

Alexander Somek

Introduction to European Union Law



Source : <http://www.ecb.int/euro/coins/html/gr.en.html>

Spring 2010

Europeans profess belief in the binding force of international legal instruments. Therefore, a copy of both the EU Treaty and the FEU Treaty will be necessary for you to follow this class.

Please visit “Eur-Lex”, the official legal information site of the EU: <http://eur-lex.europa.eu/en/treaties/index.htm>. Download a copy of the consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union. You may also benefit a lot from the Table of Equivalences in order to find your way through the renumbered Treaty

Since the latest Treaty reform has introduced major changes (among which a renumbering of all Treaty articles) we are going to have to rely heavily on the Treaty text.

In order to access additional case law you can either use Westlaw or the website of the European Court of Justice: <http://curia.eu.int/en/>

Prelude

The Weakling’s Paradise?

1. Aims and purpose of this course

explanation of the syllabus and reading assignments

competing accounts of European integration: functionalist, neo-functionalist, inter-governmentalist, federalist, etc

three strategies of European integration: the protection of human rights, the Welfare state, and market-building

a very brief overview of the Treaties and review of the goals set out in the EU Treaty (Articles 1-3 EU Treaty)

the beginning and the current state

F.A. Hayek, The Road to Serfdom (1944) 172-173

Schuman Declaration

Declaration of the Swedish Presidency on the day of the entry into force of the Lisbon Treaty

Readings: Reinisch 3-4

2. Brief history of European integration

Treaty of Rome (1957): Belgium, Germany, France, Italy, Luxembourg and the Netherlands

Luxembourg Accords (“Euro-Sclerosis”): agreement to disagree (has become a recurrent feature of Community law)

1973: accession of Denmark, Ireland and the UK

1981: accession of Greece

1986: accession of Spain and Portugal

re-launching the integration project on an economic basis: The Single European Act (SEA) 1986

Maastricht Treaty 1992 (TEU) creating the European Union and introducing monetary Union

1995: accession of Austria, Finland and Sweden

Treaty of Amsterdam (1999)

Treaty of Nice (2003)

2004: accession of Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia

2007: accession of Rumania and Bulgaria

Treaty of Lisbon (2009)

Reading: Reinisch 1-12

3. Europeans are from Venus – so what?

Some reflections on US – EU foreign policy

Kagan

Anderson

4. Europeans are from Europe – beware!

... the Empire is a machine for universal integration, an open mouth with infinite appetite, inviting all to come peacefully within its domain ...

Hardt & Negri

The aims of European integration: peace, prosperity—and imperial splendor?

European Council (Presidency Conclusions): Laeken Declaration on the Future of the European Union, 15 December 2001

European Council (Presidency Conclusions): Copenhagen European Council, 12 and 13 December 2002

Reading: Jan Zielonka, 'Europe as a global actor: empire by example?' (2008) 84 *International Affairs* 471-484
<http://www3.interscience.wiley.com/cgi-bin/fulltext/119391523/PDFSTART> (not reprinted in the materials)

Impending collapse? *Ferguson*

5. The Convention on the Future of Europe and the “Constitution for Europe”

the “Laeken Declaration”

composition of the Convention

the draft of a Constitution

the Intergovernmental Conference

initial failure to come up with another “Treaty of Rome”

the adoption of an amended draft in July 2004 by the European Council

Readings: <http://european-convention.eu.int/bienvenue.asp?lang=EN>
(please visit this site and make yourself familiar with the work of the convention)

On the (consolidated) Constitutional Treaty, see
http://europa.eu/institutional_reform/index_en.htm (not reprinted in the materials)

Renaud Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 *Constellations* 151-162 (not reprinted in the materials) After the constitutional treaty had been rejected, the Member States concluded another reform treaty, the so-called Treaty of Lisbon. See http://europa.eu/lisbon_treaty/index_en.htm. It was rejected by the Irish people in the first round and later approved by them only after the government had engaged in a massive information campaign. See http://europa.eu/lisbon_treaty/countries/index_en.htm# (not reprinted in the materials)

(I try to abstain from assigning my own writings for class, however, in this case I cannot think of any paper that would better fit the purpose): Alexander Somek, 'Post-Constitutional Treaty:' (2007) 8 *German Law Journal*
http://www.germanlawjournal.com/pdf/Vol08No12/PDF_Vol_08_No_12_1121-1132_Articles_Somek.pdf (not reprinted in the materials)

Part One

The Basic Institutional Setup

6. Major Institutions

Membership and withdrawal (Art. 49-50 EU Treaty)

in lieu of a Convention Parliament: Conventions and Intergovernmental Conferences (Art. 48 EU Treaty)

Overview (Art. 13 EU Treaty)

Commission (Art. 17 EU Treaty, Art. 244-250 FEU Treaty): ‘motor of integration’

Commission: composition and appointment

Commission: legislative initiative and agenda setting

Commission: delegated legislative power (Art. 290-291 FEU Treaty)

Commission: administrative and judicial powers

Council of the European Union (Art. 16 EU Treaty, Art. 237-243 FEU Treaty): flexible composition, presidency etc.

Art. 16 (8) EU Treaty: Public meetings

European Council (Art. 15 EU Treaty, Art. 235-236 FEU Treaty): the growing importance of intergovernmental cooperation at the expense of the Commission’s ‘supranational’ influence

The Committee of Permanent Representatives (Art. 16 (7) EC Treaty)

Parliament (Art. 14 EU Treaty, Art. 223-234 FEU Treaty): from the consultative ‘assembly’ to the growing importance of co-decision; vote of no confidence etc

elections to the European Parliament: disproportional representation, lack of a uniform procedure, low participation and popular misapprehensions

A new role for national parliaments (Art. 5(3) EU Treaty, Art. 69 FEU Treaty, Article 352(2) FEU Treaty and Protocol on the Role of National Parliaments)

European Court System (Art. 19 EU Treaty, Art. 251-281 FEU Treaty)

Reading: Reinisch 13-34

7. “Sources“ of Community Law

primary Community law: Treaty amendments (Art. 48 FEU Treaty)

general and unwritten principles (*see* Fundamental Rights)

legislation (Art. 288 FEU Treaty): regulations

legislation (Art. 288 FEU Treaty): directives

(Art. 288 FEU Treaty): decisions

Reading: Reinisch 35-36, 93-95

Part Two

Making the European Legal System Work

8. The “Constitutionalization” of Community Law I: Direct Effect and “Indirect Effect”

the dual (or even contested) meaning of direct effect (no adaption, rights of Community citizens)

Van Gend en Loos

the conditions of direct effect: clarity, unconditionality, negative obligation

direct effect even in the absence of implementing legislation: *Reyners*

granting horizontal direct effect with respect to the interest affected: *Defrenne II*

limits to the direct effect of Treaty provisions: *Zeara*

direct effect of directives

vertical direct effect of directives: *Van Duyn*

the estoppel rationale: *Ratti, Becker*

is there a case against the horizontal direct effect of directives? *Marshall* and *Dori*

indirect effect of directives: *Colson*

adverse horizontal indirect effect? *Kolpinghuis* and the balancing approach

the confirmation of this approach in *Marleasing*

the *Berlusconi* case

Reading: Reinisch 50-60, 68-75

9. The “Constitutionalization” of Community Law II: Supremacy (as seen from Luxembourg)

AG Roemer’s argument in *Van Gend en Loos*

Costa v. ENEL

Effet utile and supremacy: *Internationale Handelsgesellschaft* and *Simmenthal Factortame I*

Reading: Reinisch 60-64

10. Supremacy (as seen, in particular, from Karlsruhe): The Position of Member States

the question of *Kompetenz-Kompetenz*

the German example: The *Solange* decisions and the *Maastricht* decision

The *European Arrest Warrant* case(s)

the view from Warsaw

Readings: Reinisch 98-99

Sadurski, “Solange 3” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=963757 (not reprinted in the materials)

Julio Baquero Cruz, The Legacy of the Maastricht-Urteil and the Pluralist Movement http://www.eui.eu/RSCAS/WP-Texts/07_13.pdf (not reprinted in the materials)

Germany again: The *Lisbon* Decision

Reading: Christoph Schönberger, Lisbon in Karlsruhe: Maastricht’s Epigones At Sea, http://www.germanlawjournal.com/pdfs/Vol10No08/PDF_Vol_10_No_08_1201-1218_Lisbon%20Special_Schonberger.pdf (not reprinted in the materials)

11. Giving Effect to Community Law I: General Uniform Observance

Commission v. Member States: Art. 258 FEU Treaty

since the Maastricht Treaty: imposition of a fine (Art. 260 FEU Treaty

on the relationship between the Art. 258 FEU Treaty and the Art. 267 FEU Treaty (preliminary rulings) procedure

Commission v. Ireland

direct effect is no defense for a failure to implement directives: *Commission v. France*

reasons for bringing Art. 258 FEU Treaty procedures are entirely ‘objective’

types of breach: the importance of the former Art. 10 EC Treaty, now reflected in Art. 4(3) EU Treaty

the de facto exemption of acts by national courts from review

Member State v. Member State: Art. 259 FEU Treaty (very rarely used)

review of the legality of Community acts: different avenues of appeal (Art. 263, 265, 277, 267 FEU Treaty)

penalty payments (260 FEU Treaty): *Commission v. Greece*, *Commission v. Spain*, *Commission v. France*

Reading: Reinisch 97-82, 72-79

12. Giving Effect to Community Law II: Preliminary Rulings (Art 267 FEU Treaty)

in the context of Art. 267 FEU Treaty proceedings the ECJ is no appellate court
the division of labor between interpretation (ECJ) and application (national court)
the transformation of preliminary rulings from the horizontal and bilateral to the vertical and multilateral axis

discretion and duty to refer

the ECJ's initial policy: better refer than not to refer: *Da Costa*

precedents may be taken into account: *CILFIT*

the ECJ's exclusive jurisdiction on the validity of Community Law: *Foto-Frost*

interim Relief: *Atlanta I*

legal certainty *Kühne & Heitz*

'necessity' of reference; *Simmenthal*: ECJ will not inquire into the reasons for reference and not into the facts of the case

CILFIT (the *acte clair* doctrine): a limit on the national court's duty to refer?

the dawning of a more restrictive approach: requirement of a genuine dispute (*Foglia I*, *Foglia II*), rejection of hypothetical cases and refusal to give 'advisory opinions'

review of relevance (necessity) and review of the facts: *Dias*

reasons explaining the more restrictive approach

the elusive distinction between 'interpretation' and 'application'

overload and reform of the system

Reading: Reinisch 82-87

13. Giving Effect to Community Law III: Effet utile at the National Level

the original approach: no duty to create new remedies (REWE- Zentralfinanz)

the early restraints on domestic procedural conditions: non-discrimination, practical possibility, adequacy of burdens, effectiveness of protection

exploring the tension between those principles: *Factortame I; Marshall II*

the elusive distinction between substantive and procedural rules

the equivalence principle: *Edis, Levez, Preston*

Francovich: Member State liability for the failure to implement directives

clarification of the holding of *Francovich* in *Brasserie du Pêcheur/Factortame III*

analogy with an eye to Art. 260 FEU Treaty (liability for Community acts)

three conditions of State liability: infringement of a right conferred by Community law, ‘sufficiently serious’ breach, causality

the new approach in *Köbler*: liability for acts of high courts

duty to create a damage action for third party breach: *Courage*

conditions of liability: *Brasserie du Pêcheur/Factortame III, Köbler*

Reading: Reinisch 60-62

14. Competence Allocation

Art. 4 & 5 EU Treaty, Art. 2-6 FEU Treaty

enumeration: all competences are attributed competences

the need for choosing the right legal base

an aside on the giving reasons requirement (Art. 296 FEU Treaty)

exclusive competence: Art. 3 FEU Treaty

concurrent competence (Art. 4 EU Treaty): preemption of Member State legislation

the question of Article 114 FEU Treaty – the *Tobacco Advertisement* case

Maduro Vodafone

complementary competence

shared external competence and ‘mixed agreements’

member State competence

implied powers

implied powers, broadly understood (Art. 352)

subsidiarity (Art. 5 EU Treaty and the Protocol on Subsidiarity and Proportionality)

Art. 12 & 69 EU Treaty and the Protocol on the Role of National Parliaments in the European Union

Maduro on Vodafone

Reading: Reinisch 35-40

15. Freedom, Security and Justice

Art. 3(2) EU Treaty; Title V FEU Treaty (Art. 67-89)

Commission Communication, Report on Implementation of the Hague Programme for 2007 COM(2008) 373 final

16. Competence Allocation and Foreign Relations

The EU as an international actor

anchors in the Treaty: Article 207, 216, 217, 220 FEU Treaty,

procedures: 207, 218 FEU Treaty

Need for an internal legal basis

Express, implied and exclusive competence

The *ERTA* case

The Common Foreign and Security Policy

Art. 37 EU Treaty

Reading: Reinisch 220-236

17. International Law and EU law

Is the GATT directly effective?

International Fruit

Portugal v. Council

Reading: Reinisch 65-67

18. The Involvement of Parliament in Legislation

the original form of parliamentary participation: consultation

the Single European Act (Art. 252 EC Treaty): cooperation –now repealed

the Single European Act: assent (now e.g., Art.49 EU Treaty)

Maastricht (now Art. 294 EU Treaty): co-decision

the expansion of co-decision by the Amsterdam Treaty

the Art. 294 FEU Treaty qua default procedure (Art. 289 FEU Treaty)

parliamentary initiative

addendum: Voting Requirements in the Council: Article 16(4-5) EU Treaty, Article 238 FEU Treaty, Protocol on Transitional Provisions

the reality of decision-making: soft law, experts etc

Reading: Reinisch 41-49
http://eur-lex.europa.eu/en/droit_communaire/droit_communaire.htm (not reprinted in the materials)

19. The Role of Committees in the Law Making Process

COREPER

delegated legislation by the commission (Art. 202 and 211 EC Treaty): the role of “Comitology”

three types of committees: advisory, management, regulatory

conflicting perspectives on comitology: elitism, deliberation, or the end of normative constraints

the new Art. 290 FEU Treaty

Readings: Reinisch 28-29

Part Three

The Constitution of Liberty – Free Movement

20. Free Movement of Goods (Art. 34 FEU Treaty) as an Equality Right

the basic freedoms conferred on European citizens: free movement of goods, workers, services, freedom of establishment (Art. 34, 45, 49 56, 63 FEU Treaty)

the original conception: the basic freedoms as equality rights

the importance and symbolic significance of the free movement of goods

quantitative restrictions and measures of equivalent effect

the ominous *Dassonville* ruling: all trading rules capable of hindering, directly or indirectly, actually or potentially, intra-Community trade

Buy Irish

indirect discrimination

the transformation of existing consumer preferences: *Commission v. UK, German Beer*

the ‘derogations’ of Art. 36 FEU Treaty

the ECJ’s interpretation of the proportionality principle

e.g., public morality (*Congate, Henn and Darby*)

e.g., ordre public: may the likelihood of popular resistance against Community law provide the basis for an exception? See *Centre Leclerc*

e.g., consumer protection, see *Clinique*

e.g., Member State action under conditions of uncertainty: *Sandoz*

e.g., double checks on products and the single market program
limits to the application of Art. 36 FEU Treaty

Reading: Reinisch 106-112, 116-117

21. *Cassis de Dijon* and its Progeny

brief review of *Dassonville*

Rewe-Zentrale AG v. Bundesmonopolverwaltung für Brandwein (= *Cassis de Dijon*)

‘indistinctly applicable rules’: creating the right to free trade

the rule of reason and ‘mandatory requirements’

American Antitrust Law at the cradle of *Cassis de Dijon*?

difference to Art. 36: no exhaustive list

strict judicial scrutiny: *German Beer*, *Danish Containers*

partial overlap with Art. 36

mandatory requirements: from health to human rights (*Schmidberger*)

an aside on Art. 35

the Commission’s changed approach toward harmonization after *Cassis*

Readings: Reinisch 112-116

22. Restricting the Scope of Art. 34 after *Keck*

the scope of Art. 34

dual burden and equal burden rules

from *Cinéthèque* and *Torfaen*

broadening the scope of Art. 34 and extending the list of mandatory requirements

explaining one distinction on the ground of another distinction: ‘dual/equal burdens’ as ‘additional/normal requirements’

the proliferation of distinctions: product characteristics/selling arrangements (*Keck*)

the proliferation of distinctions: product content/sales promotion (*Familiapress*)

Keck’s re-reading of *Cassis de Dijon*

Keck’s proviso: *Hunermund*, *Familiapress*, *Heimdienst*

the trouble with Swedish temperance

salvaging a right to market access by extending the proviso?

Reading: Reinisch 117-121

23. Freedom of Establishment: From *Reyners* to *Centros* and *Viking*

Reyners

lawyers: *Vlassopoulou*, Directive 98/5/EC; Directive 2005/36/EC

companies: Art. 54 FEU Treaty

Segers, Daily Mail, Cartesio

Centros

beyond companies: posted workers, *Commission v. Germany*

relocation for reasons of lower wages: *Viking*

addendum: freedom to provide services: Internet Gambling - *Bwin International*

Part Four

The Constitution of Inclusion – A ‘European Social Model’?

24. The Impact of the Internal Market on the Welfare State I: The Social Dimension of Article 45 FEU Treaty and Regulation 1612/68

access to the host states’ social welfare services

Who is a worker? *Levin, Steymann, Ninni-Orasche, Trojani*

moderate beginnings: employment related benefits

access to education

rights of dependents and restrictions to nationals: *Even, Singh, Olazabal*

horizontal direct effect: *Angonese*

25. The Impact of the Internal Market on the Welfare State II: From Free Movement of Workers to Union Citizenship

the basic tension between economic and social objectives of Article 45

Union Citizenship: Art. 20-

Martinez Sala,

Trojani

Grzelczyk

Bidar

Förster

Vatsouras

Student admission in Austria

26. The State qua Addressee of Competition Law

The integrity of property rights (Art. 295)

The structure of Art. 86 (1-3)

what is a “public undertaking”? (see *France et al v. Commission, Pomp Funebre*)

Hoefner

Art 86 (1): what matters? Exclusive rights per se?

Merci Convenzionali

Art 86 (2): the exemption from application of Treaty rules

Art 86 (3): power of the Commission

27. The Impact of the Internal Market on the Welfare State III: Constraints on National Social Welfare Policy

regulatory competition and the waning of national problem-solving capacity

discrepancy between legal and factual power

health-care “tourism”

Kohll

Müller-Fauré

submitting social insurance to the rigor of competition law

Cisal

28. The Impact of the Internal Market on Industrial Relations: *Laval*

Laval

29. Fundamental Rights: The Emergence of the Court’s Jurisprudence

no Bill of Rights

sources

the problem of the relevant standard: national or international

Internationale Handelsgesellschaft: waiving the flag of supremacy

Nold, Rutili, Hauer: reference to the ECHR

AM&S: Is it doctrine that matters?

Hoechst (review of Commission proceedings): the divergence arising vis-à-vis the rulings of the ECtHR

three spheres of application (1): *Rutili, Johnston*

three spheres of application (2): *Klentsch, Wachauf*

three spheres of application (3): from *Cinéthèque* to *ERT* and *Schmidberger, Omega Spielhallen*

the diversity of human rights law in Europe

the Member States as signatory states of the European Convention

the conflict of obligations under European Community law and European Human Rights law: *Matthews*

European Human Rights Law and the United Nations: *Bosphoros*

EU law and the United Nations: *Kadi, Hassan*

Readings: Reinisch 88-101

30. The Union's Charter of Fundamental Rights

making of the charter: preparation by a convention

its legal form: a 'joint proclamation'

dead letter?

its relation to the European convention on human rights

provisions evincing the self-restraint of market integration

the relation to Art. 6 and 7 EU Treaty

Readings: Reinisch 103-104

The text of the charter is available at

http://www.europarl.europa.eu/charter/pdf/text_en.pdf (not reprinted in the materials)

Part Five

Reaching Out

31. Multispeed, Enlargement and Enhanced Co-operation ("Wider Europe")

already existing types of co-operation

three models: ‘multispeed’, ‘concentric circles’, ‘clubs’

the regulatory technique: the consolidated provision of Art. 20 EU Treaty

Art. 8 EU Treaty

The Western Balkans and Turkey

Readings: Commission Communication, Enlargement Strategy and Main Challenges 2009-2010, COM(2009) 533

http://ec.europa.eu/enlargement/pdf/key_documents/2009/strategy_paper_2009_en.pdf, 1-7 (not reprinted in the materials)

Communication from the Commission to the Council and the European Parliament, ‘Wider Europe – Neighborhood: A New Framework for Relations with our Southern and Eastern Neighbours’

http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf, 1-13 (not reprinted in the materials)