficient resources** and **comprehensive health insurance** (and this applies also to students).

- In relation to *pensioners*, the Comprehensive Health Insurance is provided by the **member State of last affiliation**, through another instrument of EU law (i.e., ***social security coordination***, whereby the State of origin pays for treatments in the host State[77]).
- In the case of *students*, the double requirement of sufficient resources and comprehensive health insurance is also present, even though they are asked **lighter evidence** of resources (basically, a declaration to the public authority is sufficient, and the requirement of comprehensive health insurance is not verified by the host State, nor it is actually known by the student themselves). If these conditions are met, the Union citizen has the right to **reside legally** in the host State.

It is useful and interesting to deepen the criterium of ***economical independence***, that *de facto* implies both having sufficient resources and a comprehensive health insurance. This is to balance the right of free movement with the (real or rather perceived) need to **protect *national* welfare State** (so as not to become a *burden* on the host welfare State).
However, in order to enhance the right to free movement as much as possible, the Court has held that the resources may be **provided by someone else** (this might be the mother, as in *Chen*, since of course a baby cannot have sufficient resources; or the partner, or also a friend).
Moreover, in ***Bajratari*** the Court specified that also resources acquired through **irregular work** qualify as sufficient resources.

In the case-law, many references to the perceived ***welfare tourism*** can be noticed, even though there is no evidence of its actual existence. Somehow, this narrative manages to permeate also in the caselaw of the ECJ: from 2010 onwards, the Court and the narrative have started distinguishing *good* and *bad* EU citizens. This was particularly evident in ***Dano***, in which the ECJ **changed the interpretation** of EU citizenship provisions. Ms. Dano was a Romanian citizen living in Germany with her sister. She had a child and applied for a *job-*

[75] When one is economically active, in the context of EU Free Movement law no other conditions are required: the individual will automatically benefit from **full equal treatment** in relation to almost all matters (including welfare provisions).
[76] Also, part-time workers are included for the purpose of Art. 7
[77] Pursuant, to **Reg. 883/2004**. Granting pensioners comprehensive health insurance through social security coordination is of utmost importance because, basically, "the pension follows the pensioner". Otherwise, pensioners would not be able to afford comprehensive health insurance with their own resources, because (i) elder people are more likely to develop severe diseases, (ii) certain pathologies are not covered by commercial insurances, and (iii) insurance premiums get higher with the age of the insured person.

seeker support benefit in Germany but the German authority denied the benefit claiming that foreign nationals who come to Germany only in order to obtain social assistance or to seek an employment do not have a right to the same social benefits as Germans, since they do not have to become an unreasonable burden on the national social assistance system. The national court referred to the ECJ on:

- whether she was *lawfully resident* pursuant to the Directive and
- *if not*, whether she was entitled to the right to equal treatment anyway, pursuant to Art. 21 TFEU and Art. 18 TFEU (i.e., the general right to equal treatment).

Now, if the Court had restated the ***Baumbast*** **caselaw**, it would have looked if she met the conditions set in the Directive; if not, it would have anyway looked at her personal circumstances and applied the principle of proportionality. In practice, this would have not changed much, since denial of the benefit did not look disproportionate even applying the earlier caselaw.

However, the Court did something new: it imposed to **check** whether Ms Dano had sufficient resources. If not, then she would not have been covered by Art. 7 of the directive (and thus, neither by Art. 24 Directive that ensures equal treatment).
Unlike in *Baumbast*, the Court held that if someone is not covered by Art. 7 Directive, then he/she falls *outside the scope of EU law*: **Art. 18 TFEU** (i.e., *equal treatment*) **does not apply at all** (thus, regardless of the principle of proportionality!), because it is *lex generalis* in comparison to Art. 24 Directive.
The case is extremely important as well as problematic:

- the Court stated that if **blank letter conditions** were not satisfied, then Citizens fell **outside the scope** of the Directive *and* possibly out of the treaty.
- Moreover, the ruling was full of preconceptual arguments, and is one of the first cases in which the ECJ itself made references to *welfare tourism*.
- From a legal viewpoint, it is crucial because in *Baumbast* the Court had given a "space" between the blank letter and the Treaty right in which one could demonstrate to have the right to reside, because otherwise it would be **disproportionate**. Here, instead, the Court is simply stating *either* you meet the blank letter conditions of the Directive, *or* you are altogether outside the scope of EU law.
- Moreover, it is even uncertain whether the Court has overruled *Baumbast* (and *de facto* has gone back to a pre-citizenship era) or not.

This case is also important in relation to **Brexit citizens**: anyone who was resident in the UK or in the EU either demonstrate to meet the conditions (which is highly expensive and thus difficult), or they fall *outside* the Withdrawal Agreement, and thus are treated as third country nationals, without any EU right to equal treatment.

Furthermore, the *Dano* case contributed to increase what we have define as an ***economically independent trap***. In theory, the Directive in Art. 7 provides for the *right to reside*, and, in Art. 24, provides for the *right to equal treatment*. Those who reside pursuant to *economic independence* (i.e., economically inactive people who have sufficient resources and comprehensive health insurance) are not (in theory) excluded from the right to equal treatment. However, in practice things go a bit different: since they have to satisfy the conditions throughout their stay, they **cannot claim equal treatment** in relation to **welfare**

provisions and **core benefits** (which are *means-tested*), since that would mean they are not economically independent, and their right to reside would then be terminated.
As way of example, suppose Italy requires proof of having €700/month (*sufficient resources* proof) to receive the right to reside; furthermore, Italy provides a benefit for unemployed people who live with less than – say – €600/month (*Reddito di Cittadinanza*); in theory, a legal (medium-term) resident could claim the *Reddito di Cittadinanza*, but in showing to the authority that he/she has less than €600/month, he/she is actually demonstrating not to satisfy the minimum requirement for the right to reside, and his/her residence would be terminated.
This becomes clear in *Dano*: whereas, before, not having resources did not automatically imply denial of the right to reside (since a *proportionality* test would have been applied), with this ruling, not satisfying the requirements means that you do not fall within the scope of the Directive, and thus you are not covered by EU law. Hence, it is almost **impossible** to get welfare benefits from the host State if you are **economically inactive**.

To conclude with the *medium-term* residence, it must be noted that **Art. 24(2)** imposes **two limitations** to the right of equal treatment:
- ***Work seekers*** are not eligible for **welfare benefits**. However, when moving to another Member State, they "bring with them" their **national income support** for the first **three months** of stay.
- ***Students*** are covered with the principle of equal treatment in many fields (e.g., in relation to university fees) except for **maintenance grants**. Because of this, the Court has developed caselaw whereby students are entitled to bring their **national maintenance aid** with them.

Art. 24 Directive 38/2004:
*1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy **equal treatment with the nationals of that Member State within the scope of the Treaty**. The benefit of this right shall be extended to **family members who are not nationals of a Member State and who have the right of residence or permanent residence**.*
*2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during **the first three months of residence*** [as in the case of work seekers] *or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, **to grant maintenance aid for studies**, including vocational training, consisting in **student grants or student loans** to persons other than workers, self-employed persons, persons who retain such status and members of their families.*

- The ***permanent*** residence, that must be granted **after five years of *lawful* residence**, as stated in **Art. 16**.
  This means that the Union citizen no longer has to satisfy *any* condition.

  - In ***Ziolkowski*** (a case concerning whether residence in Poland before its accession was to be counted or not) the Court clarified that it is only residence **pursuant to Art. 7 Directive** that counts for this purpose, thus excluding residence pursuant to *national* law. Hence, in order to be considered permanent resident, one has to demonstrate he/she has been either *economically active* or *economically independent* (at least) for five years.

Conversely, if one has been granted a residence permit under national law, then he/she has no rights under the Directive.
- Furthermore, pursuant to the Directive, once the status of *permanent resident* is gained, the right to reside is **unconditional**: the Union citizen enjoys the **full right to equal treatment**, without the need to fulfil any conditions, as a fully **assimilated** person in the host society (another consequence of the *incremental approach*).
- Since permanent residence is granted because of the link with the host society, the status **can be lost** through **absences** of **two consecutive years**. Because this condition would be particularly problematic in the *Brexit* context[78], the Withdrawal Agreement provides for a more generous treatment: permanent residence is lost (only) after **five years** of absence.

Going on: the right to permanent residence *also* applies to **protected family members**: they, in fact, are in the same situation as a Union citizen but for the fact that their rights *derive* from the permanent resident's one.

Finally, **economically active** citizens might acquire permanent residence **earlier** than five years in certain cases (for instance, if they reach pensionable age before five years).

FAMILY MEMBERS

We have just mentioned **family members**: the Directive distinguishes between ***protected*** (listed in **art. 2.2**) and *other* family members. As for protected family members, regardless of whether they are Union Citizens or Third Country Nationals, they are:
- The ***Spouse***.
  Be aware that in ***Coman***[79] the Court found (with a **purposive approach**) that the term *spouse* is **gender neutral**: hence, a married partner of the same sex is considered as a "spouse" for the purpose of the Directive even if the host Member State does not recognise same sex marriage.
- The ***Registered Partner***.
  However, he/she is recognised as a family member only if the Host Member State **recognizes** him/her (unlike what happens with the spouse). Ironically, this provision is a straightforward discrimination against people in a same-sex relationship: in fact, in some Member States same-sex partners cannot marry, but only "register" (as a balancing exercise between civil and human rights and – of course, always present – cultural, religious, and historical ideas about relationships). Now, this provision implies that – for instance – a homosexual couple "registered" in Italy would not be able to move to Poland, if the partner was a **third country national.**
- The ***Descendants*** (i.e., children) are protected if they are **under 21** or **dependant**.
  The latter condition is considered as a matter of **fact** (and not of law): it is for the national court to decide whether dependence subsists or not. Also, children are protected **regardless**

[78] Indeed, suppose we are an Italian citizen. We go and live In France for 10 years, and we thus acquire the status of permanent residents. Then, we come back to Italy for 4 years: when we go again to France, the clock simply starts again. This is not possible in the UK, due to *Brexit*: once you lose the status of permanent resident, you have lost it forever.

[79] Mr. Coman was a Romanian national married to a third country national of his same sex. They lived in Belgium and then Mr. Coman's contract ended. Since he was not economically independent, he went back to Romania: there, he applied for a spousal permit for his husband. However, Romania denied his request since same-sex marriage was not recognized.

of a **biological link**: so, adoptive children (and those only of the partner) are protected as well as genetic children.
- The ***dependant*** relatives ***in ascending lines*** (i.e., parents and grandparents), excluding those of students (who thus do <u>not</u> have the rights to bring their dependant relatives with them).

These protected family members are **treated same** as Union citizens, including the right to entry, reside, to work without a visa and equal treatment. In other terms, the protected family member enjoys the same rights as the main right holder, **regardless of whether he/she is a Union citizen or a third country national**.
However, these rights are <u>not</u> autonomous, but rather **derived** from the right-holder: hence, if the latter leaves, then the family member **loses** the rights (<u>except</u> for the spouse **caring for children** in education, with an exception taken from caselaw).

This might create a problem in some particular cases of separation, and therefore the Directive tried to make up providing for other **exceptions** in **Art. 12** and **Art. 13**:
- A **child** of migrant can retain his/her rights when **in education** (even at university level). Moreover, the other parent can retain his/her rights if their children are still in education.
- It might also happen that a spouse or registered partner **dies**. In such cases, as long as the marriage has lasted at least **one year** (of residence in the host State), the **spouse** or partner can **retain** his/her rights.
- Also, the Directive updates what was the situation before in relation to **divorce** and **domestic violence**.
  Before, there was a *gap*:
  - in case of divorce, the spouse would lose everything. This was incredibly unsatisfying: giving so much power to one party of the relationship (who might cause the partner's loss of his/her rights), the relationship becomes exogenously imbalanced. This need was balanced with the one for disincentivising ***sham*** **marriages** (i.e., those made only to gain residency rights). This way, the divorced partner can **retain** his/her rights if the marriage has lasted at least **three years**, of which **one** in host State.
  - He/she can also retain residency rights (besides when taking care of children) in cases of **domestic violence**. In this last case, the problem is particularly present: indeed, the abusive partner could threaten his/her spouse to make him/her lose residency rights in case of abuse report. But an abusive relationship cannot go this way, and so the Directive added this exception.

    However, the Court limited the application of this provision, in the rather controversial ***<u>NA</u>*** ruling. In 2003, NA, a Pakistani woman, married KA, a German national. They moved to the UK, where he worked, and they had two children of German nationality. On several occasions, unfortunately, NA was victim of domestic abuse by her husband.
    In 2006, when NA decides to eventually report to the police, KA immediately departs from the UK and flees to Germany.
    Then, in 2007, NA starts proceedings for **divorce** in the UK and obtains the custody of the children. She then asps for a **right to reside** in the UK, basing on her *retained rights*.
    Charmingly, the UK authorities refuse her application, despite all the evidence about the abuses, simply because, when she divorced, her husband was <u>no longer</u> in the UK. Therefore, he was <u>no longer</u> exercising his rights (he was already back in

Germany!), and remember, **<u>family members have residence rights as long as the main right-holder exercises them</u>**.
The case gets referred to the ECJ. To our dismay, the ECJ found she should <u>not</u> have been protected, since her husband had *already* left. The Court relied on the idea whereby a family member is protected <u>only</u> **insofar as** the primary right holder **still resides in the host State**, since we are dealing with **derivative rights**. Namely, the Court reasons as follows:

*50. The Union **citizen must reside** in the host Member State, in accordance with Article 7 of Directive 2004/38, **until the date of the commencement** of divorce proceedings, if that third-country national is to be entitled to rely on Article 13(2)(c) of that directive.*

*51 […] a **third-country national**, who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, **<u>cannot</u>** rely on the retention of her right of residence in the host Member State […] **where the commencement of divorce proceedings post-dates** the departure of the Union citizen spouse from that Member State.*

The rationale of including domestic violence in the Directive is quite obvious: to **protect** the abused partner (usually, the woman) from the **danger of being locked** into an abusive relationship, due to the fear of losing his/her right after reporting to the police. However, in this way, the Court added an **impossible condition**: implicitly, the ECJ gave the partner the exact same power of saying "if you denounce me, I simply go away: even if we divorce, you will no longer have residency rights". This practically demands the abused partner to initiate divorce proceedings straight after the report, in order to prevent the partner from fleeing. The Court, in this interpretation, actually reintroduces a condition that the legislature want to avoid. As for NA, **she luckily had children in education: thus, she managed to claim her derivative rights from them**.

Luckily, the Court changed the course in ***<u>X v. Belgian State</u>*** (Case C-930/19) where it ruled that if divorce proceedings are initiated within **a reasonable time <u>after</u>** the main right holder has left, the spouse still retains the right to reside.

As we have said, the Directive also addresses ***other* family members** (Art. 3.2):

- they are those who are **dependants**,
- or are members of the household,
- or require the **personal care** of the Union citizen.
- Moreover, Art. 3(2) also includes **partners in *durable* relationship** (inclusion that applies when same-sex partnerships are not recognised by the host State).

In relation to them, the host Member State has only a **duty** to ***facilitate*** entry and residence, which means (by interpretation of the Court) treating these family members **better than normal immigration rules**, providing clear criteria in legislation and the right to judicial review.
Nonetheless, the host State might always **deny** the right to entry and reside.
Moreover, the Directive does <u>not</u> specify which rights *other* family members are entitled to, and no caselaw on this is available yet.

<u>Formalities</u>

As for the **administrative formalities** required to access the right to entry and reside, all Union citizens can enter a Member State **without formalities** except for a **valid passport or ID**.

The Union citizen, when he/she arrives in another member State, may be asked to **report** his/her presence, or to **register after three months**; however, these formalities are not constituent of the rights: not complying with them simply means an administrative fine, but it does not impact on the rights which derive from the Treaty.
For this reason, any such administrative penalty must be proportionate and equivalent to similar fines imposed on nationals.
Again, this causes problems with regard of the Brexit situation: the withdrawal agreement allows to make *registration* as **constitutive** of the right. This means that Union citizens (or British citizens living in the EU) who do not apply within the allocated time simply lose everything.

Limitations
Finally, what are the **limitations** to the right to reside? Those are listed in:
- the Treaty provisions in relation to economically active citizens,
- and in **Art. 27 and following** of the Directive.

Basically, a Union citizen can be **refused entry** or **deported** only on listed (narrow) grounds: i.e.,
1. *public **policy***,
2. *public **security***,
3. and *public **health***.

It must be pointed out that ***deportation*** is different from not termination of residence for not fulfilling the conditions (which leads to **expulsion** under Art. 15 and does not require the reasons listed in Art. 27). Here, instead, it is the State not liking a particular individual.

When the Member States wants to deny entry or kick someone out, it has to respect the procedural requirements listed in **Art. 30 and 31 Directive**:
- a *decision* (that therefore may be appealed) is needed,
- the State has to *clearly state* the reasons underpinning those decisions,
- and the *right to judicial review* must be respected.

More precisely:
- The **public health** derogation can be invoked only in relation to the diseases listed by the World Health Organisation only for the **first three months** of stay (after that period, either you have already spread the disease in the host State, or you have caught it there).
- As for **public policy** and **public security**, the ECJ has *hermeneutical monopoly* over their meaning. So, the Directive codifies its caselaw and reproduces the pre-existing provisions. Before, the concept of public policy and security was very **narrowly** interpreted, because it could cause denial of one of the most important rights in EU law.

  Art. 28 Directive provides that public policy and security can be invoked only in relation to the **personal conduct** of the individual concerned: in ***Bonsignore***, an Italian resident in Germany accidentally killed his brother; the police accepted it was a genuine accident; nonetheless, the German authorities wanted to deport him on the grounds it would have a *deterrent* effect for migrants.

However, in that occasion, the Court ruled that States __**cannot**__ invoke public policy derogations just to have **general deterrent** effect[80].

Moreover, in order to rely on public policy derogation, the authorities have to demonstrate the **genuine**, **present,** and **sufficiently serious threat** to one of the **fundamental interests** of society: in __***Bouchereau***__, a French citizen convicted for only small drug dealing was to be deported; however, the Court held that the criminal activity was __not__ sufficient enough to represent a sufficiently serious threat, and therefore to justify deportation.
Likewise, in __***Adoui***__ some prostitutes in Belgium argued their deportation was against Art. 28 Directive: the Court agreed, also because the prostitution activity was even not a criminal offence.

- Be aware that the ***Principle of Proportionality*** must be strictly applied in these situations (since free movement in the EU is a fundamental right): the burden is on the State to justify that kicking someone out is both **necessary** and **proportionate**, taking into account **personal circumstances**, and also with **full application of the Charter**.
- Moreover, also in this respect, it has been ruled that **custodial sentence __cannot__** lead to an **automatic deportation** (that, instead, happens with third-country nationals).
- Moreover, States __cannot__ impose a **permanent ban** on re-entry (as ruled in __***Calfa***__): indeed, people can change and, according to the Directive, the **threat** must be **present** and __not__ purely theoretical.
- Finally, once *permanent residence* is granted, (due to the incremental approach) the Union citizen can __only__ be deported on **serious grounds**.
- There's more: **after 10 years** of stay, deportation can be __only__ based on **imperative** grounds of ***public security*** (and not public policy).

To sum up:

- we could say that the issues of European Citizen revolve around the question on how to create a supranational citizenship when everyone is so deeply rooted in the national context.
- As we saw, part of the way Europe started to conceptualize it was through **access to welfare provisions**, in order to determine a sense of belonging.
- In this respect, the caselaw of the Court contributed a lot:
  - in a first, **foundational stage**, the ECJ pushed for a ***significative* meaning of Union citizenship.**
  - Nonetheless, after a consolidation stage, it went back to a rather ***regressive* stage**, with a **blank letter** reading of the Directive: economically inactive citizens need to fulfil conditions of economic independence to be protected by EU law.
    This way, Union citizenship would not give us much in terms of welfare benefits.

The "Substance of the right": Ruiz Zambrano Doctrine

If, on the one hand, the transnational element of citizenship is possibly not as meaningful as we thought it might have been, on the other hand, there is a **parallel development** in caselaw, that can be seen as the real innovative feature of citizenship: i.e., the ***substance of the right* doctrine**.

To understand it better, we should keep in mind that Union citizenship is ***additional*** to national citizenship: for the time being, one is a Union citizen __only__ if he/she is a Member State national.

[80] Conversely, States can deny entry specifically to Mr. Tizio Caio who – say – is linked to organised crime.

Also, in theory, because of its *transnational* dimension, the provisions of Union citizenship do not apply in **purely internal situations** (i.e., when a border has not been crossed): therefore, in theory, national citizenship is left **unaffected** by EU law (as ruled also in *Chen*), and Member States remain **free** to determine their own **immigration law** from third countries (except for some harmonized laws) in situations where there is no intra-EU border-crossing.

Now, what is this parallel development? It is called ***Ruiz Zambrano Doctrine*** out of the first case in which this was elaborated.
In fact, in ***Ruiz Zambrano***, a Colombian family reached Belgium to seek asylum, which was denied. However, Belgium issued a ***non-refoulement* order**[81]: as a result, Mr. Ruiz Zambrano could actually not work (in fact, third country nationals need a resident permit and a work permit in order to do it).

- Because Belgium had *ius soli*, his children (who were born in Belgium) were of Belgian nationality.
  Given that, he argued that, if he could not work, he would be forced to go away: since they had no link (or asylum claims) to any other State, they would be forced to go out of the EU. In that case, they would have to **bring their children** with them: hence, the children would be **deprived of their Union citizenship rights**, outside the EU territory.
- Belgium argued that, actually, Union citizenship was not relevant in that case, for it was a **purely *internal* situation**: it was Belgian children, against the Belgium State. This because of the very *nature* of Union citizenship, which is ***additional*** and does not replace national citizenship. Unlike the other cases we have seen (where Free Movement was involved), in *Ruiz Zambrano* we find a claim based on **Article 20** (that *establishes* Union citizenship).

The Court held:
*Article 20 **precludes** a Member State from **refusing a third country national** upon whom his minor **children**, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, **in so far as such decisions deprive** those children of the **genuine enjoyment of the substance of the rights** attaching to the status of European Union citizen.*

In other terms, the Court grants that it should, in theory, be **a matter for the Member State**, since no border was crossed → however, the Member State has an **outer limit** to its discretion, when the act of the State would **deprive the right of its substance** (i.e., it empties the right of its content).

Therefore, in the case at issue, if the children were forced to go away, then their rights would be limited, because they would not be able to benefit from Union citizenship. Of course, this does not entirely deprive the Member States of its discretion: the principle simply implies that, when the State deprives the citizen of the *substance* of their Union citizenship rights, the decision has to be **justified** and **proportionate** (also, assuring compliance to Fundamental Rights, including the one to private and family life).
In practice, this imposes **limits to the possibility to deport third-country national parents of Union citizens**.

[81] Sometimes, despite the denial of international protection (i.e., asylum), the Courts can order not to send back someone in his/her home country, since that would put him/her in danger. In such situations, people live in a **limbo**: whereas they cannot (and do not want to) go back in their home country, they do not have a full right to stay in the host State.

As you can imagine, Member States were not very happy about the decision: as we have said, Member States retain their power to control third-country nationals' migration; however, the Ruiz Zambrano doctrine by nature applies to **third country nationals** (indeed, EU citizens are naturally able to move to another Member State).
Hence, the doctrine catches on two very sensitive nerves of Union citizenship:

1. firstly, it tells Member States **how to treat their own citizens** (and they do not want that: there is no transnational element), imposing an outer limit of *substance*, and thus it **affects** (and probably questions) the very meaning of *additionality* of Union Citizenship, whereby national citizenship should be entirely left to Member States.
2. Secondly, because this caselaw applies by nature to third country nationals, it **interferes** with the power of Member States to regulate migration from third countries. Also, as side effect, this means that this caselaw predominantly applies only to those States who have *ius soli*.

With time, the Court applied the doctrine also to situations in which the third country-national parent had been in jail (see ***CS*** ruling): so, really further interfering with **national sovereignty**.
What's more: the Court held that the doctrine at issue does not apply only to minors, but (in exceptional circumstances, e.g., with disabled people) also to **people of age**.
In practice, Member States and the Court have to look at **whether the person would have no real choice but to follow the expelled person.**

Another application of the "substance of the right" doctrine is in the **K.A.** case (2018), where the Court ruled that:
*"**Article 20 TFEU** must be interpreted as meaning that:*
*a practice of a Member State that consists in not examining such an application solely on the ground stated above, **without any examination of whether there exists a relationship of dependency between that Union citizen and that third-country national of such a nature that, in the event of a refusal to grant a derived right of residence to the third-country national**, the **Union citizen would, in practice, be compelled to leave the territory of the European Union** as a whole and thereby **be deprived of the genuine enjoyment of the substance of the rights conferred by that status**, is precluded;*
*where the Union citizen is an **adult**, a relationship of dependency, capable of justifying the grant, to the third-country national concerned, of a derived right of residence under Article 20 TFEU, is conceivable only in **exceptional cases**, where, in the light of all the relevant circumstances, **any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible;***
*where the Union citizen is a **minor**, the assessment of the existence of such a relationship of dependency must be based on consideration, in the **best interests of the child**, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child's equilibrium; the existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary. in order to establish such a relationship of dependency;"*
Here, the Court gave importance to **procedural rights for protection of individuals**, in order to assess whether it is proportionate the expulsion of a third country national who is a parent of a Union citizen. In this above mentioned ruling, the Court established that Member States must check the **relationship of dependency** between the third country national and the Union citizen when the refusal to grant the right to reside to the former would, in practice, make the latter be compelled to

leave the territory of the European Union and be deprived of the genuine enjoyment of the substance of the rights conferred by the Union citizenship.

The withdrawal of citizenship: Rottmann and Tjebbes

The other interesting development that makes Union citizenship so revolutionary is the decision of the Court to **apply** Union citizenship in another purely *internal* situation: i.e., the **withdrawal of *national* citizenship** from an individual.
In ***Rottman***, an Austrian citizen living in Germany acquired the host country's nationality (so, he was *naturalised*). To do so, he had (due to domestic rules) to give up his nationality of origin. However (how bad luck), it emerged there was a *European Arrest Warrant* pending against him, and that he had lied on his application for naturalization in relation to it. Therefore, the punishment for this lie was the **withdraw of citizenship**. However, this raised two issues:

1. firstly, this might have made him **stateless** (indeed, he had already renounced his first nationality), which is against international law;
2. moreover, it was uncertain whether Germany could withdraw (German, and therefore) Union citizenship.

- The German government argued that it was a purely internal situation, and thus it was included in the Member State's **discretion**.
- The Court disagreed and found (although with an unclear ruling) that the situation fell within the scope of EU law: indeed, withdrawing national citizenship (if it is the individual's only nationality), the State is *also* withdrawing Union citizenship. Therefore, the ***Principle of proportionality*** applied. The rationale is the same as *Zambrano*: withdrawing national citizenship in cases such as the Rottman's one, Germany would **deprive** the person of enjoying the **substance of his/her rights**.

Although in Rottman there actually was an element of transnationality, the point was made clearer in ***Tjebbes***, a group claim. According to Dutch law, a person with dual nationality no longer residing in the Netherlands would, after 10 years, *exercise the option* to remain a Dutch national (otherwise, the nationality would expire).

- When the Canadian claimants (among which, crucially, there were children) in *Tjebbes* found their Dutch nationality being withdrawn, they argued, basing on *Rottman*, that also their Union citizenship was withdrawn.
  Thus, it was (according to them) a **matter covered by EU law**; hence, they had the triple advantage of EU law (**primacy and supremacy**, **proportionality**, and **Fundamental Rights**).
- The Dutch government argued, instead, that it was (again) a matter of national legislation; moreover, the provision at stake was not that punitive, after all.

The Court eventually engages fully with the question of citizenship withdrawal, restating the *Rottman* precedent, in a (even more) internal situation.

- After *Zambrano*, it stated that in **depriving nationals** of nationality, the Netherlands were depriving them of EU citizenship, and thus the situation fell within the umbrella of EU law.
- Therefore, **proportionality** (in a very strict way) and **fundamental rights** applied.
- The Court went further, detailing the criteria on which proportionality had to be applied.
  - For instance, the State would have to look whether the second nationality was acquired *voluntarily* or ***automatically*** (in some countries, the wife automatically gets husband's citizenship), in which case a "penalty" should not follow.

- Moreover, the State should look at whether the Country in which the national concerned is living in is ***safe*** or not;
- the State should look at whether it would be *easy to* ***come and visit*** the EU from the Country of second nationality.
- Finally, the State must also be aware of ***children's best interest***: in the specific case, the Netherlands had to consider that children could not decide by themselves whether to remain Dutch or not every 10 years (the withdrawal of citizenship, indeed, might have long lasting effect on a person not then capable of a choice).

- The Court then goes further: the decision must be **open to judicial review**.

With *Tjebbes*, whereas the decision to grant citizenship remains (for the time being) a prerogative of the Member State, taking it away no longer does: **Union citizenship gives such advantages that the decision to withdraw it naturally must be proportionate**.

In this respect, an interesting case, ***JY***, has been recently ruled by the Court.
A woman has given up her Estonian nationality of origin to become Austrian, being assured by Austrian authority that she would have got it. However, Austria found out she had committed traffic offence and therefore denied her request: Ms JY was left stateless.
The Court then ruled:
1.The situation of a person who, having ***the nationality of one Member State only****, renounces that nationality and loses, as a result, his or her status of citizen of the Union, with* ***a view to obtaining the nationality of another Member State****, following the* ***assurance given by the authorities*** *of the latter Member State that he or she will be granted that nationality, falls, by reason of its nature and its consequences, within the scope of EU law* ***where that assurance is revoked with the effect of preventing that person from recovering the status of citizen of the Union****.*
*2.****Article 20 TFEU*** *must be interpreted as meaning that the competent national authorities and, as the case may be, the national courts of the host Member State are required to ascertain whether the decision to revoke the assurance as to the grant of the nationality of that Member State, which makes the loss of the status of citizen of the Union permanent for the person concerned, is* ***compatible with the principle of proportionality*** *in the light of the consequences it entails for that person's situation. That requirement of compatibility with the principle of proportionality is* ***not satisfied*** *where such a decision is based* ***on administrative traffic offences*** *which, under the applicable provisions of national law, give rise to a* ***mere pecuniary penalty***

Of course, this lets us understand why, in such circumstances, Union citizenship is so **innovative** (rather than cosmetic): EU law really **interferes** in that relationship that is key to our definition of sovereignty (i.e., **the one between the State and its nationals**).
More precisely, States keep having their discretion in this respect, but the European element of **proportionality** is introduced.

Problem question: "Issues of citizenship"

Now, as way of exercise, we shall examine the compatibility of EU law with the following situations:

- *Paula, a* ***French*** *citizen, goes to* ***Germany****; Paula applies for a* ***maintenance grant*** *to support her studies; she is* ***denied*** *it. Her* ***partner*** *Jane is a* ***USA*** *citizen, after three months she is told that she has to* ***leave*** *Germany.*

  As we are in a transnational situation, **Art. 21 TFEU** is relevant, together with **Directive 2004/38**. According to these, *different people* in EU law have *different rights*. Firstly, we have to understand whether she is economically active or economically independent (this must always be our starting point): whereas an economically active person is entitled to *full equal treatment* (and, if that were the case, Paula could not be denied the grant), an economically inactive might not. In this case, Paula is **economically inactive**, and therefore **Art. 24(2) Directive** is applicable: Member States are allowed not to confer maintenance aids for studies to students (and other economically inactive people). As for her partner Jane, she is a **third-country national**, and Paula's **partner**. We have no indication of whether she is a *registered* partner or rather one *in a durable relationship*. We therefore have to presume that **Art. 3(2) Directive** is applicable, whereby Member States only have a duty to *facilitate* partners in a durable relationship to access EU rights.

- *Mark, a **Chinese national**, has three **children** who are **Spanish citizens**, they all reside in Spain. When Mark loses his job, he is told that he has **15 days to leave** the country.*
  Here, **Art. 20 TFEU** is relevant, since we are in a purely **internal** situation, whereas the Directive does not apply. Also, we have to consider ***Ruiz Zambrano***: if the Chinese parent were kicked out, would the children need to follow him? Presumably, yes: the expulsion would **affect the substance** of their right. Hence, Spain is unlikely to be able to expel Mark. What's more: in any case, given that his children are Spanish citizens and, so, Mark has lived there for at least a while, a 15-days-notice seems undoubtedly **disproportionate**.
- *Genoveffa is an Italian environmental activist who has **lawfully resided in Spain** for **6** years. Spain is hosting the G8, and a demonstration is organized by Green activists to urge Governments to take action on climate change. Following **disorders** at the demonstration Genoveffa is arrested and **immediately deported** to Italy.*
  First of all, pay attention: whereas we are told that Genoveffa has lived in Spain for six years, we do not know whether she has done it *pursuant to the Directive* or to *Spanish* law. Only in the former case, she would have acquired the status of ***permanent resident***: she could only be kicked out for **serious** breaches of public security (with a higher threshold for the State to kick someone out) that threaten a fundamental interest of society. Moreover, her **immediate** deportation seems incredibly **disproportionate**, as one must always be able to challenge the decision in front of a Court, before being deported. Indeed, **Fundamental Rights** apply also in this respect (and the right to judicial review undoubtedly is one of those). If, instead, she was not resident pursuant to the Directive according to EU law, she would still be covered by **Art. 21 TFEU**, since she is being **deported** on grounds of public policy (indeed, it is not the case of *residence termination* – i.e., when the time for stay "expires"); however, she would not have the *enhanced* protection coming from permanent residence: only proportionality would be applied.

Summing up

Let's wrap up!

Evolution of EU citizenship:

- Originally only **economically active citizens given rights**, although economic activity interpreted very broadly
- Debate about market citizenship and the limits of E(E)C law: **exclusionary effect (**for those who could not work or did not want to move).
- **Introduction of Union citizenship** in **1992** with the **Maastricht Treaty**.
  - What does it mean? Tension created by the fact that there was a **supranational citizenship without supranational welfare**
- CJEU case law:

    - After **foundational stage** (*Martinez Sala, Grzelczyk* and UC as the fundamental status of Union citizens, *Baumbast*)
    - Goes back to black letter reading in ***Dano***: economically inactive need to fulfil conditions of economic independence (CHI and sufficient resources) to be protected by EU law
- "Fundamental status" though still relevant in **otherwise purely internal situation**
    - **Ruiz Zambrano doctrine**: case law cannot deprive UC of essence of Union citizenship rights
- Rights of UCs (both ec. active and inactive) detailed in **Directive 2004/38**

What are the rights that come from Union citizenship?

1. **Right to move and *reside in another* Member State** confer by the **Treaty** on
    - Workers
    - self-employed
    - and economically inactive Union citizens.
2. The right to reside is
        - ***unconditional*** if one is **economically active**
        - ***conditional*** upon having *sufficient resources* and *comprehensive health insurance* if not
3. Rights are detailed in **Directive 2004/38** which provides **three types of residence**.
    - *short-term* (unconditional for all)
    - *medium-term* (conditional upon economic activity or CHI and sufficient resources)
    - *Permanent* (residence for those who have lawfully resided pursuant to Dir 2004/38 for 5 years or more)
        - This reflects an **incremental approach** (i.e., the longer one stays in a Country, the more integrated he/she is).
            - The incremental approach also affects the **proportionality analysis** that must be done in case of expulsion or termination of residence.
4. Those **who have right to reside have rights to equal treatment (Art. 24 Directive),** but there are these <u>only</u> limitations:
    - students do not have a right to maintenance grants;
    - jobseekers do not have right to social assistance
    - if economically inactive relies too heavily on welfare state they are seen to no longer fulfil economic independence criterion: the economically inactive individual has always to prove he/she has **sufficient resources** (so, applying for a welfare provision could lead to his/her **termination of residence for being an unreasonable burden**)
5. The Directive gives **extensive rights to protected family members**, who are treated like they were Union citizens (but only in a derivative way): **they have same rights as right holder Union citizen.**
6. Finally, **extensive protection from expulsion** is provided for, including a narrow interpretation of the grounds of public policy and security: protected UC can only be deported on **public policy and security grounds, enhanced protection after 5 and 10 years**
7. **Right to *return* in home Member State** through the application of **Art. 21 TFEU** also to **circular migration**.
8. As a consequence of the *Ruiz Zambrano* caselaw: **right *not to be forced out* of own Member State** <u>outside the European Union</u>, if and when that would entail having to leave EU (relevant mainly to minors) so as to affect **substance of rights** conferred by Union Citizenship.

9. **Limits to the *discretion* of the MSs in withdrawing citizenship** if that is the only citizenship of the person concerned, as an extension of *Ruiz Zambrano* substance of rights doctrine (as ruled in *Tjebbes*).

In general, always remember that in *any* case, national authorities and Courts must always apply **proportionality** and **Fundamental Rights**.

The Rule of Law crisis

During very recent times, some Member States have shown a systematic deficit of compliance with the values of the Union, embodied in **Art. 2 TEU**. The issue is that such breaches of EU law, are difficult for the EU to address because of the ineffectiveness of the instruments available: this issue is said to be the **"the rule of law crisis".**

General background information

The EU has **no general competence in the field of Fundamental Rights** (although it has sectoral competence in given fields – e.g. discrimination); this means that there is no general power of enforcement in FRs. The EU has its own catalogue of rights – the Charter of FRs – but this applies to EU acts/institutions and to MSs only when they implement EU law. As a matter of fact, it means **the Commission cannot bring proceedings for violation of the Charter unless there is also a violation of another piece of EU law** (Treaty, Directive or Regulation; see Lectures on FRs; but see pending case C-769/22 Commission v Hungary, Art 2 TEU as enforceable?)

A Union of values

According to Article 2 TEU:

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

Nowadays the respect of Art. 2 is among the **Copenhagen criteria** (1993): a third State that wants to join EU law has to be a democratic state and respect the values of the Union (art. 2 TEU).

This is necessary considering EU works also on the principle of **mutual trust** in many policy areas (e.g. Arrest Warrant, Asylum, co-operation in civil matters) and in order to have mutual trust between States it is crucial for them to **share the same values**.

EU values and national identity

Article 4 (2) TEU

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

Overall, there is a vision of a Union founded on values common to all MSs (Art. 2 TEU) but which preserves their diversity and constitutional individuality (Art. 4 TEU): in this way the EU values represent the limit to diversity that MS have agreed.

But it is also true that there is a frequent use of Article 4(2) as a defensive mechanism which occurs when MS says it is not a breach of rule a law but a way to defense national identity

Why do values matter?

The interconnection between MSs requires common values to be "enforceable"; leaving aside moral issues, consider that:

- **Internal market** cannot function properly if national institutions are not accountable and democratic, and in the case of the judiciary, independent;
- What other MSs do is increasingly relevant if those MSs have a say in matters beyond their borders: consider externalities;
- How MSs deal with FRs is crucial in certain areas which are based on **"mutual trust"** (e.g. AW, Asylum, co-operation in civil matters);
- Inconsistent to have values and requirements for entry but no enforcement once a state is a member of the EU. But keep in mind that:
    - **Commission cannot action Charter against MS**
    - **It is not possible for MSs to sanction a State with the expulsion from the EU for breaching the rule of law** (and not respecting the value of the EU law).

Article 7 TEU

Preventive mechanism: Art. 7(1) TEU

The Amsterdam Treaty introduced a mechanism, later reformed in the Nice Treaty, to prevent breaches of Art. 2 TEU by MSs.

Art. 7 (1) TEU:

*"On a reasoned proposal **by one third of the Member States**, by the **European Parliament** or by the **European Commission**, the **Council**, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a **clear risk of a serious breach by a Member State of the values referred to in Article 2**.*
Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply." […]

These are the steps:

- 1/3 (9) MSs or EP (376 in favour + 2/3 of votes cast) or Commission to trigger procedure;
- Council hears MS and might make recommendations to MS;
- Council acting on majority of 4/5 (i.e. 22) and with consent of EP makes a "determination" that there is a "clear risk of a serious breach of values in Art. 2 TEU" (so-called Heider clause);
- Regular review of the MS actions;

However there are many limitations in the preventive mechanism:

- the very high threshold required;
- it only consists in an admonition, without sanctions;
- political nature of the mechanism: Member States are voting against another Member State, without any involvement of the ECJ.

Sanction mechanism: Art. 7(2) and 7(3) TEU

It serves to contrast serious and persistent breaches of Art. 2 values by Member States.

Art. 7, par. 2 and 3, establish:
*2. "The **European Council**, acting by **unanimity** [except for the State at stake for breaching the EU rule] on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a **serious and persistent breach by a Member State of the values referred to in Article 2**, after inviting the Member State in question to submit its observations".*
3. "Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall consider the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding."

These are the steps:
- Acting on proposal by 1/3 MSs or Commission (NOT EP)
- European Council votes by unanimity (minus MS under scrutiny) after having consent of the EP
- Possibility to impose sanctions (by QMV of the Council) → suspension of certain rights deriving from membership, including voting rights, taking into account rights of individuals and companies
- QMV to modify or revoke the sanction

Even this one is political mechanism, but it can lead to relevant consequences for the MS under scrutiny (e.g. the suspension of the right to vote in the Council). However, there are many issues related to the effectiveness of this procedure.

Problems with Article 7 TEU
- The majority required allows for **blocking minority**; in the sanctioning mechanism, if there is a rule of law backsliding in two MS, Article 7 TEU is paralised, This can determine an aggravation of the rule of law crisis because of effectively sheltering of MSs. This happened with Poland (art. 7 triggered by the Commission) and Hungary (art. 7 triggered by the EP).
- The mechanism is political in nature and the Treaties do not provide a definition of rule of law. As a result, the definition of "rule of law" comes from not-binding acts, such as external reports (Venice Commission, Council of Europe, NGOs, EU FR Agency). According to them the rule of law requires that:
- *Public authorities must act within the law, pursuing the values of democracy and Fundamental Rights, under the scrutiny of an independent Tribunal. Effective judicial protection and judicial review of legislation must be available, as well as free, transparent and plural elections. Respect of constitutional principles of EU Treaties, as interpreted by the ECJ case-law, is indeed necessary.*

- The Commission has no enforcement action → both procedures can be triggered only with the vote of the Council or of the European Council. However, a new – ineffective – instrument has been introduced: the Rule of law framework. It is used to avoid emerging threats to the rule of law through a dialogue with the MS concerned.

- The CJEU has a very limited role, concerning art. 7: at the request of the MS concerned, it can only review the procedural requirements stipulated in Art. 7 TEU.

Solutions to lack of effectiveness of Art. 7 TEU

A few solutions to the lack of the effectiveness of Art. 7 are based on Art. 2 TEU and Art. 19 TEU relies on those two provisions; among the abovementioned solutions we can find:

- FRs enforcement through secondary legislation (e.g. age discrimination; television without frontiers; free movement of services)
- Article 19(1) TEU, according to which Member States must provide remedies to ensure effective legal protection in the fields covered by Union law
- In C-64/16, Associação Sindical dos Juízes Portugueses, (***ASJP***), a case concerning Portugues judges, the ECJ gave rise to the obligation, under Art. 19(1) TEU, to ensure that national bodies which may rule on questions of application or interpretation of EU law meet the requirements of judicial independence. This judgement was recalled in 2018 in ***Commission v. Poland,*** where the Court found that a Polish judiciary system's reform had been made against Art. 19(1) TEU
- Rule of law conditionality Regulation (2020/2092): the disbursement of funds is conditional upon rule of law compliance, narrowly conceived; was used during pandemic when MSs did not want to waste funds provided to State that do not respect the ruel of law
- Potential effect of Art. 2 TEU as a free-standing provision had been considered only in recent times; for instance in ***Commission v Hungary*** (2022), still pending, the Commission brought an infringement proceeding against Hungary in front of the ECJ, invoking different breaches of Directives and Charter's provisions but Art. 2 TEU was considered alone.

The internal market

General overview and history

In this part of the course, we shall look at the **substantive** dimension of EU law, focusing in particular on the **internal market**: being the most important aspect of Communitarian law, it constitutes the most important *body* of law and caselaw of the ECJ.
First, we will look at the *concept* of the internal market, analysing its definition through the Treaty provisions and mentioning its history (as well as the techniques the internal market has been achieved with), and finally we will focus on **free movement**, which is the core element of internal market.

First of all, we shall look at the **treaty provisions** that define internal market:

- We find a reference to internal market in **Art. 3(3) TEU**: here, the internal market is listed among the ***objective*** of the EU (perhaps, it is the most important one). Indeed, European integration started as an **economic integration**, with internal market being the element around which the whole EU integration process revolved, especially at the very beginning. The paragraph starts clearly stating:

  *The Union shall **establish an internal market**.*

- Also, we can see the internal market mentioned at **Articles 3 and 4 TFEU**: it is contained in the first part of the TFEU, where the general principles of EU law are established.
  Namely, these two articles regulate the Union **competence** over internal market. What type of competence does the EU have in relation to internal market?
  1. First, **Art. 3** lists the ***exclusive competencies*** of the EU, among which we find:
     a. the establishment of a **customs union**,
     b. **competition rules** functional to the internal market,
     c. **monetary policy** for the Member States that have adopted the single currency,
     d. and **common commercial policy** towards third Countries.

     To be precise, these competences are *tangential* and *related* to the internal market.

  2. Conversely, the **internal market** *strictly speaking* can be found among the ***shared competencies*** listed in **Art. 4** (namely, at letter *a*). In relation to shared competence, some fundamental principles apply:
     a. first, the ***Principle of Subsidiarity***, the guiding principle of EU action in shared competencies, whereby EU action must be taken only when it is **proven necessary**, if the measure cannot be effectively taken at a level that is closer to the citizen. In other terms, the Union must act (except for exclusive competence) *insofar as* the objectives of the proposed action cannot be sufficiently achieved at national (or regional or local) level, and also *when*, by reason of its scale, the effects of the proposed action can be **better achieved** at supranational level.
     b. Also, the ***Principle of Proportionality*** applies as usual.

- Finally, **Articles 26 and 27 TFEU** (contained in the third part of the Treaty, on Union policies and internal action): indeed, in this respect, internal market not only is an *objective* of the Union, but it is also a **policy area**.

  More in deep, **Art. 26(2)** provides for a **definition** for internal market:

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

Hence, internal market is defined as an **area without internal frontiers** and barriers, where we have **free circulation** of the four factors of production: goods, persons, services and capitals are free to move and circulate.

Art. 27, then, *qualifies* the previous article, providing some kind of **derogations**. According to the Article, the Commission, when proposing a new measure, should take into account the **differences** in the economic development of Member States, and so it might propose some ***adjustments***: when these are **derogations** to the principle of Free Movement, they must be **temporary**.

But, overall, does internal market have a **practical relevance** in our lives? Undoubtedly, it does.

- Indeed, as **consumers**, internal market gives us *better choice* in choosing whatever product we might like more;
- also, as **citizens**, free movement of persons is a fundamental element of (also) internal market: in order to move, we do not need a visa.
- Also, we might think our rights as **passengers**, for instance.

In short: each of us daily experiences the effects and benefits of having an internal market. This represents one of the most advanced forms of ***economic integration***.

However, there are other forms of economic integration; we can rank these forms from the *less integrated* and onerous to the *most integrated* and complete:

INTEGRATION

1. Free trade area
2. Customs Union
3. Common market
4. Economic Union

1. Firstly, we have ***Free Trade Area***: a space in which there are no:
   -
   - **customs duties** (i.e., *charges* on the import of certain goods)
   - **quotas** (i.e., *quantitative restrictions*), and so goods are free to move
   - **barriers** in terms of free movement of *goods*.

   However:
   - there is not a **common external tariff** (or, a **common trade policy**): indeed, participating States are free to have their own external policy with third Countries → thus, they can set their own tariffs in relation to the products they import from outside.

2. Then, we have a ***Custom Union***, that instead is a **free trade area** with a **common external tariff**. So, in a custom union, (again) goods are free to move since there are no barriers nor customs duties or quotas, but also each State has the **same tariffs** on products coming from outside as the other States.
3. A ***Common Market*** is a space in which not only goods are free to move and there is a common external tariff, but in which there is **Free Movement** of ***all factors of production***, including workers. The Common market was established by the **Treaty of Rome**, in **1957**.
4. Finally, the last and most advanced level of economic integration is the ***Economic Union***, where we have:
    - the **complete unification** of **monetary and fiscal** policies;
    - so, we have the ***single currency***
    - and a **Central Monetary Authority** (in EU, it is the *European Central Bank*).

    Whereas the EU might seem an Economic Union, the real peculiarity of the European ***Economic and Monetary Union*** (henceforth, **EMU**), that was introduced in 1992 by Maastricht Treaty, is its **asymmetry**:
    - basically, we have a **single currency** (the *Euro*),
    - a **central authority** which is responsible for conducting monetary policy,
    - but we have **different *national* fiscal policies**.

    → Indeed, there is not any fiscal centralization.

So, speaking of the *history* of the economic integration and common market: the first experiment in this sense came from the **European Community of Coal and Steel**.
Indeed, the ***Treaty of Paris*** (in **1951**) established a **common market** only for *coal* and *steel*, as proposed by *Robert Schumann* in his letter dated May, 9th 1950. The idea was to **overcome** the historical Franco-German disagreement. This first experiment of common market had the same functioning and logic of the subsequent one, that would have been established by the ***Treaty of Rome*** (i.e., no customs duties or quotas, prohibition on discrimination, rules establishing **level playing field**[82]).
Basically, the idea was having a free, **fair and equal market**, despite being limited only to coal and steal.
However, the **weakness** of this experiment was the ***absence of a common external tariff***: indeed, each Member State was free to have its own trade policy with external countries, and this of course hindered fair competition (indeed, a common market cannot work if each State has different policies on external market, and so, unfair foreign competition).

This idea was later developed and extended to other sectors of economy with the ***Treaty of Rome*** (1957), in which the ***Common Market*** was created → the custom union was extended to the other sectors, thus establishing the **free movement of goods, workers, services and capitals**.
Moreover, a common **competition law** and **common economic policies** were provided: those polices were coordinated within the *Council*, since the EU is not a full-fledged fiscal federation (those are simply coordinated within the Council).

[82] I.e., a space in which everyone has a **fair and equal chance of succeeding**, where everyone starts from the same level. Thus, establishing a level playing field is crucial for regulating **competition** and avoiding **anticompetitive behaviours** both by private companies and States, that can favour certain companies and industries, through *grants*, *aids*, *subsities*, etc.

However, in the 70s and 80s a phase of **stagnation and inaction** came: as we will see, integration can be achieved through two different strategies

- ***Negative integration***, that consists in the **removal of barriers** (either **physical**, e.g., customs, or **non-physical**, e.g., national rules hindering free movement).
  In this respect, the Treaties now provide **clear prohibitions** to obstacle free movement of goods, persons, services and capital, and those provisions (being stated in a clear and unconditional manner) are capable of having **Direct Effect** (see *Van Gend En Loos*).
  With negative integration, individuals are seen as **agents** of market integration: they can challenge national provisions that go against the Treaty, so contributing themselves to the achievement of internal market.
  As we can imagine, however, negative integration is a very **deregulatory approach**: if we remove a *national rule* regulating a certain aspect or sector, we will end up without rules whatsoever. That is why a common market also requires:
- ***Positive integration***, i.e., the **replacement** of national rules with **European rules and standards**. To put it differently, ***harmonization*** and approximation of national laws, rules, and standards.
  This was to be achieved through the instrument of *Directives*. Indeed, the fact that Member States have **different standards** constitutes a practical difficulty to internal market, and a huge cost for manufacturers in order for them to respect each of those and being able to sell their products within the EU.

However, the problem in the 70s and 80s was that positive integration was extremely difficult to **achieve**, because it was entrusted with a **Specific Legislative Measure** (pursuant to Art. 115): indeed, the adoption of such harmonization measures at EU level required **unanimity** in the Council. Therefore, it was difficult for Member States to reach an agreement on the right harmonization standard.
This is why the European Council, in **1985**, asked the Commission to come up with a plan to overcome this impossibility to act. The **European Commission** then proposed what is known as the ***White Paper***:

- it contained a **new approach** to harmonization (i.e., using negative integration as far as possible and limiting positive integration to lay down **minimum standards**, such as *health and safety requirements*).
- Also, the White Paper identified a **deadline** for the achievement of a properly functioning internal market: **December 1st, 1992**.
- The following year (1986), the ***Single European Act*** was adopted, and it endorsed the conclusion and the findings of the White Paper.
- Moreover, it constituted the *internal market* as an **ongoing task** and together a **goal to be achieved**.

But, after all, what is this ***internal market***, precisely? The **Treaty** establishing the European Community (**pre-Lisbon**, after Amsterdam) defines it in **Article 2**:
*The Community shall have as its task, by establishing a **common market** and an **economic and monetary union** […], to promote throughout the Community*

- *a **harmonious, balanced and sustainable development** of economic activities,*
- *a **high level of employment** and of **social protection,***
- ***equality** between men and women,*
- ***sustainable and non-inflationary growth**,*

- *a high degree of **competitiveness** and convergence of economic performance,*
- *a high level of **protection and improvement of the quality of the environment**,*
- *the raising of the **standard of living** and quality of life,*
- *and economic and social cohesion and solidarity among Member States.*

This provision does not really tell us what internal market is: as we can see, there are different instances and interests that the internal market should embody and pursue. Some of them look even oxymoronic and incompatible with each other (e.g., how can high level of employment and social protection be reconciled with competition, etc.?).
So, we can find **different instances** of modern **welfare capitalism**: for instance, just consider that the *need for social protection* coexists in the article with *convergence of economic performance*. Thus, it is not a clear definition, but rather an **ideal**, a **compromise** between two different economic visions and competing instances. Possibly, there is much of the **dirigiste French economy** (prone public intervention in the market), but there are also elements from the **ordoliberal German** tradition. At least, this is what some scholars argue.

Another interesting definition of internal market comes from the case of ***Schul*** [83], where the Court held:
33. The concept of a common market […] *involves the **elimination of all obstacles** to intra-community trade in order to **merge the national markets into a single** market bringing about conditions as close as possible to those of a **genuine internal market**. It is important that not only commerce as such but **also private persons** who happen to be conducting an economic transaction across national frontiers should be **able to enjoy the benefits of that market**.*

As we can see, *internal market* is here used as a **synonym of national market**: not only it is common to participating Member States, but also, it can be seen exactly as an *internal* market.
Arguably, this definition is clearer than the Treaty: internal market can be indeed considered as a **space without internal barriers**, either physical or non-physical (i.e., regulatory).
Indeed, it is a space which not only enterprises, but also private persons can benefit from. In this space, we have **Four fundamental freedoms**: free movement of ***goods, services, capital, and persons***.
To overcome the inaction of the 70s and 80s, as we were saying, the *White Paper* (and the **European Single Act** in 1986) tried to offer a remedy to this deadlock:

- firstly, the Act introduces a **new dynamic definition** of *internal market* (today, in **Art. 26 TFEU**) as an **ongoing task**, which cannot be *definitely* achieved but can always go further. Indeed, the Article states:

1. *The Union shall adopt measures with the **aim of establishing or ensuring the functioning of the internal market**, in accordance with the relevant provisions of the Treaties* [this paragraph establishes internal market as a **policy area**].
2. *The internal market shall comprise an **area without internal frontiers** in which the **free movement** of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties.*

[83] A case concerning a turn-over tax (similar to VAT or IVA): the issue was that the Netherlands imposed this tax to goods coming in its territory from other Member States. Schul was a private company, arguing that the imposition of this turnover tax had equivalent effects to custom duties, and so that was a discriminatory taxation. However, the ECJ dismissed this argument.

Also, a major **institutional reform** provided for a new **law-making procedure** (the so called ***Ordinary Legislative Procedure***, with **Art. 114 TFEU**) to adopt harmonization measures, requiring (not unanimity anymore, but only) **Qualified Majority:**

1. ***Save where otherwise provided in the Treaties****, the following provisions shall apply for the achievement of the objectives set out in* ***Article 26****. The* ***European Parliament*** *and the* ***Council*** *shall, acting in accordance with the* ***ordinary legislative procedure*** *and after consulting the* ***Economic and Social Committee****, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in* ***Member States*** *which have as their object the* ***establishment and functioning of the internal market.***

In this respect, it was provided a very important role to the **European Parliament** also in relation to measures concerning the **internal market**.
It has been recognised that **article 114 TFEU** can be seen as a **residual clause**, constituting the *legal basis* for provisions in sectors that are not specifically covered by other provisions.

However, the possibility of using Art. 114 TFEU as legal basis has been **limited** in several rulings.
One in particular was ***Tobacco Advertising*** → The EU adopted a Directive, on the basis of Art. 114 TFEU, with the aim of approximating national legislations concerning advertisement of tobacco products. Germany challenged the Directive for being adopted under the **wrong legal basis**: indeed, the Member State argued that the Directive did not concern the improvement of the conditions establishing *internal market*, but rather the *protection of human health* (and remember: the EU only has a *supporting* competence when it comes to human health, and so the EU cannot harmonize national legislation on public health).
The ECJ **annulled the Directive**, agreeing with Germany: indeed, according to the Court, if the EU could adopt harmonization Directives every time it sees an abstract risk to free movement, judicial review of those Directives would be pointless. Thus, there must be (not just an abstract risk, but rather) a **genuine improvement** of the functioning of internal market, in order to justify a harmonization directive.

To sum up, the main competence the EU has in relation to internal market is ***shared*** competence (as stated in Art. 4(2) TFEU): this means that **subsidiarity** always has to be applied.

However, keep in mind that some fields related to internal market may fall under ***exclusive*** EU competences:

- competition law,
- monetary policies,
- common commercial policies,
- and Custom Union.

Also, thanks to these kinds of competence, the creation of the internal market was a (smart) instrument through which higher ***political aims*** would be achieved:

- not only **economic efficiency** (through the **theory of comparative advantage**[84] and the one of **economies of scale**[85]),
- but also **peace** (remember the idea behind the ECSC),
- **prosperity** and **social integration** (e.g., raising living standards of Member States' nationals).

[84] Indeed, it is proved that if a State *specializes* on the production of a certain good, it benefits from it.
[85] I.e., spreading production costs through a larger number of products.

It is also worth mentioning that internal market is ***indivisible***: this principle has been recognised especially in the context of Brexit negotiations, where, following of the Brit's will not to maintain free movement of people (due to the alleged welfare tourism), it was said that **four freedoms could not be divided** and that the **integrity of internal market** is of paramount importance.
As a former Commission vice-president once said*, the internal market is not a Swiss cheese: you cannot have holes in it.*

Moreover, those freedoms are defined by the Charter as ***fundamental***. Therefore, any restriction to Free Movement is subject to **strict scrutiny** (also in relation to **fundamental rights** and **proportionality**).

Free movement of goods

Now, we shall analyse the right to **Free movement of Goods**.
To better understand it, always keep in mind that the *internal market* is a **borderless space** where Free movement is ensured. But the internal market is <u>not</u> an end in itself: it is, indeed, an **instrument** to achieve the *higher political objectives* that are specified in **Art. 3(3) TEU**. (ex article 2 TEU), among which we can find also non-economic values (e.g., **equality** between men and women, **sustainable** growth, **raising living standards**, well-being, and so on).

Art. 3(3) TEU:
*The Union shall establish an **internal market**. It shall work for the sustainable development of Europe based on balanced **economic growth and price stability**, a <u>**highly competitive social market economy**</u>, aiming **at full employment and social progress**, and a **high level of protection and improvement of the quality of the environment**. It shall **promote scientific and technological advance.***
*It shall combat social exclusion and discrimination, and shall promote **social justice and protection**, **equality between women and men**, **solidarity** between generations and protection of the rights of the child.*
*It shall promote **economic, social and territorial cohesion**, and **solidarity among Member States**.*
*It shall respect its **rich cultural and linguistic diversity**, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.*

The formula that can summarize this different and sometimes competing instances is "***highly competitive and social market economy***". So, the internal market is not only about *competition*, but also about *social protection* and *well-being of citizens*.
Of course, the internal market has also its flaws: for instance, we have mentioned the huge **redistributive** problems between social classes.

To start with the free movement of goods, consider this case:
PIAT is a car manufacturer; its cheapest car costs 10,000 EUR. It is worried about imports of cheaper cars from elsewhere; it tries to lobby its government to help it out, also reminding the Government that it employs a very large number of workers, and that it pays a significant amount of taxes, both of which would be compromised should it be exposed to excessive competition. What measures would you advocate the Government should adopt to safeguard PIAT's and its own interests (<u>without</u> considering the EU (or even WTO) framework)?

- Presumably, PIAT would push the Government to introduce ***customs duties*** on the cheaper foreign cars so as to raise their final price to national consumers (so that, if they cost – say – €8.000, the price would raise to €11.000 and PIAT's cars would be cheaper);
- also, it could ask for the **prohibition** on car import,
- or (at least) for a cap on the maximum number of cars that can be imported (i.e., ***quotas*** or **quantitative restrictions**);
- moreover, another option would be to impose **discriminatory taxation** (so that imported products would be taxed in excess in comparison to national products);
- finally, there could be also some so-called **measures having equivalent effect** as quantitative restrictions
    - o e.g., the Government could ask the German producer to comply with rules different from the German ones, i.e., **regulatory diversity**, that is an obstacle to free movement;
    - o or it could impose a **traffic ban** for cars using certain fuels, that are used only by foreigner cars[86].

These are some examples of measures against the free movement of goods, that so obstacle the formation of the internal market.
That is why these are all regulated at EU level:

- ***quotas*** (i.e., quantitative restrictions on imported goods) and **measures having equivalent effect** are covered by **Art. 34/37 TFEU** → Art. 34 TFEU bans **quantitative restrictions** on imports/exports and measures having equivalent effect.
- whereas ***customs duties*** (and charges having equivalent effect) are covered by **Art. 28/30 TFEU** → The TFEU imposes the **removal of fiscal barriers**:
    - o it establishes a ***customs union***[87] within the EU (with a *common custom tariff*, as part of **positive integration**).
    - o Moreover, as part of **negative integration**, it also prohibits customs duties and charges having equivalent effect
- Finally, ***discriminatory taxation*** is regulated at **Art. 110 TFEU**, that prohibits **discriminatory or protectionist taxation**.

As part of *positive integration*, there is also ***harmonization***: the EU has competence to adopt harmonizing legislation in relation to matters which affect the common market (**Art. 114 - 115 TFEU**).

Definition of good: *Art Treasury*

But first, what is a *good*? To put it differently, when does a product fall within the scope of application of **free movement provisions**?
The ECJ clarified its meaning in the infringement procedure ***Commission v. Italy, 7/68***[88] (also known as ***Art Treasury***), including under the scope of Free movement provisions all products that:

- can be ***valued in money***

[86] This is an example of **ban on the use** of the product: indeed, importing the good at issue is perfectly allowed and without obstacles whatsoever; conversely, its use is practically limited (and this would influence consumers' demand).
[87] Characterized by a *common external tariff*. Also, remember that **common commercial policy** falls under the **exclusive competence** of the EU (Art. 3 TFEU).
[88] Italy had a tax on the export of certain products of artistic, historical, and ethnographical significance. According to Italy, those products did not fall under the term *goods* for purpose of the Treaty. The ECJ disagreed. From this case we can notice that Articles 28 and 30 TFEU also applies to **export** of goods (and not only to import).

- and can form the ***subject of commercial transactions***.

→ so, as long as a product can form the object of a commercial transaction, then it is covered by Free movement provision.

Customs duties (Art. 28-30 TFEU)

Focusing on the Treaty provisions on Free movement of goods, **Art. 28 TFEU** establishes a ***customs union***, that has both an **internal** and **external** dimension.

- As for the former, it establishes, that Member States' territories are *free from customs duties*,
- whereas the latter requires a *common customs tariff*[89].

With this customs union an area where goods can move freely, without borders, is created. To achieve it, **all customs duties, or charges having a similar effect, are forbidden**.

Indeed, Article 28 TFEU states:

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

Moreover, Article 30 TFEU adds:

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

In this respect, ***customs duties*** are (self-evidently) **charges**, taxes, imposed on goods **by reason of having crossed** an international frontier, only because of *entry*. Defining what a ***charge having equivalent effect*** (henceforth, CHEE) is, however, more difficult: in a way, we could say that they are measures very similar to customs duties, insofar as they actually **discriminate** between national and imported products, despite not *formally* being customs duties.

Charges having equivalent effect (CHEE)

The ECJ clarified in a later case (<u>***Statistical Levy***</u> case, also referred to as <u>*Commission v. Italy 24/68*</u>[90]) the meaning of CHEE, as follows:

*any **pecuniary charge**, <u>however</u> small and <u>whatever</u> 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 <u>not</u> a customs duty in the strict sense, constitutes a charge having equivalent effect (…),*

[89] It is interesting to analyse this topic linking it to what happened a few years ago, when there was a ***trade war*** between the US and the EU, because Trump, defining himself as a *tariff man*, had introduced very high duties on steel. Since the EU was the main exporter of steel to the US, the trade Commissioner of the time (Ms. Cecilia Malstrom) threatened some retaliations. Trump initially froze the duties for the EU, but then reintroduced them. The EU therefore introduced new duties on USA products (jeans, cigarettes, etc.). Finally, these two parties reached an agreement in Summer 2020. Furthermore, in October 2023 negotiations for a steel and aluminum agreeement started.

From this, we can understand that the EU is a major economic power, capable of setting standards with global partners.

[90] In this case, Italy provided for a very small fee for the collection of statistical data. Formally, it was not a customs duty: however, it was considered as CHEE since it was imposed only by reason of the export of data.

*<u>even if</u> it is <u>not</u> 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.*

In short, when establishing whether a charge can be considered as CHEE or not, we should look at some relevant elements: first, at the ***chargeable event***.
In this respect, a charge is a CHEE if:

- It is imposed on **goods** that are **objects of trade**, *and*
- It is imposed *by reason of the fact they **cross a frontier***.

<u>No</u> other element is relevant: thus, we do not have to consider

- ***when*** the fee is charged (indeed, a CHEE could be also imposed after the border has been crossed, e.g., when the product is sold to the consumer),
- nor we must consider the ***aim*** of the measure (whether discriminatory/protectionist or not): the ECJ held that it does <u>not</u> matter whether the charge has **protectionist effects** or not, or whether it is **discriminatory** or not (as it was held also in *<u>Sociaal Fonds</u>*[91])
- the ***size** or **amount*** of the fee
- and the **public authority** that imposed it (see *infra **Carbonati Apuani*** case).

In this respect, it is important to understand that **Art. 30 TFEU** is different from other Free Movement provisions, insofar charges that are covered by it can **<u>never</u> be justified** → This was established in the aforementioned *<u>Art Treasury</u>* case.

<u>Exceptions</u>
However, there are two **exceptions**, that must be interpreted extremely *narrowly*. Be aware that these exceptions are technically <u>not</u> justifications, but they rather are cases that *fall outside the scope* of the Art. 30 TFEU.
They are:

1. Charges imposed as a **consideration for a *specific* service**: indeed, if a charge is imposed as a *remuneration* for a specific service rendered to an importer or to an exporter, then the charge falls outside the scope of application of Art. 30.
   In ***<u>Bresciani</u>***, the Court clarified that:
   - the specific service must **benefit the *specific* trader** (i.e., importer or exporter), and <u>not</u> just the general public <u>nor</u> a class of importers and exporters. As way of example, a *health inspection* usually benefits the entire community and is not a *specifically* offered service to the trader.
   - Also, the charge must **reflect the cost of the service** (and not of the good which is related to): conversely, a charge calculated according to the value of the good necessarily *does fall* within the scope of Article 30 TFEU (as held in ***<u>Ford Espana</u>***). The same issues arose also in the *<u>Statistical Levy</u>* case: again, the collection of statistical data is a service provided in the interest of general economy.
2. Charges imposed to **discharge obligations imposed by EU law**. For instance, often cases EU directives impose *health inspections* on certain products. When a service like that is **required** by EU law and **mandatory**, then its cost can be charged to the trader. However, that <u>cannot</u>

[91] In this case, Belgium levied a charge for funding a social welfare measure destined to vulnerable workers: every time a diamond crossed the frontier, this charge should have been applied. Belgium argued, in its defense, that the charge was <u>not</u> protectionist (indeed, Belgium was <u>not</u> a diamond producer), nor there was discrimination; still, this charge was considered as a CHEE and in such prohibited by **Art. 28 TFEU**.

be done when the service is *optional* (i.e., merely allowed) for EU law, as emerged in ***Commission v. Belgium 314/82***.
Also in this case, the charge must not **exceed the cost** of the service, as the Court ruled in ***Bauhuis***.

Finally, the service at stake should **facilitate free circulation** of goods.

Addresses
Finally, a fee can be considered as a CHEE regardless of the **public authority** that imposes it.
Indeed, although the **addressees** of Art. 28 TFEU formally are **Member States**, this provision applies also to **local and regional authorities**, as held in ***Carbonati Apuani***[92] (and also in ***Legros***), a case in which the Court ruled that Art. 28 TFEU covers also measures imposed for having crossed a **regional or local border**:

*22. The very principle of a customs union, as provided for by Article [28 TFEU], requires the free movement of goods to be ensured **within the Union generally**, not in trade between Member States alone, but **more broadly throughout the territory** of the customs union. If Articles [28 and 30] make express reference only to trade between Member States, that is because the framers of the Treaty took it for granted that there were **no charges** exhibiting the features of a customs duty in existence **within the Member States**.*
*24. [...] **the absence of charges — whether between States or within a State — exhibiting the features of a customs duty is a precondition essential to the realisation of a customs union** in which the **free movement of goods is ensured**.*

This way, the Court also managed to answer the question about *who* was the actual addressee of Articles 28 - 30 TFEU: **not only Member States, but *also* other public (regional and local) authorities**.

Results of violations
Now, what are the **consequences** to **violations** to Art. 28 TFEU? In other words, what happens when a fee is unduly charged?
Simply, it must be **repaid** to the trader, and the conditions for reimbursement are determined by *national law*. At any case, however, national legislation must ensure that **unjust enrichment** of the reimbursed trader is **prohibited**: that is why traders who in turn charged the consumers for the undue tax cannot be reimbursed (otherwise, they would be reimbursed twice, since the burden has been shifted on the consumers!). This was ruled by the ECJ in ***Comateb***.
And what about final consumers who have been charged? They'll make do[93].

Discriminatory and Protectionist Taxation (Art. 110 TFEU)
The other relevant article we have mentioned is **Art. 110 TFEU**, that prohibits ***discriminatory taxation***. Indeed, the elimination of customs duties would be of little significance if Member States were able to discriminate between domestic and imported products simply using **internal taxation**.

For this reason, Art 110 TFEU clearly provides that:

[92] In this case, there was a fee imposed (by the Municipality of Carrara) on the export of Carrara marble not only to foreign countries, but also to other Italian regions.
[93] In Italian: *si arrangiano*.

*No Member State shall impose, **directly or indirectly**, on the products of other Member States any **internal taxation** of any kind **in excess of** that imposed directly or indirectly **on similar domestic products**.*
*Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford **indirect protection to other products**.*

1. The first paragraph directly addresses *discriminatory* taxation (i.e., taxation towards **similar products**),
2. whereas the latter is rather about *protectionist* taxation (i.e., taxation towards products that are **in competition**).

Basically, this article prohibits both.

However, Member States remain **free to set** their preferred level of taxation (also for purposes of national welfare measures), provided it is **not discriminatory nor** (also indirectly) **protectionist**.
More precisely, the first paragraph refers to taxation that discriminates between national and foreign products. To check whether it does or not, we have to look at different things:

- the **similarity** of the products at stake (e.g., products that satisfy the same needs, or that can be easily replaced with one another),
- and also a **difference in taxation** that could lead to potential ***discrimination***, either direct or indirect.

Similarity test

In this respect, the test used by the ECJ to establish whether two products are similar is actually rather *impressionistic*: you have to look at the

- characteristics of the product (for instance, at the organoleptic features of two food items),
- production method,
- the price
- and, of course, at the *functions* the products perform (i.e., whether these products are meant to satisfy the same consumers' needs).

Discrimination test

As to the second relevant element, the ***discrimination*** (i.e., two similar products are taxed differently) could come into two forms:

- ***Direct discrimination***, that can **never be justified**, since it is a *discrimination in law* based on the *different origins of goods*.
    - The discrimination can first consist of **different tax rates**: for instance, consider the provision "non-Italian products shall be taxed at X% whereas Italian products are taxed at X-1%").
    - Also, the discrimination may be caused by the **rules governing the tax system** (i.e., how taxes are levied). As way of example, in ***Commission v. Ireland***, the Irish tax system allowed Irish spirits producers to *differ the payment* of taxes, whereas foreign traders could not. The ECJ considered this rule (although not imposing two different taxation levels) as direct discrimination.
- ***Indirect discrimination***, instead, is a differential treatment based on a very peculiar criterion, that is **apparently neutral** but, in practice, affects imports more than domestic goods. Therefore, we must look at the **practical effects** of the measure (i.e., does the rule affects imports significantly more than it affects domestic goods?). For instance, consider a rule which imposes a gradually *increasing tax on small cars* up to 16 CV, and then a flat rate tax

on cars above 16 CV. This tax is apparently based on a neutral criterion; however, it becomes indirect discrimination if domestic producers make only "small" cars, exactly as it happened in ***Humblot***.

However, contrary to the former, indirect discrimination **can be justified**: a different treatment could be considered *lawful* if

- it is based on **objective factors**
- and is aimed at achieving **legitimate public policy interests** (i.e., it has not protectionist purposes).

For instance, in ***Commission v. Greece***, Greece had introduced a tax based on the cylinder capacity (i.e., an **objective** criterion) in order to impose heavier taxes on luxury goods (i.e., a **legitimate** social policy aim). In that case, the ECJ upheld the Greek decision since the imposition of this tax did not impact particularly on imported goods (indeed, it was true that many heavier-taxed cars were produced in other Member States; however, cars with "small" cylinder capacity included both domestic and foreign cars). In another case, an anti-pollution tax on cars was at stake: likewise, *environmental protection* was considered a legitimate aim, as well as, in other cases, *redistributive policies*.

Given that, how can we actually assess whether a tax is discriminatory or not?
The Court provided for a sort of "test" in ***Commission v. Denmark 106/84***. In that case, we had wine made from grapes and wine made from other kinds of fruit. Denmark imposed a **higher tax** on the former: crucially, wine made from grapes was mostly imported, whereas fruit wine was mostly domestically produced in Denmark.

1. First, in order to assess the discriminatory nature of this **discriminatory taxation**, the Court verified whether the two wines were ***similar***, basing on the *characteristics* and *function* of the products at stake.
   To do that, the Court needs to consider «*whether they have **similar characteristics** and **meet the same needs** from the point of view of consumers*».
   Hence, the two wines were **similar** in terms of alcohol content, production systems and in terms of taste; moreover, they served the **same needs** (i.e., both wines are served as refreshments and during meals).
   It is also worth mentioning that, according to the Court, when assessing the similarity aspect of two products, it is important not to focus only on the current consumer preferences, since they are obviously shaped by taxes (that are the exact thing that are under the lens of the Court!).
   In general terms, always remember that – in order to have discriminatory taxation – there must be **domestic production** of the taxed goods at issue (otherwise, a comparison would not be possible)!
2. Then, we must assess whether there is any ***discrimination***: i.e., whether there are **differences in taxation** (either in the tax rate or in the way taxation is levied). In our case, there were: indeed, wine made from grapes bore a higher fiscal burden than the same quantity of wine made from other fruit.
3. Finally, we must consider whether the difference in taxation can be **justified with reasons legitimate** according to the Treaties. In the case at stake, Denmark tried to justify the discrimination by using some *socio-economic* consideration: it argued that the different taxation aimed at helping domestic farmers to sell that particular type of wine. Otherwise, fruit wine would not have got a chance to survive in the market.

However, the Court held this justification unacceptable: indeed, it is by nature *protectionist*, and Denmark was doing the exact opposite to what the EU wanted to achieve (i.e., the **elimination of economic protectionism**). Consequently, Denmark had to apply the same tax rate.
In general terms, always keep in mind that (as the Court held) only *indirect* discrimination may be justified.

Now, we shall focus on the ***second paragraph*** of **Art. 110 TFEU**, that regulates taxation on **goods in competition**: i.e., cases of ***Protectionist Taxation***. To put it differently, if the products are **not similar** (otherwise they would fall under the first paragraph), higher taxation might be still prohibited if:

- there is a **competitive relationship** between them
- and the **tax is protectionist** in nature.

In this situation, the State is giving an advantage to domestic products by *shaping the consumers' preferences*.

Competition test

But when are two products in competition?
That happens when there is a **degree of substitution** between them, so that consumers may switch from one to the other. A good example is the relation between *wine* and *beer*, as happened in ***Commission v. UK, 170/78***. In that case, the Court considered the competition relationship existent when:

- the two products **meet identical needs,**
- and they show a **certain degree of substitution**.

Also here, the Court specified that consumers' **habits** are only *partially* relevant, since they might change over time (in a ***dynamic*** perspective) and be influenced by public policies (indeed, taxation can shape consumers' choices).

Protectionist effect test

Once we've established this competitive relationship, we need to check whether taxation has ***protectionist effects***.
In this respect, if there is no *domestic* production of similar or competing goods the tax **cannot** have a discriminatory/protectionist effect and therefore Article 110 TFEU does not apply.
The Court has established this principle in ***Commission v. Denmark, 47/88***, in which the Commission sued Denmark for an excessively high tax on cars registration. The problem was that Denmark did not have any domestic car manufacturer: hence, the Court held there was no scope for application of Art. 110 TFEU, since there was no discrimination. Pay attention to the fact that, instead, *discrimination* is not a prerequisite for the application of Art. 30 and 34 TFEU!
In short, however, when assessing the conditions for applying **Art. 110(2) TFEU**, the mere existence of a difference in price is not relevant in itself: what we need to understand is whether this different taxation **affects consumers' behavior**. For instance, in the aforementioned case of *Commission v. UK*, cheap wine was at stake: clearly, if it was taxed remarkably more than (domestic) beer, consumers would opt for the latter and their choice would be influenced.

Results of violation

What are then the consequences of breaching Art. 110 TFEU? The Member State must **eliminate the discrimination** in case of violation of the *first paragraph* of the provision, whereas it has to **remove the protectionist effect** if it has violated the *second paragraph*.
Of course, Member States must **repay charges** that have been unlawfully imposed.

Relationship Art. 30-110 TFEU
Finally, it is interesting to analyze the **relationship** between Art. 30 and Art. 110 TFEU.

First, let's focus on their **scope of application**:

a. Art. 30 TFEU applies on charges imposed on goods by the sole reason that they have crossed a border (instead, those charges do not apply to domestic goods),
b. whereas taxes under Art. 110 TFEU apply *both* to domestic and foreign goods.

These two articles are **mutually exclusive**, meaning that only one can be applied at a time: hence, every time a charge is at stake, we need to establish under which article's scope of application it should fall. What is problematic in this respect is that there might be situations in which it is not easy to **distinguish between a charge** under Art. 30 TFEU and one under Art. 110 TFEU.

These situations concern the so-called ***Para-Fiscal Charges*** → In such situations, a Member State apparently imposes a *tax* on both domestic and imported goods; however, the State *reimburses* the tax to domestic producers, thus offering them an advantage compared to foreign producers. In practice, Member States refund taxes either ***directly*** (through a refund strictly speaking), or ***indirectly*** (through destining the tax revenues exclusively in favor of national producers, e.g., giving them some subsidies or fiscal advantages). So, how do we distinguish taxes under Art. 30 and those under Art. 110? Simply:

- *If* the charge is **totally reimbursed**, then **Art. 30 TFEU** must apply[94] (*Visserijbedrijf D.J. Koornstra & Zn. Vof*).
- *If*, instead, the charge is only **partially** reimbursed to domestic producers, then **Art. 110 TFEU** applies[95] (*Compagnie Commerciale*)

Distinguishing between these two cases is extremely important, since Art. 30 **prohibits** charges having equivalent effect *in any case*, whereas taxes under Art. 110 might be legal, but needs to be applied ***equally to everybody***.

Non-fiscal barriers: Quantitative Restrictions

So far, we have engaged with fiscal barriers to free movement of goods (i.e., charges and taxation). Now, we shall look at ***non-fiscal barriers***, regulated in **Art. 34 and 35 TFEU**: basically, they are ***quantitative restrictions*** to imports or exports and **measures having equivalent effect** (henceforth, MHEE).
It is important to distinguish them from fiscal barriers: the latter *have monetary value*, whereas non-fiscal barriers consist in measures with other effects (therefore, they are **mutually exclusive**: you either apply Art. 30/110 TFEU, or you apply **Art. 34/35 TFEU**).
As way of example, consider *mandatory health inspections*: do they fall under fiscal or non-fiscal barriers? Actually, health inspections *per se* must be considered under Art. 34. However, if the health inspection requires the trader to pay a fee, then it must be assessed under Art. 30.

[94] Indeed, it would be as if the charge was imposed only on foreign goods so Art. 30 TFEU must apply
[95] In this case the charge still applies both to domestic and foreign goods, so the situation falls under the scope of Art. 110 TFEU

Now, **Art. 34 TFEU** states:
***Quantitative restrictions** on imports* [and on *exports* too, according to Art. 35] *and all **measures having equivalent effect** shall be **prohibited between** Member States.*

What can we notice here is a common element: i.e., that restrictions are prohibited for goods that **cross the border**. Hence, for these two articles to apply, there must be a **cross-border dimension**. Conversely, purely internal trade is not covered by these provisions. Nonetheless, the ECJ has been quite flexible in the interpretation of this *cross-border* element: also a hindrance to a **potential** cross-border trade can come within the scope of application of the free movement provisions.

Then, **Article 36** considers some **derogations** to the prohibitions imposed in the precedent articles:
The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of

- ***public morality**, **public policy,** or **public security**;*
- *the **protection of health and life** of humans, animals or plants;*
- *the protection of **national treasures** possessing artistic, historic or archaeological value;*
- *or the protection of **industrial and commercial property**.*

*Such prohibitions or restrictions shall not, however, **constitute a means of arbitrary discrimination** or a **disguised restriction** on trade between Member States.*

So, Art. 36 contains a list of possible justifications for quantitative restrictions. The ECJ further extended this list with some **other requirements** (e.g., environmental protection or consumers' protection): the so-called ***mandatory requirements doctrine*** *(*see *infra)*.
Suffice it for the present to stress that these derogations cannot, in any case, be used as a means of **arbitrary discrimination**: i.e., a State cannot rely on this list to have a disguised restriction on trade between Member States. If such criteria are not met, quantitative restrictions are not allowed.

Measures Having Equivalent Effect (MHEE)

As happened also for fiscal measures, we do not find a definition of *measures having equivalent effect* in any Treaty provision. Nonetheless, we may find a suggestion of it in the last sentence of Art. 36: they might be measures that in practice **create arbitrary discrimination on trade** between Member States.
Besides, as usual, it was the Court that defined ***quantitative restrictions*** in ***Geddo***: they are all those bans on imports/exports/goods in transit.
What is problematic is defining a *measure* having equivalent effect to quantitative restrictions. In general, MHEE are *quantitative measures* (that are not formally *restrictions*) which amount to a **total or partial restraint** of, according to the circumstances, **imports, exports or goods in transit**. Of course, by definition, such measures apply only to imports and exports.
In practice, one of the first attempt to give shape to this definition was with **Directive 69/50**, that provided guidance on how to interpret MHEE. For instance, **Art. 2** of that Directive made some examples of MHEE: e.g., price-fixing rules, rules setting minimum or maximum prices, rules concerning physical characteristics, labelling, packaging, etc.
However, the ECJ very rarely referred to this directive: instead, it preferred to elaborate its own definition in ***Dassonville***, which we will see in a while.

Before, it is worth mentioning that the Court has also held in ***Henn and Darby*** that a **total ban on imports** of a certain good is *automatically* covered by Art. 34 and 35, **even if the trade of such goods is not allowed**. The case originated from the fact that in the UK there was a *total ban* on imports of pornographic articles, due to the fact that trade in pornographic material was not allowed also *inside* the UK. Nonetheless, the Court has ruled that the ban at stake had to be scrutinized in light of Article 34. Moreover, also **ban on *personal* imports** and **exports** falls within the scope of application of this Free Movement provision, as the Court ruled in ***Rosengren***[96].
Also, as we have just seen, ***arbitrary discriminations*** are always **prohibited** by Art. 36, since (either direct or indirect) discriminatory measures hinder intra-Community trade (as the Court held in ***Irish souvenirs***[97]).
We should focus also on the *discriminatory element*: is **discrimination** a necessary precondition for the MHEE regime to apply? The Court answered negatively: if Article 34 covered *only* discriminatory measures, then domestic production of the limited good would be always needed to trigger Art. 34 and 35[98].

To sum up, which measures can be considered as MHEE? Of course, they are not formally quotas, as we have just said. Logically, they should be a measure having the **effect** of totally or partially **restricting imports and exports** in the EU.

Dassonville

The Court came to its final definition in ***Dassonville***. In that case, two Belgian brothers wanted to import Scottish whiskey they had bought in France; to do so, Belgium required a particular certificate (i.e., the designation of origin), that was however particularly difficult to obtain. When the Belgian law was challenged, the ECJ clarified the notion of MHEE, holding:
*All **trading rules** enacted by Member States which are **capable of hindering directly or indirectly**, **actually or potentially** intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*

Evidently, this is an extremely **broad** definition: regardless of the purpose or of the type of rule, the only thing that matters is its **impact** and **effects**.

1. First, we understand that MHEE are **national rules** that constitute an **obstacle** to intra-EU trade.
2. Moreover, this notion not only covers *actual* and present obstacles, but also **potential hindrances**. Hence, every national measure can potentially be scrutinized under EU law.
3. To understand what falls under Art. 34, it is therefore **irrelevant**:
    - The *type of measure* (indeed, potentially every kind of national rule can come within the scope of this article).
    - The *entity* of the restrictive effect on the market: even a *potential* obstacle is enough to trigger Art. 34.
    - The *discriminatory nature* of the national rule: indeed, we may have a MHEE even when the measure is **applicable also to domestic goods**.

[96] In that case, a guy wanted some medical preparations that were produced in French chemistries. However, Germany had banned such kind of import.
[97] In this case, Ireland required souvenirs coming from foreign Country to be labelled as *foreign products* without a valid justification.
[98] Discrimination exists only in relation to goods that are produced both outside and at national level

The importance and the revolutionary magnitude of *Dassonville* can be understood also from the following paragraph:
*In the absence of a community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to **prevent unfair practices** in this connection, it is however **subject to the condition** that these measures should be **reasonable** and that the means of proof required should **not act as a hindrance** to trade between Member States and should, in consequence, **be accessible to all Community nationals**.*

Of course, Member States were not happy at all about this broad interpretation. As we may imagine this interpretation was extremely **beneficial** for traders, who could challenge many national laws for the sole reason that they could potentially have an impact on cross-border trade.

Cassis de Dijon
Dassonville was quickly followed by another seminal judgement: ***Cassis de Dijon***, which clarified what was already inherent in the previous case, i.e., that also *indistinctively applicable rules* (that therefore do not discriminate between imports and domestic goods) can be caught under Art. 34 TFEU and so **they need to be justified**. In that case, a German grocery store wanted to import a French liquor, which however contained a quantity of alcohol (16%) below the level that German law required for a liquor to be sold on the market (25%). In this case, the point made in *Dassonvile* was made even clearer, given that in *Cassis de Dijon* the measure was not discriminatory, since it applied both to domestic and foreign products. This notwithstanding, the German rule was challenged and the ECJ found that:
*In the absence of common rules relating to the production and marketing of alcohol (….) **obstacles to movement** within the community resulting from **disparities between the national laws** relating to the marketing of the products in question must be **accepted in so far as** those provisions may be recognized as being **necessary** in order to satisfy **mandatory requirements** relating in particular to*

- *the **effectiveness of fiscal supervision**,*
- *the protection of **public health**,*
- *the fairness of **commercial transactions***
- *and the **defence of the consumer**.*

Hence, as a general rule, a product **lawfully manufactured** in a Member State should be **recognized** as such also by other Member States, *unless* these Member States have ***mandatory requirements*** of **public interest** to apply their rules to the product.
Indeed, although **regulatory diversity** may result to obstacle to movement, can be **justified** by establishing the aforementioned *mandatory requirements* on grounds of public interest: in this respect, the Court also established **additional justifications** (e.g., protection of public health, fairness of commercial transactions, etc.) besides those already mentioned in Art. 36. Of course, the justification must be verified by the Court.

Therefore, as to the outcome of the case: Germany tried to justify the threshold was about *consumer* and *public health protection*.
However, the Court did not accept the justification, holding that:
*In practice, the principal effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content […]. There is therefore **no valid reason why**, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal*

prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

So, the ECJ accepted that **consumer protection** can be a **legitimate justification** to obstacles to free movement; however, in *Cassis de Dijon*, it found that there was no actual justification.

To put it differently, the Court did **not make any reference to discrimination**[99]; instead, the **incompatibility** of this national measure with Art. 34 derives from the sole fact that a product *lawfully produced* in a Member State cannot be sold in the territory of another Member State.

More in general, *Cassis* is of outmost importance for two main reasons:

1. First, the Court introduced the ***Principle of Mutual Recognition***, i.e., a **presumption of regulatory equivalence**[100].
   This meant that a product lawfully produced in a Member State may be *as such* marketed and sold in another Member State, without being subject to additional rules → to put it differently, it is **assumed** that products **comply** with the regulations of other Member States.
   The rationale of this principle was not to put a sort of "double burden" on traders and producers: of course, if a product had to comply with different national rules in different Member States, its free movement would be impaired (since producers and traders would need to demonstrate compliance with the requirements of ***every single State***). Conversely, with this principle, **once a product has satisfied the requirements of its Member State of origin (or of first import), it is *assumed* to satisfy those of all other Member States**.
   The principle of Mutual Recognition was fundamental in achieving **negative integration** (i.e., in removing barriers to Free Movement): indeed, the principle makes it less necessary to harmonize national legislations (that would be a form *positive integration*) to achieve integration[101].
   Moreover, it allows for **regulatory diversity** between Member States, thus respecting *cultural traditions* and *increasing consumers' choice*, especially as far food is concerned. As way of example, consider the production of Blue Cheese. As we know, it is produced in different Member States according to different techniques and rules (e.g., the Stilton cheese in the UK, Gongorzola in Italy, etc.), as part of the **cultural diversity** between States. If each State imposed its own standard for the circulation of blue cheese, it would result in a huge **loss of product diversity** and **consumer choice** (and so, an Italian Stilton Cheese lover would be sad).
2. Furthermore, the ECJ introduced **new exceptions** to Art. 34 TFEU, with the so-called ***Mandatory Requirements Doctrine***, whereby Member States can justify the impositions of additional rules on **public interest grounds** other than those listed in Art. 36 TFEU.
   Be aware that:
   - Mandatory Requirements can only justify *non-discriminatory* MHEE (i.e., rules that are indistinctively applicable both to national and foreign goods),

[99] Due to Cassis also **indistinctively applicable rules** come within the scope of Art. 34 TFEU as MHEE and must be justified

[100] Member States must recognize each-others regulatory standards

[101] Who would want a single EU rule when any product is assumed in compliance to other States' rules? Moreover, a single EU law would lead to a single kind of product (e.g., a single type of blue cheese): who would want to eat only Stilton Cheese just because it is the only one in compliance with EU law? In this respect, negative integration is not only **more practically achievable**, but also **more desirable** in some areas (e.g., in the food sector).

- whereas *discriminatory* MHEE can be justified only on the grounds listed in **Art. 36 TFEU.**

As we have said, the broad interpretation of Art. 34 TFEU given in *Dassonvile* was excessively broad for Member States: hence, Member States would risk losing important regulatory powers (potentially, any national rule would come under scrutiny of Art. 34 TFEU), and important policy aims (e.g., consumers protection) would be impaired.
To counterbalance this notion of MHEE, the ECJ provided a **longer list of justifications**.
As way of example, imagine that a State has set a rule on labelling of some products (e.g., "The label must be clear and in a language that is widely spoken in the Country of sell"); of course, the public interest here is to protect consumers, and this rule is not designed to restrict cross-border trade. However, it might *indirectly* have that exact effect (and so, it would be considered as MHEE according to *Dassonville*). Without *Cassis*, the State could not invoke consumers' protection to justify that rule (since it is not listed in Art. 36); instead, now that rule would be saved (even if, of course, *mandatory requirements* are always subject to the principle of **necessity** and **proportionality**).

To sum up:

- whereas, on the one hand, *Cassis* extended the scope of application of Art. 34 TFEU also to **non-discriminatory rules**,
- on the other hand, it gave Member States **further grounds of public interest** that could justify restrictions to Free Movement of Goods.

The impact of these two rulings was huge, first, on **negative integration**.

- Following *Dassonville* and *Cassis*, several **national rules** were declared **illegal barriers** to Free Movement, since they fell within the broad definition of MHEE, and even though they were **indistinctively applicable** (and so, they were not discriminatory).
- Also, it impacted on the Commission's agenda, which from that moment on would have mainly focus on **negative** (rather than positive) integration, as the Commission itself stated in its ***Communication on Cassis***:
  *The Commission's work of **harmonisation*** [i.e., positive integration] *will henceforth have to be **directed mainly*** [if not, only] ***at national laws** having an **impact** on the functioning of the Common Market where **barriers to trade to be removed arise from national provisions which are admissible under the criteria set by the Court**.*

A practical consequence of Cassis: Product Requirements

As we have said, according to *Cassis*, also **indistinctively applicable rules** come within the scope of Art. 34 TFEU (as MHEE) and must therefore be justified.
An example of such rules are **product requirements** (e.g., on composition, packaging, labelling, etc.), that are *prima facie* not directly discriminatory, but need to be justified.
In this respect, product requirements are **always** caught under Art. 34 TFEU, because they pose a **double regulatory burden** between different Member States, and so they affect intra-Community trade.
Therefore, the imposition of such requirements to imports must **always be justified**, if and only if it is indistinctively applicable[102], according to the '***mandatory requirements'*** doctrine:

- they must pursue a **legitimate interest** (usually, consumer protection)
- and must be **necessary** and **proportionate** to the attainment of that aim.

[102] Otherwise, the only possible justifications are those listed in Art. 36 TFEU.

As way of example, consider the ***Glocken*** case, in which an Italian law provided that, in order to guarantee a certain quality level, all the pasta sold in Italy should have been made from 100% durum wheat. A German producer was therefore fined by Italian authorities for selling pasta not made from 100% durum wheat. However, the producer challenged the sanction, arguing that Italian legislation was not compatible with Art. 34 TFEU (and the *Pretura di Bolzano* referred to the ECJ).
Italy, in its turn, argued that the rationale for its rule was to **ensure consumer protection** and high quality of pasta; however, the ECJ considered that justification insufficient: indeed, Italy could have efficiently used a **less restrictive means** to ensure consumer protection (e.g., the obligation to write the composition of pasta in the label).
Therefore, preventing the import of products legitimately manufactured in other MS was not necessary (or rather, **disproportionate**) to attain the stated aims.

The issue that raised from *Dassonville* and *Cassis* was an **uncontrolled expansion** of Article 34: after these judgements, there was a fierce scholarship debate, first, on the *scope of application* of the provision and, more broadly, on the *rationale* of Free Movement provisions.
Indeed, every national rule (not only those regulating trade) could potentially come under the scrutiny of the ECJ, in terms of proportionality (and – as we remember – the **proportionality assessment** is extremely delicate, since there is always the risk of a judiciary interfering with political choices). In the literature, some scholars even proposed distinguishing between:

- rules concerning ***physical characteristics*** and product requirements (e.g., composition, size, labelling, packaging, etc.)
- and rules concerning ***selling arrangements*** (i.e., regulating the way a product is sold, such as those concerning advertising and marketing).

Hence, we can understand how there were no clear boundaries as for to what extent Member State could regulate. After this debate, the ECJ embraced this distinction, also considering the critiques that followed two landmark cases:

- In ***Cinéthèque***, a French legislation prohibited the trade of videocassettes of films within one year, pursuing the aim of encouraging the cinematographic production as such, and affecting trade only indirectly (moreover, there was no discrimination between national and foreign videocassettes). This notwithstanding, the French rule was caught by the ECJ **under the scope** of application of Art. 34 TFEU, and so it had to be **justified**. Fortunately, the ECJ found that the justification put forward by France (i.e., the promotion of cinematographic production) was, indeed, acceptable and proportionate.
- Likewise, in ***Sunday Trading***, the chain of shops B&Q challenged a British rule that banned Sunday trading aiming at limiting working hours and protecting workers. B&Q argued that this prohibition had, as an effect, *reducing the sale* of the company itself, and consequently, also that of imported goods. Indeed, if the shops cannot sell on Sundays, there will be a reduction in the trade of imported goods. Again, this British rule was caught **under Art. 34 TFEU**. However, the ECJ **deferred** the proportionality test to the *national* Courts, making different cases (risen before different Courts) being decided differently.
  Moreover, the case raised the question concerning the *rationale* of Free Movement provisions:
  - was it the removal of discriminatory barriers (and of economic protectionism),
  - or the promotion of economic freedoms as such?

  Indeed, in these cases, the real, underpinning issues with the challenged rules was the *loss of economic profits* by the companies that challenged them. The Court had gone too far.

As we have said before, after these cases, scholarship proposed the distinction between rules concerning ***product requirements*** (that objectively posed a "double burden" on producers and traders) and rules concerning ***selling arrangements***.

The ECJ embraced this distinction in ***Keck***, in which two guys sold some products at lower price than the actual purchase price. This type of activity (that undoubtedly concerned *modalities of sale promotion*) was prohibited by French laws. The ECJ caught the occasion to revise its previous caselaw.
First, the Court restated the principle of *Cassis* for rules concerning **product requirements**:
*It is established by the case-law beginning with "Cassis" 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 Art. 34 TFEU* [since they place a double burden on importers]. *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.*
However, right after that, the Court admits:
*By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions **restricting or prohibiting certain selling arrangements** is 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**.*
Indeed, the Court recognized that certain rules about selling arrangements place an **equal burden** on anyone, both on importers and on domestic traders.
Hence, provided that:

- Those rules are **applied to all** relevant traders, and
- They are **not discriminatory** (either directly, in law, or indirectly, in practice)[103], then:

the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State [do] ***not prevent their access to the market** or to impede access any **more** than it impedes the access of domestic products. Such rules therefore **fall outside the scope of Art. 34*** [and so, they are not considered as MHEE].

By way of contrast, rules concerning product requirements **do hinder** intra-community trade, as they place a "double-burden" on traders, and therefore they always have to be justified. From a perspective, the Court in *Keck* clarified the content of Art. 34 TFEU by referring to the concept of ***market access***.

The problem is, then: how can we define selling arrangements? Which of them benefit from the Keck doctrine?
For instance, in ***Familia Press***, an Austrian law banned the trade of magazines with prize competitions. Of course, prize competition can be defined as *selling arrangement*; however, at the

[103] In interpreting this second condition, the Court has adopted a **strict** approach. For instance, *total bans on advertisement* (as in the case *Gourmet*, in which a Swedish law banned advertising of alcoholic drinks; however, the ECJ held that the rule put national producers in an advantaged position, since national producers are already known by Swedish citizens) or on internet sales are always considered as indirectly discriminatory.

same time, the rule affected the *content* of magazines, that might have been prevented from freely circulating. In cases such as this one, **where the rule is both about product requirements and selling arrangements, it is automatically caught under Art. 34 and so it needs justification**.
Hence, *Keck* did not, in practice, dispel doubts about the real scope of application of the Treaty provision. What's more: scholarship criticized the ruling for having gone too far in the opposite direction.
Namely, **AG Jacobs** argued that *Keck* put too much emphasis on the type of rule at stake, and not on its impact. According to him, the distinction did not make any sense.
Instead, the AG proposed an alternative test, based on the **substantial hindrance** of the rule. However (guess what?) the Court has never followed his approach.
Hence, as for ***other rules*** with **doubtful application**, they fall within art. 34 only if they directly, or indirectly, actually, or potentially **hinder** intra-Community Trade (basically, the *Dassonville* formula is applied as a **residual test**).

To sum up, after this ruling, we must consider the distinction between:
- ***Product requirements***, that are in principle **always caught** under Art. 34 TFEU (since they place a "double burden" on the traders) unless they are **justified** on *public interest* grounds
    - according to Art. 36 TFEU if discriminatory,
    - or to Art. 36 TFEU + mandatory requirements if not;
- ***"Certain" selling arrangements*** (and be aware, not *all* selling arrangements), that, when non-discriminatory, **fall outside** the scope of application of Art. 34 TFEU. Instead, if they are directly or indirectly **discriminatory** (see footnote above), they fall within the scope of Art. 34 TFEU
- **Other rules** with **doubtful application:** they fall within art. 34 only if they directly, or indirectly, actually, or potentially **hinder** intra-Community Trade (basically, the *Dassonville* formula is applied as a **residual test**)

RULES ON USE

Moreover, a fourth test has been introduced for the so-called **rules on 'use'** (i.e., rules affecting the modalities in which a product can be used), that often cases influence consumers choice: if they **hinder *market access*** (i.e., *market access test*), they fall within the scope of Art. 34 TFEU and need to **be justified** (as the Court established in ***Commission v. Italy 110/05***, known as the *Trailers* case, and in ***Mickelsson Ross***).

ART. 35 TFEU: QRs and MHEE on exports

So far, we have referred to Art. 34 TFEU.
But we need to remember that there is also **Art. 35 TFEU**, that bans quantitative restrictions (and MHEE) on ***exports***. However, here caselaw is not as developed as for Art. 34 TFEU, since it is in Member States' economic interest to develop export of their own goods, with only few exceptions (for instance, consider the ban on medical equipment Germany imposed when Covid started to spread).
Suffice it to say that MHEE on exports are much more **narrowly defined**: they encompass only ***directly or indirectly discriminatory measures***. To put it differently, contrary to Art. 34, in this case **discrimination** is necessary to apply Art. 35 TFEU.
For instance, in the case ***Groenweld***, that concerned horse meat, the Court defined as:
*national measures which have as their **specific object or effect** the restriction of patterns of exports and thereby the establishment of a **difference in treatment** between the domestic trade of a*

*Member State and its export trade, in such way as to provide a **particular advantage** for national production or for the domestic market of the State in question **at the expense** of the production or of the trade of other Member States.*

However, in ***New Valmar***, the notion of "*discrimination"* has been interpreted very broadly, so as to encompass also the requirement that **invoices had to be written in the language of the country**.

DEROGATIONS (ART. 36 TFEU AND MANDATORY REQUIREMENTS DOCTRINE

Before moving on to the next part, it is necessary to specify the distinction between *derogations* to Art. 34 that are mentioned in Art. 36 and *justifications* introduced with the Mandatory Requirements doctrine (*Cassis*):

- ***Derogations*** (and so, **Art. 36 TFEU**), apply when there is an element of **direct discrimination**. Indeed, when we have direct discrimination, only derogations *ex* **Art. 36** can be used as justifications.
  For instance, Sweden tried to justify the ban of sex dolls on grounds of *public morality*; however, the Court did not accept the justification since trade of sex dolls was not banned *internally* (conversely to what eventually happened in *Henn and Darby*, in which the ECJ found the justification of public morality proportionate, given that in the UK pornographic material was totally banned).
  In this respect, the Article provides for an ***exhaustive* list** of derogations that Member States can invoke for rules that fall under Art. 34 TFEU and the Court has interpreted this list **narrowly**.
  As way of example, a restriction justified on grounds of Fundamental Rights fall under the *public policy* derogation. For instance, in ***Schmidberger***, an Austrian law was challenged because it did not ban demonstrations that blocked motorways and therefore negatively affected trade. However, Austria justified its legislation on the ground that it protected Fundamental Rights: the Court agreed.
- ***Mandatory Requirements***, instead, are included in **open list** which has been not codified but developed by caselaw. They can be applied only to rules that are not *directly* discriminatory but are **indistinctively applicable**.

Finally, when Art. 34 applies, also a **proportionality scrutiny** must follow: the measure must be ***necessary*** (i.e., there is not a less restrictive means to achieve the same aim) and ***proportionate***.
Of course, when a Member State derogates to Art. 34 TFEU, it needs to comply with the **Charter**.

Questions for reflection

To sum up what we have seen so far, consider the following questions:

- *When is taxation not compatible with EU Free Movement of Goods law?* As to **taxation**, we must apply **Art. 110 TFEU**: *discriminatory* (i.e., when different taxation applies to *similar* domestic and imported goods) and *protectionist* (i.e., when domestic and imported goods are *in competition*) taxation cannot be applied.
- *What are the advantages and disadvantages of a broad definition of MHEE?* First, a broad definition could **prevent internal market from fragmentation**. Moreover, it allows to have **cultural diversity** and **greater consumer choice**. However, such a broad definition implies taking **regulatory power away from Member States**.

Problem Question: "Nectar of Aphroditi"

To solve hypothetical problem questions on Free movement of goods, we might use this checklist:

- First, we have to check if there is a **cross-border element**: otherwise, the problem is a non-problem.
- Then, we have to check if the measure is a ***customs duty*** (i.e., a charge imposed on a product for the sole reason that it crossed a border) or a ***charge having equivalent effect***. In that case, always remember that two **exceptions** are possible to justify them: either it is imposed in consideration for a service provided to the importer, or it is *imposed* for inspections required by Union law. Also, always remember that inspections are *measures having equivalent effect*: we must analyze the **charge** under Art. 28/30, and the **inspection** *per se* under Art. 34.
- Thirdly, we have to see whether we are dealing with a **discriminatory or protectionist taxation**, in which case Art. 110 TFEU is applicable. To do so, we may answer to the following questions: are the products *similar*? Is the tax directly/indirectly *discriminatory* (taking also into consideration whether levied at the same stage of production, and in the same manner)? If it is indirectly discriminatory, is it *objectively justified*? Are the products in *competition*? Does the tax have a *protectionist effect*?
- Instead, if the measure imposes a **quantitative restriction on imports**, we must check whether it is justified (only) by the Treaty derogations, whether it is *proportionate* to the aim and consistent with *fundamental rights*. Likewise, the same procedure must apply in case of **measures having an equivalent effect** that are *directly discriminatory*. Conversely, if the MHEE applies *equally to imports and domestic goods*, and it is a **product requirement**, Art. 34 TFEU must apply, but the measure can be justified both by Art. 36 TFEU and by *mandatory requirements*. Moreover, the measure must be *proportionate* to the aim and comply with *fundamental rights*.

To put it in practice, we shall see a particular problem question, of course concerning free movement on goods. Suppose that *Aphroditi* is the CEO of a Greek company that sells her yogurt with 22% fat all over Europe. However, some problems emerge:

a) *In Croatia to disincentive consumption of products rich in animal fat (risky for health), products with up to 20% animal fat are taxed 10% of their value, products having between 20% and 40% fat are taxed 15%, and those having above 40% fat are taxed 20%.* We might solve this case as the Court did in *Commission v. Greece*: in this case, we have **neutral criterion** (i.e., the taxation is levied according to the percentage of fat contained in yogurts), that nonetheless can have different effects on imported or domestic goods. Therefore, we should mention different possible outcomes: for instance, we have to consider whether there is domestic production of similar goods (or in competition) in Croatia or not. Then, we have to establish whether there is a *discriminatory effect* or not.

b) *Belgium, in line with an EU regulation, conducts regular inspections on all dairy products and charges 500€ for each inspection.* Here, we have a *fee* imposed for an inspection **required by EU law**: therefore, we fall within an exception insofar as the fee is *proportionate* to the provided service.

c) *France taxes all yogurts at a fixed rate of 3%, the money levied goes to a fund to help French cow farmers.* This is undoubtedly a **Parafiscal Charge** (i.e., the State appears to tax both domestic and foreign products in the same way, except there is a total or partial reimbursement to domestic producers): this French rule is caught within the scope of Art. 30 TFEU.

d) *Ireland requires a certificate of quality which does not exist in Greece and is difficult to obtain.* Lastly, this is a case similar to *Dassonville*, with a Measure having Equivalent Effect.

Another Problem Question: "Smooth as oil, grooved as pasta"

Now, consider another problem question, about or favorite subject: Free Movement? No, I meant food. Stefano is an Italian retailer. He imports olive oil and pasta from Germany. However:

a) *Union law imposes an inspection on olive oil: Italy charges a fee to carry out these inspections. Italian law also imposes a tax of 30% on vegetable oil; however extra-virgin olive oil is taxed at 10%.* An inspection fee might be considered as a CHEE; however, in this case it is imposed by Union Law: if the fee is *proportionate* to the cost of inspection, then it is fine. As to the tax, we have to determine whether it is *discriminatory* or *protectionist*. To do so, it is necessary to see whether the products are *similar* Then, we must establish whether Italy produces extra virgin olive oil: in that case, there is (direct or indirect) discrimination. Finally, always remember that discrimination in this case can be justified. If, instead, products are in *competition* (i.e., there is a degree of substitution), we must establish a protectionist impact.

b) *Italian authorities seize the pasta and prosecute Stefano on the grounds that the pasta label does not comply with Italian law which requires that Pasta which is not 100% durum wheat should bear a Red label indicating the ingredients in Italian (whilst Stefano's Pasta bears a black label which indicates the ingredients in French), and that Stefano's Pasta contains a dangerous type of flour which might produce violent allergic reactions.* Labelling requirements always are MHEE, since it is a product requirement that needs to be justified by *mandatory requirements*. In this respect, imposing a red label seems disproportionate, unless there is a serious public concern about allergies. Anyway, it would be possible to find a *less restrictive* means. Moreover, as for the requirement that ingredients must be written in Italian (still a product requirement), they too need to be justified. In principle, ingredients requirements in a language that can be easily understood by consumer are justified on consumer protection grounds, especially as there is the risk of allergy.

c) *Pasten, the German producer has launched a European wide advertising campaign to promote its pasta. The advertisement shows a priest enjoying some spaghetti and the motto "Not all good pasta is Italian: Pasten the pasta for the true Aryan". In Spain the advertisement campaign is banned because it constitutes incitement to racial hatred.* They are considered as *selling arrangements* pursuant to *Keck*: in principle, they are forbidden only insofar as they are *directly or indirectly discriminatory* or if they impose a *total ban* on advertising. Spanish rules do not seem to fall within Article 34 TFEU at all, so they do not need to be justified. However, remember that restriction on advertising is always a restriction on the freedom to provide and receive services: we will consider that in the following paragraphs.

d) *The group "United against Racism" together with local catholic groups organises a demonstration picketing Stefano's warehouse; as a result, Stefano is unable to distribute his products and loses several contracts.* United against racism is a private group, not the state or its emanation, and Article 34 TFEU does **not apply horizontally**. However, Art. 34 imposes on Member States a **duty to protect effective exercise of freedom** (as ruled in ***Schmidberger***) and Stefano would make the argument that Spain should not have allowed the picket because it has failed to protect the free movement of goods. Spain can justify its permission to mount the picket with reference to the **need to protect fundamental rights**, and namely freedom of expression (as ruled in the same decision). This shall be in line with proportionality.

Free movement of workers

We have already started walking through Free Movement of Workers when we analysed Free Movement of Citizens. As we know, Free Movement is a fundamental aspect of **Union Citizenship**: indeed, all EU citizens enjoy the fundamental right to **move freely in the Union**.
However, the content and the extent of such right, and the conditions for its exercise depend on the situation of the person.
The peculiar element of EU citizenship is that we have a **dichotomy** among the status of citizen and the plateau of right conferred upon the person. There is, indeed, a distinction among:

- ***economically inactive citizens*** → enjoy less protection, and their rights are subject to ***conditions***, as we have already seen in Dano, case in which the Court ruled that economically inactive citizens *without sufficient resources* (according to the conditions set in the directive 38/2004) fall outside the scope of the Directive (and possibly of the Treaty), and do not enjoy the rights connected to equal treatment
- and ***economically active citizens*** → namely, workers and self-employed people, who enjoy more rights within the Union and do not need to prove any condition

The freedom of movement of ***workers*** is first provided by the **Art. 45 TFEU**.
*1. **Freedom of movement for workers** shall be secured within the Union.*
*2. Such freedom of movement shall entail the **abolition of any discrimination based on nationality** between workers of the Member States as regards **employment**, **remuneration** and **other conditions of work and employment**.*
*3. It shall entail the right, subject to **limitations** justified on grounds of **public policy**, **public security** or **public health**:*

a) to accept offers of employment actually made;
b) to move freely within the territory of Member States for this purpose;
c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

*4. The provisions of this Article shall not apply to **employment in the public service**.*

In the first paragraph of the Article, it is established that **freedom of movement for workers** have to be *secured* within the union → this is one of the four fundamental freedoms in the internal market.
There is a strong rational in ensuring this, namely the ***efficient allocation of resources*** within the Union. The idea was that if there is an excess of labour in a Member State, the exceeding unity of labour could be *shifted in another Member State*, where more workers are needed.
Nevertheless, according to the political declarations succeeded over the years and by the caselaw, human labour is never considered a *mere factor of production*. There is always an emphasis on **human aspects**, which are not strictly intertwined with economic activity of these people. It is worth saying that the ECJ, in the construction of a legal framework, established that workers must have access to several **benefits** also not properly connected with the economic activity they provide.

In the second paragraph of Art. 45 TFEU the freedom of movement is ensured through the ***principle of non-discrimination based on nationality*** concerning **employment**, **remuneration** and any other **condition related** to work and employment; the third paragraph of Art. 45, then, details several rights for workers.

In the fourth paragraph an exception is provided: indeed, the provisions of the article 45 do not apply to **employment in the public service** → only in such cases it is possible for Member States to **discriminate** among foreign and national workers.

We should now consider the **personal scope** of application of article 45.
Neither the article, nor the secondary legislation, provide a definition of what a worker is: a such technical definition, being extremely important for ensuring *legal certainty* and to achieve the objectives of the treaties, cannot be established by each Member State.
Indeed, in ***Hoekstra***, the ECJ ruled that worker cannot be defined according to national law, because Member States might be able to enforce **restrictive interpretations** capable of *frustrating* the aims of the treaties.

The definition was then provided in ***Lawrie-Blum***:
*The essential feature of an **employment relationship** (…) is that for **a certain period of time** a person performs **services for** and **under the direction** of another person in return for which he receives remuneration.*
So, in a nutshell, two elements are required to fall within the definition of worker:
1. a ***remuneration*** (for the services provided)
2. and a ***relation of subordination*** (for a certain period of time).

Scope of application and part-time workers
Given that, it is worth wondering whether part time workers fall within the scope of application of Art. 45. An answer is provided in ***Levin***, where a British citizen living in Netherlands saw rejected her application for a residence permit. The court ruled as follows:
*"Since part-time employment, although it **may provide an income lower** that what is to be considered to be the minimum required for subsistence, constitutes for a large number of persons an **effective means to improve** their living conditions, the effectiveness of Union law would be impaired and the achievement of the objectives of the Treaty would be jeopardised if the enjoyment of rights conferred by the principle of freedom of movement of workers were reserved solely to persons engaged in full time employment earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration"*

Levin had a quite huge **inclusive impact**, since low-income part-time workers (often belonging to disadvantaged categories), being considered workers, gained **equal access to social benefits** (even when they are means-tested benefits, as ruled in *Kempf*).
This might be considered as a true **transnational solidarity**, as opposed to what happens regarding Union citizenship.
It is worth noting that the ECJ specifies that free movement of workers pursues an important **political objective**, and that it is not justified only by economic considerations.
Just consider, as way of example, how many *disadvantaged* categories of workers, such as disabled people, are part time workers. Giving a narrow interpretation of *workers* (so as to exclude part-time ones) would have been rather problematic also under the lenses of **gender discrimination**, given that it is more common for women to have a part time job.
Excluding this kind of work-relationship from the scope of application of the Art. 45 would have been, in fact, not **proportionate**.
However, there is a ***caveat***: the activity of part-time workers must be **genuine** and **effective**, and not amount to a such small scales as to be purely marginal and ancillary. The Court clarified this

principle in ***Trojani***, where a French citizen living in Belgium was involved in a rehabilitation programme for drug addicted people. He received lodging as a small remuneration, but the court ruled that Mr. Trojani was not a worker since his activity was not part of the normal labour market.

Kempf

Now, let us move towards the well-known ***Kempf*** case. Mr. Kempf was a piano teacher, giving few lessons a week. Due to health issues, he was temporarily not able to work, so he asked for a social assistance benefit. The legal issue, in this case, was his qualification as worker which could have guaranteed him the access to the benefit.

The judgment held that:

*"a person in **effective and genuine part-time employment** cannot be excluded from their sphere of application merely because the remuneration he derives from it is **below the level of the minimum** means of subsistence and he seeks to **supplement it by other lawful** means of subsistence. In that regard it is **irrelevant** whether those supplementary means of subsistence are derived from **property** or from the **employment** of a member of his family, as was the case in Levin, or whether, as in this instance, they are obtained from **financial assistance** drawn from the public funds of the Member State in which he resides, provided that the effective and genuine nature of his work is established. That conclusion is, indeed, corroborated by the fact that, as the court held most recently in Levin, the terms 'worker' and 'activity as an employed person' for the purposes of Community law may not be defined by reference to the national laws of the Member States but have a **meaning specific to Community Law**. Their effect would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host state"*

Looking through this decision, we should be able to find a connection to the "*unreasonable burden*" condition we have seen in relation to cases about the Union citizenship.

- Of course, we are not talking about purely inactive citizens, but it is quite tricky to conciliate this relation among the requisite of sufficient resources and the temporary need. This piano teacher had always been self-sufficient, and his need was **temporary** indeed. If we think about this, we can notice that sometimes the boundary between being economically active or inactive is not so easy to draw. Consider the phenomenon of the so-called ***working poors***, namely those full-time workers who are not able to earn enough to be considered self-sufficient.
- Also, in this respect, the **amount** of the salary is **irrelevant**. In *Lawrie-Blum*, for instance, the remuneration of the trainee teacher was below the starting salary of qualified teacher.
- Even the **form of compensation** is not considered to fall within the scope of the article 45. Indeed, in ***Steyman***, it was ruled that also a person working in a religious congregation, which would provide for his material needs, was to be considered a worker. The remuneration, in fact, can also be provided in the form of a *quid pro quo*. But again, we should remember that the activity must always be **genuine** and **effective** and not purely marginal and ancillary.

Jobseekers

And what about **jobseekers**? These are not mentioned in Art. 45, although the right to accept work offers is present. But how can EU migrants find a job without going to the host Member State first? The exclusion of the freedom of movement to seek employment would deprive Art. 45 of its useful effect, as established in ***Antonissen***.

Moreover, as stated in ***Commission v. Belgium*** and then codified in the ***Directive 2004/38***, jobseekers can **reside unconditionally** for the first **three months** and for a **longer period** if they demonstrate that they have **a *genuine chance* to find a job**.
However, the status of job seekers is not the same as the one of workers: indeed, to be legally resident after three months, pursuant to **Art. 7** of the Directive, as they are not workers, they have to demonstrate to have **sufficient resources** not to become an unreasonable burden.
Hence, job seekers are **partly excluded** from the principle of *equal treatment*.
Initially, the Court held (in *Lebanon*) that they enjoy only equal treatment in the procedures for obtaining a job, but they had no access to financial assistance.
After the creation of the Union citizenship, instead, job seekers could be entitled to **benefits that facilitate access to employment**, if they have a **genuine link with the host State's job market**, as ruled in *Collins*. In that case, an Irish citizen moved to UK in order to seek a job. He applied for a benefit which was functional in order to access to the job market. Since *Collins* pre-dates the Directive, there was more scope for the Court to expand the rights of job seekers. The directive is indeed more straightforward in giving Member States discretion on the exclusion of job seekers from social assistance for the first three months.

Recently, in ***Alimanovic***, the Court **extended the *Dano* test** also to jobseekers.
Currently, jobseekers, similarly to purely inactive citizens, shall prove **to legally reside under the conditions set by the directive**.
It is said that:
*"That said, it should be added that, as is apparent from the Court's case-law, such benefits are also covered by the concept of "**social assistance**" within **the meaning of Article 24(2) of Directive 2004/38.***
*That concept refers to all assistance schemes established by the public authorities (…), to which recourse may be had by an individual who does **not have resources sufficient to meet his own basic needs** and those of his family and who by reason of that fact may, during his period of residence, **become a burden on the public finances of the host Member State** which could have consequences for the overall level of assistance which may be granted by that State (judgment in Dano, C-333/13, EU:C:2014:2358, paragraph 63)"*

Finally, there are other two categories which fall under the scope of application of Art. 45 TFEU. They are:

- ***Employers***, who are able to **challenge rules restricting their ability** to hire other EU workers. It would be nonsense to exclude them from the article 45.
- ***Frontier workers***, **returning** and **circular** workers.

Retained status of worker: art. 7 directive 2004/38
We have seen how finding a job within the EU is regulated. But what happens if a citizen loses his/her job? In **Art. 7** of **Directive 2004/38**, it is stated that former workers **retain their status *if*** they are:

a. **Temporarily** unable to work for *sickness* or an *accident*.
b. **Involuntary unemployed** after being employed for **more than one year** and **registered** as jobseeker.
c. **Involuntary** unemployed during the **first twelve months** and they **registered** as jobseekers. In this last case, the status of worker is retained for no less than six months.
d. When on **vocational training**, if is related to the previous employment of the jobseeker.

The retention of worker status is particularly important: with it, they still enjoy ***equal treatment*** and do not have to demonstrate sufficient resources.
In this respect, let us give a look to the ***Jessi Saint Prix*** case. In 2006, Jessy, a French citizen, moved to London to work and study. She started working at a nursery school but, having fallen pregnant and being the job too demanding for her status, she quitted. Eventually, she found herself unable to find another position. In 2008 she asked for income support, but the UK refused because she was no longer a worker, and her situation did not fall within Art. 7 of the Directive. Jessy appealed and 3 months after giving birth she resumed work. The ECJ held that:
*In that regard, the Court has consistently held that **pregnancy must be clearly distinguished from illness**, in that pregnancy is not in any way comparable with a pathological condition.* […] *In those circumstances, it cannot be argued, contrary to what the United Kingdom Government contends, that Article 7(3) of Directive 2004/38 lists **exhaustively** the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status.* [...] *The fact that she was **not actually available** on the employment market of the host Member State for a few months does not mean that she has **ceased to belong** to that market during that period, **provided she returns** to work or finds another job within a **reasonable period** after confinement.*

Rights of workers
We should now give a look to the material scope, namely the rights workers have:

- They have a right to ***move, enter, circulate*** within the "host" Member State (as provided in the Dirctive 2004/38).
- The right to ***take up*** employment.
- The right not to be ***discriminated*** on grounds of **nationality** in relation to almost all matters, including **welfare provisions, social** and **tax advantages**.
- Right to ***access* the labour market**.
- Right to ***family reunification*** (according to the Directive) along with the right to **equal treatment** for children in **education**.

DIRECT DISCRIMINATION
We will be focusing mainly on the right to equal treatment, namely, the right not to be discriminated on grounds of nationality.
It is the cornerstone of the internal market since **direct discrimination** is always **prohibited**. Indeed, according to **Art. 45 TFEU**, rules that distinguish on grounds of nationality are allowed only in relation to *employment in **public service***. The definition of public service, as the one of workers, must be given according to EU law (and not according to national law), and must be interpreted **narrowly** (since it is an exception to the principle), as the ECJ ruled in in ***Commission v. Belgium***:
*"Posts which involve direct or indirect **participation in the exercise of powers conferred by public law** and **duties** designed to safeguard **general interests of the State or other public authorities** – those presume the existence of a **special relationship of allegiance** to the State and reciprocity of rights and duties which form the foundation of the bond of nationality."*

So, when it comes to employment in public services, Member States can reserve some posts to their nationals, provided that:

- the post involves the ***exercise of public law powers***
- *and* there is a duty to ***protect the general interest*** of the State.

These requirements presuppose the existence of a **special relationship of allegiance** to the State.

As way of example, employment in public services excluded from the scope of application could be a **job in the army**.

INDIRECT DISCRIMINATION

Indirect discrimination (i.e., rules that are apparently *neutral*, but in practice affect non-nationals heavier than nationals) is also **forbidden**.

An example of indirect discrimination comes from ***O'Flynn***. Mr. O'Flynn was an Irishman working in the UK, where he applied for a grant offered for funeral expenses. The UK refused to accord the grant since the funeral took place in another Country. However, the Court ruled as follows:

*"Although applicable **irrespective of nationality**, they **affect essentially migrant workers** (…) or the great majority of those affected are migrant workers (…), where they are indistinctly applicable but can more **easily be satisfied by national workers** than by migrant workers (…) or where there is a risk that they may operate to the **particular detriment of migrant workers**".*

To put it differently, if a rule can be more easily satisfied by nationals, rather than non-nationals, it needs **justification**, satisfying both the requirements of ***necessity*** and ***proportionality***.

Examples of indirectly discriminating rules are those that establish a **residence requirement** (of course, nationals can easily satisfy it).

But in general, any condition for employment is likely to be indirectly discriminatory when it contains:

- a **territorial** element,
- or a **language requirement**.

For instance, a Dutch national applied for a position in Ireland, but she was rejected because she did not know Gaelic. In this respect, it is strictly necessary that the **linguistic requisite is *functional*** to the job the non-national is applying for, otherwise it is an indirect discrimination *(**Groener**).*

Long story short, indirect discrimination can be justified by:

- ***imperative reasons of public interest***
- and must always comply with **fundamental rights**.

What happens when rules are neither directly nor indirectly discriminatory, but yet they **discourage** or **hinder** movement or **affects access** to the employment market?

In this sense, ***Bosman*** was a landmark judgment, particularly relevant in the definition of European constitutional law. Bosman was a Belgian football player, engaged with a Belgian club. He desired to move to another club in France, but this transfer was not possible without the payment of a fee requested by French collective rules, according to the transfer system developed by national and transnational football associations.

The ECJ ruled that such rules, like the ones which impose a transfer fee only because he used to play in another club, were an **unjustified restriction** to free movement right. We should now wonder whether the Bosman ruling could lead to problems. This should remind us of the debate after *Cineteque* and *Sunday Trade*, concerning free movement of goods.

The risk of Bosman is again that, potentially, *any national rule regulating an employment relationship may fall within the scope of application of Art. 45 TFEU*. The **test** that the ECJ seems to have applied was the so-called ***market access test***, according to which:

*"Rules which are neither directly nor indirectly discriminatory, but which **affect access** to the employment market, or **affect the workers' ability to move**, are also considered barriers caught by article 45 TFEU unless justified by **imperative requirement of public interest**."*

<u>Horizontal direct effect of Art. 45 TFEU</u>
Of course, <u>not</u> every rule that makes movement less attractive is caught by the article 45. The hindrance must be **real**, and <u>not</u> just potential or too remote. This ruling was particularly important as for the clarification of the scope of application of Art. 45.

- We know that article 45 was liable to have ***vertical direct effect***.
- Later, the Court recognised a ***semi-horizontal*** direct effect against **collective rules** as in *<u>Bosman</u>*, whereby rules made by a football association were caught under the scope of application, due to their particular **collective nature**.
- Eventually, in ***<u>Angonese</u>***, it was ruled that the right not to be discriminated on grounds of nationality can also be invoked ***horizontally***, namely, against a **private party**.

Problem question: "Austria's little secrets"
As usual, let's put in practice what we have learnt (or, have we?). Peter is a Dutch national, and he is a designer. He travels to Austria to seek work. His partner Tim accompanies him. Peter manages to apply for a senior design position within an Austrian government department. However:
His application is turned down for a number of reasons, (a) the department only recruits a limited number of foreign nationals; (b) they claim that Peter's Italian is not good enough for the job; (c) they contend that certain of the design work requires access to military installations and can therefore only be entrusted to Austrian national. Both Peter and Tim are asked to leave the country. Advise Peter as to his and his family's rights under Union law.
First, we have to consider that there is a **cross border element**, so the Free Movement provisions must apply. There is a Dutch national emigrated in Austria, along with Tim. We do not know much about them and their relationship (namely, if they are married, registered partners or none of the above). According to the scope of application of Art. 45, Peter can be **qualified as a job seeker**. The first legal issue is to understand whether this Austrian rule imposing a ***quota on foreign workers*** might be caught by Art. 45. It is of course a **directly discriminatory** rule, which could be challenged. As for the second rule, we can be sure that it is also **discriminatory** since it does <u>not</u> give to non-nationals the possibility to **prove the proficiency** of a language spoken in Austria: of course, Italian is not the most spoken language in Austria. In relation to the third rule, we must know that the definition of **public service** is *interpreted very narrowly*, as we have already seen. Providing an **external** service to the army <u>cannot</u> be considered a public service because it does not fall within the definition provided in *<u>Commission v. Belgium</u>*. Let us now consider the position of Tim, assuming that they are not married or in a registered partnership. They are just in a **durable relationship**, so he falls in the category of *other family members* pursuant to Art. 3 of Directive 2004/38.

Freedom of establishment
We should know, by now, that every EU citizen enjoys the fundamental right to move freely in the Union. However, the content and the extent of such a right, and the conditions for its exercise, depend on the situation of the person:

- ***Economically active citizens***, as we have said, enjoy *more rights* in the Union.
  The category of economically active citizens includes, along with workers, also those who are ***self-employed persons***.
  - Those are covered by **Art. 49 TFEU**, on ***Freedom of Establishment***, if they are **based in another country**, but **contribute to the host country** economy as **settled persons**.

- On the other hand, if they provide services ***temporarily***, they are covered by **Art. 56 TFEU** on ***Freedom to provide services***[104]. Moreover, the ECJ reminded us that it is not simply the duration of the activity to be the fundamental criterion to distinguish between establishment and services: indeed, other criteria may also be relevant (e.g., continuity, periodicity of an activity, etc.).

So, Art. 49 and Art. 56 are **mutually exclusive**.

Art. 49 TFEU

Let us give a look to the articles regarding the freedom of establishment. **Art. 49 TFEU** provides:
*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 affected, subject to the provisions of the Chapter relating to capital.*

It follows from this article that legal persons can have establishment in several MSs through the setting up of branches and agencies. In the case of natural persons, it can be possible that the individual can have a separate activity in another country.

Art. 51 TFEU provides for a **derogation**: if a service is connected, even *occasionally, with an official authority*, then Art. 49 does not apply. This is quite similar to the *public service exception* provided in Art. 45 TFEU, in relation to Free Movement of Workers.
It states:
*The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to **activities which in that State are connected**, even occasionally, with the **exercise of official authority**.*
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

According to **Art. 52 TFEU**, other possible derogations are admitted only insofar they are **justified** on grounds of ***public policy***, public ***security***, and public ***health***.
It states:
*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for **special treatment for foreign nationals on grounds of public policy, public security or public health**.*
The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Scope of application

Now, we should give a look to the scope of application of Art. 49 TFEU:

[104] As a way of example, if you are a doctor in Italy and you are visiting a patient in France, then Art. 56 applies

1. **Self-employed persons** and **legal persons** (so-called *Corporate Establishment*) are EU citizens who **exercise an activity** *outside* a relationship of subordination.
   This is, of course, a totally different situation from the free movement of workers. A similar definition was provided also in ***Jany***, regarding a prostitute in the Netherlands. She paid taxes, and also a rent into the landlord. The Court of Justice delegated the National Court on whether to define Jany as a self-employed worker.
2. For the purposes of the application, a **cross border situation** must be (as usual) present: to put it differently, the EU citizen must **move** to another Member State to exercise an economic activity **there**. But remember that (again, as usual) the norm applies also to *circular* or *returning* people.
   This was relevantly important in ***Kraus***, a case concerning a German national, who started studying in the UK. Coming back in Germany, he wanted to use his academic title, but the German rules required a previous authorisation. Eventually, he successfully challenged the German rule.
3. Moreover, Art. 49 TFEU has **direct effect**, like Art. 45. It applies in **vertical** and **semi-horizontal** situations, and in **horizontal** situations only with *discriminatory measures*. The latter is rather problematic, as emerged in ***Viking***.
   A Finnish ferry operated between Finland and Estonia, and this operator wanted to move to Estonia due to the lower wage level. Viking challenge the trade union action of striking because it limited its freedom of establishment. The ECJ, in this respect, ruled in favour of Viking since the provision has **horizontal direct effect**. The limits of *Viking* are not clear, and there is still uncertainty about what kind of non-discriminatory rules can be caught under Article 49.

Gebhard

As we said, Articles 49 and 56 are **mutually exclusive** in terms of application. However, both apply to **self-employed EU citizens who exercise an economic activity in another member state**. It is relevant, for this reason, differentiate the freedom of establishment from the freedom to provide a service.

- The ***Freedom to provide services*** applies to those who **temporarily** move in another State in order to provide or receive a service.
- The ***Freedom of establishment***, on the other hand, applies to economic activities exercised on a more **stable basis**.

It is not always easy to distinguish between a stable and a temporary activity.
In this sense, the ECJ provided a ***functional*** test, whereby you can be a service provider even if you have an office in another MS. This regards your activity, whether it is **periodic or occasional**.
We should consider the ***Gebhard*** case, where the ECJ provided the difference among Article 49 and 56. The concept of establishment has been defined as follows:
*The **concept of establishment** within the meaning of the Treaty is therefore a very broad one, allowing a Union national to **participate, on a stable and continuous basis, in the economic life of another Member State** other than his state of origin, and to profit therefrom, so contributing to economic and social interpenetration within the Union in the sphere of activities as self-employed persons.*

Hence, *establishment* is the **participation**, on a *stable* and *continuous* basis, in the **economic** life of another Member State other than his one of origin. So, in light of this interpretation, someone who *establishes* in a Member State gives a **contribution** to the economic and social sphere of the host Member State.

In contrast, the Court defines *provision for services* as follows:
***Where the provider of services moves** to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, **envisage that he is to pursue his activity there on a temporary basis**.*

In the same judgement, the ECJ clarified *when* **Art. 49** applies (i.e., its scope of application in relation to *barriers to establishment*): in short,

- not only discriminatory barriers (whether direct or indirect) are covered by this Article,
- but also **non-discriminatory** barriers.

Hence, the scope of application of Art. 49 is remarkably *broad*, since also **indistinctively applicable rules** (e.g., requirements imposed for the exercise of a profession) are covered under *Freedom of Establishment* and need justifications. More specifically, Mr Gebhard was a German citizen and lawyer, who registered to the Stuttgart bar in 1977. In 1978 he moved to Italy to live with his Italian wife. From that moment on, he has practiced as a lawyer in Milan. Once created his own law firm, the Milan bar association starts disciplinary proceedings against him because he cannot use the title "avvocato" like his Italian colleagues, since he was not enrolled in the national bar. For this reason, he challenged the rule that prohibited using that title on the basis of the article 49. The ECJ replied that even if the requirements to practice as an "avvocato" *apply equally to nationals and foreigners* (i.e., the rule is non-discriminatory), they still may hinder art. 49 and need justification: the Court found that this measure was a **restriction** of Mr. Gebhard's right to establishment.
Those are rules which are **indistinctly applicable**, yet able to **hinder the access** to a particular market. The Court ruled as follows:
However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good. [in this first passage, the Court recognises that some restrictions may be imposed] *It follows, however, from the Court's case-law that **national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions**: they must be applied in a **non-discriminatory** manner; they must be **justified by imperative requirements** in the general interest; they must be **suitable** for securing the attainment of the objective which they pursue; and they must not go beyond what is **necessary** in order to attain it.*

Hence, national measures liable to **hinder** or **make less attractive** the exercise of Fundamental Freedoms must fulfil four conditions:

1. First, they must be **applied in a non-discriminatory manner**
2. They must be **justified** by ***imperative requirements*** (i.e., the equivalent of *mandatory requirements*) in the *general interest*
3. They must be **suitable** to attain the objective they pursue
4. They must comply with the principle of **necessity** and **proportionality**

However, which are such measures? Does this ruling mean that *every* national rule that makes less attractive the right to move and establish is caught by Art. 49 and needs justification? Or rather, only rules that *affect market access*?
Actually, *Gebhard* left this question unanswered, and the ECJ addressed the issue in subsequent caselaw, establishing **not** every national rule need justification, but only those that ***affect market***

access (i.e., that make it difficult for foreign operators to **compete** with already established ones in the host State).

As we have mentioned, national rules that affect *Freedom of Establishment* are usually those that set some **requirements** for the exercise of a profession, or that require **certain qualifications** or certifications for those purposes. In this respect, in ***Vlassopoulou***, a Greek lawyer, after obtaining a Greek law degree, practiced in Germany for several years and then applied for admission to the German bar. Her authorization to practice was rejected, because she *lacked the necessary qualifications,* since she had not passed the relevant *German examinations*.
The ECJ began by ruling that **even the non-discriminatory application of national qualification requirements** could hinder the exercise of freedom of establishment.
What's more: **automatic exclusion** of foreign persons not possessing the qualifications required by national rules for the exercise of a profession is not admissible. Therefore, Member States have to make a **comparison** between the specialized knowledge and abilities possessed by the EU citizen, as certified in his/her diploma or certificate, and the qualifications and knowledge required by national rules.
Hence, the non-possession of a diploma or of a professional qualification was found to be a **barrier** and need a **proportionate justification**.
This way, the Court pushed **negative integration** in the field of equivalence of qualifications between Member States.
Eventually, Member States harmonized their legislation on the subject (as part of, instead, a *positive integration*), towards a **mutual recognition** of *higher education diplomas*, through **Directive 2005/36**.
Therefore, the *Gebhard* and *Vlassopoulou* caselaw is now applied only as a **residual instrument** when the area is not already regulated by the Directive.

Public service provision
Now, when we discussed Free Movement of workers, we came across the so-called ***Public Service Provison***: likewise, according to Art. **51 TFEU**, activities which are **connected**, even occasionally, with the exercise of an **official authority**, are *excluded* from the application of Art. 49 TFEU.
This, being an exception, means that Member States can reserve certain professions to their nationals.
The question first arose in ***Reyners***, a case in which, *inter alia*, the ECJ found that Art. 49 TFEU was liable to have **vertical direct effect**. And on top of that, the Court also addressed the question of whether certain professions, such as **advocates or notaries**, can be considered as exceptions. The Court answered negatively: **advocates** are indeed not even occasionally involved in the administration of justice and so they **do not exercise any official State authority**. This question emerged also in a series of cases related to notaries. According to Member States, notaries do exercise official authority, since they have the power to authenticate documents; however, the Court disagreed**: not even notaries are covered by the exceptions of Art. 51 TFEU**. Hence also this exception, as usual with regard to fundamental freedoms, must be interpreted **narrowly**.

Rights granted
What about the *material scope* of Article 49: wat kind of **rights** are granted by the Treaty provision?

1. First, the **right to take up** and **exercise** an economic activity in another Member State: this right is conferred not only upon individuals (i.e., *natural* persons), but *also* upon *legal persons*, that thus have the right to set up agencies and branches in another Member State.

2. Moreover, the Article provides for the right to **have more than one** establishment in another Member State.
3. Finally, the inevitable **right not to be discriminated** on grounds of nationality (as for natural persons) or of country of incorporation (as for legal persons). In this respect:
    a. When we have ***direct discrimination*** (i.e., a rule makes a direct distinction on the basis of nationality/State of incorporation), it can be justified only through **Treaty derogations**, provided for in **Art. 51** (*official authority*) and in **Art. 52** (*public policy*, public *security* and public *health*).
    b. When we have ***indirect discrimination*** (i.e., when rules are neutral in their formulation, yet they have a differential impact on foreigners), it can be justified, besides on grounds of Treaty exceptions, also by **imperative requirements of public interest** (as usual, if they are *necessary*, *proportionate* and complying with *Fundamental Rights*).
    c. As seen in *Gebhard*[105], also ***non-discriminatory barriers*** (i.e., any rule that hinders or makes less attractive the exercise of the freedom, despite being **indistinctively applicable** to everyone, provided they *hinder market access*) are covered by Art. 49 TFEU, and so they need to be justified accordingly to the **imperative requirements** doctrine (or to Treaty derogations). Of course, *proportionality* applies too.

CORPORATE ESTABLISHMENTS

As we have said, also **companies** and corporate entities have the right to establishment in the Union (through new branches and agencies), and they can have more than one establishment. However, how do we determine the *nationality* of a corporate entity in order to verify that the right not to be discriminated is respected? **Art. 54 TFEU** answers as follows:

*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.*

Hence, corporate entities enjoy the same rights as natural persons if **two cumulative conditions** are fulfilled:

1. First, they must be ***lawfully formed*** according to the legislation of a Member State, *and*
2. They must have their **registered office** (or central administration, or principal place of business) ***within the Union***.
   These are defined as **connecting factors** of the corporate entity to the Member State. Indeed, we do not have a harmonized system of corporate regulations: therefore, since there is not a single European connecting factor, the ECJ held **each Member State can adopt different connecting factors to determine the applicable national law**. For instance, some (e.g., Italy) adopt the *incorporation doctrine*, whereby a company is covered by the legislation of a Member State if it has its registered office there, whereas others (e.g., Germany) prefer the so-called *effective seat doctrine*, focusing rather on the principal place of business. However, according to the principle of **mutual recognition**, Italy will have to recognize a legitimately formed "German" company, and *vice-versa*.

[105] One could wonder why the ECJ found the rules in that case as *non-discriminatory* rules, rather than *indirectly* discriminatory. This objection was particularly raised by scholars (Eleanor Spaventa included) who do not accept market access as justification for those rules: in practice, a rule affecting market access is always indirectly discriminatory. Instead, they use grounds of *citizenship* (instead of the *market access test*) to define and justify non-discriminatory rules.

These principles (i.e., freedom of connecting factors and mutual recognition) have been stated by the Court in ***Cartesio*** and ***Inspire Art***.
This is very important with regard to *Brexit*: financial companies established in one Member State have passporting rights all over the EU; once the UK is out, British companies will have to *reincorporate* in EU if they want to be treated as EU companies. This will also affect the many EU letterbox (i.e., fictitious) companies established in the UK.

We have said that companies established in the EU enjoy similar rights as natural persons. However, Treaty provisions do not confer a **right to move** the registered office or central administration to another Member State while retaining *primary establishment* in the first Member State. As way of example, in ***Daily Mail***, the Daily Mail wanted to move its central management and control to the Netherlands to pay less taxes but continuing being established primarily in the UK. The UK authorities refused the transfer and the newspaper appealed invoking its freedom of establishment. However, the Court accepted this restriction because the EU lacked harmonization on companies connecting factors: indeed, the UK could deny authorization.
Ten years later, however, another case arose in ***Centros***. In that case, the restriction to the right of establishment of a Danish company was imposed not by the State of primary establishment but by the State where the company wanted to move. Indeed, Danish company had stablished in the UK in order to avoid Danish minimum capital requirements but mainly operated in Denmark through a secondary establishment (a branch). However, Danish authorities refused to register Centros' branch in DK, as they considered this to be an **abuse of EU law**.
The question, then, was whether Centros could rely on Art. 49 TFEU. The ECJ answered positively: **it did not matter that an individual or a company "cherry-picked" a more favourable jurisdiction**. In the Court's own words:
The provisions of the Treaty on freedom of establishment are intended ***specifically to enable*** *companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an* ***agency, branch or subsidiary****.*
That being so, the fact that a national of a Member State who wishes to set up a company ***chooses to form it*** *in the Member State whose* ***rules of company law seem to him the least restrictive*** *and to set up branches in other Member States* ***cannot, in itself, constitute an abuse of the right*** *of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is* ***inherent*** *in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.*

Freedom to provide services

Let's conclude with Freedom to Provide services.
We already know when **Art. 56 TFEU** applies: i.e., when the *economic activity* is exercised in **another Member State** on a ***temporary basis***. In these cases, Art. 56 provides:
*Within the framework of the provisions set out below****, restrictions*** *on freedom to provide* ***services*** *within the Union shall be* ***prohibited*** *in respect of nationals of Member States who are established in a Member State* ***other than that of the person for whom*** *the services are intended.*
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to ***nationals of a third country*** *who provide* ***services*** *and* ***who are established within the Union****.*

As we can see, there is a **cross-border element** that must be present in order to trigger Art. 56.

- Both this article and the subsequent refer only to the Freedom of the *provider* to move to *another* State to provide another service.
- However, the *cross-border* element is also present when the **recipient** moves to another Member State to receive the service.
- Also, the *cross-border* element is present when the *service* itself moves.

Art. 57 TFEU, then, regards the **definition** of ***services*** and provide a **non-exhaustive** list of services:
Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for ***remuneration****, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*
"Services" shall in particular include:

a) activities of an industrial character;
b) activities of a commercial character;
c) activities of craftsmen;
d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, ***temporarily pursue his activity in the Member State where the service is provided****, under the* ***same conditions*** *as* ***are imposed by that State on its own nationals.***

As we can see, the service, to be so within the meaning of the Treaty, needs to have a ***commercial nature***; that is to say that **remuneration** must be present.
The ECJ has then clarified that the *remuneration* does not have to come from the recipient of the service but may come also from the State or someone else. For instance, many people move to other Member States to receive medical services: often cases, they do not pay for them, but it is their medical insurance (usually, their State of citizenship) that pays.
The Court clarified this principle in ***Bond van Adverteerders***[106] and in ***Kohll***[107].

However, in ***Grogan*** it limited this broad interpretation of remuneration, providing that even if it is acceptable that the remuneration comes from a source other than the recipient, there must always be an **economic element** to it, so that the service has always a **commercial nature**. In that case, an Irish anti-abortion group filed a lawsuit against student associations distributing flyers with information regarding clinics that performed abortion in the UK (indeed, in Ireland, abortion was not legal). The case is of outmost importance because it clarified that ***termination of pregnancy*** **is, indeed, a service under Art. 56 and 57 TFEU**.
This gave rise to a fierce debate about cross-border access to abortion. Moreover, the Irish court also asked the ECJ whether Irish law on the *prohibition of distribution* of information on clinics practising abortion was contrary to the free movement of services or not. To put it differently, could the prohibition on distributing such flyers be a **restriction** to the free movement of service?
The Court actually found that no economic element was present in the case at hand. Indeed, the students were not working for the abortion clinics and were not providing information in cooperation with them (nor were they remunerated for it). Theirs was therefore not an **economic activity**, and as such fell ***outside the scope*** **of Art. 56 TFEU**.

[106] That case was about broadcasters and cable-television operators, that received remuneration not by their direct subscribers located in other Member States, but only by those in their own Member State.
[107] In that case, an orthodontist service abroad was at stake.

Although students were not providing services, they were manifesting their *freedom of expression*, which is a fundamental right. However, given that at that time the situation fell outside the scope of application of the Treaties, the Court could not rule on this issue.

Furthermore, as we had said also in relation to Freedom of Establishment, the Court further specified that in order to establish whether the service provision has a "**temporary nature**" (and so, whether we are dealing with *Freedom of establishment* or with the one *of services*), the fact that the provider has infrastructure, offices etc., does not mean that it is "established" in a Member State: it depends, instead, on **link with host country**.

As to the list of services (activities of an industrial character, of a commercial character, of craftsmen, of the professions), the scope of definition of *service* is really **broad**, also covering sporting activities and medical services.

Originally, *Freedom to provide services* was considered as a sort of **residual category** of other freedoms (as we can understand by the lettering of the Article: "insofar as they are not governed…"). However, nowadays, services are the **principal economic activity** in the EU, and therefore this freedom has grown in importance.

To sum up, **two cumulative conditions** are to be fulfilled in order to benefit from Art. 56 TFEU:

1. The service at issue must be provided for a **remuneration**; *and*
2. There must be a **cross-border element**. More specifically, we have three types of cross-border links:
    a. The **service provider moves** to another MS where recipients are: this is the typical scenario, on which the black letter of Articles 56 and 57 is modelled.
    b. **Recipients of services move** to the Member State where the provider is[108].
    c. The **services move** to the MS where the recipient resides (e.g., a lawyer residing in one Member State who sends *via email* his legal advice to his client residing in another MS falls within the scope of Art. 56; and so does it *calling people* in other Member States, as we will see in the *Alpine* case).

    Also, the cross-border element is satisfied even when the service provider/recipient is merely ***potential***, such in the case of **advertisement**. In this respect, ***Gourmet*** is an interesting example. The case was about the prohibition of advertising alcoholic drinks in Sweden. We mentioned this case when discussing *Keck*, since **rules on advertisement** also fall within the definition of *certain selling arrangements*: therefore, they must be first assessed **in light of Free Movement of Goods**.
    In that case, the Court scrutinised that rule under **Art. 34 TFEU**, finding it (indirectly) discriminatory, because of its impact on foreign goods.
    However, we should also verify whether those rules constitute a barrier to Free Movement of Service (namely, of *advertising services*). In that case, the possibility for the advertiser in a Member State to access the market in Sweden was only *potential*, but **the mere possibility to have clients and recipients of services in another Member State (namely, Sweden) is sufficient to trigger Art. 56 TFEU**.

[108] The ECJ recognized this in ***Luisi and Carbone***, where two Italian citizens were fined for moving out of Italy an excessive amount of money. However, they argued to have done it as consideration for a service provided in another Member States. The ECJ accepted this situation, holding that imposing a maximum amount of money that could be transferred out of the Country was a restriction to Freedom to provide Services.

Hence, we can understand how **broad** the scope of application of Art. 56 TFEU is.

Rights granted

As to the **material scope**: what is the catalogue of rights granted by Freedom to provide services?

1. As per usual, we have the **right to move** in order to *provide* or *receive* services. It is also worth mentioning that **Directive 2004/38** (the *Citizens' Directive*) regulates the right to move and reside in another Member State for recipients of services, as we have said talking about citizenship: they can indeed stay in the host Member State for **up to 3 months**.
2. Secondly, we have a right **not to be discriminated** on grounds of nationality. As usual, this is the most important aspect of the material scope of Free Movement of services.
   a. ***Direct discrimination*** can be justified only by **Treaty derogations**: public *policy*, public *security* and public *health*. Moreover, the Treaty provides for another exception: i.e., when the service constitutes the **exercise of official authority**. Otherwise, direct discrimination always prohibited.
   b. Article 56 also applies in cases of ***indirect discrimination***, that happens when national measures have a **differential impact** on foreign operators in comparison to domestic ones. In such cases, the indirectly discriminating measure can be justified not only with Treaty derogations, but also with the additional category of **imperative requirements of public interest** (exactly in the same way as for the other Free Movement rights).
   Moreover, as per usual, the ***proportionality test*** needs to be satisfied: national rules must be **necessary**, **proportionate** and **complying with Fundamental Rights**. As way of example, in *Carpenter*, a case regarding the deportation of the wife of a British citizen, the potential deportation was considered as a restriction to Free Movement of services (since Mr. Carpenter provided services abroad): in this respect, the justification the UK gave was considered *in contrast* to the *right to family reunification*, which is indeed a Fundamental Right. In that case, the cross-border element was rather fictional and artificial. Nonetheless, that perfectly witnesses the broad application of Art. 56.
   c. Furthermore, prohibition of discrimination also covers ***social and tax advantages***: even if it is not expressly provided in Art. 56, the Court derived it from **Art. 18 TFEU** (i.e., the general *principle of non-discrimination on grounds of nationality*) in ***Cowan***, a case of a British citizen attacked in Paris who nonetheless could not receive his compensation for damages.

Barriers to provide services

The ECJ further **expanded** the scope of application of Art. 56 TFEU through an ***extensive interpretation*** of what constitutes a ***barrier***.

Often cases, in fact, many (formally) **non-discriminatory** rules are caught by Art. 56 TFEU. In this respect, the Court has held, basing on Art. 57.2 TFEU[109], that ***any*** **requirement** related to residence, nationality or establishment is **illegitimate**, for being "*the very **negation** of that freedom*": these requirements can be justified only if they are **indispensable** to pursue a **legitimate aim**.

To put it differently, the Court gave an extensive interpretation of the principle of *Equal Treatment*, stating that ***any*** **requirement** (and not only discriminatory rules!) **imposed by the host Member**

[109] The black letter of the Article refers to the principle of non-discrimination to service providers.

State for providing a service might constitute a barrier. In this respect, also **generally non-discriminatory rules need justification**.

This is because, with services, any requirement imposed by the host MS implies an **imposition of a *burden*** on providers from other Member States, in the sense that the latter *already comply* with requirements imposed by their state of establishment. Thus, if they had to comply with requirements imposed also by the State of destination, they would suffer from a **double regulatory burden**, very similarly to what we have seen with *product requirements* in *Cassis* and with the principle of *mutual recognition*.

Basically, in the caselaw concerning Freedom of Services, the principle of ***mutual recognition*** also emerged: the Court of Justice held that the imposition of such requirements can be **objectively** justified only when pursuing a **legitimate aim** that is not already satisfied by the requirements imposed by the **State of origin**.
For instance, if the host Member State requires a health authorization for a service in order to protect consumers, that requirement would not be justified if the provider has already obtained a health authorization in its State of establishment. This was held by the Court in ***Commission v. Germany***.
However, there's more: non-discriminatory barriers are prohibited not only when they impose a double burden on the provider, but also when they, *de facto*, ***restrict market access***, as the Court ruled in ***Webb*** and ***Sager***[110]: they will have to be justified also in that case.
Hence, as for Free movement of services, we should not assess whether the measure at issue is discriminatory or not, but we should rather focus on a broader **market access test**.
Namely, the Court in *Sager* held that:
[Article 56 TFEU] *requires not only the **elimination of all discrimination** against a person providing services on the ground of his nationality but also the **abolition of any restriction**, even if it applies without distinction to national providers of services and to those of other Member States, when it is **liable to prohibit or otherwise impede** the activities of a provider of services established in another Member State where he **lawfully** provides similar services.*

To sum up, we can distinguish between three types of rules that need justification under Article 56 and 57 TFEU (even if not discriminatory):

- Rules that place a **double regulatory burden** on the service provider, similarly to *Cassis* in the field of goods (e.g. requirement related to residence, nationality or establishment): these requirements can be justified only if they are **indispensable to pursue a legitimate aim,** that is not already satisfied by the requirements imposed **by the State of origin**
- Rules that **hinder market access**
- Rules that **prohibit a service** completely.

The Alpine Investment case and the market access test
Furthermore, the ECJ in ***Alpine Investments*** clarified that there is not a *Keck*-style exclusion when it comes to services. In that case, Alpine Investments was a company incorporated under Dutch law, specialized in commodities futures and operating in the Netherlands and other Member States. Following many complaints, the Netherlands decided to prohibit their use of the selling technique

[110] In that case, a patent agent tried to react to the fact that a company incorporated in England was providing services in Germany, where intellectual property law was stricter than the British one. This case has the effect of liberalizing marketing services.

known as "*cold calling*" (i.e., contacting individuals by phone without their prior consent) to offer investments in commodities futures. Since some of the complaints came from abroad, the prohibition applied *also* to offers of services made to other Member States. The Netherlands justified this prohibition by referring to *consumer protection* objectives, and also to protection of Dutch reputation. The Netherlands, in the case at hand, seemed to rely on a *Keck-style* justification. However, this was not enough for the ECJ, which instead held:

Although a prohibition such as the one at issue […] *is* ***general*** *and* ***non-discriminatory*** […], *it can, nonetheless, constitute a* ***restriction on the freedom*** *to provide services. Such a prohibition is not analogous to the legislation concerning selling arrangements held in Keck to fall outside the scope of Article 30 of the Treaty. According to* [Keck], *the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders,* […] *secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products* [to put it differently, in *Keck* the market access test was applied and gave a positive outcome for certain selling arrangements].

Hence, we also understand that services must **not** be treated as "selling arrangements" as in *Keck*: also **rules regarding selling techniques**, which might **restrict freedom to provide services**, are caught by Article 56 TFEU and therefore need to be justified.
Again, see how broad the scope of application of such freedom is. What's more: the Court in *Alpine Investments* provided for the same ***Market Access*** test, as usual:
A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to ***potential recipients in another*** *Member State. It therefore* ***directly affects access to the market*** [here it is the market access test!] *in services in the other Member States and is* ***thus capable of hindering*** *intra-Community trade in services.* […]

Of course, there can be space for **objective justifications**, as the Court itself admits:
As the Netherlands Government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller' s services with competitors' offers. Since the ***commodities futures market is highly speculative*** *and barely comprehensible for non-expert investors, it was* ***necessary to protect them from the most aggressive*** *selling techniques.*

Although the Court clearly applied the *market access test*, as we have said, there are some **inconsistencies in the caselaw**. For instance, consider the *Carpenter* case: in that case, there was not a problem of market access. Indeed, Mr. Carpenter could provide services in another Member States. Yet, it was used as a justification to rule in his favor.

This notwithstanding, it emerges from caselaw that ***market access*** is considered as an **overarching principle**, since it justified some of the ECJ rulings on Free Movement: as way of example,

- In *Bosman* restrictions on Free Movement of Workers were considered to have an impact on access to employment market;
- in *Gebhard*, market access was the test applied by the Court to assess a barrier to establishment.

Definitely, in the field of services, the **market access test is once again the main way to scrutinize national regulations**. That is also why some discriminatory measures may be still **considered as justified**: we have distinguished between

- rules that do hinder market access,
- and those that "simply" make the exercise of Free Movement *less attractive* → they do not need to be justified, in order not to include practically every national measure under the Free Movement Provisions.

Negative and positive integration in the Free Movement of Service

- So far, we have seen how Free Movement of Services was achieved through **negative integration** (i.e., the removal of barriers to movement), and so through judicial remedies provided for by the ECJ. From this point of view, it is clear how individuals acted as the **agents of market integration**: thanks to them, who challenged many national rules, the Court of Justice was able to develop its caselaw.
- However, *Free Movement of Services* was also subject to **positive integration** that entails the so-called **harmonization** (i.e., adoption of positive measures) to bring national legislations closer. In the field of *professional qualifications*, for instance, initially there was a piecemeal approach trying to harmonize professions "sector by sector", but that was very slow. Eventually, Member States agreed on adopting a general instrument: **Directive 2005/36**, codifying part of the ECJ caselaw, provided for a new approach for professional qualifications based on ***mutual recognition***, whereby a host Member State cannot refuse entry to a regulated profession to a national of another Member State who had the qualifications necessary for the exercise of that profession in another Member State.
  We have seen it in action in *Vlassopoulou*: Germany could not ***automatically*** **exclude** a Greek lawyer only because she had not passed the German examination, provided that the person at hand possessed the mandatory qualifications for exercising in Greece. Instead, Germany would have had to **make a comparison** between what the person from the other Member State had (in terms of knowledge, qualifications, skills, etc.) and the requirements by national rules.

Services Directive 2006/123

Also, the so-called ***Services Directive*** **2006/123** was adopted the following year. The background of this second instrument was very complicated: there had been a proposal by the Bolkestein Commission, which regarded a Directive that eventually was not adopted for being too much criticized (to the extent that it was renamed as ***Frankenstein directive***) because of its potential **social dumping effects**: indeed, its approach was too liberal (for instance, in the field of services, it proposed the adoption of the *Country of origin* approach: this would have led to a "raise to the bottom", since the least demanding regulatory standard applied). After a long debate, the Directive was not adopted in those terms: Member States reached a compromise, without a straightforward application of the **Country-of-Origin approach**.

The final Directive:

- codified previous caselaw on both Freedom of Establishment and Services,

- and listed some **prohibited requirements**, giving practical guidance on what constitutes an unlawful requirement
- and enlisting the **criteria** according to which requirements should be interpreted.
- Also, the Directive does not apply to some, listed services (e.g., health, and financial services, gambling, etc.).
- As for *Establishment*, the scope of application of the Directive is not as broad as the one for *services*: for restrictions to the latter, **all rules** must be **justified**.

Thus, basically, the Directive reflects previous caselaw. More specifically, the Directive:

- Provides for **procedural and administrative simplification**, ensuring **legal certainty** (enlisting which rules may be justified and which not), the so-called *points of single contacts* and electronic procedures.
- As for **Freedom of Establishment**, establishes that ***authorization*** requirements must be
    - **non-discriminatory**,
    - **justified** by overriding reasons of public interest,
    - **necessary** and **proportionate**.
- Finally, as for **Freedom to provide Services**, the initial mutual recognition approach (with the Country-of-origin principle) was abandoned, and Art. 16 of the Directive reflects the difficult compromise reached:
    - There is a **general prohibition** of subjecting the activity to the **authorization** of the host Member State. However:
        - A host Member State can impose **requirements**, only if they are
            - **non-discriminatory**,
            - **proportionate**, and **necessary** to attain a **legitimate aim**.
        - Art. 16.3 Directive lists five ***legitimate aims***:
            1. public **policy**,
            2. public **security**,
            3. public **health**,
            4. public **protection** of the **environment**,
            5. and rules on **employment conditions**.

          These legitimate aims have been codified to **avoid legal uncertainty**. Nonetheless, one could ask if this list is *exhaustive* or not: what about all other "*imperative requirements*" (which, as we know, are an open list) recognized by the Court as legitimate justifications? According to the *handbook* on the interpretation of this Directive, **Member States cannot use justifications other than those specified**[111]**.**

Problem question: "A European massage…"

To conclude, consider this problem question. MaxCo is a company offering massages; however:

Italy requires all masseurs to ask the local authorities for a registration.

Although, on the one hand, consumer protection instances might justify the request to register with local authorities, both the Directive and the broad interpretation of Art. 56 TFEU makes an **authorization** *always* **prohibited**.

[111] However, for purposes of the exam, we may not rely on the Directive to solve the problem question, but rather focus on the **general principles of caselaw**.

Table of Cases

The following table sums up the main case law analysed throughout the course. They are shown in order of appearance and divided by subject matter. Each case is flanked by its main principle of law established therein and by the page (or the footnote, abbreviated *ftn*.) where it is explained in detail. If not specified, the case has been ruled by the ECJ (or CJEU). Be aware that the list may contain errors, and some cases might be missing!

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Foster	Broadened the definition of State: every *body* that has public law duties (including private companies)	43 ss.
Faccini Dori	Restated the prohibition of horizontal direct effect for directives, despite the adverse opinion of AG Lenz	45
Mangold	Established the possibility of Charter rights to have horizontal direct effect if the subject matter falls within the scope of EU law	46
Max Planck	Restated the principle of *Mangold*, in relation to directives	47
Von Colson	Established the duty of Consistent Interpretation (indirect effect)	47 ss.
	Francovich damages and State Liability	
Francovich	Established that a redress is due by Member States for breaches of Community law	48 ss.
Brasserie – Factortame III	Provided for a *test* to establish if Francovich damages are actually due or not (provision intended to confer ascertainable rights, sufficiently serious breach and causal link)	49 ss.

BT	Provided for a *test* to establish whether the breach is *sufficiently serious* for purposes of Francovich Damages	50 ss.
Headly Lomas	Where MSs have no discretion, a mere breach of EU law automatically leads to Francovich Damages	50
Dillenkofer	Failure to implement a Directive automatically leads to Francovich Damages	50 ss.
Kobler	Established that also National Supreme Courts may be held responsible for breaching EU law (for purposes of Francovich damages)	51, *ftn. 39*
Emmot	An example of a case in which the principle of *Effectiveness* in National Procedural Autonomy was not respected	52

The ECJ and Enforcement of EU law

Foto-Frost	Reiterated the principle whereby diffused judicial review of EU law is not possible, due to the principle of legal certainty	56 ss.
CILFIT	A domestic judge is not obliged by the request of the parties to refer to the ECJ. However, the Court of last instance has a duty to refer under certain conditions.	57, *ftn. 44*
International Fruit	Specified the meaning of Direct Concern	63
Plaumann	Established a *test* to ascertain Individual Concern (the provision individually distinguishes a person by reason of certain attributes or circumstances: *closed class of applicants*).	63 ss.
Codorniu	The *Plaumann* test may be satisfied also if the challenged act is of (theoretically) general application.	64
UPA	Example of application of the *Plaumann Test*, in which AG Jacobs' opinion is of outmost importance for proposing an alternative test (i.e., *substantial adverse effect*)	65
Jégo-Quéré	The General Court broadened the *Plaumann Test*. However, the CJ reversed.	65 ss.
Inuit	Specified the meaning of *Non-Regulatory Acts* (as non-legislative acts) for purposes of Art. 263 TFEU.	66
Telefónica	Clarified the meaning of *not entailing implementing measures*	67

Fundamental Rights and Union Law

Stauder	Held that Fundamental Rights are *general principles* of EU law	73
Internationale	Community law has an analogous guarantee of fundamental rights inherent to its general principles	73
Digital Rights Ireland	Example of application of the *proportionality* test for the respect of Fundamental Rights.	76 ss.
Melloni	EU law must only be subject to the Union constitutional principles and not to national ones.	78
Kadi I	Established that Fundamental Rights always apply in the EU (e.g., also to acts in the international arena), since it is a proper constitutional system.	79 ss.
Ledra Advertising	Every EU institution is always bound to Fundamental Rights, regardless of the capacity in which it acts (e.g., through the ESM)	80

Carpenter	Example of a case in which a national regulation was considered to limit Free Movement rights	82, (135, 137)
ERT	Another example of relevant limitation to Free Movement rights	83
***Matthews* (ECtHR)**	Decided by the ECtHR, it is a case about the right to vote for the EP. The ECtHR held (not the EU, but) the UK and other MSs liable. Established the rebuttable presumption of equivalent protection.	(17), 84
***Bosphorus* (ECtHR)**	Example of when EU protection is manifestly deficient (for purposes of the equivalent protection doctrine).	85
Opinion 2/13	Opinion of the ECJ on accession to the Convention (found incompatible with the Treaties)	85

Citizenship

Martinez Sala	Established the principle of Equal treatment for lawfully resident Union citizens → every union citizen, regardless of its conditions, should have been treated equally as nationals of the host Country	88
Grzekczyk	Reiterated the fundamental status of EU citizenship. Subjected Equal Treatment for Students to two conditions: i) legality of residence and ii) being at most a reasonable doubt	89
Baumbast	Recognised direct effect of Art. 21 TFEU. Moreover, any limitation must be necessary and proportionate (even in cases of unreasonable burden).	90
Chen	Union citizenship is determined by reference to national law, that cannot be questioned by the host MS.	91
Surinder Singh	Citizenship rights also apply to circular migrants (and their families)	92 ss.
Bajatari	Sufficient resources can be also acquired by irregular work	94
Dano	Changed the interpretation of EU citizenship provisions (despite not explicitly overruling *Baumbast*): if conditions of the Directive are not met, Treaty provisions do not apply	94 ss.
Ziolkowski	Only residence pursuant to Art. 7 Directive counts in order to obtain the permanent residence status.	95 ss.
Coman	Clarified that the term *spouse* is gender neutral	96, *ftn. 75*
NA	Citizenship rights can be retained by (divorced) family members only insofar as the Union citizen has reside in the host Member State until the date of divorce (even in cases of domestic violence)	97 ss.
X v. Belgian State	If divorce proceedings are initiated within **a reasonable time after** the main right holder has left, the spouse still retains the right to reside.	
Bonsignore	MSs cannot invoke a general deterrent effect as public policy derogation to justify deportation of an EU resident.	98
Bouchereau and ***Adoui***	Examples of application of the *Principle of Proportionality* in cases of deportation of an EU resident.	99
Calfa	No permanent ban on re-entry is allowed.	99

Ruiz Zambrano	Outer limit to the discretion of MSs: deprivation of the substance of the right (also in purely internal situations)	99 ss.
K.A.	Application of *Ruiz Zambrano* when there is a relationship of dependency between a third country national and a Union citizen parent.	
Rottman and ***Tjebbes***	Applications of *Ruiz Zambrano* doctrine in cases of withdrawal of national citizenship.	101
JY	Applications of *Ruiz Zambrano* doctrine in case where the withdrawal of national citizenship is not proportionate	
	Free Movement of Goods	
Schul	Provides for an interesting definition of *Internal Market*	106, *ftn. 79*
Tobacco Advertising	A case in which the necessity to narrow the application of Art. 114 TFEU emerged	107
Art Treasury (***EC v. Italy 7/68***)	The scope of application of Free Movement provisions encompasses all goods that can be valued in money and form the subject to commercial transactions.	109, *ftn. 84*
Statistical Levy (***EC v. Italy 24/68)***	Defined the concept of *Charges Having Equivalent Effects* to customs duties	109, *ftn. 86*
Sociaal Fonds	Discrimination is not relevant to define CHEE	109, *ftn. 87*
Bresciani	Narrowed the cases in which CHEE fall outside the scope of Art. 30 TFEU: the specific service must benefit a specific trader	110
Ford Espana	Likewise, the charge must reflect the cost of the specific service (and not of the traded product on which the inspection is imposed)	110
Commission v. Belgium 314/82	Charges imposed under obligations of EU law fall outside the scope of Art. 30 TFEU	110
Carbonati Apuani and ***Legros***	Art. 30 TFEU also applies to measures imposed on crossing a regional or local border	110, *ftn. 88*
Comated	In refunding unduly collected charges, States must ensure not to cause unjust enrichment of the trader	111
Commission v. Ireland	Direct discriminations in taxes may also be caused by the rules governing the entire tax system, and can never be justified	111
Humblot	A case of indirect discrimination in taxes: practical effects of the measure must be considered.	112
Commission v. Greece	Indirect discrimination in taxes may be justified, if based on objective factors and to achieve legitimate public policy interests	112
Commission v. Denmark 106/84	Provided for a *test* to assess whether a tax is discriminatory or not: i) similarity; ii) discrimination; iii) absence of justifications	112
Commission v. UK 170/78	Defined when two goods are *in competition* for purposes of protectionist taxation (i.e., degree of substitution)	113
Commission v. Denmark 47/88	When there is no domestic production of the taxed good, discrimination is not possible, so Art. 110 TFEU does not apply	113
Geddo	Defined the notion of *quantitative restrictions*	114

Henn and Darby	A total ban on imports of a certain good is covered by Art. 34, even if its trade is generally not allowed (e.g., pornographic material)	114
Rosengren	Bans on products for personal use are also prohibited.	115
Dassonville	Clarified the meaning of MHEE, providing for a *test* to assess them: trading rules that may directly or indirectly, actually or potentially, hinder intra-Community trade.	115
Cassis de Dijon	Established the *Mandatory Requirements Doctrine*, applicable for indistinctively applicable rules (i.e., non-discriminatory ones)	115 ss.
Glocken	A case in which the principle of *proportionality* was applied to assess the justification put forward by the State.	118
Cinéthèque and ***Sunday Trading***	A case in which the extremely broad definition of MHEE emerges. To counterbalance, the ECJ found the justification sufficient and proportionate.	118
Keck	Differentiated between *product requirements* (that are always considered as MHEE) and *certain selling arrangements* (that are not considered MHEE if applied to all without discrimination).	119
Familia Press	If the measure is not completely a selling arrangement nor a product requirement, Art. 34 must apply anyway.	119 ss.
Trailers (***EC v. Italy 110/05***)	Provided for the *market access test* for "rules on use".	120
Groenweld	Defined MHEE as for exports (narrowly), requiring discrimination as a condition to apply Art. 35	120
New Valmar	Interpreted the notion of *discrimination* very broadly for purposes of the Groenweld test	120
Schmidberger	Fundamental Rights are included within the concept of *public policy* derogations in Art. 36	120
	Free Movement of Workers	
Hoekstra	The concept of *worker* for purposes of Union law must not be defined according to national laws	124
Lawrie-Blum	Defined the concept of *worker* for purposes of EU law, with two requisites: i) remuneration; ii) subordination	124
Levin	Addressed the issue of part-time workers, including them within the scope of Art. 45	124
Trojani	Reiterated *Levin*, provided that the activity of part-time workers is genuine and effective (and not marginal and ancillary)	124
Kempf	Addressed the issue of part-time workers who seek to supplement their remuneration with other lawful means	124 ss.
Steyman	An example of consequence of the *Kempf* docrine, concerning a member of a religious congregation	125
Antonissen	Accorded (partial) Equal Treatment also to *job seekers*	125
Alimanovic	Extended the *Dano* test for job seekers after three months of stay	125 ss.
Jessi Saint Prix	Pregnancy cannot causing loss of the status of *worker* if the mother returns to work within a reasonable period	126
Commission v. Belgium	Provided for a narrow definition of *public post* for purposes of justifying derogations to Art. 34	127

O' Flynn	Indirect discrimination between national and domestic workers are also forbidden	127
Bosman	Applied the *market access test* for rules on workers that are neither directly or indirectly discriminatory	127 ss.
Angonese	Establish the horizontal direct effect of Art. 34	128
	Freedom of Establishment	
Jany	Contributed to the definition of self-employed persons	129
Kraus	Art. 49 TFEU also applies to circular or returning persons	129
Viking	Art. 49 TFEU has horizontal direct effect	129
Gebhard	Distinguished between *establishment* and *services*. Moreover, provided for the *market access test* to apply when dealing with non-discriminatory barriers (e.g., requirements for the title of "avvocato")	130
Vlassopoulou	Automatic exclusion of foreign persons not possessing the qualifications required by national rules for the exercise of a profession is not admissible	131
Reyners	Narrow interpretation of the "official authority" exceptions, so as to exclude advocates (and later, notaries)	131
Cartesio	Established MS's freedom to choose their "connecting factor" for corporate entities	132
Inspire Act	Established the principle of *mutual recognition* between connecting factors	132
Daily Mail and ***Centros***	Examples of cases concerning Freedom of Establishment of corporate entities, with two opposite outcomes	133
	Freedom to provide services	
Bond Van Adverteerders	Remuneration of services can come from sources other than the recipients	133, *ftn. 96*
Kohll	Remuneration of services can come also from public funds	133, *ftn. 97*
Grogan	An economic element must be always present to define something as *service*	134
Gourmet	The cross-border element (and so, the service) might also be *potential* (e.g., advertisements)	*ftn. 94*, 134 ss.
Cowan	Prohibition of discrimination also covers social and tax advantages	135
Commission v. Germany	Established the principle of mutual recognition: the imposition of requirements can be objectively justified only when pursuing a legitimate aim that is not already satisfied by the requirements imposed by the State of origin.	136
Webb and ***Sager***	Provided for the *market access test* for restrictions to services	136, *ftn. 100*
Apline investments	Reiterated more specifically the *market access test* even for non-discriminatory barriers	136 ss.
	Free movement of handouts	

Pantaleo	A case in which the Court obliged Gianluca Pantaleo to help Francesco to write some paragraphs of this handout	*thx. 1000*