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TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

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PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS,¹

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

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 favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

and to this end HAVE DESIGNATED as their Plenipotentiaries:

(List of plenipotentiaries not reproduced)

¹ The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland as well as the Republic of Croatia have since become members of the European Union.

TFEU Preamble

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

Bibliography: *v. Bogdandy/Bast*, Principles of European Constitutional Law, 2nd ed. 2010; *Jaeger*, We Hold These Truths to Be Self-Evident, Perhaps – Side-Stepping the Commonality or Common Principles’ and Fundamental Aims in EU Law, 8 Austrian Review of International and European Law 2003, 247; *Kotzur*, Die Ziele der Union: Verfassungsidentität und Gemeinschaftsidee, DÖV 2005, 313; *Kotzur*, Die Präambel, die Artikel zu den Werten und Zielen der Europäischen Union, in: *Niedobitek/Zemánek* (eds), Continuing the European Constitutional Debate, 2008; *Kotzur*, Zur politischen Identität der europäischen Staaten, in: *Tsatsos* (ed.), Die Unionsgrundordnung, 2010, 165 et seq., 174 et seq.; *Nergelius*, The EU Constitution in a comparative and historical perspective. An analysis of the Lisbon Treaty and its importance, 2009; *Pernice/Maduro* (eds), A Constitution for the European Union, 2004; *Schepe*, The Legal Force of the Preamble of the EEC Treaty, 6 ELRev 1981, 356; see also the bibliography concerning the Preamble of the TEU.

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I. General remarks

In a solemn language and more citizen-centred than the operative part of the Treaty, the Preamble of the TFEU reflects the historic development of the process of European integration. It links value-related commitments of the Union with insights on the integration process and develops a vision for the future: In both a retrospective and a prospective manner, the Preamble wants to formulate the **quintessence** of the following Treaty provisions. Therefore it highlights objectives, motives and basic principles which have been significant for the EEC, later for its transformation to the EC and finally for the **inclusion** of the Community into the new EU structure. The amendments to the Preamble by the Lisbon Treaty are of an editorial nature, depending on the mandate (see indent 2). The text of the Preamble therefore stands for the great continuity which has been preserved on the way from the original economic Community to the present political Union. The solemn introductory clause does not postulate any concrete legal obligations. However, this does not mean that the text is legally irrelevant. This is confirmed by public international law. Article 31 para. 2 VCLT states that the preamble is an **integral part of the Treaty** at hand. Within the frame of its specific function, the Preamble is of the same binding nature as any other provision of the Treaty, especially in correlation with provisions of the operative part of the Treaty. The Preamble contains indications for the interpretation of the Union law which has been created by agreement of Member States, leading to its constant further development.² In addition, the explicitly named bases of

² ECJ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3; Case 136/79 *National Panasonic* [1980] ECR 2033.

legitimacy address those Treaty foundations which cannot be abandoned without endangering the existence of the Union and which are fundamental to the Union's **common identity**.³

II. An ever closer Union among the peoples of Europe

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1. The Community Treaties within the process of integration

After naming the original parties to the Treaty, the Preamble formulates its leitmotiv: the European integration as a process with a clear objective but with an open final aim. In the first indent, the Member States declare their strong will to create the basic requirements for an ever closer Union of the European peoples – and consequently of the Union citizens (Articles 20 et seq. TFEU). Historically, the Treaty is strongly linked to the different endeavours to **unify the European nations**, which in the aftermath of the catastrophe of the Second World War played an important role for a return to the idea of a common European heritage, as it was expressed e.g. by the Zurich Speech of Winston Churchill on 19 September 1946.⁴ The process of integration follows a **functionalist approach**, the first step of what was the founding of the ECSC in 1951. This approach is based on the idea that the experience made in the process of closer cooperation and integration in the field of economy and technology will finally lead to common solutions also in highly political questions (**theory of 'spill-over'**).

Among the next important steps in the **process of integration** based on the EEC Treaty ³ (and the other two Treaties on ECSC and EAEC) in the period until 1986, the following intermediate steps shall be emphasized: the expansion of the institutional constitutionality of the Community (system of Community revenues since 1971; direct elections to the European Parliament since 1979; extension of the functions and competences of the European Parliament), the inclusion of additional (accompanying) policy areas into the practice of the Communities since 1972 (environmental protection, regional development policy, research policy) as well as the creation of the European Monetary System (EMS). In addition, there has been an integration-friendly jurisprudence of the ECJ, leading to an early justification of the primacy of Community law⁵ and to the strengthening of the competences of the Community against the interests of the Member States.

2. Single European Act (SEA)

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A new impulse for further integration came with the SEA of 17/28 February 1986 (in force since 1 July 1987). By amending the Treaty, the SEA introduced the **concept of the internal market** (Articles 13 et seq. SEA) into primary law in order to accelerate the development of the European common market. In addition, explicit provisions for new Community policies (now e.g. Articles 174 et seq. TFEU) and a stronger involvement of the European Parliament in the legislative process were adopted. Also the reduction of the structural deficit of democratic legitimacy on the Community level was already an objective of the SEA.

Apart from this, the SEA formulated a public international law basis for the **European** ⁵ **Political Cooperation (EPC)** in the field of foreign policy. The European foreign ministers of the Member States met at least four times a year within the framework of the EPC,

³ Cf. Kotzur, Zur politischen Identität der europäischen Staaten, in: Tsatsos (ed.), Die Unionsgrundordnung, 2010, 165 et seq., 174 et seq.

⁴ Cf. Oppermann/Classen/Nettesheim, § 2 mns 3 et seq.

⁵ ECJ Case 6/64 Costa v E. N. E. L. [1964] ECR 585.

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in order to coordinate the foreign policies of the Member States and to assure coherence of the foreign policy at the national level on the one hand and the Community policy on the other hand.

- 6 Finally, the SEA stated that the European Communities and the EPC together served the aim to commonly make concrete progress on the way to a future European Union. It formulated a textual basis under public international law for the newly introduced institution of the **European Council** meeting as a summit of the European Heads of State or Government since December 1974. The Heads of State or Government and the President of the European Commission meet in the European Council on a regular basis, at least two times a year. According to the SEA, the European Council first of all found its function in defining baseline questions for the construction of Europe and in defining further approaches for the construction of Europe as well as general political guidelines for the Communities and the EPC; when acting in matters within the scope of the European Communities, the European Council acted in its capacity as the Council of the European Communities within the meaning of the respective Treaties.⁶

7 3. Treaty of the European Union (Maastricht Treaty)

The **Treaty of Maastricht** (TEU) of 2 February 1992 is the founding Treaty of the European Union. It started the process of a step by step integration by structuring the Union according to the model of State constitutions. This development found its temporary completion in the draft Treaty on Establishing a Constitution for Europe (TECE). After the latter attempt failed, the Reform Treaty of Lisbon (2007) relinquished all State-like symbolism such as an official flag or anthem but retained its essential characteristics.

- 8 The Union, according to the Maastricht Treaty, is based on the concept of an **inter-connection of States**⁷ or more precisely of **constitutions**⁸ relying on three bases, namely the European Communities (forming the ‘first pillar’), a common foreign and security policy (‘second pillar’) and a closer cooperation in specific fields of police and judicial affairs (originally concerning immigration, asylum, the fight against drug trafficking, and organised international crime as well as judicial co-operation in civil and penal matters; ‘third pillar’).
- 9 The Maastricht Treaty contained significant changes in the legal structure of the Community Treaties, creating a dynamic move towards a more effective integration. The hitherto European Economic Community was renamed ‘European Community’ (EC) because limiting the integration process to economic cooperation had been explicitly abandoned. The Treaty Establishing the European Community (TEC) included provisions according to which a comprehensive **Economic and Monetary Union (EMU)**, aiming at introducing a common currency and a framework for close cooperation in the field of the economic policy of the Member States, should be established not later than by 1 January 1999. The Treaty already contained all provisions which were in force in the final stage of the EMU, notably the Statute of a European System of Central Banks and of the European Central Bank (ESCB), consisting of an independent European Central Bank (ECB) and the (likewise independent) national central banks.
- 10 In addition, the Maastricht Treaty strengthened the competences of the European Parliament, conferred several new policy areas to the Community level, enshrined the prin-

⁶ See Stuttgart, *Solemn Declaration on European Union*, 19 June 1983, Bulletin of the European Communities, 6/1983 24–29.

⁷ BVerfGE 89, 155 – *Maastricht*.

⁸ See Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 CMLR 1999, 703.

ciple of subsidiarity of Community action in the Treaty, established a consultative Committee of Regions and introduced a citizenship of the European Union.⁹

The Treaty of Maastricht entered into force on 1 January 1993 after the German government as the last one deposited its instrument of ratification on 13 October 1993. The delay was caused by the proceedings instituted before the Bundesverfassungsgericht (BVerfG; German Federal Constitutional Court) concerning the German law authorising the accession to the Maastricht Treaty which was finally upheld by the Court's judgment of 12 October 1993.¹⁰

4. Treaties of Amsterdam and Nice

Maastricht was, however, only an intermediate step. Already the text of the Treaty itself provided for a revision conference in 1996 in order to negotiate further integration steps. Hereby – after successfully enacting the European Economic and Monetary Union – the political Union should also be further developed. The Eastern enlargement of the EU raised additional questions. On 2 October 1997, the meanwhile 15 governments of the Member States signed the ‘**Treaty of Amsterdam** amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts’. The Treaty entered into force on 1 May 1999.

Among the large number of amendments, the following have to be highlighted: transfer of the rules on visa, asylum, immigration related to non-EU citizens from the third pillar (police and judicial affairs) as well as transfer of the Schengen acquis into the TEC (now Article 67 TFEU), the provisions regulating the general possibility of a differentiated integration (‘flexibility’) and the strengthening of the position of the President of the Commission as well as the functions of the European Parliament (here especially by extending the practical importance of the codecision procedure in legislation, now Article 294 TFEU). Essential further amendments were concerned with the introduction of a new title on ‘employment’ (now Articles 145 et seq. TFEU), the enhancement of civil rights and the further development of the areas of social policy and environmental protection.

Because the Treaty of Amsterdam left open important questions of the European enlargement process, a further amendment of the Treaties was agreed upon by the **Treaty of Nice** of 26 February 2001, which entered into force on 1 February 2003. However, this Treaty was not sufficiently able to answer the pressing calls for institutional reform and efficient majority vote.

5. Enlargement

At the time of the ratification of the Amsterdam Treaty, the number of Member States of the European Community (and the EU respectively) had grown to 15. With the Treaty of Accession of 16 April 2003 ten more States were admitted to the Union. In 2007 the accession of Bulgaria and Rumania led to a Union composed of then 27 Member States, today (after the accession of Croatia in 2013) the Union consists of 28 Member States. Long transition periods and comprehensive adjustment clauses shall meet the economic and political challenges of the enlargement process und facilitate the parallel process of a deepening of European integration.

⁹ Cf. Streinz, Vom Marktbürger zum Unionsbürger, in: Breuer et.al. (eds), Im Dienste des Menschen: Recht, Staat und Staatengemeinschaft, 2009, 63.

¹⁰ BVerfGE 89, 155 – Maastricht.

16 6. The European Constitutional Convention of 2002/2003 and the proposed Constitutional Treaty of 2004

After the successful Convention on Fundamental Rights of 1999/2000, the European Council of Laeken used the Convention method again in order to negotiate a Treaty Establishing a Constitution of Europe (TECE) for the enlarged Union. The Convention finally presented the 'Draft of a Treaty establishing a Constitution for Europe' in 2003.¹¹ This draft relinquished the Treaty structure of the three pillars created by Maastricht and proposed a single EU with primary law that should be contained in one single Treaty, including a European Charter of Fundamental Rights. The Constitution failed due to unsuccessful public referenda in France and the Netherlands. One of the main reasons for the final refusal besides the non-transparent complexity of the draft Treaty might have been the fear, sometimes called an irrational angst created by mere populism, that the Constitution could erode national sovereignty. However, the constitutional principles of the draft-TECE have been retained by the Lisbon negotiations on Treaty reform. Lisbon presents a new framework for the ever closer unification of the European nations in the spirit of the draft-TECE.¹²

17 7. The Lisbon Treaty of 2007

The European Council of 21–23 June 2007 issued the mandate to a new intergovernmental summit. Whereas important impulses for resuming the negotiations came from the German presidency, the consensus on creating the **Reform Treaty** of Lisbon was obtained under the subsequent presidency of Portugal. The respective Treaty was signed in the Portuguese capital on 13 December 2007 by the governments of the (then) 27 Member States.¹³ Although the ambitious term 'Constitution' was avoided, the Lisbon Treaty incorporated to a great extent the framework developed by the draft-TECE. All State-like symbolism was relinquished; the position of the Member States, especially of the national Parliaments, was strengthened; the CFREU was not incorporated but formed a 'third' Treaty which is legally binding, being of the same primary law quality as the TEU and the TFEU. The process of ratification was difficult. A necessary referendum in Ireland was only successful in a second attempt. For Poland, Great Britain and the Czech Republic exceptions concerning the CFREU had to be made. By the end of 2009, after the positive decision of the German BVerfG¹⁴ and of the Czech Constitutional Court, the way was cleared for the Lisbon Treaty entering into force. It became effective by 1 December 2009. Although the Reform Treaty did not keep the promise to make the Union more transparent to its citizens, it nonetheless created a stable framework for the future development of the Union. The **threefold Treaty system of TEU, TFEU and CFREU** does reflect and can **develop further these basic ideas** which have been the driving force of European integration since 1945.¹⁵

18 III. Economic objectives of the TFEU

The preliminary considerations of the TFEU reflect the economic motives for the European integration process with more emphasis than the preamble of the TEU.

¹¹ OJ 2003 C 169/1.

¹² It is debated whether the new framework is too narrow, see the German BVerfG in its Lisbon Decision (BVerfGE 123, 267 – Lissabon) and the discussion in *Häberle*, Das retrospektive Lissabon-Urteil als versteinernde Maastricht-Entscheidung, JöR 58 (2010), 317 et seq.

¹³ OJ 2007 C 306/1.

¹⁴ BVerfGE 123, 267 – Lissabon.

¹⁵ See *Häberle*, Europäische Verfassungslehre, 721 et seq.

The objectives are intertwined with each other with view to means and ends. One of the essential objectives is the **constant improvement of the living and working conditions** of the population (indent 3). This requires a steady economic expansion, balanced trade and fair competition (indent 4), as well as a balanced economic development in the various geographic regions (indent 5), which gives a pre-federal answer comparable to the aim of a convergence of living standards, typical for federal States. The barriers and obstacles which still divide Europe shall be removed by concerted and cooperative means (indents 2 and 4). The importance of global trade and of development cooperation is highlighted by indents 6 and 7, opening the political and legal order of the EU to the international legal community. Indent 9 derives from the Treaty of Amsterdam which activated the idea of a knowledge based society at European level. It emphasizes the objectives to achieve the highest possible level of knowledge for the European peoples through a wide access to education and continuous retraining.

IV. Political foundations

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Notwithstanding the fact that the dynamics of integration are primarily economically driven, also broad political objectives are formulated. The economy is not an end in itself but it has to serve the interests of the people and is insofar instrumental to the needs of the human being. Henceforth the Member States pool their (economic) resources 'to preserve and strengthen peace and liberty'. This clarifies that Europe is prepared for **international cooperation** on a global scale, that the Union does not advocate isolationist policies in international relations, that it does not want to create a 'European fortress', and that it is not directed against any third States.

However, this statement is also related to the internal politics of the Union. Implicitly, 20 the Member States declare that they accept the fundamental principles which serve the preservation of peace and liberty according to their national constitutional traditions: the foundations of the liberal and democratic State governed by the rule of law. These include the principles of democracy, the principle of the rule of law (including the separation of powers and judicial review) and the respect for the fundamental freedoms of the individual. Freedom, democracy, equality and the protection of human rights are explicitly mentioned by Article 2 TEU as compulsory core values.

The commitment to these principles forms the political basis for the process of integration: They are the legitimising foundations for both, the Union and the Member 21 States. Although the primary law of the Union does not have to be congruent to the constitution of a federal State, the Union has to guarantee that its organs and agencies have the structural capacity to obey and to carry out the major objectives of these core principles. But if the national constitution of a Member State should cease to be in conformity with the aforementioned principles, the legitimising basis for membership in the EU would be lost (see Article 7 TEU and Article 354 TFEU). The **constitutional identities**¹⁶ at national and Union level form just two different sides of the same coin.

¹⁶ Cf. *Korioth/von Bogdandy*, Europäische und nationale Identität: Integration durch Verfassungsrecht? VVDStRL 62 (2003), 117 and 156.

PART ONE
PRINCIPLES

Bibliography: *Craig*, The Lisbon Treaty: law, politics, and treaty reform, 2013; *Devuyst*, The European Union at the crossroads, 2nd ed. 2003; *Delanty*, Inventing Europe: Idea, Identity, Reality, 1995; *Fischer*, Der Vertrag von Lissabon, 2nd ed. 2010; *Hartley*, The Foundations of European Union Law, 7th ed. 2010; *Häberle*, Europäische Verfassungslehre, 7th ed. 2011; *Kowalik-Banczyk/Szwarc-Kuczer*, The EU Reform in the Treaty of Lisbon – The Horizontal and Systemic Changes, 11 Y.B. Polish Eur. Stud. 2007–2008, 139; *Ott*, Depillarisation: The Entrance of Intergovernmentalism through the Backdoor, 15 Maastricht Journal of European and Comparative Law 2008, 35; *Tridimas/Nebbia* (eds), European Union Law for the Twenty-First Century, 2004; *Weiler*, The Constitution of Europe, 1999; see also bibliographies on the Preambles of TFEU and TEU.

Article 1 [Purpose of the Treaty]

- 1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
- 2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as ‘the Treaties’.

Bibliography: *v. Bogdandy/Bast* (eds), Principles of European Constitutional Law, 2nd ed. 2010; *Calliess*, Die neue Europäische Union nach dem Vertrag von Lissabon, 2010; *Dougan*, The Treaty of Lisbon 2007: Winning Minds, Not Hearts, 45 CMLR 2008, 617; *Everson/Eisner*, The Making of a European Constitution, 2007; *Sarooshi*, International Organizations and their Exercise of Sovereign Powers, 2007.

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1 I. The new EU and the new TFEU

The Reform Treaty of Lisbon abandons the hitherto existing three pillar structure of the European Union and endows the EU with legal personality under national and public international law (Article 47 TEU).¹ The European Union, already founded by the Treaty of Maastricht, thereby replaces the European Community and becomes its **legal successor** (Article 1 para. 3 TEU). The term ‘Community’ is now obsolete, but not the ‘Community idea’ which unfolds a constitutionalising and integrative power. For this reason the former TEC was renamed ‘**Treaty on the Functioning of the European Union**’ (TFEU). The TFEU, according to the wording of Article 1 para. 1 TFEU, substantiates and details the provisions of the TEU. It organises the functioning of the Union and establishes a detailed framework for the exercise of its competences. With Article 1 TFEU in its present form, Article 1 and 2 TEC became obsolete. Article 1 TEU and Article 1 TFEU form the interrelated and partly identical founding articles of the Union and ‘mark a new stage in the process of creating an ever closer Union among the peoples of Europe’².

¹ See also Schwarze/Schwarze, Article 1 AEUV mn. 2.
² See the wording in the first paragraphs of the Preambles of TEU and TFEU.

To a certain extent, however, the wording is misleading. The TFEU does not only contain provisions dealing with the **functioning** of the Union in the narrow sense, but also includes **fundamental norms** like Article 18 or Article 21 TFEU, which should have been placed in the TEU because of their nature. This complicates the readability of the new Treaties and creates normative duplications or artificially divided areas which systematically belong together, e. g. concerning the institutional EU law.

II. Elements and legal nature of the TFEU, the question of supranationality

The Treaty consists of an operative part, including the Preamble and the attached annexes and protocols. Amendments to the Treaties have to be enacted in accordance with the procedures laid down in Article 48 TEU. The provisions of such Treaties amending the TEU and TFEU can be regarded as **having the same legal value** as the other norms of primary law.

Like the founding Treaties of the European Communities and the Treaty on the founding of the EU, the TFEU qualifies as an international treaty under public international law, concluded by the Member States. In this respect the general rules of public international law on the law of treaties apply, as particularly codified in the Vienna Convention on the Law of Treaties (VCLT). However, the European Union has meanwhile emancipated itself from the legal acts founding it and has formed **a legal order in its own right**.³ This independent legal order has been termed '**supranational**' order; formerly only in respect to the EC, the term is now applicable to the whole EU, except for the rules on the Common Foreign and Security Policy (CFSP), which keep their **intergovernmental character**.

Contrary to a conventional international organisation, a supranational organisation possesses the competence to enact legislation which is of binding force to the Member States. This binding force can even occur against the will of a single Member State. Besides this, the **direct effect** of the legislative acts within the internal legal order of the Member States is of particular importance.⁴ The Union can enact legislation (especially in the case of regulations) which is not only binding on the Member States but also directly applicable in their internal sphere, creating rights and obligations without any further act of transformation.⁵ The national shield of sovereignty⁶ is pierced.

III. The legal equality of TEU and TFEU

Unlike the Constitutional Treaty which intended to include TEC, TEU and the Charter of Fundamental Freedoms into one single Treaty, the Reform Treaty of 2007 leaves the structure of three separate treaties untouched. Article 1 para. 2 TFEU explicitly rejects any form of hierarchy between these three legal documents. TEU and TFEU are designed as complementary texts of equal value which together form the foundation of the EU.

³ ECJ Case C-6/64 *Costa v E.N.E.L.* [1964] ECR 585, later followed by the German Constitutional Court in BVerfGE 37, 277 – *Solange I*.

⁴ See also *Sarooshi*, International Organizations and their Exercise of Sovereign Powers, 2007, 69–76 with critical remarks.

⁵ Cf. *Zuleeg*, Wandlungen des Begriffs der Supranationalität, Integration 1988, 103.

⁶ 'Shield of sovereignty' is a translation of the word 'Souveränitätspanzer' going back to *Albert Bleckmann*.

From a semantic perspective this is expressed by using the plural term 'the Treaties'. However, it should not be ignored that also the Charter of Fundamental Rights of the European Union is now a legally binding part of the EU's primary law, completing the **constitutional triad**.

TITLE I CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2 [Types of competences]

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that 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.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Bibliography: *Azoulai*, The Question of Competence in the EU, 2014; *Blanke/Mangiameli*, Governing Europe under a Constitution, 2006; *von Bogdandy/Bast*, The Federal Order of Competences, in: von Bogdandy/Bast (eds), Principles of European Constitutional Law, 2nd ed. 2011, 275; *Di Fabio*, Some Remarks on the Allocation of Competences between the European Union and its Member States, 39 CMLRev 2002, 1289; *Konstantinides*, Division of Powers in European Union Law, 2009; *Krausser*, Das Prinzip der begrenzten Einzelermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWGV, 1991; *Oppermann*, Eine Verfassung für die Europäische Union, DVBl 2003, 1165, 1172; *Orebech*, The EU Competency Confusion: Limits, Extension Mechanisms, Split Power, Subsidiarity, and Institutional Clashes, 13 Journal of Transnational Law & Policy 2003, 99; *Sarooshi*, International Organizations and their Exercise of Sovereign Powers, 2007; *Weatherill*, Competence Creep and Competence Control, 23 YEL 2004, 1; *id.*, Better Competence Monitoring, 30 ELRev 2005, 23; *Weber*, The Distribution of Competences Between the Union and the Member States, in: *Blanke/Mangiameli* (eds), The European Union after Lisbon, 2012, 311.

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I. Origins of the norm and its systematic context

1

The norm is without precedent in earlier EU and EC primary law. It adopts the provision of draft-Article I-12 TECE and thereby performs one of the central tasks of the Lisbon reform process which the European Council Meeting in Laeken had already delegated to the Convention on the European Constitution: **a better division and definition of competence in the European Union and the Member States**. The EU's **prefederal** structure which is comparable to competence schedules in the constitutions of federal States is no coincidence. It pursues to clarify the distribution of competences between the Union and the Member States in compliance with the **principle of subsidiarity**.¹ The Member States had a very strong interest in setting up a material catalogue of competences in order to prevent the Union from claiming more and more competences. It serves to strengthen the principle of **conferral of powers** (Article 7 TFEU) and to effectively prevent an erosion of the sovereign powers of the Member States. Ultimately, this attempt was only rudimentarily successful; apart from details the catalogue of Article 2 TFEU is very similar to the hitherto existing EU competences. From a systematic perspective the inclusion of the catalogue into the TFEU is not convincing. As a fundamental norm of the legal order of the Union, it should have been placed in the TEU; the competences mentioned therein are not part of the Union's way of functioning, but a **constitutional precondition** of it.

II. The different types of competences

2

1. General remarks on typology

The basis of the distribution of competences is still formed by the **principle of conferral of powers** (Article 7 TFEU).² The wording of the Treaties is very clear about this: '[...] the Union shall act only within the limits of the competences conferred upon it by the Member States [...].'³ The Union does not possess a competence to create legislative competences. Moreover, it is the aim of the Member States to limit the dynamic and evolutionary expansion of the competences at Union level by the case law of the ECJ; e.g. several competences conferred to the Union are limited by specific derogations. Typical also for federal States are the **exclusive and shared competences**. In addition, competences to **support, coordinate or supplement the actions of the Member States** can be found in paras 3 to 5 (e.g. the coordination of the economic and employment policies or of the common foreign and security policy).

¹ Cf. *Oppermann*, Eine Verfassung für die Europäische Union, DVBl. 2003, 1165, 1172.

² See *Krausser*, Das Prinzip der begrenzten Einzelermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWGV, 1991.

³ See Article 5 para. 2 TEU.

3

2. Exclusive competence (para. 1)

A competence qualifies as an exclusive competence if a respective competence of the Member States is blocked by the mere existence of the Union competence. In this case the question of primacy of EU law comes into play not only in the phase of comparing the compatibility of the content of the legal acts of the Union and the Member States but already in the phase of determining whether a Union competence to take measures in the relevant field is exclusive. In the case of an exclusive competence, the Union has the sole competence to act and the Member States are unconditionally and permanently excluded from taking any legislative measures.⁴ However, there are **three exceptions**: a) The Union is allowed – probably by means of regulation – to explicitly authorise (empower) the Member States to act. b) In addition the Member States are entitled to adopt legally binding acts in order to implement acts of the Union. c) There is a reserve competence of the Member States if the Union, such as in cases of urgent need for foreign policy action, proves to be incapable of action. In this framework the Member States can act as **‘trustees of the common interest’**⁵ by means of interim measures that are limited in both duration and scope. According to Article 5 para. 3 TEU, the principle of subsidiarity is not applicable to exclusive competences. The definition of a competence as being exclusive is in itself already a case in which **uniform measures at Union level are necessary**.

4

3. Shared competences (para. 2)

The shared competence (until the Lisbon Treaty called concurring competence) forms the standard case of distribution of powers between the Union and the Member States. This becomes clear by the extent and the importance of the relevant policy areas mentioned in Article 4 TFEU. The shared competence does not as such exclude the Member States from legislating in the respective field; it rather restricts the Member States only insofar as the Union has exercised the competences conferred to it.⁶ The mere existence of a Union competence does not prevent the Member States from continuing to make use of their own legislative power. The exercise of the competence by the Union is directed by the principle of **subsidiarity** which sets the general rule under which circumstances and to what extent a shared Union competence may be exercised; the application of this rule, however, may be vague and open to debate in the individual case (cf. Article 5 TEU).⁷

5

Article 2 para. 2 s. 3 TFEU lays down, as a novelty, an explicit rule concerning the ‘fall-back’ of competences. This provision applies when the Union has at first exercised its competence but after some time decides to abandon the respective legislative act. It remains unclear which prerequisites have to be met in order to determine this and to what extent the Union has **decided** to cease exercising its competence. It should be sufficient that the Union formally abandoned its acts. It is further unclear whether the Union, after repealing its legislation, can nevertheless order the Member States not to exercise the competence themselves and, by this, avoid a ‘fall back-automatism’.

⁴ Cf. CR/Ruffert, Article 1 AEUV mn. 7.

⁵ ECJ Case C-804/79 *Commission v United Kingdom* [1981] ECR 1045, mn. 30.

⁶ ‘to the extend’, see already ECJ Case 22/70 *ERTA* [1971] ECR 263; Joined Cases 3, 4 and 6/76 *Kramer and others* [1976] ECR 1279; Case 804/79 *Commission v United Kingdom* [1981] ECR 1045.

⁷ Cf. D’Atena, Die Subsidiarität: Werte und Regeln, in: Liber Amicorum Häberle, 2004, 327 et seq.

4. The competence to support, coordinate or supplement Member States' actions according to paras 3 and 5 6

The third category or type of competences includes all of the so far called '**soft competences**', according to which the Union supports and coordinates actions of the Member States. Most of these competences have been created by the Treaty of Maastricht. Union and Member States in these cases are acting by parallel measures. The action of the Member States is directed and oriented consistently with the aims of the Union (Article 3 TFEU) and thereby is somehow '**Europeanised**'. The competences to support, coordinate or supplement relate to all those areas which are basically left in the responsibility of the Member States, sometimes referred to as exclusive competences of the Member States, which may be supplemented but not absorbed. The competences of the present two paragraphs can be exercised also by legally binding acts of the Union. However, because they are of a **solely supportive nature**, a strict prohibition of harmonising measures applies. Apart from legislative acts in a narrow sense, especially financial and other assistance to specific projects in the areas concerned, fall within the scope of the norm.

Special emphasis is given to the coordination of the national economic and employment policies in Article 2 para. 3 TFEU. Here, the Member States are primarily committed to **self-coordination**, acting solely as trustees of the common interest of the Union. Nevertheless, the Union is also not excluded from laying down legally binding acts. This generally reflects the hitherto existing legal situation.⁸ At large, coordination is a weak, but – because of its **cooperative nature** – definitely effective means of integration. 7

5. Common foreign and security policy (para. 4) 8

This competence is of a declaratory nature only and refers to the specific norms regulating the Common foreign and security policy (CFSP). It clarifies that acts concluded within the framework of the CFSP are not governed by the usual canon of competences but are of an inherently independent nature. This relates especially to the different means of action and decision-making. There is a strong interest of clarification in this respect. Also, after its integration into the TFEU, the CFSP is of an intergovernmental character.⁹

Article 3 [Exclusive competences]

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

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

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

⁸ See VHVH/Vedder, Article 2 AEUV mn. 21.

⁹ See Thym, Beyond Parliament's Reach? The Role of the European Parliament in the CFSP, 11 European Foreign Affairs Review 2006, 109.

TFEU Article 3

Bibliography: *Cremona*, The Draft Constitutional Treaty: External Relations and External Action, 40 CMLR 2003, 1347; *Lenaerts/van Nuffel/Bray*, European Union Law, 3rd ed. 2011, 112 et seq.; *Prechal/de Vries/van Eijken*, The Principle of Attributed Powers and the ‘Scope of EU Law’, in: Besselink/Pennings/Prechal (eds), The Eclipse of the Legality Principle in the European Union, 2011, 213 et seq.; *Trübe*, Das System der EU-Kompetenzen vor und nach dem Entwurf eines Europäischen Verfassungsvertrages, 64 ZaöRV 2004, 391; *Thym*, Beyond Parliament’s Reach? The Role of the European Parliament in the CFSP, 11 European Foreign Affairs Review 2006, 109.

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1

I. General remarks

Article 3 TFEU defines – in form of a conclusive enumeration – the exclusive competences mentioned in Article 2 para. 1 TFEU. The enumeration is not just a (declaratory) preview of the most important chapters of the TFEU, but it solves the difficult and so far heavily disputed question of the extent of the Union's exclusive competences. However, it is not possible to assess the extent of the competences mentioned in Article 3 TFEU without making reference to the individual Union policies in the third part of the TFEU. The enumeration is identical to the one in draft-Article I-13 TECE and evidently shows the constitutional continuity between the TECE and the TFEU. It is intentionally kept short. Until the Lisbon Treaty the ECJ had assumed an exclusive competence only in the fields of customs and trade policies (especially the conclusion of Treaties on trade and customs issues with third States) as well as the fisheries policy.¹

2

II. The specific categories

Customs union primarily means the legal framework of the customs tariffs (external dimension of the customs union). This exclusive competence is further elaborated by Articles 30 et seq. TFEU. The customs union includes the abolition of all kinds of customs within the internal market (internal dimension of the customs union). It establishes an **area without any tariff-related internal frontiers**.

³ **The establishing of the competition rules necessary for the functioning of the internal market** does not comprise a competence to regulate the whole internal market (Articles 26 et seq. TFEU), but only relates to the common rules of competition for the internal market (Articles 101 et seq. TFEU). It is disputed whether all articles of this chapter fall within the scope of Article 3 TFEU or not.² At least the wording implies a wide interpretation.

4 **Monetary policy for the Member States whose currency is the euro** means the monetary policy including the issue of banknotes and coins and the supervision of the stability criteria for the euro currency according to the provisions laid down in the TFEU.³

5 **The conservation of marine biological resources under the common fisheries policy** describes a part of the common agriculture and fisheries policy (Articles 38 et seq. TFEU, especially the assignment of Article 38 para. 1 TFEU, devoid of any further defini-

¹ ECJ Case 804/79 *Commission v United Kingdom* [1981] ECR 1045.

² See CR/*Calliess*, Article 3 AEUV mn. 8 with further references.

³ See Articles 126 et seq. and Articles 136 et seq. TFEU.

tion of the terminology). A special competence to regulate the conservation of marine biological resources as part of the common agricultural and fisheries policy is not explicitly mentioned.

The term **common commercial policy** is very broad, as such it is difficult to define and it can be interpreted only by taking the provisions of Articles 206 et seq. TFEU into account. The common commercial policy is the set of rules comprising Treaty law and autonomous rules regulating foreign commercial relations. It comprises particularly foreign trade and foreign direct investment.⁴ This ultimately means that the whole commercial policy falls within the competence of the Union.

There is an **exclusive competence for the conclusion of agreements under public international law** in three cases: a) when conclusion of such an agreement is provided for in a legislative act of the Union; b) when the conclusion of an agreement is necessary in order to enable the Union to exercise its internal competence; c) in so far as the agreement may affect Union rules or alter their scope. This means that the ERTA doctrine of the ECJ⁵ has been codified by the authors of the TFEU. It is an example of case law developed by the ECJ being codified as primary Union law by inserting it into the TFEU. The Member States are excluded from concluding agreements under public international law, as far as the preconditions set out in Article 3 para. 2 TFEU are establishing a competence of the Union. External and internal competences of the EU are coherent. Article 216 para. 2 TFEU elaborates this principle further and clarifies that, according to Union law, the Member States – even if not parties to the agreement – are bound to apply the rules of the agreement.⁶

Sometimes also the comprehensive exercise of a non-exclusive competence by the Union is dealt with as generating an exclusive competence.⁷ However, although in this case the Member States have no room for further legislation in the respective field, this is a question of how the Union exercises a shared competence and it is therefore rightly not mentioned in Article 3 TFEU but in Article 4 TFEU.

Article 4 [Shared competences]

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;**
- (b) social policy, for the aspects defined in this Treaty;**
- (c) economic, social and territorial cohesion;**
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;**
- (e) environment;**
- (f) consumer protection;**
- (g) transport;**
- (h) trans-European networks;**
- (i) energy;**

⁴ See also VHVH/Vedder, Article 3 AEUV mn. 3.

⁵ ECJ Case 22/70 ERTA [1971] ECR 263 (276); Joined Cases 3, 4 and 6/76 Kramer and others [1976] ECR 1279 (1311 et seq.).

⁶ See Article 216 TFEU mn. 21.

⁷ Cf. GS/Zuleeg, Article 5 EGV mn. 10 with further references.

- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Bibliography: Häberle, Der kooperative Verfassungsstaat, 1978; Häberle, Verfassung als öffentlicher Prozess, 3rd ed. 1998, 407 et seq.; Hobe, Der kooperationsoffene Verfassungsstaat, Der Staat 37 (1998), 521; Kotzur, Sovereignty and the European Federal Constitution – New Perspectives on Sovereignty in a Multilevel Scheme of Governance, 2 The Federalist 2008, 131; Bogdandy/Bast, The Federal Order of Competences, in: Bogdandy/Bast (eds), Principles of European Constitutional Law, 2nd ed. 2010, 275 et seq.; Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, 36 CMLR 1999, 703.

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1

I. General remarks

The idea of ‘shared competences’ corresponds to the paradigm of **cooperative-openness** which is fundamental to ‘multi-layered legal orders’.¹ It is similar to the concept of ‘shared sovereignty’ within orders of multilevel constitutionalism as in confederations or federal States.² The term ‘shared competences’ – in contrast to ‘concurring competences’ as used in a federal State like Germany – implies a less rival and more cooperative interaction between the Union and the Member States. However, it has to be observed that measures taken under the regime of the Common Foreign and Security Policy (CFSP) do not at all fall within the scope of competences of Articles 2 et seq. TFEU.

2

II. Systematic structure of the provision

Article 4 para. 1 TFEU has to be understood as a **general clause**. All competences that do not qualify as either exclusive according to Article 3 TFEU or as competences allowing to support, coordinate or supplement actions of the Member States according to Article 6 TFEU are **shared competences**. This residuary category makes the shared competences the commonly applicable standard, both by quality and by quantity.³

¹ See Häberle, Der kooperative Verfassungsstaat, 1978; Häberle, Verfassung als öffentlicher Prozess, 3. ed. 1998, 407 et seq.; Hobe, Der kooperationsoffene Verfassungsstaat, Der Staat 37 (1998), 521; Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, 36 CMLR 1999, 703 et seq.

² Cf. Kotzur, Sovereignty and the European Federal Constitution – New Perspectives on Sovereignty in a Multilevel Scheme of Governance, in: 2 The Federalist 2008, 131 et seq.

³ Cf. Nettesheim, Die Kompetenzordnung im Vertrag über eine Verfassung für Europa, EuR 2004, 511, 528; VHvH/Vedder, Article 4 AEUV mn. 2.

Article 4 para. 2 TFEU names the **most typical** areas in which a shared competence exists. The catalogue is exemplary, although the wording implies a conclusive enumeration. However, this would not be consistent with the concept of Article 4 para. 1 TFEU as a residuary clause and would contradict the explicit will of the European Convention (2002–2003) that drafted Article I-14 TECE which served as the direct model for Article 4 TFEU.⁴ Essentially Article 4 para. 1 TFEU lays down the principle that a shared competence exists as long as no other type of competence (like Articles 3 or 6 TFEU) applies.

Article 4 paras 3 and 4 TFEU are concerned with special competences; however, the systematic position of these two provisions is not convincing. Contrary to the general definition in Article 2 para. 2 TFEU, the exercise of the competence by the Union in the fields mentioned in Article 4 para. 3 TFEU does not hinder the Member States to continue exercising their competences. In fact, it is only the ordinary precedence of Union law over national law which applies, comparable to coordinating measures.⁵ The same is true concerning Article 4 para. 4 TFEU. At best the principle of sincere cooperation (Article 4 para. 3 TEU)⁶ could set a limit to the parallel exercise of these competences by the Member States. Eventually Article 4 paras 3 and 4 deal with **parallel competences** which should have been placed beside the competences allowing the Union to support, coordinate or supplement actions of the Member States.

III. The fields of shared competences in detail

The specific competences are largely concerned with fields dealing with the establishment and conservation of the **internal market** – at least they facilitate, strengthen, enhance and supplement it. Altogether eleven main areas can be identified:

- The **internal market** particularly encompasses the market freedoms of Articles 26 et seq. TFEU.
- **Social policy** in respect to the aspects mentioned in this Treaty refers to Articles 151 et seq. TFEU. The restrictive formulation emphasises the fact that the Union has no comprehensive competence in the field of social policy. Specific aspects of social policy in addition are part of a competence to solely coordinate or supplement actions of the Member States. Insofar there is no homogeneous ‘Social Union’ within the EU.
- The field of **economic, social and territorial cohesion** relates to Articles 174 et seq. TFEU. The scope of this group of provisions is the establishment of a common structural policy of which its territory-related momentum had been emphasised already in the draft-TECE and has now been integrated into the TFEU.
- **Agriculture and fisheries** are dealt with in a more detailed manner in Articles 38 et seq. TFEU in the context of the market freedoms. The independence of the fisheries policy from the agricultural policy is specially highlighted by the TFEU. The protection of marine resources is excluded from the shared competence since Article 3 para. 1 lit.d TFEU contains an exclusive competence of the EU in this respect.
- The **environmental policy** is regulated by Articles 191 et seq. TFEU. Its design as a typical horizontal policy which encompasses all other policies suggests the classification as a shared competence.
- Article 169 TFEU specifies the field of **consumer protection** as another horizontal policy.

⁴ Cf. Fischer, Der Vertrag von Lissabon, 215.

⁵ See CR/Ruffert, Article 4 mn. 1 with reference to the commentaries on CR/Callies, Article 2 mn. 15.

⁶ See Unruh, Die Unionstreue, EuR 2002, 41 et seq.

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within the framework of EU primary law, concrete competences are to be retrieved from the normative context of the specific EU policies. From a systematic perspective the provision of Article 5 TFEU is questionable. According to the inherent logic of the order of competences in the EU system, the norm should be a subset of the shared competences. The coordination of national policies, regardless of whether it is done externally or in a self-coordinated manner, requires the existence of competences of the Member States. Therefore the inclusion into Article 6 TFEU, regulating the competence to support, coordinate or supplement actions of the Member States, would have been more convincing.¹

Article 5 TFEU in its present shape is a *mélange* of elements of the shared competence 2 and the coordination competence but neither belongs to the first nor the second, which makes it difficult to classify it by dogmatic terms. The special emphasis probably has political reasons. By regulating it in a separate article, the importance of the economic and employment policies is underscored – with a deliberately chosen **symbolism**. This, however, cannot wholly circumvent the conceptual inconsistency.²

II. The areas of coordination

3

The norm addresses three major areas of integration, which are intertwined in their contents, and in practice presuppose each other: a) the **economic policy** (Articles 120 et seq. TFEU, excluding the **monetary policy for the Euro**, see Articles 136 et seq. TFEU); b) the **employment policy** (Articles 145 et seq. TFEU) which is often driven by economic-political decisions and itself influences the development of the economy; c) the **social policy** (Articles 151 et seq. TFEU) which is linked to the economic policy by the idea of a social market economy (Article 3 para. 3 TEU).

The norm also names the **instruments of coordination**. In the area of economic poli- 4 cies according to Article 5 para. 1 TFEU, the Council decides on the broad guidelines for these policies. Article 121 para. 1 TFEU defines criteria of and reasons for the coordination: 'Member States shall regard their economic policies as a matter of common concern'. Article 121 para. 2 TFEU corresponds to Article 5 para. 1 TFEU and further specifies it. Within the framework of employment policies, the coordination is carried out by policy guidelines which again have to be consistent with the broad guidelines of the economic policies (Article 146 para. 1 TFEU). The Union and its Council are obliged to actively coordinate the respective policies of the Member States.³ The monetary policy in the euro zone is explicitly exempted from the economic coordination process. In this respect a special regime, laid down in Articles 136 et seq. TFEU, applies. Concerning this matter, Article 3 para. 1 lit.c TFEU formulates an exclusive competence of the Union. The monetary policy of the non-euro States, however, forms a separate sub-category of the economic policy, since otherwise it could not be allocated to one of the categories of competences.⁴

The coordination of the social policies according to Article 5 para. 3 TFEU is faculta- 5 tive in its nature; the wording ('may') allows no doubt in this respect. It is a matter of interpretation to which competence a concrete measure of social policy coordination belongs. The coordination under Article 5 para. 3 TFEU especially refers to the tasks formulated in Article 153 para. 1 TFEU ('the Union shall support and complement the

¹ Cf. VHVH/Vedder, Article 5 AEUV mn. 2.

² Cf. VHVH/Vedder, Article 5 AEUV mn. 2.

³ Cf. VHVH/Vedder, Article 5 AEUV mn. 4.

⁴ Cf. VHVH/Vedder, Article 5 AEUV mn. 5.

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation.

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I. General remarks

The catalogue of Article 6 TFEU concerns matters of **support, coordination or supplementation** as defined by Article 2 para. 5 TFEU. The list of areas is almost comprehensive¹ but from a dogmatic point of view has to be read together with Article 5 TFEU. The latter determines the coordination in the fields of economic, employment and social policy. The particular titles are further elaborated in the various policy areas of the TFEU. The provisions of the specific policy areas also contain the yardstick for the scope and meaning of the terms industry, culture, tourism etc. It is noteworthy that the catalogue is very comprehensive and touches almost every policy area of the Member States which has not yet been covered in other policy areas. Areas in which the Member States cannot be affected by measures of the Union at all, not even in the sense of coordination and support, are hard to imagine. This fact can be seen as a preliminary stage of an evolving **‘cooperative federalism’** between the Union and the Member States.²

⁵ Speaking of a method of open coordination, see CR/*Calliess*, Article 5 mns 7 et seq.

¹ According to VHvH/*Vedder*, Article 6 AEUV mn. 3, the catalogue is entirely comprehensive.

² See Häberle, *Europäische Verfassungslehre*, 427 et seq.

The competences to support, coordinate and supplement under Article 6 TFEU must be distinguished from the **‘open method of coordination’** which has established itself since the European Council of Lisbon (2000). This form of coordination relates to the coordination by the Member States of such national policies which lie outside the competences conferred to the EU. Thus, it has to be of a non-binding nature; Council and Commission both can only formulate non-binding guidelines. This open coordination outside the realm of EU competences is not abrogated by Article 6 TFEU.

II. The measures of support, coordination and supplementation in detail

The measures named in Article 6 TFEU are concerned with the following fields of Union policies:

- the protection and improvement of human health (Article 168 TFEU),
- industry (Article 173 TFEU),
- culture as a specific cross-sectional matter (Article 167 TFEU),
- tourism, which for the first time had been recognized as an independent policy by the draft Constitutional Treaty, an idea adopted by the TFEU,
- education in general, vocational training, youth and sport (Articles 165 and 166 TFEU) whereby sport had first been mentioned in the draft Constitutional Treaty and was then transferred into the TFEU.³ In addition, the significant context between education, vocational training and culture is remarkable, although they belong to different policies,
- civil protection (Article 196 TFEU), as a specification of the more general principle of solidarity as enshrined in Article 222 TFEU; it had already been designed as a ‘constitutional adhesive’ in the draft Constitutional Treaty and now functions as a momentum of integration and of constitutional quality in the TFEU,
- administrative cooperation (Article 197 TFEU), also mentioned for the first time by the draft Constitutional Treaty; it has to be read in connection with the right to good administration (Article 41 CFREU).

It is the nature of the measures to support, coordinate and supplement that the competences of the Member States in the respective policy field remain in force, while the Union can take measures of a complementary nature which have to be carried out with a special respect for national sovereignty. Such measures require that they are taken by the Union in the light of a ‘European goal’ and thereby leading the national policies closer to Europe. A more detailed supervision of the Member States, which would certainly have led to greater interference with national sovereignty, had already been avoided by the draft Constitutional Treaty. The TFEU, even more sensitive in respect to sovereignty, consequently does not introduce such measures either. The innovative potential of Article 6 TFEU finally lies in the grouping and systemising of measures, already existing under the pre-Lisbon Treaties, thereby creating a separate **type of competences**.⁴

³ Cf. *Gradde*, Die Aufnahmen des Sports in die Europäische Verfassung, SpuRt 2005, 222.

⁴ Cf. VHVH/*Vedder*, Article 6 AEUV mn. 1.

TITLE II
PROVISIONS HAVING GENERAL APPLICATION

Article 7 [Principle of coherence]

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Bibliography: *Bartea*, Looking for Coherence within the European Community, 11 ELJ 2005, 154; *Carbone* (ed.), Policy Coherence and EU Development Policy, 2009; *Pechstein*, Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union, EuR 1995, 247; *Prechal/van Roermund* (eds), The Coherence of EU Law, 2008; *Siems*, Das Kohärenzgebot in der Europäischen Union und seine Justiziabilität, 1999; *Tietje*, The Concept of Coherence in the Treaty on the European Union and the Common Foreign and Security Policy, 2 EFAR 1997, 211.

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1 I. General remarks

Article 7 TFEU, created by the Lisbon Treaty but going back to draft-Article III-115 TECE, combines the **principle of consistency** of Article 3 TEU (pre-Lisbon version) – at that time **enriched with the principle of continuity** – and the **principle of conferral of powers** of Article 5 para. 1 TEC. The requirement of external consistency goes back to Article 30 No 5 SEA. The former provision of Article 3 TEU (old version) used the principle of consistency still with a strong reference to the institutional framework of the Union, as if it was narrowing its scope to the institutional aspect. While the institutional aspect is without any doubt a prerequisite, it is not the sole gauge for the consistency of EU policies. This is reflected by the new formulation in Article 7 TFEU, while the institutional aspect is highlighted in Article 13 TEU. Also the contextualising of the principle of consistency with the principle of conferral is new; it has a limiting and simultaneously directing effect for the consistency of policies. The national counterpart of the principle of consistency – certainly with specific modifications – is the idea of the **unity of the legal order**.¹

2 II. The principle of consistency

The principle of consistency in Article 7 TFEU requires an **inter-sectoral** coordination of the decision makers in respect to common objectives, and the likewise **consistent formulation of their political agendas**. Whereas at the time of the former three pillar structure, the principle of consistency was designed as a safeguard for the connection of the pillars², the meaning has changed with the overcoming of the pillar architecture. The

¹ See VHVH/*Heintschel von Heinegg*, Article 7 AEUV mn. 2.

² Cf. *Pechstein*, EuR 1995, 247 et seq., 258 et seq.

function as an institutional conjunction is replaced by the requirement of consistent and attuned politics.

There is a need for **instruments, safeguarding coherence**. Article 11 para. 3 TEU for 3
example emphasises that also broad consultations contribute to the realisation of the principle of coherence. The principle of continuity, although not explicitly mentioned anymore, is still implicitly present in the norm; it is strongly linked with the idea of consistency, adding a chronological aspect. It interdicts spontaneous policy changes in one field without prior consultations with decision-makers in other fields (see also Article 13 para. 1 TEU). This aspect can be understood as coherence with respect to the political time horizon. Article 7 TFEU arguably has a declaratory function for the exercise of competences in the narrow sense of the term, especially concerning legal acts. The systematic separation of Article 7 TFEU and Article 13 TEU, which both overlap each other, does not contribute to the readability of the Treaties.

After its redesign, the European Union as single legal person under the Treaties is the 4
addressee of the principle of coherence. Before the Lisbon Treaty came into force, the question of the correct addressee had been open to debate. The question, which was formulated also as a question about the scope of the former Article 3 TEU, gave reason to doubt whether also the European Communities were bound by the principle since the former EU Treaties clearly differentiated between supranational (European Communities) and the inter-governmental (CFSP and PJCCM) forms of cooperation. Notably the EC should be protected from the influence of inter-governmental political actors and decision-making processes. This problem has, after the merger of the pillars of the former EU, lost its importance, although the CSFP remains an inter-governmental policy field within the post-Lisbon Union.

Without any doubt the principle of consistency is important in the relation of the 5
Member States towards the Union, as well as among the Member States themselves. However, this form of consistency is not dealt with by Article 7 TFEU but by the principle of loyalty (**sincere cooperation**) as laid down in Article 4 para. 3 TEU.

III. The principle of conferral of powers

6

The principle of conferral, formerly Article 5 para. 1 TEC, now Article 5 para. 1 TEU, is explicitly mentioned in Article 7 TFEU, too. This makes clear that the Union cannot extend its competences by invoking the principle of consistency. This would also prevent the ECJ from (too) open 'judicial activism'³ – something the Member States sometimes worry about. The Union may only act within the objectives and powers which the Treaties set out. It only has a generally limited set of institutional powers and therefore is not allowed to interfere with such competences that remain exclusively with the Member States. However, the principle of conferral of powers or limited institutional powers does not preclude a possible recourse to '**implied powers**' or Treaty supplementation according to Articles 252, 253 TFEU. The obligation of the Union to comply with the principle of conferral of powers, also in the context of Article 7 TFEU, makes it clear that measures carried out in order to strengthen coherence among the policies of the Union cannot be based on implied powers or a competence to supplementation alone.

³ See e.g. Herzog/Gerken, Stoppt den Europäischen Gerichtshof, DRiZ 2009, 141.

Article 8 [Horizontal clause: equality]
(ex Article 3 (2) TEC)

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Bibliography: *Gromek-Broc*, Equality Issues in the CEE Countries: Women and Decision-Making in the Labor Market, 31 *Review of Central and East European Law* 2006, 413; *Hiou-Maniatopoulou*, Gender Equality in the Enlarged European Union, 57 *Revue Hellenique de Droit International* 2004, 227; *McHugh*, The Equality Principle in EU Law: Taking a Human Rights Approach, 14 *Irish Student Law Review* 2006, 31; *Millns*, Gender Equality, Citizenship, and the EU's Constitutional Future, 13 *ELJ* 2007, 218; *Szyssczak*, Antidiscrimination Law in the European Community, 32 *Fordham International Law Journal* 2009, 624; *Tobler*, Sex Equality Law under the Treaty of Amsterdam, 2 *European Journal of Law Reform* 2000, 135.

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1 I. Horizontal policy clauses in general

In many of its policy fields EU law makes use of the so-called horizontal policy clauses as a regulatory instrument. They are in both their form and their function comparable to constitutional objectives formulated in national constitutions and their content corresponds with the Union objectives formulated in the TEU. They define perspective goals not only within a single policy area but across the different policies, perspective goals which are binding to all EU institutions, first of all the EU legislature. However, the horizontal policy clauses are **not in themselves competences**; they do not provide independent titles of competence. Also in this context the Union can only act within the usual set of powers conferred to it. Nonetheless Article 8 TFEU is, from a systematic perspective, no alien element within the chapter on EU competences. It formulates objectives for the **way in which the competences have to be interpreted**.

2 II. The equality clause

Nowadays, the policy of gender equality of the Union extends far beyond the limits of classical civil rights protection. In its origins, however, it was much more moderate¹ and only step by step it has been extended into a comprehensive anti-discrimination legislation, especially based on acts of secondary legislation.² In many cases this was the result of an **'affirmative legislative reaction'** to a broad, equality-friendly case law of the ECJ.³ The equality clause, formerly contained in Article 3 para. 2 TEC, has gained even more importance after its formulation as a separate Treaty provision in Article 8 TFEU, thereby reflecting this development at the level of primary law. The starting point of this development can be found in the Treaty of Amsterdam (1997).

¹ See Article 119 TEC.

² E.g. Directive 2002/73/EC amending Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

³ Cf. *Jestaedt/Britz*, 64 VVDStRL 2005, 298 (306) with further reference.

In all its activities, the Union aims at the elimination of inequalities. Especially the equality of men and women has to be promoted. As already mentioned above, the provision is a horizontal policy clause. The clause is applicable to the acts of the Union and its institutions. It forms part of the rules of EU primary law concerning equal treatment and non-discrimination, especially the respective provision of the Charter of Fundamental Rights (Article 23 CFREU) and Articles 10, 18 et seq., 157 TFEU. The principle of non-discrimination is explicitly mentioned in Article 2 TEU as one of the fundamental values of the Union. Despite this value orientation a **broad political margin of appreciation** remains for the addressees of the clause, which by itself does not establish a subjective individual right.⁴

Article 9 [Horizontal clause: social protection]

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Bibliography: *Gijzen*, The Charter: A Milestone for Social Protection in Europe, 8 Maastricht Journal of European and Comparative Law 2001, 33; *Katrougalos*, The Implementation of Social Rights in Europe, 2 Columbia Journal of European Law 1996, 277; *Kenner*, EU Employment Law, 2002.

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I. General remarks

1

The provision essentially derived from draft-Article III-117 TECE; although the high level of employment was already mentioned by Article 127 para. 2 TEC, this covered only one of the five fields of the present social horizontal clause.¹ The ‘**social Europe**’, a term used also by the working group XI of the European Convention², is reflecting its social values. Therefore, while exercising its policies, the Union takes into account the promotion of a high level of employment and adequate standards of social protection and social welfare, including education and health related issues. The provision is a typical horizontal policy clause. Therefore it is situated aside of the competences mentioned in Articles 151 et seq. TFEU. The provision is an expression of a liberal idea of man and humanity. The citizens shall have the possibility to actively take part in professional life in a self-determined manner. At the same time, however, the provision opposes the liberal or libertarian ‘night watchman state’ whose only role is that of guaranteeing law and order. By emphasising education and training it reflects the requirements of a modern knowledge-based society.

The provision is no legislative basis in itself; it rather requires the applicability of the specific policy fields of the EU Treaties. Article 9 TFEU only comes into play in the im-

⁴ See Streinz/Streinz/Eichenhofer, Article 8 TFEU mn. 4.

¹ See also VHvH/Gassner, Article 9 AEUV mns 1 et seq.

² See Final report of Working Group XI on Social Europe of 4 February 2003, CONV 516/1/03 REV 1.

plementation and specification of these policies. Insofar it has an integrative and horizontal scope but it does not grant any subjective individual rights.

3

II. The horizontal policies in detail

The first horizontal policy clause is concerned with a **high level of employment**. It corresponds with Article 3 para. 3 TEU which promotes 'a highly competitive social market economy', which again asks for 'full employment' and 'social progress'. The wording of Article 9 TFEU is more realistic and implies a dynamic approaching a high level of employment, without committing itself to a maybe unrealistic objective of 'full employment'. Insofar a coherent terminology within the Treaty provisions would have been preferable. Articles 145 et seq. TFEU elaborate employment policy in more details. The demand, according to which the Union has to contribute to a high level of employment, is laid down in Article 147 para. 1 TFEU. Article 147 para. 2 TFEU focusses on the horizontal policy of employment in an almost identical manner – and therefore is superfluous in the end. Striking it out of the Treaty text has been missed in both the debate on the draft Constitutional Treaty as well as on the Lisbon Treaty.

4 **Social protection** is no novelty for the 'social Europe'. Remarkable, however, is that the Treaties after Lisbon put such a special emphasis on the social dimension in order to counter the fear of a possibly narrow, market-liberal focus from a semantic and also a teleological perspective. Article 9 TFEU finds a corresponding norm again in Article 3 para. 3 TEU, which complements 'social protection' with 'social justice', and names, in a very close connection to this, the equality between men and women, the solidarity between generations and the rights of the child. The details of the Union's social policy, especially its legal basis in a specific provision on Union competence, can be found in Articles 151 et seq. TFEU.

5 The '**fight against social exclusion**' is a sub-category of social protection, but because of its anti-discriminatory focus, it is named and highlighted independently. In the cases mentioned above, Article 3 para. 3 TEU provides the value foundation for the provision. It also emphasises the fight against social exclusion and discrimination. The prohibition of social exclusion is enhanced with a civil rights dimension by Article 34 para. 3 CFREU, also taking into account the fight against poverty. Additionally Article 153 para. 1 lit. j TFEU explicitly mentions the 'combating of social exclusion'. The Union has to support the activities of the Member States in this field as well.

6 **Education and training**, of which a high level has to be ensured, are regulated in more detail in Article 165 et seq. TFEU – together with the policy areas of **youth and sport**. Education is an inter-generation task which is especially connected with the postulate of **sustainability**. The Union can perform coordinating, supporting and supplementing measures in this field of competences. Notable and innovative is the right to education in Article 14 CFREU.

7 The **policy on human health** has its legislative basis in Article 168 TFEU. Article 168 para. 1 TFEU takes on the present horizontal clause when it postulates: 'A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.' The same clause on human health is reflected from the perspective of civil rights in Article 35 CFREU. This systematic structure has been criticised widely since a horizontal policy clause does not contain enforceable subjective rights.³ It is not least the task of the ECJ to prevent the effective protection of the rights guaranteed by the CFREU from being weakened by such merely programmatic provisions.

³ For further criticism, see VHvH/Gassner, Article 9 AEUV mns 13 et seq.

III. Comprehensive conclusions

8

The overall impact of Article 9 TFEU remains at a relatively low level. The issues addressed by it have to be taken into account, which opens a broad political margin of appreciation. They do not enjoy the same priority as other objectives, such as the free competition at the market, and they have to be carefully balanced with such other provisions (in German literature described as ‘praktische Konkordanz’ by *Konrad Hesse*). For this reason also the judicial review is limited to the question whether the competent institution did either not at all or not in an appropriate manner take into account the objectives of the horizontal policy clause when exercising its discretion. However, the horizontal policy clauses have in addition a special relevance for the interpretation of the EU’s secondary legislation, which has to be construed in the light of the objectives of primary law. Addressees of the social protection clause are the Union as well as its institutions. The Member States are not bound by it.⁴

Article 10 [Horizontal clause: combating discrimination]

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

Bibliography: *European Commission* (ed.), *The fight against discrimination and the promotion of equality*, 2008; *Isensee* (ed.), *Vertragsfreiheit und Diskriminierung*, 2007; *Mönn*, *Das Verbot der Diskriminierung*, 2008, chapter 2; *Muir*, *Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test*, 18 *Maastricht Journal of European and Comparative Law* 2011, 136; *Ram*, *Anti-Discrimination Policy and the Roma: Assessing the Impact of EU Enlargement*, 3 *Croatian Yearbook of European Law & Policy* 2007, 491.

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I. General remarks

1

The Union has implemented an advanced **equal protection policy**. The general legal rule of equality has been part of Union law for a considerable period of time: Within the scope of application of the Treaties it is interdicted to treat comparable issues in a different way, unless there is objective reason justifying a distinction.¹ In a consequent manner the draft TECE took on these progressive developments and cast them into an anti-discriminatory horizontal policy clause. Article 10 TFEU adopts this draft in its original wording. The substantive scope of application is very broad and covers all policies of the Union. The provision corresponds with various other anti-discriminatory provisions of EU law, not least the statement of values in Article 3 para. 3 TEU. Further reference should be made to the fundamental rights provisions on equality of Article 20 et seq. CFREU which reach far beyond the general equal protection clause. Article 10 TFEU,

⁴ See *VHvH/Gassner*, Article 9 AEUV mn. 19.

¹ ECJ Joined Cases 117/76 and 16/77 *Ruckdeschl* [1977] ECR 1753.

however, does not contain any legal competence for anti-discriminatory measures. The function of the provision is **comparable to constitutional objectives in national constitutions**, providing a framework for acts of the Union and its institutions. It is legally relevant particularly in those cases in which secondary legislation has to be construed in its light or where competences are exercised under EU primary law. Thus e.g. Declaration No 22 of the Treaty Conference of Amsterdam called for the institutions of the Community to take into account the needs of persons with a disability when harmonising measures concerning the internal market were taken. The possibility of judicial review, however, is limited: At the most, cases in which the objectives of the horizontal clause apparently have not or not duly been taken into account in a decision-making process can be reviewed by the Court. The provision of Article 10 TFEU binds the Union and its institutions. The Member States are not addressees of the norm.

2 **II. Forms of discrimination interdicted by Article 10 TFEU**

The horizontal clause of Article 10 TFEU refers to discriminations on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

- 3 In comparison to this, Article 14 of the ECHR, which according to Article 6 para. 3 TEU has become a legally binding part of EU law, contains a prohibition of discriminations based on sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Against this background, Article 10 TFEU highlights further possible bases for discrimination, namely disability, age and sexual orientation.² The inclusion of these grounds into Article 10 TFEU, as already in the draft-Article III-118 TECE, can be seen as emphasising the fact that also distinctions made upon these grounds are prohibited by the general equal protection clause of EU law. The CFREU on its part prohibits – based on the aforementioned norms – discriminations based ‘on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’. By making reference to the genetic heritage³, the CFREU even exceeds the level of protection provided by Article 10 TFEU.

4 **III. Relevant secondary legislation**

In respect to the anti-discrimination policy, a large amount of secondary legislation exists, which has to be interpreted in the light of Article 10 TFEU. This applies, in each case based on the former Article 13 TEC, to Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (**Racial Equality Directive**) and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (**Employment Equality Framework Directive**).⁴ The last mentioned directive is concerned with the grounds of religion or belief, disability, age or sexual orientation. See also Article 8 TFEU mns 2 et seq.

² ECJ Case C-117/01 *K. B.* [2004] ECR I-541.

³ See Article 11 of the Convention on Human Rights and Biomedicine of the Council of Europe of 4 April 1997.

⁴ Cf. *Frenzel*, Umsetzung der europäischen Antidiskriminierungsrichtlinien ins deutsche Recht – Untersuchung auf Effizienz, ZESAR 2010, 62.

Article 11 [Horizontal clause: environmental protection]
(ex Article 6 TEC)

Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.

Bibliography: *Bell/McGillivray*, Environmental Law, 7th ed. 2008; *Benson/Jordan*, A Grand Bargain or an Incomplete Contract: European Union Environmental Policy after the Lisbon Treaty, 17 European Energy and Environmental Law Review 2008, 280; *de Sadeleer*, Environmental Principles, 2002; *Epiney*, Umweltrecht in der EU, 3rd ed. 2013; *Frenz*, Europäisches Umweltrecht, 1997; *Lee*, Sustainable Development in the EU: The Renewed Sustainable Development Strategy 2006, 9 Environmental Law Review 2007, 41; *Macroy*, Principles of European Environmental Law, 2004; *Kotzur*, Nachhaltigkeit im Völkerrecht – eine sektorenübergreifende und systembildende Ordnungsidee, 57 JöR 2009, 503.

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I. Horizontal policy clause 1

The provision has been introduced for the first time by the Amsterdam Treaty as a new article in the former EC Treaty: It replaced the former horizontal clause of Article 174 para. 2 subpara. 1 s. 3 TEC. Already this horizontal clause had, in connection with Article 174 paras 2 and 3 TFEU, elevated environmental protection requirements into the rank of a **general objective** of EC law. By introducing the norm into the chapter on fundamental principles of the EC Treaty, the requirements of environmental protection have been emphasized in a special manner since the Amsterdam Treaty. The draft Constitutional Treaty followed suit and combined – taking into account environmental law developments in public international law – the principle of integration with the principle of sustainable development at a systematically exposed position in draft-Article III-119 TECE. Article 11 TFEU adopts the provision into the TFEU, Article 3 para. 3 TEU provides an even broader context by making reference to a perspective of global sustainable development.

Article 11 TFEU contains a horizontal policy clause only. Environmental protection as an objective of the EU in general is discussed in Article 3 para. 3 TEU and finds a more detailed elaboration in Articles 191 et seq. TFEU. The CFREU provides in its Article 37 that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. 2

3

II. Requirements of environmental protection

1. Sustainable development

The inclusion of the requirements of environmental protection shall particularly serve the promotion of a **sustainable development**. The concept of sustainable development ('nachhaltige Entwicklung'/'développement durable') was postulated as an objective with worldwide validity for the first time by the United Nations Conference of Rio de Janeiro on Environment and Development in 1992. It will harmonise a steady development with the protection of natural resources for future generations.¹ The concept of sustainability is based on an **integrative approach**, assuming the possibility of a balance between ecological, economic, cultural and social interests.

4

2. The integrative approach

The principle of integration requires a stronger, though not over-proportionate inclusion of ecological interests into other policy areas; notably those areas which bear a particular risk or threat to natural resource, such as agriculture or transport and infrastructure. The inclusion has to be oriented to the conservation and protection of the environment as well as the advancement of quality of the environment.

5

3. Further requirements

Further requirements are due to the special provisions of Article 191 TFEU and the objectives (para. 1) and principles (para. 2) formulated therein.

6

III. The inclusion of environmental protection

1. Legal relevance

When defining other policies and measure thereof, the requirements of environmental protection have to be taken into consideration as being part of the task at hand. A public contracting authority for example can consider criteria of environmental protection when deciding whether a tender is economically favourable.² Addressees of the norm are the Union and the Member States. Differing from the social protection clause in Article 9 TFEU, the environmental protection clause applies to the policies of the Union, not only to the implementing activities of its institutions, the policies being primarily carried out by the Member States.

7

Furthermore, Article 11 TFEU establishes a legal obligation which is subject to judicial review.³ However, this does not mean that the objective of environmental protection prevails in every single case. Article 11 TFEU provides no basis for such a broad understanding of the norm, allowing environmental policy to be exercised under the guise of every other policy.⁴ The institutions of the Union and the Member States possess a **broad margin of appreciation** in the process of implementing the horizontal clause. In case of a conflict between different objectives, the objectives at hand have to be balanced in order to realise each of them in the best possible way in each situation. Also secon-

¹ Cf. Kotzur, 57 JöR 2009, 503, 506.

² ECJ Case C-513/99 *Concordia* [2002] ECR I-7213.

³ Cf. CR/Calliess, Article 6 AEUV mns 21 et seq. with further references.

⁴ Cf. Frenz, *Europäisches Umweltrecht*, 65.

dary legislation has to be interpreted in the light of the horizontal policy clause on environmental protection. As to **environmental liability**, see Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damages.

2. Environmental impact assessments

8

Not least Declaration No 12 of the Amsterdam Treaty Conference is concerned with the implementation of the present clause. According to this Declaration, the Commission assured the Conference that it will undertake to prepare **environmental impact assessment studies** when making proposals which may have significant environmental implications.

Article 12 [Horizontal clause: consumer protection] (ex Article 153 para. 2 TEC)

Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Bibliography: *Kuneva*, Closing the Gap: Consumer Policy in a Globalized World, 32 *Fletcher Forum of World Affairs* 2008, 173; *Lilleholt*, Notes on the Proposal for a New Directive on Consumer Rights, 17 *European Review of Private Law* 2009, 335; *Schulte-Nölke/Tichý* (eds), *Perspectives for European consumer law: towards a directive on consumer rights and beyond*, 2010; *Stuyck*, *European Consumer Law after the Treaty of Amsterdam: Consumer Policy on or beyond the Internal Market*, 37 *Common Market Law Review* 2000, 367; *Weatherhill*, *Consumer Law and Policy*, 2005.

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I. General remarks

1

In modern industrialised societies with their complex range of products and the connected problem of product-related risks, consumer protection plays an ever more important role. This importance is reflected by the development of EC and EU law. The consumer protection clause in its function as a horizontal policy clause has already been introduced into European law as Article 153 para. 2 EC by the Treaty of Amsterdam. Draft-Article III-120 TECE took over Article 153 para. 2 EC almost in the original wording but placed it – systematically more convincing – within the canon of those provisions and principles which are applicable to all EU policies.¹ Article 12 TFEU follows this example and prescribes that whenever policies of the Union are enacted or implemented, demands of consumer protection have to be duly considered. However, as in the case of the other horizontal policy clauses, the norm does **not contain a duty to optimise or prioritise** aspects of consumer protection. It qualifies as one criterion among others and has to be balanced against these on an equal footing. It is further elaborated in Article 169 TFEU and, more extensively, in acts of secondary legislation.

The TFEU does not contain any explicit definition of the term ‘consumer’. In its very core the term ‘consumer’ describes a natural person who acts at the market for its per-

¹ Cf. *VHvH/Khan/Eisenhut*, Article 12 AEUV mn. 1.

sonal, private and not commercial purpose.² According to the matter at hand, the scope of application may be broader and more precisely elaborated. Generally speaking, the ECJ assumes that a consumer is reasonably well-informed and reasonably observant and circumspect.³

- 3 From the former **consumer protection measures** of the Union, the following are the most noteworthy: Harmonisation in the field of the composition of specific substances and of food law, including the establishment of the European Food Safety Authority (mostly based on Articles 114 et seq. TFEU) and the Directive on general product safety (based on Article 114 TFEU). In addition, the new Regulation (EU) No 1169/2011 of 25 October 2011 on the provision of food information to consumers and several strategies and programmes of Community action in the field of consumer protection have to be mentioned.

4 **II. Horizontal policy, addressee of the norm, implementation**

The Union aims to take requirements of consumer protection into account when defining and implementing other Union policies and activities. Measures of consumer protection, however, on their part are dependent upon the **interests of the consumers concerned**.

- 5 **Consumer interests and protection** in the meaning of Article 12 TFEU are:
- **Protection of health, safety and the economic interests of consumers.** The Council enacted several directives relating to health policy, likewise directives concerning product safety (e.g. Directive 92/59 on general product safety). Additional directives, sometimes with very detailed substantive law provisions include: Directive 84/450/EEC concerning misleading advertising; Directive 85/374/EEC concerning liability for defective products; Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises; Directive 90/314/EEC on package travel, package holidays and package tours; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 98/7/EC amending Directive 87/102/EEC concerning consumer credit; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. The proposal of a regulation concerning sales promotions in the internal market⁴, which among others contained rules on bans on sales below cost, bans on taking part in promotional contests or games, bans on the promotion of sales promotions and limiting certain discounts, was cancelled. In contrast regulations on rail passengers' rights and obligations (Regulation 1371/2007/EC) and on compensation and/or assistance to passengers in case of denied boarding, downgrading, cancellation or long delay of flight (Regulation 261/2004/EC) entered into force.
 - 6 – **Promotion of the right to consumer information, education and the formation of consumer interest groups.** Besides many other directives and programme in this field, the Directive 98/27 on injunctions for the protection of consumers' interests by qualified consumer protection organisations in cases of possible intra-Community infringements of consumer related rights is noteworthy. A large set of rules regulating consumer information rights is also contained in European legislation on food items.⁵

² ECJ Case C-269/95 *Benincasa* [1997] ECR I-3767.

³ See *Weatherhill*, Consumer Law and Policy, 57 et seq.

⁴ COM (2001) 546 final.

⁵ Cf. *Schwarze/Berg*, Article 169 AEUV mn. 24.

The consumer protection policy of the European Union exists in addition to the **competences of the Member States** in the same field. The latter ones keep the primary responsibility for consumer protection. Article 12 TFEU therefore gives a **shared competence** in the meaning of Article 4 para. 2 et seq. TFEU. Addressee of this horizontal policy clause, first of all, is the Union. Since the respective legislative acts and other acts of EU policies have to be carried out by the Member States, they also are addressees and they are bound by Article 12 TFEU when implementing measures of the Union in the field of consumer protection. However, like the EU institutions themselves, the Member States have broad discretion which implies that the consumer protection clause is subject to judicial review only in a limited way. It is nonetheless legally relevant, since every provision of secondary legislation has to be interpreted in the light of Article 12 TFEU.

Article 13 [Horizontal clause: protection of animals]

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Bibliography: *Evertsen/de Kok*, Legal Protection of Animals: The Basics, 5 *Journal of Animal Law* 2009, 91; *Klein*, EU Cosmetics Directive and the Ban on the Animal Testing: Compliance, Challenges, and the GATT as a Potential Barrier to Animal Welfare, 21 *Transnational Law & Contemporary Problems* 2012, 251; *Kleveland*, To Save Lab Animals the Legal Way: The Right to Appeal on Permits to Perform Animal Experiments, 4 *Journal of Animal Law* 2008, 99.

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I. General remarks

1

The norm originates from a Protocol of the Treaty of Amsterdam ('Protocol on protection and welfare of animals').¹ Contrary to the Declaration on the protection of animals (Maastricht), this Protocol already formed a legally binding part of European law, accommodating modern developments in the fields of environmental law and the law of animal protection which had already been discussed at the national level and sometimes resulted in innovative national legislation, including constitutional amendments such as in Article 20a of the Grundgesetz (German constitution). Draft-Article III-121 TECE also included a horizontal policy of animal protection which basically served as a model for the provision laid down in Art 13 TFEU. In both its structure and scope, the provision is closely related to the horizontal policy clause on environmental protection in Article 11 TFEU. However, animal protection is not mentioned in Article 3 TEU, therefore its **rank** as a goal of EU policy as well as the **intensity by which it has to be taken into consideration** are questionable and open to debate. At least it is ineligible to consider aspects of animal protection as prior-ranking matters. The foremost addressee of the

¹ OJ 1997 C 340/110.

norm is the Union, but where the Member States have the competence and the responsibility to carry out EU policies, they are also bound by the present clause. In this case, the wording of the norm is much clearer than it is in the case of other horizontal policies: ‘the Union **and** the Member States’.

- 2 Certainly the question can be raised why animal protection should only be of importance in the policy areas mentioned in Article 13 TFEU. Surely the areas explicitly named by the norm typically require a very high standard of animal protection. But agriculture, fisheries, transport, internal market, research and technological development and space policies are not the only fields where the welfare of animals is a concern. Article 13 TFEU therefore is not to be understood as a complete catalogue but as an **exemplary enumeration**.

3 **II. Requirements of animal protection and welfare**

The Treaty does not contain any details on the requirements of animal protection. In the case of **feral animals** measures for comprehensive wildlife conservation come into mind, an aspect which is also included in Article 191 para. 1 TFEU (animals are a special kind of living resources). **Pets, other domestic animals and farm animals** have to be treated in a species-appropriate manner. When **laboratory animals** are concerned, Article 13 TFEU can serve as a restraint of the freedom of the arts and sciences as laid down in Article 13 CFREU. In individual cases difficult questions as to the limits of Article 13 TFEU can be raised: Halal (meaning in conformity with Islam) or kosher (meaning in conformity with Judaism) butchering as an expression of religious freedom (Article 10 para. 1 CFREU) may be in conflict with the present horizontal policy, likewise it is still unanswered to what extent cultural issues have to be taken into account (for instance the Spanish corrida or the English tradition of fox hunting). In any case the TFEU attaches special importance to the cultural identity of the Member States; their legislative and administrative provisions as well as national and local customs relating particularly to religious rites, cultural traditions and regional heritage have to be taken into account. Consequently, Article 13 TFEU is subject to the **cultural identity** of the Member States in its various forms.

Article 14 [Services of general economic interest] (ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Bibliography: *Baquero Cruz*, Beyond Competition: Services of General Economic Interest and European Community Law, in: *EU Law and the Welfare State – in Search of Solidarity*, de Búrca (ed.), Oxford

2005, 169; v. *Danwitz*, Dienste von allgemeinem wirtschaftlichem Interesse in der europäischen Wettbewerbsordnung, in: *Krautscheid* (ed.) Die Daseinsvorsorge im Spannungsfeld von europäischem Wettbewerb und Gemeinwohl, 2009; *Häberle*, Gibt es ein europäisches Gemeinwohl? – eine Problemskizze, in: *FS Steinberger*, 2002, 1153 et seq.; *Krajewski/Neergard/van de Gronden* (eds), The Changing Legal Framework for Services of General Interest in Europe – Between Competition and Solidarity, 2009; *Rodrigues*, Les services publics et le Traité d'Amsterdam – Genèse et portée juridique du projet de nouvel article 16 du Traité, 414, *RMUE* 1998, 37; *Wernicke*, Services of General Economic Interest in European Law: Solidarity embedded in the Economic Constitution, in: *EU and WTO law on Services*, van de Gronden (ed.), 2008, 139 et seq.

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I. Scope

1

The European Union aims at the establishment of a **competitive**, but **social market economy** (Article 3 para. 3 TEU). The conflicting demands of the economic and the social orientation of the EU have to be taken into account when describing the function of services of general economic interest. Created by the Treaty of Amsterdam, already Article 16 TEC emphasised the importance of **services serving the common welfare**. Draft-Article III-122 TECE built on this norm. The present Article 14 TFEU is an amalgamation of both. Article 14 s. 2 TFEU is a continuation of the text drafted in the TECE but contains an additional competence of the European Parliament and the Council to establish principles and conditions, particularly economic and financial conditions, which are necessary for the said services to fulfil their functions. The very cumbersome formulation of the norm on the one hand is the result of systematic precariousness on the other; it reflects the patchwork character of its genesis.

The services of general economic interest mainly include the enterprises which serve the common welfare ('services publics'). These have always been defined by a provision which is now Article 106 para. 2 TFEU, according to which services for the public can be punctually exempted from EU competition law. Here, the constitutional orientation towards a European common good becomes visible.¹

II. Assurance of operativeness

3

1. Context of the norm

By making reference to the shared values of the Union as well as the need for **social and territorial cohesion**², Article 14 TFEU wants to assure the effective functioning of the services of general economic interest. However, in general, the rules on competition of the EU including Article 106 para. 2 TFEU remain untouched. This is likewise true for the jurisprudence developed by the ECJ, especially its case law on the prohibition of discriminatory acts on the ground of nationality. Already Declaration No 13 annexed to the Final Act of the Treaty of Amsterdam requested that Article 16 TEC 'shall be imple-

¹ Cf. *Häberle*, Gibt es ein europäisches Gemeinwohl? – eine Problemskizze, in: *FS Steinberger*, 2002, 1153 et seq.

² See Articles 174 et seq. TFEU.

mented with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality of treatment, quality and continuity of such services.’ The same is true for the interpretation of Article 14 TFEU.

4

2. Legal relevance

Under these circumstances the legal impact of the norm should be seen in the following:

The services of general economic interest are of an independent value within the framework of the EU’s legal order. They play an important role for the EU which is committed to the principle of establishing a market economy which is both highly competitive and market-driven, as well as socially responsible (Article 3 para. 3 TEU). This concept of a social, not self-referred market economy is to serve the interests of the EU citizens; in this regard the EU has the duty to establish a framework for economic competition in accordance with the needs of public welfare.³

5 The proposition of Article 14 TFEU forms a **criterion for interpretation** which – as a part of the overall system of the TEU/TFEU – has to be taken into consideration in the application of Article 106 para. 2 TFEU,⁴ thereby strengthening the position of undertakings entrusted with the operation of services of general economic interest. However, the norm is not directly applicable.

6 The **Union** and its **Member States** both have legislative and administrative competences regarding these public service undertakings. Since therefore an exclusive competence of the EU does not exist in this field, the Member States are generally free in making the relevant policy choices which are protected by the principle of subsidiarity.

7 The norm is legally binding only on the Union and the Member States. It is not determinate and detailed enough to be **applied directly** in favour of individuals or legal persons.⁵ Likewise the Union and the Member States are not obliged to offer **specific public services**. However, they bear the responsibility to make relevant policy choices and to define principles and preconditions for the functioning of those services.

8 The Article 14 s. 2 TFEU creates a **competence of the Union** to establish rules for those principles and preconditions. However, this competence is limited (**‘without prejudice to the competence of Member States’**). The Member States are entitled to provide, commission or fund such services in accordance with the TFEU. The Union itself can exercise its competence in this field by means of regulations only. The European Parliament works as a joint legislator since these regulations are to be enacted by applying the ordinary legislative procedure.

9

III. Special cases

Certain cases of public services find special mentioning in the Annexes to the Amsterdam and the Lisbon Final Acts. These include public broadcasting networks and the public banking sector which have been dealt with in the Protocol (No 29) on the system of public broadcasting in the Member States (Lisbon) and the Declaration on public credit institutions in Germany (Declaration No 37) and in Declaration No 1 by Austria and Luxembourg on credit institutions (Amsterdam). As to the legal relevance of protocols and declarations, see Article 51 TEU.

³ Cf. VHVH/Müller-Graff, Article 14 AEUV mns 3 et seq.

⁴ Cf. LB/Lenz, Article 14 AEUV mn. 5.

⁵ Cf. LB/Lenz, Article 14 AEUV mn. 9; CR/Jung, Article 14 AEUV mn. 23.

**Article 15 [Principle of transparency]
(ex Article 255 TEC)**

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Bibliography: *Bradley*, Transparency and Financial Regulation in the European Union: Crisis and Complexity, 35 *Fordham International Law Journal* 2012, 1171; *Buijze*, The Six Faces of Transparency, 9 *Utrecht Law Review* 2013, 3; *Curtin*, Citizens' fundamental right of access to EU information: An evolving digital passepartout?, 37 *CMLRev* 2000, 7; *Driessen*, Public Access to EU Institution Documents: An Introduction, 3 *Global Trade and Customs Journal* 2008, 329; *Häberle*, Gibt es eine europäische Öffentlichkeit?, 2000; *Kranenborg/Voermans*, Access to Information in the European Union: A comparative Analysis of EC and Member State Legislation, 2005; *Leeuw*, The Regulation on public access to European Parliament, Council and Commission documents in the European Union: are citizens better off?, 28 *ELRev* 2003, 324; *Roberts*, Multilateral Institutions and the Right to Information: Experience in the European Union, 8 *European Public Law* 2002, 255; *Schirvani*, New Public Management und europäische Agenturen: Transparenzfragen bei der Modernisierung der Verwaltungsorganisation, *DÖV* 2008, 1; *Weiss/Steiner*, Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison, 30 *Fordham International Law Journal* 2007, 1545.

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1

I. General remarks

The norm traces back to Article 255 TEC and draft-Article I-50 paras 1 and 2 TECE. Compared to Article 255 TEC, Article 15 TFEU is much more comprehensive and of broader constitutional significance. It regulates baseline questions of **transparency** and **openness** of administrative and legislative work – not only in respect to the access to documents. E.g. it recognizes the principle of **publicity of parliamentary work**. While the text drafted for the TECE has been incorporated in paras 1 and 2 without any amendments, the provisions of the Article 255 TEC live on in para. 3. In addition, a new para. 3 subpara. 4 has been introduced which – apart from editorial changes – is identical to draft-Article III-399 para. 1 TECE. It declares applicable the principles of transparency and openness also to the **European Court of Justice**, the **European Central Bank** and the **European Investment Bank** but only in respect to their administrative acts. Finally, as a new para. 3 subpara. 5, the TFEU incorporates draft-Article III-399 para. 2 TECE; by this, the Treaty clarifies that **documents relating to the legislative procedures** under the terms laid down by the regulations referred to in the second subparagraph, shall be accessible.¹ The principle of transparency is of overall importance for any act of the EU. The openness of the decision-making processes is seen as a major prerequisite for the later acceptance of the decisions taken by the EU institutions.

2

II. Principle of transparency

Article 15 para. 1 TFEU requests the institutions, bodies, offices and agencies to conduct their work under strict adherence to the **principle of openness**. The norm qualifies as the **'lex generalis' of the Union's commitment to transparency**.² It is indispensable for the democratic legitimacy and the democratic supervision of the Union as a political community.³ However, the norm does not constitute a boundless form of transparency; the need for confidentiality (e.g. in security-related fields) or the need for privacy protection relativise the application of the principle. It has to be balanced with other interests and constitutional principles.

3

III. Publicity of the legislative process

The transparency of the legislative process (Article 15 para. 2 TFEU) is a broader form of the **classical principle of public parliamentary work**. Democracy, regardless of whether it is of a national or supranational nature, lives from and in the public sphere.⁴ The European Parliament and the Council both have to sit in public sessions when debating or voting on a draft legislative act. The general obligation of the European Parliament to hold public sessions is henceforth prescribed by primary law but its Rules of Procedure already contained such an obligation (Article 103 RoP EP 2014). In contrast to this, the Council public sessions are a novelty.⁵

¹ Cf. Fischer, Der Vertrag von Lissabon, 221.

² Cf. VHVH/Epping, Article 15 AEUV mn. 3.

³ See Calliess, Optionen zur Demokratisierung der Europäischen Union, in: Bauer/Huber/Sommermann (eds), Demokratie in Europa, 2005, 281 et seq.

⁴ Cf. Häberle, Gibt es eine europäische Öffentlichkeit?, 2000.

⁵ Cf. VHVH/Epping, Article 15 AEUV mn. 5.

IV. Right to information

4

Article 15 para. 3 TFEU, by extending the scope of its predecessor norm in Article 255 TEC, creates an **individual right to information** on the content of documents of the EU's organs and other institutions, bodies, offices and agencies, regardless of the storage medium containing the documents. All the aforementioned bodies have to assure that this individual right can be realised by the citizens – predominantly by amending their Rules of Procedure. In general the right extends also to documents of third parties, e.g. the Member States, which have been transmitted to the EU organs.⁶ Every **EU citizen, other natural person or legal person**, having her/his/its domicile in a Member State is entitled to the right in Article 15 para. 3 TFEU. Although this right is not granted without limitation, the respective EU agency has to assess ex officio in every single case whether access is at least partly possible.⁷ It should be kept in mind that the right to information is strongly linked to the right to good governance (Article 42 CFREU). Following the pattern of the draft TECE, the ECJ, the European Central Bank and the European Investment Bank are subject to the individual right to information only regarding their administrative tasks. At the very least this is how the banking secrecy and the secrecy of internal decision-making processes are protected. In the case of the ECB this serves to strengthen its institutional independence which is needed in order to perform the Bank's task as the guardian of monetary stability in the euro zone.

V. Legislative mandate

5

According to the former EU/EC Treaties, general principles and preconditions up to 30 April 2001 had to be enacted in accordance with the **codecision procedure** (Article 251 para. 2 TEC) which is now replaced by the **ordinary legislative procedure** according to Article 294 TFEU (with far-reaching amendments). This procedure is particularly important for setting up the legal boundaries of the individual right to information in order to protect conflicting public or private interests.

The European Parliament and the Council have observed the mandate to create a general legal framework by enacting Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.⁸ The original implementation period of the predecessor norm therefore has become superfluous. Amendments henceforth are decided upon according to the **ordinary legislative procedure** (Article 15 para. 3 subpara. 2 TFEU).

**Article 16 [Protection of personal data]
(ex Article 286 TEC)**

1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of indi-

⁶ Cf. CR/Wegener, Article 15 AEUV mn. 18; see also Declaration No 35 of the Conference on the Treaty of Amsterdam which explicitly states that a Member State is allowed 'to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement'.

⁷ ECJ Case C-353/01 P *Mattila v Council*, *Commission* [2004] ECR I-1073.

⁸ See the report of the Commission on the implementation of this regulation in COM (2004) 45 final.

viduals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Bibliography: *Beyleveld*, Implementation of the Data Protection Directive in relation to medical research in Europe, 2004; *Collins*, Privacy in the United Kingdom: A Right Conferred by Europe, 1 International Journal of Law and Information Technology 1994, 290; *de Busser*, EU Data Protection in Transatlantic Cooperation in Criminal Matters – Will the EU Be Serving Its Citizens an American Meal, 6 Utrecht Law Review 2010, 86; *Heisenberg*, Negotiating Privacy: The European Union, the United States, and Personal Data Protection, 2005; *Hijmans/Scirocco*, Shortcomings in the EU Data Protection in the Third and the Second Pillars. Can the Lisbon Treaty be expected to help?, 46 CMLRev 2009, 1485; *Kuner*, Beyond Safe Harbor: European Data Protection Law and Electronic Commerce, 35 The international lawyer : a quarterly publication of the Section of International and Comparative Law of the American Bar Association 2001, 79; *Kuner*, European data protection law: corporate compliance and regulation, 2007; *Schwartz*, European Data Protection Law and Restrictions on International Data Flows, 80 Iowa Law Review 1995, 471; *Weir*, A European Perspective on Offshoring and Data Protection, 51 Practical Lawyer 2005, 49.

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1 I. Origins of the norm

Article 16 TFEU is, apart from certain editorial adjustments, identical to draft Article I-51 TECE, which finds its predecessor in Article 286 TEC; it is thus dating back to the Amsterdam Treaty. This dynamic advancement is evidence for the ever growing **importance of data protection in the information society** in both, the Member States and the Union. The ongoing development of the internal market and the interrelated growth of data exchange at Union level, require a common set of rules on data protection.¹

2 II. Normative content

Article 16 para. 1 TFEU creates a **fundamental right to data protection** within the EU which is further elaborated in Article 8 para. 1 and 2 CFREU.² Corresponding to this right, Article 16 para. 2 TFEU provides the basis for acts of secondary legislation. The most important hitherto existing provisions of secondary law are laid down in: a) the **Directive 95/46/EC** on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) which deals with the protection of natural persons' rights in the process of data processing and with free data exchange³ and b) **Directive 2002/21/EC** on a common regulatory framework for elec-

¹ See *Schwarze/Hatje*, Article 16 AEUV mn. 4.
² Cf. *CR/Kingreen*, Article 16 mn. 3.
³ ECJ Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989; Case C-101/01 *Lindqvist* [2003] ECR I-12971 (on the naming of persons on private websites); as well as case C-131/12 *Google*, not yet officially published (on the "right to be forgotten").

tronic communications networks and services ('Framework Directive') which regulates electronic communication in general. Due to the Data Protection Directives, there is a uniform and legally binding standard of data protection now which corresponds with the level of data protection that can be found within the Member States. The Directives address the Member States. The EU institutions themselves had not been bound by these Directives; they obeyed their provisions only on a voluntary basis. In order to fill this gap, the EP and the Council enacted **Regulation 45/01** on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data. In this respect also the office of the European Data Protection Supervisor has to be mentioned (see Article 41 Regulation 45/01).

Not only because it is thwarting data protection for reasons of security but also because the legislative basis chosen for it remains doubtful, **Directive 2006/24/EC** on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks has been heavily criticised.⁴ In the end of 2013, the Advocate General in the Joined Cases C-293/12 and C-594/12 took the view that the Directive as a whole violates the fundamental rights of the EU citizens, particularly the right to privacy.⁵ On 8 April 2014, the ECJ decided that the respective directive is invalid because it exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52 para. 1 CFREU.⁶ Although the retention of specific data might be considered an important investigative tool to combat serious crimes and terrorism, derogations and limitations in relation to the protection of personal data must apply only in so far as strictly necessary. In this regard, Directive 2006/24/EC did not sufficiently respect the right of private life enshrined in Article 7 CFREU. It remains to be seen whether and when the EU or the Member States take new and proportionate measures in this field.

Future legislative acts of the EU in the field of data protection have to be enacted in the **ordinary legislative procedure**. Article 16 para. 2 TFEU draws a distinction according to the purpose of the respective legislative acts: on the one hand addressees of securing data protection can be the institutions, agencies and other bodies of the EU but on the other hand also the Member States, who can be obliged to implement EU directives on data protection as long and as far as their administrative operation falls within the scope of EU law.⁷ An **independent agency** supervises compliance with the rules set up by the Union.

In conjunction with Article 16 TFEU the '**Declaration No 20** on Article 16 of the Treaty on the Functioning of the European Union' and '**Declaration No 21** on the protection of personal data in the fields of judicial cooperation in criminal matters and police cooperation' have to be highlighted. Declaration No 20 establishes that 'whenever rules on protection of personal data to be adopted on the basis of Article 16 TFEU could have direct implications for national security, due account will have to be taken of the specific characteristics of the matter', while Declaration No 21 'acknowledges that specific rules on the protection of personal data and the free movement of such data in the fields of judicial co-operation in criminal matters and police cooperation (the former 3rd pillar of the former EU) based on Article 16 TFEU may prove necessary because of the specific nature of these fields.'

⁴ See ECJ Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593, acknowledging Article 95 as to the correct legislative basis.

⁵ Advocate General's Opinion in Joined Cases C-293/12 *Digital Rights Ireland* and and C-594/12 *Seitlinger and Others*, in press release No 167/13 of the Court of Justice of the European Union.

⁶ Joined Cases C-293/12 *Digital Rights Ireland* and C-594/12 *Seitlinger and Others*, judgement of 8 April 2014, not yet officially published.

⁷ Cf. VHVH/Folz, Article 16 AEUV mn. 3.

Article 17 [Religious and non-confessional organisations]

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

Bibliography: *Heyward*, What Constitutes Europe: Religion, Law and Identity in the Draft Constitution for the European Union, 1 *Hanse Law Review* 2005, 227; *Oanta*, The Status of Churches and Philosophical and Non-Confessional Organizations within the Framework of the European Union Reform, 15 *Lex ET Scientia International Journal* 2008, 121; *Rynkowski*, Remarks on Article 1-52 of the Constitutional Treaty: New Aspects of the European Ecclesiastical Law, *German Law Journal* 2005, 1719; *Vachek*, Das Religionsrecht der Europäischen Union im Spannungsfeld zwischen mitgliedstaatlichen Kompetenzreservaten und Article 9 EMRK, 2000.

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1

I. Origins of the norm

Article 17 TFEU has no direct or indirect predecessor in the former EC Treaty – although there had been attempts to include an article on religious communities in the Treaty of Amsterdam.¹ It is an unmodified adoption of draft-Article I-52 TECE, which finds its origin in Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Amsterdam Treaty. This original text has been amended by paragraph 3 which initiates a dialogue between the European Union and religious communities. Insofar the norm creates a normative basis for ‘**European Constitutional Law on Religion**’² taking into account religious and non-confessional communities as well as the institutionalised dialogue between those communities and the Union, without conferring any legislative competences in this respect.

2

II. Scope and meaning

Article 17 TFEU is of an objective character qualifying as a regulatory provision. However, specific subjective rights are not excluded from the scope of the norm. It contains **aspects of a collective right to freedom of religion**. Article 17 para. 1 TFEU recognises the **various organisational forms** of religious communities that can be found and are legally accepted within the EU Member States. Article 17 para. 2 TFEU guarantees the same status and the same protection to philosophical and non-confessional organisations. Similar to national constitutions, the TFEU distinguishes between transcendent (Article 17 para. 1 TFEU) and non-transcendent traditions (Article 17 para. 2 TFEU).

¹ Cf. *Vachek*, Das Religionsrecht der Europäischen Union, im Spannungsfeld zwischen mitgliedstaatlichen Kompetenzreservaten und Art. 9 EMRK, 2000, 131 et seq.

² Cf. Häberle, Europäische Verfassungslehre, 513 et seq.

However, differentiating between the two alternatives may be difficult in particular cases, especially because the classical European dichotomy of theistic-transcendent religions and non-theistic, non-transcendent worldviews is not applicable to many non-European traditions like Buddhism or Hinduism, which can be understood as being transcendent without necessarily being theistic.

Arguably, the majority of legal scholars qualify Article 17 TFEU as an **objective norm** 3 that contains a basic principle of EU law but does not confer any individual right or litigable title of competence.³ However, the mere context of the norm at the beginning of the TFEU does not preclude an **individual dimension**. Undoubtedly, Article 16 para. 1 TFEU contains an individual right to data privacy and individual data protection. The collective right to freedom of religion and belief is, in any case, guaranteed in Article 10 para. 1 CFREU. Any form of discrimination on the grounds of religious or philosophical belief is prohibited by Article 21 CFREU. According to Article 22 CFREU, the Union 'shall respect cultural, religious and linguistic diversity'. The duty to 'respect' in this context is clearly understood as granting an individual legal position against the Union. Parallel to this reading of Article 22 CFREU, Article 17 paras 1 and 2 TFEU could likewise be understood as containing a subjective right.

A **duty to respect** must be distinguished from the **duty not to prejudice** the status of 4 the said communities. Both aspects are likewise relevant for all measures taken by the Union. Notably the Union has to take into account the different roles that religious communities are playing in the national cultures of the Member States. Article 17 para. 1 TFEU contains at the same time a **prohibition of legal harmonisation** which prevents the Union from introducing even minor legislative acts concerning religion and religious communities. The older terminus of 'Staatskirchenrecht' (state legislation concerning the status of churches), which is still in use in Germany and quite similarly in other continental European jurisdictions, should not be used in this context since the EU is neither a State nor is Article 17 TFEU reserved to ecclesiastic communities.

The prohibition of legal harmonisation raises difficult questions in fields that only in- 5 directly touch the status of religious communities, such as the general legislation of non-discrimination. Such legal provisions are possible and unproblematic if they do not intend to set up legal frameworks that are specifically concerned with these communities. Furthermore it is questionable whether the prohibition also refers to **factual intrusions** into the sphere of religious groups, e.g. by making direct EU grants to anti-fundamentalist initiatives in Islamic communities. However, it is necessary to bear in mind that also such factual intrusions could have a practical impact comparable to normative regulation.

Article 17 TFEU also recognizes the Established Churches which still exist in some Member States (such as the Church of Denmark, the Church of England, the Evangelical and the Orthodox Churches of Finland or the Church of Greece).

The norm does not only apply to EU legislation but it also gives power of discretion to national legislators implementing legal acts of the Union into the national legal order. For example, the implementation of a EU directive in a Member State has to be carried out in the light of Article 17 TFEU. Thus the norm is another example for the doubling of basic rights and similar legal positions in the EU Treaties on the one hand and the CFREU on the other hand.

Article 17 para. 3 TFEU lays down a **general objective** of the EU. It calls for a struc- 6 tured dialogue, which has to be open, transparent and regular. Obviously, its aim is to take into account the religious and philosophical positions of the respective communities

³ Like this: VHvH/Folz, Article 17 AEUV mn. 2.

at an early stage. Article 17 TFEU does not define any specifications as to the content, form and time frame for such a dialogue. Thus a single religious community cannot, by legal means, enforce a specific form of dialogue. The equal treatment of all religious and philosophical communities is not a question of Article 17 TFEU but of Article 10 TFEU, which contains a general prohibition of discrimination and thereby explicitly refers to religion.

PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18 [Prohibition of discrimination] (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Bibliography: *Balthasar*, Inländerdiskriminierung in der EU nach dem EG-Vertrag und aus österreichischer Sicht, *Zeitschrift für öffentliches Recht* 1998, 143; *Bleckmann*, Umgekehrte Diskriminierungen. Zulässigkeit und Grenzen der discrimination à rebours nach europäischem Gemeinschaftsrecht und nationalem Verfassungsrecht, 1995; *Bode*, Das Diskriminierungsverbot im Vertrag über die EWG, 1969; *von Bogdandy*, Unionsbürgerschaft und Diskriminierungsverbot, in: *Gaitanides/Kadelbach/Rodríguez Iglesias* (eds), *Europa und seine Verfassung*, Festschrift für Manfred Zuleeg, 2005, 309; *Croon*, Comparative institutional analysis, the European Court of Justice and the general principle of non-discrimination, or alternative tales on equality reasoning, 19 *ELJ* 2013, 153; *de Mol*, The novel Approach of the CJEU on the horizontal direct effect of the EU principle of Maastricht Journal of European and Comparative Law non-discrimination: (unbridled) expansionism of EU law?, 18 *MJ* 2011, 109; *Epiney*, The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship, 13 *ELJ* 2007, 611; *Epiney*, Die Rechtsprechung des EuGH im Jahr 2008: Unionsbürgerschaft, Grundfreiheiten und Gleichstellungsrecht, *Neue Zeitschrift für Verwaltungsrecht* 2009, 1139; *Fastenrath*, Inländerdiskriminierung, 42 *JZ* 1987, 170; *Hailbronner*, Diskriminierungsverbot, Unionsbürgerschaft und gleicher Zugang zu Sozialleistungen, 64 *ZaöRV* 2004, 603; *Hailbronner*, Die Unionsbürgerschaft und das Diskriminierungsverbot, 2004; *Hublet*, Some foreigners more equal than others under EU law, in: *Bonjour, Rea and Jacobs*, The others in Europe, 2011, 63; *Iliopoulou*, Libre Circulation et Non-Discrimination, *Eléments du Statut de Citoyen de l'Union Européenne*, 2007; *König*, Das Problem der Inländerdiskriminierung – Abschied von Reinheitsgebot, Nachtbackverbot und Meisterprüfung?, 118 *AöR* 1993, 591; *Penn*, Note: From Bosman to Simutenkov: The Application of non-discrimination principles to non-EU nationals in European sports, 30 *Suffolk Transnat'l L Rev* 2006, 203; *Pennings*, Non-Discrimination on the ground of nationality in Social Security: What are the consequences of the accession of the EU to the ECHR?, 9 *Utrecht Law Journal* 2013, 118; *Plötscher*, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht, 2003; *Reitmaier*, Inländerdiskriminierungen nach dem EWG-Vertrag. Zugleich ein Beitrag zur Auslegung von Article 7 EWGV (1984); *Rossi*, Das Diskriminierungsverbot nach Artikel 12 EGV, *EuR* 2000, 197; *Schilling*, Gleichheitssatz und Inländerdiskriminierung, 49 *JZ* 1994, 8; *Schweitzer*, Article 12 EGV – Auf dem Weg zum allgemeinen Gleichheitssatz, in: *Arndt et al.* (eds), *Völkerrecht und deutsches Recht: Festschrift für Walter Rudolf*, 2001, 189; *Stern*, Das Staatsangehörigkeitsprinzip in Europa, 2008; *Störmer*, Gemeinschaftsrechtliche Diskriminierungsverbote versus nationale Grundrechte?, 123 *AöR* 1998, 541; *Temming*, Case note – judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contract, 13 *German Law Journal* 2012, 105; *Tryfonidou*, Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe, 35 *LIEI* 2008, 43;

Waddington, Testing the limits of the EC Treaty Article on Non-Discrimination, 28 The Industrial Law Journal 1999, 133.

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I. General remarks

1

The extensive privileges granted to a state's own nationals in comparison to persons who do not possess this status are distinct features of the traditional concept of national statehood. As an opposed character to this idea of demarcation, Article 18 TFEU lays down a prohibition on discrimination on grounds of nationality which is gaining importance in an ever growing area of application. The prohibition established in Article 18 TFEU constitutes a **guiding principle for the whole law of the Union**¹ and a necessary precondition for the functioning of the single market and the EU itself.² It also leads (at least to some part) to the forfeit of the importance of nationality as part of the traditional state in the growing Union of the peoples. In regard to the prohibition set down in Article 18 TFEU, the continuous commitment to the national citizenship (Article 20 para. 1, s. 3 TFEU) seems to be lacking in content.

The prohibition – according to the ECJ an **implementation of the general principle of equality**³ – becomes more concrete in numerous more specialised provisions of the Treaties, namely in the provisions on the internal market. Insofar, the general prohibition of discrimination on grounds of nationality is **subsidiary** to the specialised prohibitions.⁴ Article 18 TFEU only holds autonomous importance in cases regulated by EU law for which the Treaties do not provide specific prohibitions on discrimination.⁵

Other than the general principle of equality, Article 18 only prohibits discrimination on grounds of nationality. It therefore solely prohibits discrimination and is not a command to differentiate diverse cases.⁶

However, Article 18 TFEU is to be drawn on for the interpretation of the specific prohibitions on discrimination⁷ – for example in cases concerning the admission to education facilities⁸, in cases concerning the protection of copyright – irrespective of the dura-

¹ ECJ Case C-115/08 *Land Oberösterreich v ČEZ* [2009] ECR I-10265, mn. 88 et seq.

² *Holoubek*, Artikel 18 AEUV, in: Schwarze, EU-Kommentar, 3rd edn 2012, mn. 3 with further references; CR/*Epiney*, Article 18, mn. 1.

³ ECJ Case 147/79 *Hochstrass* [1980] ECR 3005, mn. 7.

⁴ ECJ Case 8/77 *Sagulo* [1977] ECR 1495.

⁵ See for example ECJ Joined Cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and others and Hoechst AG and others* [2001] ECR I-1727; ECJ Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-06817.

⁶ *Epiney* (n 2), mn. 8.

⁷ ECJ Cases C-85/96 *Martinez Sala* [1998] ECR I-2691, mn. 62; C-274/96 *Bickel and Franz* [1998] ECR I-7637, mn. 16; *Epiney* (n 2), mn. 4.

⁸ ECJ Case C-293/83 *Gravier* [1985] ECR 593.

tion of protection according to national citizenship⁹, in cases concerning the citizenship of the Union with regard to rules governing the surname¹⁰ or in cases concerning educational policy (allocation of maintenance assistance to indigent students studying in another Member State without a permanent residence permit status)¹¹. Thus a citizen of a Member State who moves to another Member State in order to take up studies at a university may rely upon Article 18 para. 1 for the purpose of obtaining maintenance grants if the student can demonstrate a certain degree of integration into the society of the hosting state – for example by verifying previous residence in that state for a certain (minimum) duration of time. The requirement of permanent residence, which under national law cannot be obtained solely by the study itself, may not be presupposed.¹² In a recent judgment, the ECJ declared that the granting of reduced fares on public transport in principle only to students whose parents are in receipt of family allowances of the host state constitutes a discrimination on grounds of nationality which, in the case of Austria, was not justified.¹³

5

II. Obligated parties

1. The Union and the Member States

Article 18 TFEU does not name the institutions addressed by the prohibition. Primarily, the **Member States** are bound by Article 18 TFEU.¹⁴ The obligation conveyed by this provision rests on all organs of the states – on the legislative, the executive branch as well as on the judiciary. Furthermore, every level of governmental power including the central state as well as the local community is addressed by the prohibition.

In addition, the **Union** itself as well as its organs are bound by Article 18 TFEU. The prohibition applies particularly but not exclusively to acts of legislation.¹⁵ Therefore the ECJ examines the compatibility of secondary EU law with the prohibition laid down in Article 18 TFEU.¹⁶

6

2. Private persons (horizontal effect)

Whether and to what extent Article 18 TFEU has direct effect in private disputes, and therefore also binds private persons, is still contested.¹⁷ While the ECJ assumed such an effect for the specialised prohibition of discrimination between men and women in Article 157 TFEU¹⁸, the application of this principle in the case of discrimination based on nationality is less clear. Within the scope of the market freedoms, the principle of non-discrimination on grounds of nationality refers at least to private parties who possess legal autonomy in relation to individual persons.¹⁹ The ECJ stated in *Walrave*, that since

⁹ ECJ Case C-360/00 *Ricordi* [2002] ECR I-5089.

¹⁰ ECJ Case C-148/02 *Gracia Avello* [2003] ECR I-11613.

¹¹ ECJ Case C-209/03 *Dany Bidar* [2005] ECR I-2119.

¹² ECJ Case C-158/07 *Jacqueline Förster v. IB-Groep* [2008] ECR I-8507 (in this case: five years).

¹³ ECJ Case C-75/11 of 4 October 2012 *European Commission v Republic of Austria* [not yet reported].

¹⁴ Already: ECJ Case 14/68 *Walt Wilhelm* [1969] ECR I-0001; *Streinz*, Artikel 18 AEUV in: *Streinz, EUV/AEUV Kommentar*, 2nd edn 2012, mn. 41.

¹⁵ ECJ Case 167/88 *AGBP v ONIC* [1989] ECR I-1653.

¹⁶ *Streinz* (n 14), mn. 42; e.g. ECJ Case C-180/96 *Codorniu* [1994] ECR I-1853, mn. 26.

¹⁷ See for example *Streinz* (n 14), mn. 43 et seq.; *Holoubek*, Artikel 18 AEUV, in *Schwarze* (ed), *EU-Kommentar*, 3rd edn 2012, mn. 43; *Epiney*, (n 2), mn. 44.

¹⁸ ECJ Case C-43/75 *Defrenne (no 2)* [1976] ECR 455.

¹⁹ ECJ Case 36/74 *Walrave* [1974] ECR I-1405.

working conditions in the Member States are sometimes governed by agreements and other acts concluded by private persons, a limitation of the prohibition of discrimination to acts of the states would risk creating inequality in the application of the provision.²⁰ This reasoning would have meaning and purpose in the case of Article 18 TFEU as well. However, it only applies to situations comparable to the relationship between the state as authority and the subordinated individual. Whether Article 18 TFEU also has horizontal effect in private disputes between coequal individuals is **yet to be decided**. The endorsement of such an effect could allow individuals to invoke the prohibition contained in Article 18 TFEU in civil law disputes before national courts (direct horizontal effect).²¹ While the extension of the prohibition would considerably enhance the rights of the EU citizens in their reality of life, it would at the same time constitute a severe intrusion into the private autonomy of Member State nationals. It is argued that therefore any application of Article 18 TFEU to private disputes should be limited to conflicts characterised by the subordinated position of one private party and a law-making authority comparable to the legislative powers of a state of the other party.²² Hence, Article 18 TFEU could be applicable in disputes concerning the law-making of associations or unions as well as in disputes concerning collective agreements.²³ It is at least doubtful whether the mere participation of the individual in an area of life governed by laws of the Union may justify imposing restrictions to such an extent on the private autonomy of the person.

However, the acceptance of a direct effect of Article 18 TFEU for **specific founded cases** is not precluded by the current state of law. The application of the prohibition could for example be introduced by measures according to para. 2. A future-oriented approach to the prohibition established in Article 18 TFEU could clearly enhance the situation of individuals within the scope of the application of the treaties – presupposed a consideration of the possible negative effects on individual freedoms. The lack of jurisdiction by the ECJ in that matter probably is due to the existence of the more specific market freedoms that apply in cases brought on ground of discrimination.

The existence of farer reaching obligations on individuals concerning the prohibitions on discrimination on grounds of the reasons mentioned in Article 19 TFEU is owed to fundamental rights and human rights as accepted principles of the Union.

III. Beneficiaries

7

The prohibition on discrimination on grounds of nationality protects all **citizens of the Union**, even if they hold the nationality of a third state at the same time.²⁴ Not only does Article 18 TFEU prohibit discrimination by Member States or institutions of the Union, it also grants a **subjective right** not to be discriminated against.²⁵ The beneficiaries of Article 18 TFEU are entitled to equal treatment. In general, Article 18 para. 1 TFEU does not have effect on nationals of third states or on stateless persons.²⁶ The prohibition of discrimination on grounds of nationality constitutes an instrument of Euro-

²⁰ Ibid, mn. 19.

²¹ With further references: *de Mol*, The novel Approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?, 18 Maastricht Journal of European and Comparative Law 2011, 110.

²² *Streinz* (n 14), mn. 43; *Epiney* (n 2), mn. 44 with further references.

²³ *Holoubek*, (n 17), mn. 44 points to ECJ Cases C-415/93 *Bosman* [1995] ECR I-4921, mn. 82 et seq.; C-309/99 *Wouters* [2002] ECR I-1577. Also see *Streinz* (n 14), mn. 43.

²⁴ ECJ C-122/96 *Saldanha* [1997] ECR I-5325.

²⁵ ECJ *Bickel and Franz* (n 7), mn. 16.

²⁶ ECJ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-04585, mn. 53; ECJ Joined Cases C-64/96 and C-65/96 *Uecker and Jaquet* [1997] ECR I-3171.

pean integration – its rational justifies the limit of its application.²⁷ Third state nationals do only participate in the Union if they act within the scope of the Treaties. Therefore, **third state nationals** and stateless persons are in this respect protected as they fall within the scope of application of the Treaty.²⁸ Secondary law of the Union could grant third state nationals such legal positions which would then fall within the scope of the Treaty.²⁹ Any application of the prohibition of discrimination in this regard would need to be decided on a case-by-case basis.

8 **Legal entities** (as well as other bodies of persons without legal personality³⁰⁾) formed in accordance with the law of a Member State and belonging to the Union as defined in Article 54 para. 1 TFEU are also beneficiaries of Article 18 TFEU. However, the special prohibitions on discrimination as part of the freedom of establishment and the freedom to provide services are in this regard of particular importance.

9 IV. Prohibition of discrimination

1. Direct effect

The prohibition of discrimination established in Article 18 para. 1 TFEU has direct effect³¹ and grants subjective rights which can be invoked by the beneficiaries.

10 2. Discrimination on grounds of Nationality

Article 18 TFEU prohibits so-called **direct discriminations**. This encompasses the discrimination of a Member State national on grounds of his or her nationality compared to the treatment of nationals of other Member States within the scope of the EU law. Examples of direct discrimination are: security for the costs of proceedings before a court³², the right to criminal proceedings conducted in a language other than the principal language of the State for national minorities but not for nationals of other Member States³³. The prohibition on direct discrimination does not apply in cases of unequal treatment of third state nationals in comparison to nationals of the Member States.³⁴

11 Also prohibited is the so-called **indirect discrimination** which is given in cases in which individuals are not treated differently on grounds of their nationality but on grounds of other criteria that are typically only met by nationals or non-nationals. An example is the requirement of residential qualifications³⁵ unless such a requirement is justified by objective reasons impartial of nationality.³⁶ An indirect discrimination is not given in the case of unequal treatment of a foreigner that solely results from differences in national legislation of different Member States.³⁷

²⁷ With a different view: *Hublet*, Some foreigners more equal than others under EU law, in: Bonjour/Rea/Jacobs, *The others in Europe*, 2011, 63 et seq.

²⁸ In detail: GHN/*von Bogdandy*, Artikel 18 AEUV, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union (50th edn 2013) mn. 31 et seq.

²⁹ Ibid; *Holoubek* (n 17), mn. 31.

³⁰ Rossi, Das Diskriminierungsverbot nach Article 12 EGV, Europarecht 2000, 200.

³¹ ECJ Cases 293/83 *Gravier* [1985] ECR 593; C-357/89 *Raulin* [1992] ECR I-1052.

³² ECJ Case C-43/95 *Data Delecta* [1996] ECR I-4661.

³³ ECJ Case C-274/96 *Bickel* [1998] I-7637.

³⁴ ECJ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-04585.

³⁵ ECJ Case C-388/01 *Commission v Italy* [2003] ECR I-721, mn. 13.

³⁶ ECJ Cases 152/73 *Sotgiu* [1974] ECR 153; C-398/92 *Hatrex* [1994] ECR I-467; C 29/95 *Pastors* [1997] ECR I-285; C-209/03 *Bidar* [2005] ECR I-2119.

³⁷ ECJ Case C-44/94 *NFFO* [1995] ECR I-03115.

Article 18 TFEU does not prohibit the discrimination of a Member State national in comparison to a national from another Member State (**reverse discrimination**) by national legislation in cases in which the position of the national is unrelated to the scope of the EU.³⁸ Considering the rise of the legal position of the citizenship of the Union, the exclusion of this form of discrimination from the scope of Article 18 TFEU is no longer uncontested.³⁹ Nevertheless, it must be kept in mind, that only discriminations of a Member State's own nationals in purely domestic situations without any connection to the scope of the Treaty, fall outside the application of Article 18 TFEU (also see mn. 15/16).

3. Within the scope of the Treaties

Since the Lisbon Treaty, the scope of application of Article 18 TFEU also covers measures of the Union on basis of the EU-Treaty ('the Treaties').

As the Member States have only transferred specific powers to the Union, the prohibition on discrimination laid down in Article 18 para. 1 TFEU only applies to acts of the Member States in areas governed legitimately by European Union law. Therefore, the person or entity discriminated against needs to be in a situation governed by law of the Union.⁴⁰ In this regard it is of no relevance whether the rules of the Union are compulsory. It is sufficient that a Member State acts within the scope of EU legislation, which serves the implementation and functioning of the single market.⁴¹

For the evaluation of its applicability, Article 18 TFEU must also be read in conjunction with the provisions on EU citizenship in Artt. 20 TFEU et seq.⁴² It is not yet finally determined, whether the recent judgments of the ECJ in *Grzelczyk*, in *d'Hoop*, *Bidar* and in other recent cases⁴³ need to be understood insofar, as the application of the Treaties as precondition for the applicability of Article 18 TFEU is given in any case in which an EU national exercises his or her freedom to move and reside in another Member State (Article 21 TFEU). If so, the prohibition of discrimination on grounds of nationality could be invoked in every area of life irrespective of any connection of the relevant provision to the residence of the national.⁴⁴

A national who never made use of his or her freedom of movement and still works in the Member State of nationality may not rely on Article 18 para. 1 TFEU to invoke provisions on entry and residence of family members of workers from other Member States which allow the immigration of non-EU national family members.⁴⁵ The ECJ rejects in

³⁸ ECJ Case C-29/94 *Aubertin and others* [1995] I-301. Also see mn. 14.

³⁹ *Tryfonidou*, Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe, 35 *LIEI* 2008, 43 et seq.

⁴⁰ ECJ Case C-186/87 *Cowan v Trésor public* [1989] ECR I-00195, mn. 14 et seq.; see *Epiney*, The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship, 13 *ELJ* 2007, at 615.

⁴¹ Concerning access to vocational training: ECJ Case 293/83 *Gravier* [1985] ECR 593; concerning national copyright law: ECJ Case C-92/92 *Phil Collins/Imtrat and Patricia* [1992] ECR I-5145; law of associations: ECJ Case C-503/99 *Commission/Belgium* [2002] ECR I-4809.

⁴² ECJ Cases C-184/99 *Grzelczyk* [2001] ECR I-6229; C-148/02 *Gracia Avello* [2003] ECR I-11613.

⁴³ ECJ *Grzelczyk* (ibid); ECJ Cases C-224/98 *d'Hoop* [2002] ECR I-6191; *Bidar* (n 36); C-164/07 *Wood/Fonds de Garantie* [2008] ECR I-4143; joined cases C-523/11 and C-585/11 of 18 July 2013 *Prinz v Hannover and Seeberger v Studentenwerk Heidelberg* [not yet reported], mn. 27; ECJ Cases C-75/11 *European Commission v Republic of Austria* [not yet reported]; C-406/04 *De Cuyper* [2006] ECR I-6947, mn. 39; C-499/06 *Nerkowska* [2008] ECR I-3993, mn. 32.

⁴⁴ See the commentary on Art. 21, mn. 1. Approving: *Epiney* Die Rechtsprechung des EuGH im Jahr 2008: Unionsbürgerschaft, Grundfreiheiten und Gleichstellungsrecht, *Neue Zeitschrift für Verwaltungsrecht* 2009, 1139.

⁴⁵ ECJ Joined Cases 35/82 and 36/82 *Morson* [1982] ECR 3723; see the commentary on Art. 45.

its settled case law⁴⁶ the applicability of Article 18 para. 1 TFEU and of the market freedoms to pure domestic situations which **lack any cross-border element**.⁴⁷

- 16 However, the refusal of a Member State to accept a Diploma obtained by a national of that state in another Member State in the same way as the Diploma of a national of another Member State violates Article 18 para. 1 TFEU.⁴⁸

17

V. Authority to legislate (para. 2)

The **authority to adopt rules** designed to prohibit discrimination in Article 18 para. 2 TFEU (ordinary legislative procedure) is interpreted broadly by the ECJ. It therefore covers not only provisions governing the prohibition of discrimination on grounds of nationality *strictu sensu*, 'but may also be concerned with matters in respect of which rules appear to be required in order to ensure that those rights can be effectively exercised'.⁴⁹ Besides the enactment of procedural provisions, which are designed to facilitate the prohibition of discrimination, para. 2 could also be used to extend the application of the prohibition laid down in Article 18 para. 1 TFEU to disputes between private persons.⁵⁰ However, in this regard, the concerns mentioned above need to be kept in mind. Given the numerous more specific provisions that can be used as legal basis for secondary legislation in this field (e.g. also Article 21 paras 2 and 3 TFEU), the practical significance of Article 18 para. 2 TFEU is rather limited.

Article 19 [Actions to combat discrimination] (ex-Article 13 TEC)

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

(2) By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Bibliography: *Allen*, Article 13 EC, Evolution and current contexts, in: Meenan (ed), Equality Law in an Enlarged European Union (2007), 38; *Baer*, Recht gegen Fremdenfeindlichkeit und andere Ausgrenzungen, ZRP 2001, 500; *Bauer*, Europäische Antidiskriminierungsrichtlinien und ihr Einfluss auf das deutsche Arbeitsrecht, NJW 2001, 2672; *Bell*, The New Article 13 EC Treaty: A Sound basis for European Anti-Discrimination Law, 6 Maastricht J. Eur. & Comp. L. 1999, 5; *Bell*, Anti-Discrimination Law and the European Union (2004); *Bell*, The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?, 79 The Political Quarterly 2008, 35; *Bell*, Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law, 60 American Journal of Com-

⁴⁶ For instance ECJ Cases C-29/94 *Aubertin and others* [1995] ECR I-301; C-217/08 *Mariano* [2009] ECR I-00035 (summary).

⁴⁷ In detail: *Epiney*, n 2, mn. 33 et seq.; *Streinz* (n 14), mn. 64.

⁴⁸ ECJ Case 246/80 *Broekmeulen* [1981] ECR 2311.

⁴⁹ ECJ Case 295/90 *European Parliament v Council of the EC* [1992] ECR I-4193, mn. 18.

⁵⁰ *Folz* Article III-123, in: Vedder/Heintschel von Heinegg (eds), *Europäischer Verfassungsvertrag Handkommentar*, 2007, mn. 3.

parative Law 2012, 127; *Bell/Chopin/Palmer* (eds), *Developing Anti-Discrimination Law in Europe*, 2007; *Bouchouaf/Richter*, *Reichweite und Grenzen des Article 13 EGV*, JURA 2006, 651; *Caracciolo di Torella*, *The Principle of Gender Equality, The Goods and Services Directive and Insurance: A Conceptual Analysis*, 13 MJ 2006, 339; *Connolly*, *Victimising Third Parties: The Equality Directives, the European Convention on Human Rights, and EU General Principles*, 35 ELR 2010, 822; *de Mol, Kucukdeveci*: *Mangold revisited – horizontal direct effect of a general principle of EU law*, 6 EuConst 2010, 293; *Dewhurst*, *The Development of EU Case-Law on Age Discrimination in Employment: ‘Will You Still Need Me? Will You Still Feed Me? When I’m Sixty-Four’*, 19 European Law Journal 2013, 517; *Ellis/Watson*, *EU Anti-discrimination law*, 2nd edn 2012; *European Commission*, *Discrimination in the European Union Perceptions and experiences of discrimination in the areas of housing, healthcare, education, and when buying products or using services – Analytical Report*, 2008; *European Union Agency For Fundamental Rights*, *Handbook on European non-discrimination law*, 2011; *Hailbronner*, *Die Antidiskriminierungsrichtlinien der EU*, ZAR 2001, 254; *Howard*, *Reasonable accommodation of religion and other discrimination grounds in EU law*, 38 ELR 2013, 360; *Howard*, *The EU Race Directive*, 2013; *Kilpatrick*, *The Court of Justice and labour law in 2010: a new EU discrimination law architecture*, 40 Industrial Law Review 2011, 280; *Masselot*, *The State of Gender Equality Law in the European Union*, 13 ELJ 2007, 152; *Muir*, *Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test*, 18 MJ 2011, 136; *Schiek/Chege* (eds), *European Union Non-Discrimination Law*, 2009; *Stork*, *Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC and 2004/113/EC in German Private Law*, 6 German Law Review 2005, 534; *Waddington*, *Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive*, 36 ELR 2011, 163; *Whittle*, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*, 27 ELR 2002, 203.

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I. General remarks

1

The idea of integration into the European Union is no longer solely governed by the attempt to form an economic union but a **community of values** as well. The protection against discrimination forms one of the core constituents of the human rights aquis of the Union and is also laid down in Article 14 ECHR and Article 21 CFREU. All Member States of the Union share the basic idea of equality of all people and their right to have equal opportunities is common.¹ Discrimination on grounds of specific characteristics of human beings poses an obstacle to this shared idea. However, discrimination on grounds of the reasons listed in Article 19 TFEU is still reality in the Member States. Neither EU legislation nor implementation of the existing law has led to equality as sought by Article 19 TFEU. However, the provision is frequently used by the Council in on-going at-

¹ *Commission Communication* Non-discrimination and equal opportunities: A renewed commitment, COM (2008) 420 final.

tempts to improve the situation for people affected by discrimination on grounds of the aforementioned reasons.

- 2 The legal basis for actions by the EU contained in para. 1 was introduced in the law of the Union for the first time by the Amsterdam Treaty in 1997. Para. 2 was established in 2001 by the Treaty of Nice. The Treaty of Lisbon modified Article 19 TFEU with regard to the procedural regulations and granted the Parliament a new veto right². The provision solely contains an allocation of competences to the Council (para. 1), respectively the Parliament and the Council (para. 2), to take appropriate actions to combat discrimination based on the characteristics mentioned in Article 19 para. 1 TFEU. These actions may consist of promotion and facilitation measures to improve knowledge or support the development of equality policies as well as of precautionary measures against violation of the rule of equality in regard to the mentioned characteristics. Article 19 TFEU therefore serves the implementation of **specific facets of the general rule of equal treatment**. As an authorization for the organs of the Union to take action, Article 19 TFEU itself **does not confer specific rights** upon the EU citizens or other individuals. The substantive prohibition on discrimination is not contained in Article 19 TFEU but rather results from the general principles of EU law as laid down in Article 14 ECHR and Article 21 CFREU.³

3

II. Protection and obligations

1. Protected persons

Actions based on Article 19 TFEU can be designed to protect all humans which are discriminated against on grounds of one of the reasons listed in para. 1. Therefore, **citizens of non-Member States** can also belong to the protected persons. **Legal entities**, on the other hand, do not fall within the scope of the provision as the characteristics mentioned in para. 1 generally only apply to human beings. However, actions taken on basis of Article 19 TFEU may also concern legal entities – especially in the field of religion and belief as these entities may exist to facilitate the freedoms of their members.⁴ The partial extension of European Union law beyond EU citizens, which is connected with the broad scope of application of Article 19 TFEU, is not unintended: The origin of the authorization established in Article 19 TFEU is marked by campaigns of the European institutions against racism and xenophobia.⁵ Therefore the scope of protection of anti-discrimination laws in the Union was always meant to reach further than the EU citizenship. In addition, the open wording of Article 19 also points towards a broad scope of application.

² *Syrpis*, The Treaty of Lisbon: much ado...but about what?, 37 *Industrial Law Journal* 2008, 219, at 224.

³ *Streinz*, Artikel 19 AEUV, in: Streinz (ed), *EUV/AEUV Kommentar*, 2nd edn 2012, mn. 19; ECJ Case C-13/05 *Chacon Navas* [2006] ECR I-6467, mn. 54 et seq.; *CR/Epiney*, Artikel 19, mn. 1 with further references. With another view: *Holoubek*, Artikel 19 AEUV, in Schwarze (ed), *EU-Kommentar*, 3rd edn 2012, mn. 21.

⁴ *Epiney* (n 3), mn. 5, 14 with further references.

⁵ See inter alia *Commissio*, Legal instruments to combat racism and xenophobia (1993), <<http://aei.pitt.edu/8697/1/8697.pdf>>, accessed 20 August 2013, based on Council Resolution of 27 June 1990 (OJ C 157). Already in the 1980s the problem of racism and xenophobia was raised within the European institutions. For details on the historical development see: *European Parliament*, Prospects for an Anti-Discrimination Policy, Social Affairs Series, SOCI 105 EN (PE 168.637) (2000), <http://www.europarl.europa.eu/workingpapers/soci/105_en.htm>, accessed 20 August 2013.

2. Obligated institutions

4

Actions taken on basis of Article 19 para. 1 TFEU can bind the organs of the Union as well as the Member States. Private persons as well as legal entities can also be addressed and obliged by these measures. Therefore even private disputes may be regulated by measures on basis of this provision.⁶

III. Grounds of discrimination

5

The aim of Article 19 TFEU is to combat discrimination arising from various reasons. Other than Article 18 or Article 157 TFEU it is not limited to a certain differentiation criterion or to a certain comparison group. The provision refers to discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**. Parallel provisions, containing similar but partly modified prohibitions, can be found in **Article 14 ECHR** (which prohibits 'discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status') and Article 21 CFREU (prohibiting 'discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation') which according to Article 6 TEU has the same legal value as the Treaties. Due to the different scope of these instruments, **conflicts concerning competences** cannot arise. Article 19 TFEU is the only provision containing the authority to issue legislation.

According to its wording, Article 19 TFEU does **not have direct effect** and therefore **6** does not contain subjective rights of individuals. It rather constitutes a legal basis for combating discrimination. Part of this authorization also is the issuing of measures promoting the factual exercise of equal opportunities.

IV. Authority to regulate

7

1. Scope of application

According to Article 19 para. 1 TFEU, actions may only be taken within the limits of the powers conferred by the Treaties upon the Union. Compared to the wording in Article 18 TFEU ('Within the scope of application of the Treaties'), it seems that Article 19 TFEU limits the authority to take action in fields in which the Union holds legislative powers. Considering the importance of equal treatment for individuals, this constriction should at least be reconsidered. A strict link (accessoriness) between the scope of Article 19 TFEU and the legislative competence of the Union significantly limits the protection granted by Article 19 TFEU. Therefore an interpretation of Article 19 TFEU similar to the interpretation of the scope of Article 18 TFEU (despite of the different wording) is desirable.⁷ An *effet utile* approach to the prohibition on discrimination, furthering the objectives of the Treaty, would fortify the factual equality of the individuals living within Europe.

⁶ *Epiney* (n 3), mn. 5.

⁷ The bigger part of the literature on Art 19 seems to support a narrower interpretation of the provision. See *Streinz* (n 3), mn. 13 et seq. with further references; *European Parliament*, Prospects for an Anti-Discrimination Policy (n 5).

8

2. Subsidiarity

The competence to take action established in Article 19 TFEU exists ‘without prejudice to the other provisions of the Treaties’. In fact, in every language of the treaty, a significant difference between the wording of Articles 18 and 19 TFEU can be found (‘special’/‘particulières’/‘besondere’/‘particolari ...’). Therefore it is not clear from the wording of Article 19 TFEU whether the authorization contained is meant to be subsidiary to other authorizations in the Treaty and may therefore only be used to combat discrimination if actions cannot be brought on basis of other provisions, or whether it can be used in addition and beside other legislative authorizations contained in the Treaty.⁸ At least in relation to Article 352 TFEU precedence has to be given to Article 19 TFEU. But considering the purpose of Article 19 TFEU to establish a Union free of discrimination, the wording of the provision should not be read as demand of subsidiary application but rather as reference to the other provisions of the Treaty which can also be applied and may not be limited by Article 19 TFEU. However, the differentiation between the provisions of the Treaty is of importance as the procedural requirements for actions taken on their basis are different in the respective provisions (see Article 157 para. 3 TFEU compared to Article 19 para. 1 TFEU).⁹

9

3. Procedure

According to para. 1, as established by the Treaty of Lisbon, the **Council** decides, after obtaining the consent of the European Parliament, **unanimously** in accordance with a special legislative procedure. A proposal by the Commission is no longer necessary. Basic principles of Union incentive measures for the achievement of the goals contained in para. 1 are adopted in accordance with the **ordinary legislative procedure** (Article 294 TFEU).

10

V. Anti-discrimination measures

1. Secondary EU law

So far, three directives have been issued on basis of Article 19 para. 1 TFEU: Directive **2000/43/EC** implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁰ (**Racial Equality Directive**), Directive **2000/78/EC** establishing a general framework for equal treatment in employment and occupation¹¹ (**Employment Equality Directive**) containing prohibitions on discrimination on ground of religion or belief, disability, age or sexual orientation and Directive **2004/113/EC** implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹² (**Gender Goods and Services Directive**) which prohibits unequal treatment of men and women outside the scope of Article 157 TFEU and therefore outside the sphere of employment and occupation (eg unequal treatment concerning insurances). Of all hitherto existing directives, the Racial Equality Directive has the broadest scope. Compared to the protection against discrimination based on race or

⁸ On this problem see: *Streinz* (n 3), mn. 3; *Epiney* (n 3), mn. 3; GHN/*Grabenwarter*; Artikel 19, 18.

⁹ *Streinz* (n 3) with reference to ECJ Case C-300/89 *Commission v Council (titanium dioxide)* [1991] ECR I-2867, mn. 18 et seq.

¹⁰ Council Directive 2000/43/EC of 29 June 2000 (OJ L 180/22).

¹¹ Council Directive 2000/78/EC of 27 November 2000 (OJ L 303/16).

¹² Council Directive 2004/113/EC of 13 December 2004 (OJ L 375/37).

ethnic origin, protection against discrimination on grounds of religion or belief, disability, age and sexual orientation is rather limited and only exists within the scope of the Employment Equality Directive. Therefore, no conformity in the prohibition on discrimination on grounds of these various reasons exists in the EU.¹³

In order to remove this inequality in protection, another directive is needed. Hence, in 2008 the Commission proposed an additional directive. For the completion of the European legal framework of non-discrimination, the Commission issued a **proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**.¹⁴ The original proposal contained prohibitions of discrimination both in the public and private sector in social protection (including social security and health care), social advantages, education and access to and supply of goods and services which are available to the public, including housing. It thus adopted the material scope of the Racial Equality Directive¹⁵ to develop a Union-wide regime of equal protection against discrimination on grounds of the reasons listed in Article 19 TFEU. The **impression of a hierarchy** concerning the protection against discrimination on different grounds was meant to be eliminated.¹⁶ However, the proposal was only approved with amendments, limiting the protection granted, by the European Parliament in April 2009.¹⁷ Even with these amendments in place, the Member States were not able to agree on the new directive. As Article 19 TFEU foresees a **unanimous approval** of a proposed directive, the hitherto opposition of some Member States, notably Germany¹⁸, barred the proposal from being implemented. Reasons for the lack of support seem to be the idea of already existing adequate protections in national law¹⁹ as well as the question whether the Union holds competence in the field of the directive.²⁰ However, an existing hierarchy between 'more acceptable' and 'less acceptable' grounds of discrimination still seems possible. Inequality within the system of protection is still a reality in the European Union.

2. Flanking measures

Action programs for the years 2001–2006²¹ and 2006–2013²² to combat discriminations as well as **'European Years'** concentrating on equality and non-discrimination²³ support the existing and proposed legal acts. These measures serve as important generators for normative and factual implementation of the aims laid down in Article 19 TFEU.

¹³ In detail: Waddington, Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive, 36 ELR 2011, at 164.

¹⁴ COM (2008) 426 final.

¹⁵ Waddington (n 13), at 166.

¹⁶ COM (2008) 426 final.

¹⁷ EP legislative Resolution of 2 April 2009 (OJ 2010 C 137 E/22)

¹⁸ See the Recommendation for Decision of the German *Bundestag* 17/13848 of 10 June 2013, available in German at: <<http://dip21.bundestag.de/dip21/btd/17/138/1713848.pdf>>, accessed 20 August 2013; Coalition Agreement of 2009, Wachstum. Bildung Zusammenhalt. Koalitionsvertrag zwischen CDU, CSU und FDP of 26 October 2009, 26. For the 2013 position of these parties, see *Antworten der CDU, CSU auf die Fragen des Lesben- und Schwulenverbandes (LSVD)* <http://www.lsvd.de/fileadmin/pics/Dokumente/Wahlpruefsteine/2013_CDUCSU.pdf>, accessed 20 August 2013. To a lesser extent, also the Czech Republic opposed the proposal. However, opposition was not expressed as openly as by the German Government. For details, see Waddington (n 13) at 169.

¹⁹ For Germany, see the Coalition Agreement (n 18) at 17.

²⁰ See the Press release PRES/11/471 of the 3131st Council meeting of 1 December 2011, <http://europa.eu/rapid/press-release_PRES-11-471_en.htm?locale=en>, accessed 20 August 2013.

²¹ Decision 2000/750/EC of 27 November 2000 (OJ L 303/23).

²² Programme 'Progress', Decision 1672/2006/EC of 26 October 2006 (OJ L 315/1).

²³ 1997: Against Racism, 2007: Equal Opportunities for All.

- 15
- ### 3. Implementation
- At least in some aspects, the Directives against discrimination touch traditions deeply rooted in societies of a large number of Member States. Even though the already existing Directives are met with broad general consensus, effective implementation often encounters difficulties. The fact that an effective anti-discrimination legislation, possessing direct effect as well as enforcing measures, necessarily leads to a **limitation of private autonomy** requires rethinking within a number of Member States. On-going discrepancies concerning the application of EU measures and the implementation of directives led to the initiation of numerous infringement procedures by the Commission. In several cases, implementation was carried out only following decisions of the ECJ against a Member State.²⁹

**Article 20 [Citizenship of the Union]
(ex Article 17 TEC)**

(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;

²⁹ ECJ Cases C-320/04 *Commission v Luxembourg* (not reported); C-327/04 *Commission v Finland* (not reported); C-329/04 *Commission v Germany* (EuZW 2004, 444); C-335/04 *Commission v Austria* (not reported); C-133/05 *Commission v Austria* [2006] ECR I-36; C-43/05 *Commission v Germany* [2006], ECR I-33; C-70/05 *Commission v Luxembourg* (not reported); see Streinz (n 3), mn. 25.

- (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;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, 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.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Bibliography: *Azoulai*, 'Euro-Bonds' The Ruiz Zambrano judgment or the Real Invention of EU Citizenship, 3 Perspectives on Federalism 2011, E-31; *von Bodandy/Arndt*, European Citizenship, in Wolfrum (ed), Max Planck Encyclopedia of Public International Law (2011); *Konstadinides*, La fraternité européenne? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship, 35 ELR 2010, 401; *Lansbergen/Miller*, Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution?, 7 ECLR 2011, 287; *Martinico/Castaldi*, Editorial: Rethinking (EU) citizenship, 3 Perspectives on Federalism 2001, III; *van Eijken*, European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their National, Case Note, Merkourios 2010, 65.

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I. General remarks

1

Originally introduced by the Treaty of the European Union, adopted in Maastricht in 1992, the provisions on the European citizenship in Article 20 TFEU and Article 9 TEU aim at promoting an ongoing (Article 25 TFEU) expansion concerning the process of integration from a mere economic fusion to the creation of 'an ever closer union among the peoples of Europe' (Article 1 para. 2 TEU). As an expression of the intention of the Member States to strengthen the actual bond between the European population and the ever unfolding Union, the provisions on the citizenship constitute an important step towards a **political federation of Europe**¹ (which, concerning its precise ultimate object, admittedly is not defined so far). The introduction of this legal concept also endorses the essential significance ascribed to the strengthening of the legal position of the individual in the dynamic evolution of the Union. Moreover, the development of the legal concept aims at strengthening the sense of a European identity and identification with the Union in the minds of about half a billion people entitled to citizenship of a Member State. As the process of integration proceeds, this link between the citizens of the 27 States and the EU, empowered with ever-growing authority to regulate life in the Member States, constitutes a relevant part of fostering European public opinion and the idea of coalescence of the European nations.

¹ Already envisaged in the Schuman Declaration 1950 – Declaration by the by French foreign minister Robert Schuman on 9 May 1950, reproduced in Fontaine, Europe – A fresh Start, The Schuman Declaration 1950-90, 1990 43.

II. Citizens of the Union

Even though the European citizenship is defined to constitute the ‘fundamental status of nationals of the Member States’², it still is linked to the **citizenship of a Member State** (which is determined solely by national laws). Thus, the national citizenship is a mandatory condition for the existence of the European citizenship (Article 9 s. 2 TEU, see also mn. 6 et seq.). Characterized by a collection of rights subject to public law, the European citizenship neither replaces nor is positioned equally side by side to the national citizenship. Therefore, a relationship defined by comprehensive rights and duties, comparable to the close link between the individual and the national state, is not constituted by the citizenship of the Union. Nevertheless, the European citizenship confers an additional set of rights upon the individual.³

- 3 On a regular basis, the European Commission issues an **EU Citizenship Report** on the effectiveness of applicable legal rules and the obstacles confronting citizens de facto. The 2010 report⁴ names three categories of actions to be taken by the European institutions and the Member States in order to overcome the obstacles faced by the European citizens in their daily life: where EU law already exists, the report aims at guaranteeing that the specific rights of the citizens are fully enforced by the Member States and furthermore can in fact be exercised by the individuals. As pre-condition for the exercise of a right, the report clarifies the necessity to raise the citizens’ awareness of their rights. The report is based on a public consultation aimed at all European citizens and organisations.⁵ In May 2013, in the year also announced as the as the European Year of Citizens (EY 2013) by the European Parliament and Council⁶, the Commission adopted its newest report on citizenship, identifying 12 new key actions to improve EU citizens’ lives⁷. In the light of the financial crisis in Europe, the Report depicts obstacles faced by workers, students and trainees who wish to cross borders in order to obtain work and education. But also the assertion of rights for all citizens, especially for those members of society who are more vulnerable due to age, mental or physical conditions, is part of the actions envisaged in the Report.

III. Rights and duties

In addition to the rights already guaranteed by the national citizenship, the citizens of the Union are endowed with additional **rights subject to public law**, which normally are connected with the national citizenship of a State.⁸ Those rights are listed in Article 20 para. 2 lit. a to d TFEU and concretized in Articles 21–25 TFEU⁹. The listing in Arti-

² ECJ Cases C-184/99 *Grzelczyk* [2001] ECR I-6193; C-76/05 *Schwarz/Gootjes-Schwarz* [2007] ECR I-16849.

³ *Community*, EU Citizenship Report 2010, COM (2010) 603 final.

⁴ *Ibid.*

⁵ See the analytical report of the citizens’ contributions on EU Citizenship 2012, European Commission, *The EU Citizens’ Agenda, Analysis Report- Public consultation 2012*, <http://ec.europa.eu/justice/citizen/files/report_eucitizenship_consultation_en.pdf>, accessed March 16, 2013.

⁶ Decision 1093/2012/EU of 21 November 2012 on the European Year of Citizens (2013) (OJ L 325/1).

⁷ Available at: <http://ec.europa.eu/justice/citizen/files/2013eucitizenshipreport_en.pdf>, accessed 4 June 2013; accompanied by Commission report of 8 May 2013 on progress towards effective EU Citizenship 2011–2013, COM (2013) 270 final.

⁸ See in particular Article 18 TFEU; ECJ Cases C-85/96 *Martinez Sala* [1998] ECR I-; C-1224/98 *D’Hoop* [2002] ECR I-6212.

⁹ For details see the commentary on Article 21–25 TFEU below.

cle 20 para. 2 TFEU, introduced by the Treaty of Lisbon, is not exclusive ('inter alia') but rather open for the prospective granting of additional rights. The wording only reaffirms the commitment to further strengthen the citizenship stipulated in Article 25 TFEU.

Article 20 para. 2 s. 3 affirms that concerning protection, participation and the freedom of movement, the citizenship of the Union establishes **self-executing individual rights** of the citizens. Merely the precise definition may be ascertained through the formation of secondary rules respecting the crux of the granted rights.

The amendments in the phrasing of Article 20 para. 1 s. 3 TFEU ('shall be additional' instead of hitherto 'shall complement') seem to carry little substantial weight: At the current level of integration, the citizenship of the Union still has a **complementary function** in relation to the citizenship granted by the Member States. An 'independent personal subject of legitimation at European level', completely autonomous in relation to the citizenship of the Member States and therefore independent from their determination, has not been developed so far.¹⁰

Nevertheless, recent decisions of the ECJ can be interpreted as the beginning of a potential alteration of this perception. A strengthening of the citizenship of the Union in relation to the Member States is illustrated by the Court's determination of a **substance of the rights** guaranteed by Article 20 TFEU which may not be touched upon by the Member States. Thereby Article 20 precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.¹¹ According to the ECJ, in the case of a revocation of national citizenship by a Member State, which would lead to the loss of the EU citizenship, the EU principle of proportionality restricts the competence of the Member State to regulate the conditions of nationality.¹² Even though this decision affirms the dependency of EU citizenship on Member State citizenship, it also constrains the State's possible course of action and therefore strengthens the concept of Union citizenship. In *Ruiz Zambrano*, the Court concluded that the refusal by a State to grant the parents of a child, who holds the citizenship of the Union and still is dependent on its parents, permits to reside and work in the State, has the effect of depriving the child's rights under Article 20 TFEU. Remarkably in this case the ECJ grants protection to static EU citizens who had not exercised their right to move and reside freely within another Member State and where thus in a situation previously considered solely internal and outside the scope of EU protections.¹³ Following cases concerning family reunifications between citizens of the Union and third-country nationals¹⁴ concretize the criterion under which Article 20 TFEU requires the granting of residence documents. Only exceptional circumstances, in which the dependent Union citizen otherwise would have to leave the territory of the Union as a whole, conveys the citizenship of the Union protec-

¹⁰ Rightly so the German Constitutional Court in 2009 (*Bundesverfassungsgericht BVerfG*) 2 BvE 2/08 of 30 June 2009 *Treaty of Lisbon*, mn. 349.

¹¹ ECJ Cases C-34/09 *Gerardo Ruiz Zambrano v ONEM* [2011] ECR I-01177, mn. 42; C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-01449, mn. 42.

¹² ECJ *Rottmann* (ibid.), mn. 42, cf. *van Eijken*, European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their National, Case Note, Merkourios 2010, 65 at 68.

¹³ See on the development initiated by the *Zambrano* case: *Mantu*, European Citizenship anno 2011: *Zambrano*, McCarthy and Dereci, 26 J.I.A.N.L. 2012, 40 et seq.; Azoulai, 'Euro-Bonds' The *Ruiz Zambrano* judgment or the Real Invention of EU Citizenship, 3 Perspectives on Federalism 2011, E-31; *Hailbronner/Thym*, Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, Case Note, 48 CMLR 2011, 1253.

¹⁴ ECJ Joined Cases C-356/11 and C-357/11 *O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.* [not yet reported]; ECJ Cases C-40/11 *Yoshikazu Iida v Stadt Ulm* [not yet reported]; C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375; C-256/11 *Dereci and others v Bundesministerium für Inneres* [not yet reported].

tion.¹⁵ In those cases, no cross-border element is necessary. Nevertheless, the ECJ showed in its recent judgments a distinct reluctance to extend its findings in *Zambrano*. It remains to be seen whether the determination of a substance of rights of the citizenship will lead to a concept completely independent from that of nationality.¹⁶

- 8 Even though a Union of ‘the people of Europe’¹⁷ has not been established by the Lisbon Treaty, the strengthening of a European identity through a normative consolidation of the EU citizenship could definitely lead to the formation of such an Union in the medium term. Instruments such as the citizens’ initiative in Article 11 TEU already support this evolution.¹⁸

9 **IV. Loss of the citizenship**

The citizenship of the Union refers to the legal and political status a citizen of a Member State, which is granted beyond the boundaries of the single state. Due to its accessory character, the citizenship of the Union is stringently linked to the citizenship of the Member State. Therefore, a termination of the citizenship of the Member State due to a measure of that State also leads to the discontinuation of the EU citizenship, unless ‘that the reason for withdrawal [...] is not the exercise of the rights and freedoms arising from the Treaty and that withdrawal is not based on any other reason prohibited by Community law’.¹⁹ The probability of the ECJ being willing to acknowledge a citizenship of the Union completely detached from the medium of Member State nationality currently is not too high. In the current state of integration, such a development in the case law of the ECJ would have to be regarded as the crossing of a ‘red line’ and actualize the risk of a serious ‘constitutional crisis’.

Article 21 [Right to move and reside freely] (ex Article 18 TEC)

(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.

(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.

¹⁵ ECJ *O. and S.* (n 14), mn. 82; ECJ *Dereci* (n 14), mn. 66.

¹⁶ See ECJ *Rottmann* (n 192), opinion of AG Poiares Maduro, mn. 23 who speaks of the Union citizenship as an independent legal and political concept; *Kochenov*, The essence of EU Citizenship, 62 ICLQ 2013, 104, n 36.

¹⁷ *Hatje/Kind*, Der Vertrag von Lissabon – Europa endlich in guter Verfassung?, NJW 2008, 1766 use in this context the phrase ‘europäisches Volk’ (people of Europe); The Preamble of the TFEU deliberately speaks of the ‘peoples of Europe’.

¹⁸ See on the recent developments in the field of EU citizenship the Com report of 8 May 2013 (n 7).

¹⁹ Opinion of AG Poiares Maduro in *Rottmann* (n 11); the ECJ followed this argumentation in *Rottmann* (ibid).

Bibliography: *Calabresi-Scholz*, European citizenship – freedom to move and reside in the Member States, 2 European Legal Forum 2011, 97; *Carrera*, What Does Free Movement mean in Theory and Practice in an Enlarged EU?, 11 ELJ 2005, 699; *Cousins*, Citizenship, residence and social security, 32 ELR 2007, 386; *Düsterhaus*, Nationalität – Mobilität – Territorialität. Gemeinschaftsrechtliche Ansprüche mobiler Unionsbürger gegen ihre Heimatstaaten, EuZW 2008, 103; *Iliopoulou/Toner*, A new approach to discrimination against free movers?, 28 ELR 2003, 389; *Odendahl*, Originäre Rechte von Drittstaatsangehörigen auf Zugang zu den Hochschulen in der EG?, Schweizerisches Jahrbuch für Europarecht 2006, 347; *Reich*, Herkunftsprinzip oder Diskriminierung als Maßstab für Studentenfreizügigkeit?, EuZW 2009, 637; *Rogalla/Hermes/Hochheimer*, ‘Digitaler – Dialog’ oder Bürgerinteresse – EU-Freizügigkeit im Schongang. Kritisches zu ‘Schengen und Umgebung’: Wie ein EU-Bürgerrecht ausgehöhlt wird, EuR 2007, 660; *Schweitzer*, Artikel 18 Abs. 1 EGV – Die fünfte Grundfreiheit, in: Fischer-Lescarno et al., Frieden in Freiheit – Peace in Liberty- Pax en liberté: Festschrift Bothe (2008), 1159; *Shuibhne*, Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, 32 ELR 2009, 230; *Winkelmann*, Die Inanspruchnahme des gemeinschaftsrechtlichen Freizügigkeitsrechts durch drittstaatsangehörige Familienmitglieder von Freizügigkeitsberechtigten, Informativbrief Ausländerrecht 2009, 45; *Wollenschläger*, Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime, 2007; *Wollenschläger*, A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, 17 ELJ 2011, 1; *Wollenschläger*, The judiciary, the legislature and the evolution of Union citizenship, in: Syrpis (ed), The Judiciary, the Legislature and the EU Internal Market, 2012, 302.

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I. General remarks

1

The right to move and reside freely within the Member States of the Union is the right associated most directly with the citizenship of the Union.¹ It therefore constitutes an important instrument for the integration of individuals living within the Member States and a concept able to communicate the conception of a united Europe to the citizens themselves.² Irrespective of the different freedoms granted by the Treaty within the framework of the Single European Market, Article 21 TFEU establishes a **general right of every EU citizen** to move and reside freely within the territory of the Member States without a specific purpose of the stay. The ban on restrictions of the general right of free movement has been broadened significantly by case-law of the ECJ starting with the decision in **Martínéz Sala**.³ As the exercise of the freedom to move falls within the scope of the TFEU, it also permits the application of the other provisions of the Treaty and therefore of the principle of non-discrimination established by Article 18 para. 1 TFEU.⁴ The conjunction of the **principle of non-discrimination** and the right to move and reside freely within the Member States established by Article 21 TFEU has led to a far-reaching prohibition on discriminating EU citizens who have made use of their

¹ European Ombudsman press release 14/2011, Special Eurobarometer: Right to move and reside freely in the EU and right to good administration are the most important citizens' right, <<http://www.ombudsman.europa.eu/en/press/release/faces/en/10666/html.bookmark>>, accessed 11 August 2013; *European Commission*, EU citizenship report of 8 May 2013, COM (2013) 269 final, 10.

² See on the importance of Article 21 TFEU: CR/Kluth, Article 21 AEUV, mn. 3, citing *European Commission*, Report of 27 May 1997 on the EU citizenship, COM (97) 230 final, 29.

³ ECJ Case C- 85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁴ *Ibid*; in detail: *Wollenschläger*, A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, 17 ELJ 2011, 21.

freedom to move.⁵ Therefore, national law which discriminates against certain nationals of the Member State concerned and places them at a disadvantage, solely because they made use of the freedom to move to and reside in another Member State, constitutes a restriction of the rights conferred by Article 21 para. 1 TFEU.⁶ Whether this prohibition includes every act connected to the freedom to move and reside – and therefore constitutes a **comprehensive claim to equal treatment** in other Member States – is still contested.⁷

2 However, migrant workers still enjoy better conditions than non-active citizens due to the freedom of movement for workers guaranteed by Article 45 TFEU. For example, according to Article 7 para. 2 of Regulation 1612/68, migrant workers are entitled to the same social and tax advantages granted to nationals of the respective Member State.⁸ The fundamental freedoms linked to the internal market still constitute *legis specialis* in relation to the rights awarded by Article 21 TFEU.⁹

3 II. Scope of application

Protected by the freedom is the movement as well as the residence of EU citizens in other Member States. The protection includes the entry, the free movement within the State as well as the exit. In the current state of case-law, Article 21 TFEU is not applicable to a citizen of the Union who has never exercised his right of free movement and has always stayed in the Member State of nationality.¹⁰

4 The personal scope of application of the Treaties, previously only embracing subjects connected to the single market, is expanded by the provisions on citizenship of the Union.¹¹ The rights arising from the EU citizenship are **subject to the limitations** (e.g. Article 45 para. 3 TFEU) and conditions laid down in other parts of the Treaty as well as in the implementing provisions. For example, the requirements of sufficient means of subsistence and the existence of health insurance coverage need to be met.¹²

5 The conditions laid down in Article 21 TFEU as well as in the implementing provisions pay regard to legitimate interests of the Member States such as public health and security, which, at the same time, are limited by the general principles of the Union.¹³ According to the ECJ in **Baumbast**, the principle of proportionality narrows the scope of limitations a Member State may introduce.¹⁴

6 The case-law of the ECJ can be summarized as acknowledging in general the right of every EU citizen lawfully residing in another Member State to be treated by the state of

⁵ Ibid with further analyses.

⁶ ECJ, Joined Cases C-523/11 and C-585/11 of 18 July 2013 *Prinz v Hannover and Seeburger v Studentenwerk Heidelberg* [not yet reported], mn. 27; ECJ Cases C-75/11 of 4 October 2012 *European Commission v Republic of Austria* [not yet reported]; C-406/04 *De Cuyper* [2006] ECR I-6947, mn. 39; C-499/06 *Nerkowska* [2008] ECR I-3993, mn. 32; C-184/99 *Grzelczyk* [2001] ECR I-6229.

⁷ In detail: *Wollenschläger* (n 4), 21 et seq.; *Kluth* (n 2), mn. 6.

⁸ Commission Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257/2).

⁹ ECJ Case C-100/01 *Olazabal* [2002] ECR I-10981, mn. 26.

¹⁰ ECJ Case C-434/09 *McCarthy* [2011] ECR I-03375.

¹¹ ECJ Cases C-184/99 *Grzelczyk* [2001] ECR I-6229; C-224/98 *d'Hoop* [2002] I-6191; C-148/02 *Gracia Avello* [2003] ECR I-11613.

¹² This precondition was already comprised in Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ L 180/26) and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ L 180/30), replaced by Directive 93/96/EEC of 29 October 1993 (OJ L 317/59). Both Directives were repealed by Council Directive 2004/38/EC of 29 April 2004 (OJ L 158/77).

¹³ ECJ *Martínez Sala* (n 3).

¹⁴ ECJ Case C-413/99 *Baumbast* [2002] ECR I-7136.

residence in the same way, as a citizen of the respective Member State. This principle applies in cases regulated by law of the Union and is subject to the mentioned limitations¹⁵ – in particular the limitations needed to ensure the functioning of national social security systems. In a recent judgment, the ECJ declared that the granting of reduced fares on public transport in principle only to students whose parents are in receipt of family allowances of the host state constitute an interference with Article 21 TFEU which was not justified.¹⁶ However, the Court also recalled that although EU law relating to the free movement of persons allows for a **certain degree of financial solidarity**, persons exercising their rights under Article 21 TFEU should not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore the right of residence for citizens of the Union and their family members for periods in excess of three months is subject to conditions.¹⁷

Concerning **Switzerland**, an agreement between the Union, its Member States and the **Swiss Confederation** on free movement of persons¹⁸ allocates every citizen of the Union a right of entry and residence in Switzerland. Additional protocols guarantee these rights to citizens from the new eastern Member States. The Agreement envisages a phased introduction of free movement between Switzerland and the Union. Transitional periods and a safeguard clause allow restrictions of these rights. In April 2013, the Swiss Federal Council decided to extend the safeguard clause for the EU-8 Member States¹⁹ and invoke the clause for the other 17 Member States for one year to tighten measures against increasing immigration from the European Union.²⁰ In February 2014, a popular initiative aimed at stopping mass immigration was adopted in Switzerland. As a result of this initiative and in order to implement it in Switzerland, the free movement agreement will need to be revised.

III. Directive 2004/38/EC

8

According to Article 21 para. 2 TFEU, 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 freedom to move and reside. Restrictions on the freedoms established in para. 1 may not be based on this authorization. Therefore the instruments of secondary legislation based on para. 2 may not be interpreted as restricting the freedoms granted by the Treaty.²¹

Directive 2004/38/EC²², mainly issued on basis of Articles 12 and 18 TEC, brought together the different sets of provisions and measures that had before governed the freedom to move and reside in the EU. It consumed the Directives 64/221, 68/360, 72/194,

¹⁵ For further analyses, see *Kluth* (n 2), mn. 12a; *Magiera*, Artikel 21 AEUV, in Streinz (ed), EUV/AEUV, 2nd edn 2012, mn. 13 et seq.

¹⁶ ECJ Case C-75/11 of 4 October 2012 *European Commission v Republic of Austria* [not yet reported].

¹⁷ *Ibid*, mn. 60.

¹⁸ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 26 June 1999 (entry into force 1 June 2002) (OJ L 114/6). Additional protocols of 2004 and 2009 guarantee these rights for nationals of the eastern EU Member States including Rumania and Bulgaria. For further information see the webpage of the Federal Office of Immigration of the Swiss Confederation <http://www.bfm.admin.ch/content/bfm/en/home/themen/fza_schweiz-eu-efta/eu-efta_buerger_schweiz.html>, accessed 20 August 2013.

¹⁹ Poland, Hungary, the Czech Republic, Slovenia, Slovakia, Estonia, Lithuania, and Latvia.

²⁰ <http://www.bfm.admin.ch/content/bfm/en/home/themen/fza_schweiz-eu-efta/eu-efta_buerger_schweiz/eu-8.html>, accessed 20 August 2013.

²¹ See on the scope of Directive 2004/38/EC ECJ Cases C-145/09 *Tsakouridis* [2010] ECR I-11979, mn. 21; C-127/08 *Matock* [2008] ECR I-06241, mn. 84; *Magiera* (n 15), mn. 27 et seq.

²² Council Directive 2004/38/EC of 29 April 2004 (OJ L 158/77).

73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 and transferred the already existing set of rules into a single instrument. The Directive regulates the conditions in which citizens of the Union, as well as their families, may exercise their right to move and reside freely within the Member States. It also governs the right of permanent residence and the legitimate restrictions of these rights on grounds of public policy, security or health.

- 9 Articles 5 and 6 of the Directive deal with the right to enter and remain in another Member State for up to three months without any entry or exit visa. Some of the most important provisions of the Directive are Articles 16 et seq. dealing with the right of **permanent residence**. According to these Articles, after five years of uninterrupted legal residence in another Member State, every citizen of the Union is entitled to permanent residence in the host State. The same applies to family members of the citizen who themselves are not nationals of a Member State but have lived with the EU citizen in another Member State for at least five years. According to Article 2, family members are spouses, dependent direct descendants of the spouse or partner or of the citizen as well as dependent direct relatives of those. Host Member States are only obliged to treat registered partners of a citizen as family if the legislation of the host Member State treats **registered partnerships** as equivalent to marriage. Therefore in many cases, registered partners do not enjoy the entitlements awarded by the Directive.
- 10 Considering the requirement of proof of sufficient resources and health insurance as for example laid down in Articles 7, 8, 12 and 13 of the Directive, a comprehensive right to equal treatment is not established by the Directive. It needs to be seen whether the ECJ will grant such a far-reaching entitlement in the future.

Article 22 [Right to vote and stand as candidate]
(ex-Article 19 TEU)

(1) Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

(2) Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Bibliography: *Besselink/Mourik*, The roles of the national parliament and the European Parliament in EU decision-making, 15 E.P.L. 2009, 207; *Burkholz*, Teilnahme von Unionsbürgern an kommunalen Bürgerentscheiden?, 48 DÖV 1995, 816; *Dürig*, Das neue Wahlrecht für Unionsbürger bei den Wahlen zum Europäischen Parlament, NVwZ 1994, 1180; *Eijk*, The Multilevel Electoral System of the EU, 2008; *Engelken*, Nochmals: Teilnahme von Unionsbürgern an kommunalen Bürgerentscheiden?, DÖV 1996, 737; *Fabbrini*, Voting rights for non-citizens: the European multilevel and the US federal constitutional systems compared, 7 ECLR 2011, 392; *Geyer*, Trends in the EU-27 Regarding Participation of Third-Country Nationals in the Host Country's Political Life, Briefing Paper for the LIBE Commission of the

European Parliament, <http://www.libertysecurity.org/IMG/pdf_EST17153.pdf>, accessed 10 August 2013; *Groenendijk*, Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn, (2008); *Gundel*, Probleme der Umsetzung des EG-Kommunalwahlrechts und ihrer gerichtlichen Kontrolle in Frankreich und Deutschland, 52 DÖV 1999, 353; *Lansbergen/Shaw*, National membership models in a multilevel Europe, 8 International Journal of Constitutional Law 2010, 50; *Oriol*, Le Droit de Vote des Résidents Etrangers dans l'Union Européenne, 114 Migrations Société 2007, 83; *Pieroth/Schmülling*, Die Umsetzung der Richtlinie des Rates zum Kommunalwahlrecht der Unionsbürger in den deutschen Ländern, 113 Deutsches Verwaltungsblatt 1998, 365; *Reich*, Bürgerrechte der EU, 1999; *Schraper*, Die Richtlinie 94/80/EG zum aktiven und passiven Kommunalwahlrecht für Unionsbürger, DVBl. 1995, 1167; *Schrauwen*, Granting the right to vote for the European Parliament to resident third-country nationals: civic citizenship revisited, 19 ELJ 2013, 201; *Shaw*, The Transformation of Citizenship in the European Union, Electoral Rights and the Restructuring of Political Space, 2007; *Strejcek*, Das Europawahlrecht, in: Hammer and others (eds), Demokratie und sozialer Rechtsstaat in Europa, 2004, 395; *Zibouh*, Le Droit de vote des étrangers aux élections municipales de 2006 en Belgique, 114 Migrations Société 2007, 141.

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I. General remarks

1

The rights laid down in Article 22 TFEU correspond with and flank the (almost) comprehensive freedom of movement established by Article 21 TFEU. Article 22 TFEU replaces in parts the requirement of nationality with the precondition of **residential qualifications**. For the **participation in the political life of the local community** (municipal elections) as well as for the **democratic participation at the level of the European Union** (elections to the European Parliament) the residence of the citizen of the Union is decisive (also see Article 20 para. 2 lit. b). In principle, the introduction of further reaching rights of political participation (as for example a broader right to take part in elections) is possible as Article 25 TFEU sets out the option of adding new rights to the EU citizenship. However, according to the German *Bundesverfassungsgericht*, such an expansion of rights may not constitute a replacement of, or superimpose the citizenship of the Member States.¹ Therefore, at least for Germany, the process of integration and the enhancement of rights of EU citizens, is limited by the sovereignty of the Member States and the identity of their people.

II. Municipal elections

2

For the citizens of the EU, the rights conferred by the Union ought to be an improvement and enhancement of the previously existing rights. But as the freedom of movement for EU citizens most of the time is accompanied with the loss of political participation rights in the municipality of origin, the granting of voting rights at the new place of

¹ BVerfG 2 BvE 2/08 of 30 June 2009, <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>, accessed 8 August 2013, mn. 350. See on the judgment inter alia *Fischer-Lescarno/Joerges/Wonka* (eds), The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives, 2010, <<http://www.mpifg.de/people/mh/paper/ZERP%20Discussion%20Paper%201.2010.pdf>>, accessed 8 August 2013; *Kiiver*, The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU, 16 ELJ 2010, 578; *Grosser*, The Federal Constitutional Court's Lisbon Case: Germany's Sonderweg – An Outsider's Perspective, 10 German Law Journal 2009, 1263; *Schorkopf*, The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon, 10 German Law Journal 2009, 1219.

residence is a necessary compensation to the individual. At the same time, the granting of participation rights outside the home state is a tool to increase the sense of social and political adherences across the borders of the Member States. Therefore it contributes to the development of a desired **European identity** of the peoples.

- 3 Already in 1975, the Commission considered the granting of voting rights to 'Community nationals' in municipal elections.² Ten years later, the idea was discussed in detail in the **Adonnino Report** by the ad hoc committee 'On a People's Europe'.³ In 1988, the Commission **proposed a Council Directive** on voting rights in local elections.⁴ However, the proposal was never adopted.⁵ Instead, the right to vote was embraced by primary law in the Maastricht Treaty (Article 8b para. 1 Maastricht Treaty, Article 19 TEC).
- 4 Article 22 para. 1 TFEU guarantees every EU citizen who resides in a Member State of which he or she is not national the **right to vote and to stand as a candidate** at municipal elections in the Member State in which he or she resides. Citizens of the Union are therefore in this regard equated with citizens of the Member States who live in the same municipality. This right is also laid down in Article 40 CFREU.
- 5 The Member States are obliged to allow the exertion of this right by citizens from other Member States. The exertion of the right is subject to arrangements by the Council (para. 1 s. 2) which were realised by the **Council Directive 94/80/EC**.⁶ Nevertheless, the Directive provides two exceptions from the right to vote and to stand for election: Article 12 of the Directive permits **derogations** from the general rule in cases in which problems specific to a Member State justify such an action. For example, a high percentage of EU citizens of voting age who reside in it but are not nationals of a Member State might allow for derogation from the general rule.⁷ In this regard, Article 12 speaks of a percentage of 20 % of the population. As for 2012, **Luxembourg** is the only Member State that meets these conditions and has made use of the derogation. Therefore, in Luxembourg the right to vote and to stand as a candidate is only granted to non-national EU citizens who have had their legal domicile and have resided in the territory for at least five years before registration.⁸ According to Article 12 para. 2, **Belgium** may apply restrictions to a limited number of local government units but has never made use of this derogation.⁹
- 6 Article 5 para. 3 of the Directive enables the Member States to restrict the offices of elected head, deputy or member of the governing college of the executive body of the local administration to its own nationals. In nearly half of the Member States legislation restricts the access to at least some of the mentioned offices to nationals.¹⁰

² Commission Report COM (75) 321 final of 2 July 1975 26 at 31; see on the historical background *Magiera*, Article 22 TFEU, in Streinz (ed), EUV/AEUV (2nd edn 2012), mn. 1–5.

³ Ad Hoc Committee 'On a People's Europe', of 28 and 29 June 1985 (EC Bull Suppl 7/85) at 20.

⁴ COM (88) 371 final of 11 July 1988 (OJ 346/3); amended by COM (89) 524 final of 17 October 1989 (OJ C-290/4); see *Magiera* (n 2) mn. 2.

⁵ *Magiera* (n 2) mn. 2.

⁶ of 19 December 1994 (OJ L 368/38); last amended by Council Directive 2013/19/EU of 13 May 2013 (OJ L 158/231) by reason of the accession of the Republic of Croatia. See also the 2006 amendment by Council Directive 2006/106/EC of 20 November 2006 (OJ L 363/409) by reason of the accession of Bulgaria and Romania.

⁷ See the Commission Report COM (2005) 382 final of 22 August 2005 in which the Commission concludes the circumstances warranting the granting to Belgium and Luxembourg of a derogation apply. In the 2012 Commission Report COM (2012) 99 final of 9 March 2012, Luxembourg is named to be the only Member State that meets the conditions and has made use of the derogation (11 et seq.).

⁸ Commission Report COM (2012) 99 final of 9 March 2012, 11 et seq.

⁹ *Ibid.*

¹⁰ For a detailed analyses, see the Commission Report COM (2012) 99 final of 9 March 2012, at 10 et seq.

Directive 94/80/EC essentially aims at a removal of nationality as a requirement for the exercise of voting rights. Therefore it establishes the **principle national treatment** for EU citizens in comparison to nationals of the respective Member State. As citizens of other Member States need to fulfil the same preconditions as nationals, the right awarded by Article 22 TFEU solely stipulates a **prohibition of discrimination** on the basis of nationality. Article 22 TFEU does not call for a harmonization of other preconditions as required by national law of the Member States.¹¹ Although the implementation of the 1994 Directive had to be achieved by January 1996, it was only completed in 1999. France, the last Member State to hold elections organised on the basis of the Directive, applied the provisions in the municipal elections 2001.¹² For the implementation of the Directive, constitutional amendments had to be initiated in several Member States.¹³

Other forms of political participation on the local level (petitions for a referendum, local councils and other) are not covered by the Directive. Under the current law of the Union, the establishment of participation rights for non-national EU citizens in this regard is possible but not demanded and could be achieved by use of Article 25 TFEU.

III. Elections to the European Parliament

The existence of direct elections to the European Parliament (Article 14 TEU, Article 223 TFEU), combined with the Parliament's authority to significantly participate in and partly determine the legislation of the Union, is one of the strongest arguments in favour of the existence of an adequate democratic legitimation of the Union. Therefore, the existence of elections to the European Parliament goes beyond the aim of creating a **European identity** among the peoples of Europe. The direct link between the citizens of the Member States and one of the decision making entities at European level becomes imperative as the process of integration proceeds. Article 22 TFEU awards this right to have a part in the creation of the ever stronger Union of peoples to every non-national citizen of the Union at the place of residence of another Member State. Thereby, Article 22 TFEU presupposes the existence of a right to vote for elections of the EP.¹⁴ Its significance rests upon the partly overcoming of nationality as precondition of political participation. For example, the political integration established by this provision leads to the election of candidates of one Member State also with the votes of non-nationals.¹⁵

Every citizen of the Union is endowed with the right to vote and stand as a candidate in elections to the European Parliament at the place of his residence – subject to the national preconditions that apply to the Member State's own nationals. This right is also laid down in Article 39 CFREU.

Article 22 para. 2 TFEU only aims at a **prohibition of discrimination** on the basis of nationality. A detailed regulation of the election to the European Parliament is not envisaged by Article 22 TFEU. A harmonisation and standardisation of the procedure of election could be achieved on the basis of Article 223 para. 1 TFEU but has not been reached so far. **Decision 76/787/ECSC, EEC, Euratom** relating to the Act concerning the election

¹¹ COM (2002) 260 final, 1.

¹² COM (2002) 260 final, 2.

¹³ For example in Germany, Article 28 para. 1 s. 3 of the *Grundgesetz* was integrated; see on the constitutional obstacles in the Member States *Groenendijk*, Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn, 2008, 6 et seq.

¹⁴ ECJ Cases C-145/04 *Spain v UK and Northern Ireland* and C-300/04 *Eman and Sevinger* [2006] ECR I-07917, Opinion of AG Tizzano, mn. 69; *Hatje*, Artikel 22 AEUV, in: Schwarze, EU-Kommentar, 3rd edn 2012, mn. 19.

¹⁵ *Hatje*, Artikel 22 AEUV, in: Schwarze, EU-Kommentar, 3rd edn 2012, mn. 1.

of the representatives of the Assembly by direct universal suffrage¹⁶ only constitutes a partial regulation.¹⁷ **Directive 93/109/EC** laying down detailed arrangements for the exercise of the right to vote (Article 4 para. 1) and stand as a candidate (Article 4 para. 2) in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, merely develops the arrangements to ensure the equal treatment of non-national EU-citizens. The voting procedure in the Member States is governed by national law and is therefore diverse. In 2006, the ECJ confirmed the liberty of the EU countries to regulate aspects of the electoral procedure not harmonised at EU level.¹⁸ In particular, the Member States may define the persons entitled to vote and to stand as a candidate in elections to the European Parliament.¹⁹ Therefore they are free to grant this right to persons other than their nationals or EU citizens.²⁰ However, the Member States are obliged to obey the law of the EU, including its general principles. The unequal treatment of EU citizens in comparable situations is therefore illegitimate, unless it can be justified by objective reasons. The right to vote in elections to the EP is also protected by Article 3 of Protocol 1 ECHR.²¹

- 12 According to Directive 93/109/EC no citizen may vote in more than one country in the same election. Similar to the provisions governing the right to vote in municipal elections, the Directive allows exceptions: if more than 20 % of the eligible voting population are non-nationals, the Member State may require an additional period of residence for participating in the elections.²² As for 2013, Luxembourg is the only Member State which qualifies for this derogation.²³
- 13 In view of the 2014 European elections and the still existing misperceptions concerning the rights awarded to the citizens²⁴, the Commission issued a Communication²⁵ and a Recommendation²⁶ suggesting actions to be taken by the Member States and the national and European political parties in order to further enhance the democratic conduct of the elections.

**Article 23 [Protection by diplomatic or consular authorities]
(ex Article 20 TEC)**

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by

¹⁶ Amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002 (OJ L-283/01).

¹⁷ *Magiera*, (n 2), mn. 23.

¹⁸ ECJ Case C-300/04 *Eman and Sevinger* [2006] ECR I-8060, mn. 45, 60.

¹⁹ ECJ Case C-145/04 *Spain v UK and Northern Ireland* [2006] ECR I-7961, mn. 78.

²⁰ Ibid; also see the 2013 Study by *Arrighi et al.*, Franchise and electoral participation of third country citizens residing in the European Union and of EU citizens residing in third countries, <<http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=94778>>, accessed 10 August 2013, 21.

²¹ ECHR App. no 24833/94 of 18 February 1999 *Matthews v UK* ECHR 1999-I.

²² Article 14 of the Directive. See on the granting of a derogation for Luxembourg the Commission Report COM (2003) 31 final of 27 January 2003 and COM (2007) 846 final of 20 December 2007.

²³ Commission Report COM (2013) 126 final of 12 March 2013 preparing for the 2014 European elections, 9.

²⁴ See the Commission Report COM (2010) 605 final of 27 November 2010 on the election of Members of the European Parliament and the survey by the Gallup Organization, Electoral rights of EU citizens <http://ec.europa.eu/justice/policies/citizenship/docs/eurobarometer_surveys_2010/electoral_rights_eu_citizens_summary_102010_en.pdf> accessed 10 August 2013.

²⁵ Ibid., 9.

²⁶ Commission Report COM (2013) 1303 final of 12 March 2013.

the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Bibliography: *Bleckmann*, Anspruch auf diplomatischen Schutz durch Klage vor dem Europäischen Gerichtshof, *Europäisches Wirtschafts- & Steuerrecht* 1995, 213; *von Bogdandy/Arndt*, *European Citizenship*, in: Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2012); *Busse*, Enthält Article 20 S. 1 EGV einen unmittelbaren Anspruch auf diplomatischen und konsularischen Schutz?, *Europablätter* 1999, 92; *Forni*, The Consular Protection of EU Citizens during Emergencies in Third Countries, in: de Guttery, Gestri and Venturini, *International Disaster Response Law*, 2012, 155; *Ianniello Saliceti*, The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services, 17 *E.P.L.* 2011, 91; *Moraru*, Protection of EU citizens abroad: A legal assessment of the EU citizen's right to consular and diplomatic protection, 3 *Perspectives on Feralism* 2011, 67; *Pavlovič*, Protection of EU Citizen according to Article 23 TFEU: Diplomatic Protection as defined by International Law?, 2 *Ad Alta Journal of Interdisciplinary Research* 2012, 30; *Ruffert*, Diplomatischer und konsularischer Schutz zwischen Völker- und Europarecht, 35 *Archiv des Völkerrechts* 1997, 459; *Storost*, Der Fall Abbasi: Wegbereiter eines gemeineuropäischen Anspruchs auf diplomatischen Schutz?, 42 *Archiv des Völkerrechts* 2004, 411; *Szczekalla*, Die Pflicht der Gemeinschaft und der Mitgliedstaaten zum diplomatischen und konsularischen Schutz, 34 *EuR* 1999, 325; *Vermeer-Kunzli*, Where the law becomes irrelevant: consular assistance in the European Union, 60 *International & Comparative Law Quarterly* 2011, 965; *Vigni*, Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution?, *EUI Law Working Paper* 2010, 28.

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I. Protection abroad

1

The protection granted by the national state to its citizen abroad comprises two subject matters to be differentiated: one aspect is the assistance accorded to citizens abroad (eg by means of information, advice, aid and relief) which is primarily administrated by the consular authorities of the national state (**consular assistance**); the other aspect is the invocation by a state of the responsibility of another state for an injury caused by an internationally wrongful act to a national of the former state¹ (**diplomatic protection**), particularly in cases in which the minimum standard of protection for aliens is not met.² Both aspects of protection are firmly anchored in international law and regulated by both treaty and customary law³ and conduce to the understanding of Article 23 TFEU.

¹ See Article 1 of the Draft Articles on Diplomatic Protection adopted by the International Law Commission (ILC) GA OR A/61/10 of 2006, suppl. no 10.

² *Dugard*, Diplomatic Protection, in: Wolfrum (ed), *MPEPIL*, 2009, mn. 3; *Dienelt*, Vienna Convention on Consular Relations, 1963, *ibid*, mn. 15.

³ The Vienna Convention on Diplomatic Relations, 500 UNTS 1964, 95 and the Vienna Convention on Consular Relations, 596 UNTS 1967, 262 codify the relevant customary international law; fundamental on diplomatic protection also: ICJ *Nottebohm (second phase)* I.C.J. Reports 1955, 4.

2

II. Protection of the EU citizens

1. Wording and content

One of the rights attached to the European citizenship is the entitlement to protection by the diplomatic or consular authorities of a Member State in third countries embodied in Articles 23 and 20 para. 2 lit c TFEU. Unlike the other freedoms and rights warranted by the concept of EU citizenship, the entitlement laid down in Article 23 TFEU is not limited to the borders of the European Union but aims at a protection outside the territory of the Union. It thus constitutes a distinct enhancement of the concept of the EU citizenship from a mere political to a legal status.⁴

3 According to Article 23 TFEU the Member States afford the necessary protection by diplomatic and consular authorities to citizens of the European Union in the territory of a third state **on the same conditions as to their own nationals**. This rule applies in cases in which the national state of an EU citizen is not represented by consular and diplomatic authorities in the third state (also see Article 46 CFREU). This might particularly be the case for smaller Member States in many regions of the world. An estimated 9 million citizens travel to or live outside the EU in countries where their Member State is not represented.⁵ Given the rising number of trips to third states⁶ and the increasing geographical mobility for the purpose of education and profession, the entitlement expressed in Article 23 TFEU is of high practical relevance for the life of a significant and still rising number of EU citizens. Article 23 TFEU is to be applied by analogy to legal persons incorporated in a Member State.

4 The introduction of para. 2 by the Lisbon Treaty affirmatively answered the hitherto unanswered question, of whether the Union is entitled to issue directives for the purpose of cooperation in this field. An assertion of this competence is illustrated by the Commission's proposal for a Directive on consular protection in 2011.⁷

5

2. Clarification and enhancement of rights

a) Consular assistance

Despite Article 23 TFEU, **Decision 95/553/EC** of 18 Dec 1995⁸, which only entered into force in May 2002, already introduced a common protection arrangement regarding consular assistance for EU citizens. The Decision was based on the protection codified in Article 8 TEC, which comprises the same provision as Article 23 TFEU. According to the Decision, assistance is to be offered by every consular and diplomatic authority of a Member State, if in the place in which the EU citizen is located, neither a permanent rep-

⁴ On the development of consular protection in the EU see the CARE Report of 2010: Citizens Consular Assistance Regulation in Europe, Report on Consular and Diplomatic Protection, Legal framework in the EU Member States, <<http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>>, accessed 2 May 2013, 22 et seq.

⁵ As for 2009. See *Commission* Communication, Justice, freedom and security in Europe since 2005: An evaluation of The Hague programme and action plan, COM (2009), 263 final.

⁶ According to the 2006 Green Paper of the Commission, estimated 180 million trips were carried out each year; *Commission*, Green Paper, Diplomatic and Consular protection of Union citizens in third Countries, COM (2006), 712 final, 4.

⁷ Cf. mn. 6; COM (2011) 881 final.

⁸ Decision 95/553/EC of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (OJ 1995 L314/73).

resentation nor an Honorary Consul competent for such matters of the citizen's home state or another state representing it on a permanent basis, is accessible. According to Article 5 para. 1 of the decision, the protection includes (a) assistance in cases of death, (b) assistance in cases of serious accident or serious illness, (c) assistance in cases of arrest or detention, (d) assistance to victims of violent crime, (e) the relief and repatriation of distressed citizens of the Union. Beyond that, the consular and diplomatic representations of Member States in a third state may, to the extent to which they are competent, grant assistance to EU citizens in other cases. The decision makes clear that all costs of assistance to a foreign citizen in any case are imposed on the state of nationality, thus Member States are not restrained from assisting by monetary considerations. The course of action to be taken by the consular officer is supplemented by a decision concerning measures to be applied in practice by the consular authorities⁹ and other decisions concerning the issuing of an emergency travel documents¹⁰.

In November 2006, the Commission issued a **Green Paper on 'diplomatic and consular protection of Union citizens in third countries'**¹¹, containing proposals for a better protection of EU citizens abroad.¹² Those proposals were integrated into an European Union **'Action Plan 2007–2009'**¹³, which, in fact, was restricted to consular assistance. Public consultations¹⁴ led to the 2010 Final Report on 'Consular and Diplomatic Protection Legal Framework in the EU Member States' by the CARE project. The Report summarizes and compares the national legal frameworks concerning consular assistance in the Member States. The identified differences in law and obstacles in fact were also picked up in the 2010 EU Citizenship Report¹⁵. Following this Report, one year later the Commission presented a Communication on consular protection¹⁶. With the goal of establishing legally binding rules on cooperation and coordination between consular authorities of the EU Member States, the Commission also issued a **proposal for a Directive** on consular protection for Union citizens abroad¹⁷ to be adopted under the new Article 23 para. 2 TFEU.

b) Diplomatic protection

While the implementation and strengthening of consular assistance is pursued effectively in the Union, the realization of **diplomatic protection** for non-national EU Citizens hardly is promoted. This might be due to more diverse national traditions, legal frameworks and administrative practice. But against the background of the non-existence of a state's legal duty under international law to protect its own citizens¹⁷, the absence of a fast

⁹ See the second report from the Commission on citizenship of the Union COM (97) 230 final (not published in OJ) 12.

¹⁰ Decision 96/409/CFSP of 25 June 1996 (OJ 168/04).

¹¹ COM (2006) 712 final. Prior to the Green Paper, the Council Working Group promoting consular cooperation (COCON) had issued guidelines on consular protection of EU citizens in third countries (Document 10109/06 of 2 June 2006) also see EP Resolution A6-0454/2007 of 11 December 2007 (OJ C 323E/02, 120) and the EESC OP of 14 March 2007 (OJ C 161/75).

¹² COM (2007) 767 final of 5 December 2007, Effective consular protection in third countries: the contribution of the European Union Action Plan 2007–2009; also see the Commission staff working documents SEC(2007)/1600 final and SEC(2007) 1601 of 5 December 2007.

¹³ CARE (Citizens Consular Assistance Regulation in Europe) Report, Consular and Diplomatic Protection Legal Framework in the EU Member States, <<http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>>, accessed 17 May 2013.

¹⁴ COM (2010) 603 final, 9 et seq.

¹⁵ COM (2011) 149 final.

¹⁶ (n 7). As for June 2013, the proposal is still discussed at the EP and the Council.

¹⁷ Cf. the commentary on Article 2 of the ILC Draft Articles on Diplomatic protection 2006, Report of the ILC 58th session, A/61/10, mn. 50.

development in the field of protection for citizens from other Member States is not surprising.

- 8 While Article 23 TFEU speaks of protection by diplomatic authorities, the term itself does not reveal the actual content of the described protection. While the German version of Article 23 TFEU refers to ‘diplomatic and consular protection’ (*diplomatischen und konsularischen Schutz*) and therefore seems to include the field of diplomatic protection, the wording in all other languages is less clear as consular assistance might also be facilitated by diplomatic authorities.¹⁸ The wording chosen for Article 23 TFEU could be understood as containing the whole area of protection of citizens abroad, thus including diplomatic protection as well as consular assistance.¹⁹ On the other hand, Article 23 TFEU is part of a set of articles, granting specific rights to EU citizens. Would Article 23 TFEU therefore entitle citizens of the Union to diplomatic protection as it traditionally is regarded under international law, the provision might grant third-country nationals a right not even nationals of the Member States traditionally own. Even though Article 23 TFEU entitles EU citizen only to protection under the same conditions as the nationals of that State and therefore would not grant a right, the national does not possess, the inclusion of all EU citizens in a Member State’s system of diplomatic protection would constitute a significant change in the traditionally restrictive system of diplomatic protection. International law does not prohibit states to go beyond the current level of diplomatic protection²⁰ however, the cautiousness of the international actors to extend the states’ discretion into an actual right of the individual cannot be denied.²¹
- 9 Assuming the willingness of the Member States to provide assistance includes this range of protection, international law concerning diplomatic protection might demand additional requirements. The exercise of diplomatic protection as a right of the national state is justified by the bond between the person and its home state. The same link is not available between the person and another EU Member State as a different entity under international law.²² Thus, in the view of customary international law as well as Article 46 Vienna Convention on Diplomatic Relations, the consent of the third state is an additional requirement for the exercise of diplomatic protection. In the case of consular assistance, a notification would be sufficient – provided the third state raises no objection. The development under Article 23 TFEU concerning diplomatic protection thus raises a multiplicity of questions. The open wording of the provision itself does not preclude progress in this field, but considering the non-existence of an individual right to diplomatic protection under international law, the acceptance of such a right arising from Article 23 TFEU even for citizens of other EU states would be a big step for the Member States and a significant enhancement of the European citizenship itself.

***Article 24 [Elements of a participative democracy]
(ex-Article 21 TEU)***

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the

¹⁸ von Bogdandy/Arndt, European Citizenship, in Wolfrum (ed), Max Planck Encyclopedia of Public International Law, 2012, mn. 16.

¹⁹ Ibid, mn. 16 et seq.; Pavlovič, Protection of EU Citizen according to Article 23 TFEU: Diplomatic Protection as defined by International Law?, 2 Ad Alta Journal of Interdisciplinary Research 2012, 31.

²⁰ Moraru, Protection of EU citizens abroad: A legal assessment of the EU citizen’s right to consular and diplomatic protection, 3 Perspectives on Federalism 2011, 85.

²¹ The ILC Draft articles (n 17) express the traditional view on diplomatic protection.

²² Ibid, 32; for details on the question of diplomatic protection see Pavlovič (n 19).

procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions, bodies, offices or agencies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Bibliography: See the bibliography of Article 20 TFEU. *Bouza García et al.* (eds), *The European Citizens' Initiative – A First Assessment*, 2012; *Conrad*, *The European Citizens' Initiative*. *Transnational Democracy in the EU at last?*, 1 *Stjórnmal & Stjórnýsla* 2011, 5; *Deplano*, *The Citizens of Democracy: Participation for Integration in the European Union after the Lisbon Treaty*, 19 *Human Rights Brief* 2011, 8; *Eckhardt*, *Die Akteure des außergerichtlichen Grundrechtsschutzes in der Europäischen Union*, 2010; *Gromek-Broc*, *The future of European integration: could it bring a 'Europe of citizens'?*, 18 *Cov. Law Journal* 2013, 1; *Guckelberger*, *Der Europäische Bürgerbeauftragte und die Petition zum Europäischen Parlament*, 2004; *Guckelberger*, *Die Europäische Bürgerinitiative*, 63 *DÖV* 2010, 745; *Gundel*, *Zur Sprachenregelung bei den EG-Agenturen – Abschied auf Raten von der Regel der 'Allsprachigkeit' der Gemeinschaft im Verkehr mit dem Bürger*, *EuR* 2001, 776; *Kaufmann*, *Transnational Citizens' initiative – How modern Direct Democracy can make the European Union a better place for Minorities*, in: *Marxer* (ed), *Direct Democracy and Minorities*, 2012, 230; *Obwexer*, *Petitions- und Beschwerderecht in der EU*, *ecolex* 1995, 772; *Suchman*, *European Citizens' (may soon take the) Initiative*, *The Columbia Journal of European Law Online* 2010, 59; *Tsadiras*, *Unraveling Ariadne's Thread: The European Ombudsman's Investigative Powers*, 45 *CMLR* 2008, 757; *Urrutia/Lasagabaster*, *Language Rights as a General Principle of Community Law*, 8 *German Law Journal* 2007, 479; *Vos*, *Reforming the European Commission: What role to play for EU Agencies?*, 37 *CMLR* 2000, 1113; *Yvon*, *Sprachenvielfalt und europäische Einheit – Zur Reform des Sprachenregimes der Europäischen Union*, *EuR* 2003, 681.

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I. General remarks

1

Article 24 TFEU embodies the thought that a wide-ranging dialogue between the institutions of the Union and the European citizens is necessary to legitimate the on-going process of integration leading towards a Europe of the people. These **elements of a participative democracy** go beyond the mere act of voting in the elections to the European Parliament as regulated in Article 22 para. 2 TFEU and constitute at least a partial compensation for the rudimentary existence of a European public sphere.¹ In a rather unsystematic manner, Article 24 TFEU refers to four different rights of EU citizens: the citizens' initiative as laid down in Article 11 TEU, the right to petition to the European Parliament (Article 227 TFEU), the right to apply to the (European) Ombudsman (Article 225 TFEU) and the right to communicate with the organs of the Union in the citizen's

¹ Also see the Council Decision 2004/100/EC of 26 January 2004 establishing a Community action programme to promote active European citizenship (civic participation) (OJ L 30/6).

own language. The listing of all these rights in Article 24 TFEU identifies them as inseparably linked to the European citizenship.

2

II. Elements of a participative democracy

1. Citizens' initiative

Article 24 TFEU lays down the legislative procedure for the specification of rules and modalities governing the **citizens' initiative** introduced in Article 11 para. 4 TEU by the Lisbon Treaty. By means of a citizens' initiative, citizens can invite the European Commission to propose legislation in any field where the Commission has the power to do so.²

3 In 2011, the EP and the Council issued **Regulation 211/2011**³ in which the procedure and the conditions required for a European citizens' initiative were established. While Article 11 para. 4 TEU already sets out the requirement of support for the initiative of at least one million nationals of Member States, the 2011 regulation further clarifies this condition: according to Article 7 of the Regulation, signatories of an initiative need to come from at least one quarter – and therefore from at least seven – of the currently 28 Member States. In each of these Member States, a minimum number of signatories, corresponding to the number of the Members of the European Parliament elected in each Member State and multiplied by 750⁴, is required. As for 2013, the minimum numbers vary from 4.500 signatories (Cyprus, Estonia, Luxembourg and Malta) to 74.250 (Germany).⁵ The Regulation came into force in April 2012. February 2013 saw the first initiative to succeed in collecting the required number of signatures.⁶ In 2014, the first two initiatives were submitted to the Commission and were answered in Communications.⁷

4 But even if the aforementioned conditions are met, the Commission is not required to propose legislation, but rather may decide whether and what action it will propose. However, the Commission has the duty to set out its conclusions on the initiative and explain its reasons for taking or not taking action in a communication within three months after receiving the initiative.⁸

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2. Individual rights to complain

Article 24 subparas. 2 and 3 TFEU contain a **cross-reference** to the extrajudicial rights of the individual to petition the European Parliament and to complain to the European Ombudsman as established in Articles 227 and 228 TFEU.⁹ These rights are also integral part of the citizens' rights as established in **Articles 43 and 44 CFREU**. Unlike the voting

² For further information see the commentary on Article 11 para. 4 TEU and the official register of the citizen's initiative at <<http://ec.europa.eu/citizens-initiative/public/welcome>>, accessed 7 August 2013.

³ Regulation 211/2011 of 16 February 2011 on the citizens' initiative (OJ L 56/1).

⁴ See Article 7 para. 2 of the Regulation (ibid.). A list of the minimum number per Member State is available at <<http://ec.europa.eu/citizens-initiative/public/signatories>>, accessed 8 August 2013.

⁵ As for August 2013.

⁶ Commission press release IP 13/107 of 11 February 2013, <http://europa.eu/rapid/press-release_IP-13-107_en.htm>, accessed 8 August 2013.

⁷ See the Commission Communications on the European Citizens' Initiative 'One of us' COM (2014) 355 final and on the European Citizens' Initiative 'water and sanitation are a human right! water is a public good' initiatives can be found on the official website of the citizens' initiative register (n 2).

⁸ Article 10 para. 2 of the Regulation (n 5).

⁹ See on petitions and complaints between 2011 and 2012: Commission Report of 8 May 2013 on progress towards effective EU citizenship 2011–2013 COM (2013) 270 final.

rights laid down in Article 22 TFEU, the right to petition and to apply to the Ombudsman are not limited to EU citizens, but are also awarded to every natural or legal person residing or having its registered office in a Member State.¹⁰

3. Communication with the Union

6

In contrast, Article 24 subpara. 4 TFEU confers a **self-contained right** to communicate with the organs of the European Union. Not only is the individual citizen of the Union awarded the right to correspond directly and in written form with the organs and institutions named in Article 24 TFEU or Article 13 TEU, the citizen may also choose the language of the correspondence from one of the official treaty languages as mentioned in Article 55 para. 1 TEU. This right is also awarded by Article 41 para. 4 CFREU. Already in 1958 a **Council Regulation** determined the languages to be used by the EEC and established the citizen's right to choose the language of correspondence.¹¹ The achievement of Article 24 TFEU is the transfer of this right into primary law of the Union.¹² The provision is connected to other guarantees of transparency and **good governance** which are reinforced by the Lisbon Treaty and laid down in Articles 15, 16 and 298 TFEU as well as in the CFREU.¹³ The right to correspond with the institutions in any treaty language is another example of the effort to establish a closer connection between the Union and the people living within its Member States. However, regional languages or languages used by ethnic minorities, even though they are subject to extensive efforts of protection by the EU¹⁴, are not covered by this guarantee.

As the guarantee established by Article 24 TFEU only applies to communication with the bodies, agencies and institutions mentioned in this provision or in Article 13 TEU¹⁵, the growing **proliferation of administrative units** not referred to in these Articles – notably the 'Agencies' established by secondary sources of EU law- and the accompanied relocation of essential activities of these bodies, should be regarded critically.¹⁶

Article 25 [Further development of Union citizenship] (ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

¹⁰ Articles 227, 228 TFEU. Also see *Magiera*, Article 24 TFEU, in Streinz (ed), EUV/AEUV, 2nd edn 2012, mn. 7.

¹¹ EEC Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17/385); see *Hatje*, Artikel 24, in Schwarze (ed), EU-Kommentar, 3rd edn 2012, mn. 4.

¹² *Magiera* (n 10), mn. 10.

¹³ Articles 41, 42 CFREU. See *Magiera* (n 10), mn. 10; *Mayoral*, Democratic improvements in the European Union under the Lisbon Treaty, Institutional changes regarding democratic government in the EU, EUDO publications, 2011, <<http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDO-report922011.pdf>>, accessed 8 August 2013.

¹⁴ See on this matter the following report: *FRA-European Union Agency for Fundamental Rights*, Respect for and protection of persons belonging to minorities 2008–2010, 2011, <http://fra.europa.eu/sites/default/files/fra_uploads/1769-FRA-Report-Respect-protection-minorities-2011_EN.pdf#page=85>, accessed 7 August 2013, 65 et seq.

¹⁵ See CFI Case T-120/99 *Kik v. Office for Harmonisation in the Internal Market* [2001] ECR II-2235, mn. 64; affirmed by ECJ Case C-361/01 [2003] ECR I-8283.

¹⁶ See *Hatje* (n 11), mn. 5; *Urrutia/Lasagabaster*, Language Rights as a General Principle of Community Law, 8 German Law Journal 2007, 479 at 482.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Bibliography: See the bibliography of Article 20 TFEU.

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I. Duty to report

Article 25 TFEU aims at a dynamic evolution¹ of the citizenship of the Union and the individual rights inherent to it. Every three years, the Commission reports to the European Parliament, to the Council and the EESC on the actions taken by the organs of the Union and the Member States concerning the implementation of the EU citizenship rights warranted by Articles 21 to 24 TFEU. In this process, the Commission may also comment on the adoption of new rights linked to the European citizenship. So far, the Commission has issued seven **reports on the progress towards effective EU citizenship**, the latest, seventh report, being issued in May 2013.² This report highlights the recent development in the field of EU citizenship rights – inter alia the ECJ case law substantiating the EU citizenship as a fundamental status of nationals of the Member States.³ But also Member State provisions and actions taken to remove obstacles are recorded.⁴

2 II. Dynamic evolution of EU citizenship

Article 25 para. 2 TFEU contains the legal basis for the adoption of further provisions to add to the rights listed in Article 20 para. 2 TFEU. By means of this authorisation, the existing citizenship rights may not only be strengthened or complemented, but also new rights may be developed and warranted to the citizens of the Member States.⁵ Even though the wording of Article 25 para. 2 TFEU does not exclude the adoption of provisions aiming at a limitation of already existing rights or at the creation or expansion of duties for individuals, the continuing development of strengthening the EU citizenship since the introduction of this legal concept speaks against such an understanding of Arti-

¹ CR/*Kluth*, Article 25 AEUV, mn. 1; *Magiera*, Artikel 25 AEUV, in Streinz (ed), EUV/AEUV, 2nd edn 2012, mn. 1.

² COM (2013) 270 final. See also the earlier reports: sixth report COM (2010) 603 final of 27 November 2010; fifth report COM (2008) 85 final of 15 February 2008; fourth report COM (2004) 695 final of 26 November 2004; third report COM (2001) 0506 final of 7 September 2001; second report COM (97) 230 final of 27 May 1997; first report COM (93) 702 final of 21 December 1993.

³ COM (2013) 270 final, 2 with reference to the ECJ judgments in the cases *Zambrano* (ECJ Case C-34/09 *Zambrano v ONEM* [2011] ECR I-01177), *Dereci* (ECJ case C-256/11 *Dereci and others v Bundesministerium für Inneres* [not yet reported]) and O, S (ECJ Joined Cases C-356/11 and C-357/11 *O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.* [not yet reported]).

⁴ COM (2013) 270 final, 8.

⁵ Also see *Magiera* (n 1), mn. 4.

cle 25 para. 2 TFEU.⁶ Following the guiding idea of a process of developing the EU as an ever closer Union among the peoples of Europe (Article 1 para. 2 TEU), Article 20 para. 2 TFEU serves a **dynamic evolution and expansion of the EU citizenship**.

Like all other provisions allowing for a dynamic evolution of the Treaty, Article 25 3 para. 2 TFEU stipulates a two-stage proceeding:

During a **first stage covered by law of the Union**, the Council, acting in accordance with a special legislation procedure, issues provisions based on a report pursuant to para. 1, aiming at a further strengthening of the status of EU citizens. Even though Article 25 TFEU no longer speaks of a proposal of these provisions to the Member States (see Article 22 para. 2 TEC), it can be assumed that a recommendation is still allowed for. The respective decision requires unanimity in the Council and is issued with the consent (not only the consultation as set in Article 22 TEC) of the European Parliament.

During the **second stage** covered by the internal laws of the Member States, all mem- 4 bers of the EU need to ratify the measures in accordance with the provisions of their state constitution. Subsequent to the approval by all Member States, the new provisions become an integral part of the primary law of the Union.⁷

An amendment or extension of the rights listed in Article 20 para. 2 TFEU on the ba- 5 sis of other provisions of the Treaties, namely on the basis of the revision procedures laid down in Article 48 TEU, is not barred by Article 25 para. 2 TFEU.

PART THREE UNION POLICIES AND INTERNAL ACTIONS

TITLE I THE INTERNAL MARKET

Article 26 [Establishing the internal market] (ex Article 14 TEC)

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

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

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Bibliography: *Armstrong/Bulmer*, The Governance of the Single European Market, 1998; *Barnard/Scott* (eds), The Law of the European Single Market, 2005; *Bieber/Dehousse/Pinder/Weiler* (eds), 1992: One

⁶ Concurring: *Streinz/Magiera* Art. 22 AEUV mn. 4; *Haag*, Article 22 EGV, in Groeben/Schwarze (eds), Kommentar zum EU-/EG-Vertrag (6th edn. 2003), mn. 8; contrary: *Hatje*, Artikel 25 AEUV, in Schwarze (ed), EU-Kommentar (3rd edn. 2012), mn. 2.

⁷ With a different view: *Streinz/Magiera*, Article 22 AEUV mn. 283, speaking of a special form of secondary law of the Union as the provisions had their origin in treaty law and had to stay within the framework of it.

European Market?, 1988; *Egan*, Constructing a European Market, 2001; *Craig/de Búrca*, EU Law, 5th ed. 2011; *Ehlermann*, The internal market following the Single European Act, 24 CMLRev 1987, 361; *Mortelmans*, The common market, the internal market and the single market, what's in a market?, 35 CMLRev 1998, 101; *Oliver*, Free Movement of Goods in the European Union, 5th ed. 2010; *Shuibhne* (ed.), Regulating the Internal Market, 2006; *Streit/Mussler*, The Economic Constitution of the European Community: From 'Rome' to 'Maastricht', 1 ELJ 1995, 5; *Weatherill* (ed.), Better Regulation, 2007; *Weiler*, Epilogue: Towards a Common Law of International Trade, in: Weiler (ed.), The EU, the WTO and the NAFTA, 2000.

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1 I. General remarks and historical development (para. 1)

The TFEU introduces Title I ('The Internal Market') as a new and independent chapter. Article 26 TFEU adopts its two predecessor norms (Article 14 TEC and draft-Article III-130 TECE) partly word by word, partly with substantial modifications. According to the SEA, and subsequently anchored within the primary law of the Union, the internal market should have been finalized by 31 December 1992; however, the 'finalization clause' has not been taken over by the Lisbon Treaty. Finalizing the internal market means **removing all barriers to the intra-EU trade**. The coalescence of the national markets of the Member States into one European market, that can be qualified as a **real internal market**, is the overall goal of integration, meaning an area without any internal borders or barriers to trade between the Member States.¹

2 It was an illusion to set a **fixed date** for the goal of establishing an internal market from the very beginning. Such a final approach first and foremost disregarded the ongoing dynamic of the integration process. A 'finalized' internal market was neither reached by the end of 1992 nor later. The main hazards were the distinctions between the national legal systems, which remained and still remain as barriers; this cannot be underestimated. The deficits in harmonising national economic policies also had a negative impact. Even the Treaty of Lisbon does not mark a final step towards market integration. On the contrary, Article 26 para. 1 TFEU requires the Union to further develop the internal market, taking into account the ever changing real-world conditions in an age of globalisation, increasing economic interdependencies and rapid dynamics of economic crises. The Union has to take **all necessary measures** to ensure a dynamic development and further integration.

3 This 'piecemeal engineering' as developed by *Karl Popper* has a long tradition in the legal and political integration of Europe. It can be qualified as a key technique for the European unification process. Facing a **common market** which still has many deficits, the Member States gradually tried to realize the internal market. **The concept of an internal market** was developed by the Commission (White Paper 1985²). It relied on the aforementioned step-by-step approach. According to this White Paper, the former Community should have been endowed with further competences in order to take all necessary measures until 31 December 1992. The implication of finality, however, was misleading from the very beginning. Article 26 TFEU leaves room for future reforms, its para. 3 deliberately and expressly refers to a continuous 'balanced progress'.

¹ ECJ Case 15/81 *Gaston Schul* [1982] ECR 1409.

² COM (1985) 310 final.

II. The internal market (para. 2)

4

Article 26 para. 2 TFEU gives a **legal definition** of the internal market. It comprises an **area without internal frontiers**, in which the free movement of goods, persons, services and capital is ensured in accordance with the Lisbon Treaty. The (systematic) relationship of the internal market and the common market was controversially debated in the literature on the Pre-Lisbon legal situation. Partly, the term ‘internal market’ was conceived of as being narrower than the term ‘common market’; partly, the term ‘internal market’ was seen as more extensive (in its aims and purposes) than the previous concept of a common market. However, taking into account the overall aims and purposes of the concept of a common or internal market, a difference in meaning – let alone an antagonism – could not be found. The internal market is a further integrated part of the common market (in other words a further step in realizing the fundamental freedoms, see Article 26 para. 2 TFEU). This is affirmed by the Treaty of Lisbon, which set an end to the confusing coexistence of the two terms. They now merge into what is conceived as **one internal market**.

III. Instruments for development (para. 3)

5

The provision of Article 26 para. 3 TFEU was newly introduced by the Treaty of Amsterdam. It provides for a **competence to act** regarding – not directly applicable – **guidelines** and **conditions** for the further development of the internal market. Article 293 TFEU is concerned with this process and applies to their proceedings. The Treaty of Lisbon deleted the need for a qualified majority in the decision-making of the Council, which was formerly enshrined in Article 14 para. 3 TEC. An involvement of the European Parliament is not provided for (inter alia) because the measures potentially taken will not have a grave impact on human rights and fundamental freedoms.

Article 27 [Exceptional provisions] (ex Article 15 TEC)

When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

Bibliography: *Tuytschaever*, Differentiation in European Union Law, 1999.

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1

I. General remarks

The newly composed Article 27 TFEU goes back to Article 15 TEC. According to Article 27 TFEU, the **disparities in the level of development** of the national economies of the Member States need to be considered in the implementation of an internal market.¹ This requirement – a typical concept of flexible integration because of the asynchrony in the process of (economic or infrastructural) integration – addresses the Commission as initiator of the legislative procedure (basic **monopoly of initiative** of the Commission), which predetermines the legal acts of the Council.²

2 The provision corresponds to the possibility of the Member States to hurry ahead with more severe measures than provided for by Union law and to mandate higher levels of protection, especially in the cases of Articles 114 para. 4, 153 para. 2, 193 TFEU.

3

II. Facilitation of approximation

Taking into account less developed economies, it might be appropriate to issue legal acts which are equally binding for all Member States but accommodate the different development statuses of certain Member States or which leave these Member States at least a margin of appreciation allowing them to choose adequate implementing measures.³ The **German reunification** and the **eastern enlargement** provide examples. Thus, the Council decided on transitional measures for the accession of the former German Democratic Republic to the Federal Republic of Germany on 4 December 1990, which were based on the predecessor of what is today Article 27 TFEU.⁴ This seems to be the only way to control a simultaneous process of transformation and integration.

4 In addition, the binding effect of legal acts of the Union on single Member States may be limited under special circumstances (**gradual integration**). To begin with, exemptions from the binding effect must be designed to disturb the operation and functioning of the internal market as little as possible. For this reason, these exemptions are not allowed in the core areas of the internal market.⁵ The exemptions are permitted only on the further condition that the Member State concerned is capable of following the respective provision of the Union in the foreseeable future (exemptions of a temporary nature).

5 Furthermore, the exemptions must comply with the **principle of proportionality** and may not violate the **general principles of Union law** (protection of fundamental rights, the rule of law, in particular legitimate expectations, etc.).⁶

¹ See Article 26 TFEU.

² See Article 293 TFEU.

³ See *Langenheine/Weinstock*, Europa-Archiv 1984, 261 et seq.

⁴ For details, see *Schwarze/Hatje*, Article 27 AEUV mn. 9.

⁵ See *Langenheine/Weinstock*, Europa-Archiv 1984, 265 et seq.; with a different opinion, see *CR/Kahl*, Article 27 AEUV mn. 6.

⁶ See *CR/Kahl*, Article 27 AEUV mn. 6; *Schwarze/Hatje*, Article 27 AEUV mn. 8.

TITLE II
FREE MOVEMENT OF GOODS

Article 28 [Customs Union]
(ex Article 23 TEC)

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
2. The provisions of Article 30 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Bibliography: *Dashwood*, Dual-use goods, Continuity and Change in EU law, 2008; *Freund* (ed.), The WTO and Reciprocal Preferential Trading Agreements, 2007; *Grave*, The Impact of the Lisbon Treaty on Customs Matters: A Legal Assessment, 5 *Global Trade & Cust. J.* 2010, 95; *Inama/Vermulst*, Customs and Trade Laws of The European Community, 1999; *Lux*, EU Customs Law and International Law, 1 *World Customs Journal* 2007, 19; *Pomfret*, The Economics of Regional Trading Arrangements, 1997; *Shuibhne* (ed.), Regulating the Internal Market, 2006; *Viner*, The Customs Union Issue, 1950.

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I. Customs Union 1

1. Term

Article 28 TFEU adopts Article 23 TEC without changes and stands for the continuity of what can be described as the **nucleus of integration** since 1957: the **Customs Union**. Article 28 para. 1 TFEU emphasizes the Customs Union between the Member States as one of the very foundations of the Union. A substantial feature of this Customs Union is the abolition of tariff barriers (internal customs) and of all charges having equivalent effect (see Article 30 TFEU), as well as the establishment of a **common external tariff** including the common regulation of all charges which have an equivalent effect on their relations with third states.¹

The Customs Union of the EU differs from a mere **free trade area**; it removes the tariff barriers between their Member States (internal tariff walls) but does not introduce a **common external tariff** in relation to third countries. 2

¹ ECJ Joined Cases 2/69 and 3/69 *Diamantarbeiders* [1969] ECR 211.

3 For the further development of the internal market, the provisions on the Customs Union **are supplemented** by Chapter 3 (Articles 34–37 TFEU), including rules on the abolishment of quantitative restrictions on imports and measures having equivalent effect (so-called **non-tariff barriers**, Articles 34–35 TFEU), rules regarding the prohibition of discriminating practices via state monopolies (Article 37 TFEU), rules regarding discriminating taxation (Articles 110–112 TFEU), and rules on the customs cooperation between the Member States (Article 33 TFEU). As far as the relation of the Union to third countries is concerned, the following provisions have to be taken into account as well: rules on the common commercial policy (Articles 206, 207 TFEU), rules on the development cooperation (Article 208 TFEU), rules on the association of third countries or international organizations (Article 217 TFEU), and rules on the association of the overseas countries and territories of the Member States (Article 200 TFEU). The harmonisation of the tariff law of the Member States is highly developed not least because of the common **Customs Code**.² The Customs Code underwent substantial changes and is under continuous revision. Already in 2005, the Commission proposed a modernized Customs Code³, aiming at simplifying the customs procedure. In 2008, a new regulation laid down the **Modernized Customs Code (MCC)**⁴. The MCC intends to not only fitting but also governing the electronic infrastructure for customs and trade. Furthermore, it simplifies the very complex customs rules and tries to structure them in a better way. A completely new **strategy for the evolution of the Customs Union** until 2019 has been developed.⁵ Against this background, the Commission proposed a new **Union Customs Code (UCC)** in 2012, which aims at adjusting the current Community Code to the development within the Union not only in its wording but also in its content; it came into force on 30 October 2013.⁶

4 2. Scope of application

The Customs Union substantially encompasses the **entire exchange of goods**. Passage in transit is also covered.⁷ The TFEU permits special rules for agriculture (Article 38 para. 2 TFEU) and for the trade in arms, munitions and war material (Article 346 para. 1 lit. b TFEU). Exceptional rules may also apply to dual-use goods, which can be used for military as well as non-military purposes.⁸

5 The territorial boundaries of the Customs Union are defined by the **customs territory**. The customs territory defines the geographic space in which the customs rules of the Union shall apply uniformly. The customs territory comprises the territory of the Member States.⁹ Article 4 para. 1 UCC¹⁰ specifies this (in particular the purpose of customs exclusions, customs connections and special regulations for certain territories). Accordingly, the following territories are not part of the customs territory of the Union: Faroe Islands, Greenland (Denmark); Helgoland, Büsingen (Germany); Ceuta, Melilla (Spain), the French overseas territories as well as the islands St. Pierre, Miquelon and Mayotte;

² Regulation (EEC) No 2913/92 establishing the Community Customs Code; today in the version of Regulation (EC) No 450/2008 laying down the Community Customs Code (Modernised Customs Code).

³ COM (2005) 608.

⁴ Regulation 450/2008 laying down the Community Customs Code (Modernised Customs Code).

⁵ COM (2008) 169 final; see Schwarze/*Hatje*, Article 28 AEUV mn. 9.

⁶ COM (2012) 64 final.

⁷ ECJ Case 266/81 *SIOT* [1983] ECR 731.

⁸ Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

⁹ Including the inland maritime waters, the territorial waters and the airspace, see Articles 349, 355 TFEU.

¹⁰ Regulation 2913/92.

Livigno, Campione d'Italia, parts of the Lake Lugano (Italy); the non-European territories of the Kingdom of the Netherlands; the British territories outside the United Kingdom, the British Channel Islands and the Isle of Man.

According to Article 4 para. 2 lit. a UCC, the territory of the principality of Monaco is considered to be part of the customs territory because of a **Customs Convention with France**, even though the TFEU does not apply there. 6

A customs union exists with Andorra and San Marino. For dealings with Turkey, the EEC-Turkey Association Agreement of 12 September 1963 with its additional protocol, can be used.¹¹ The highly controversial discussion as to whether Turkey will become a full member or should be granted a 'privileged partnership', was originally prompted by the principle of customs union. 7

3. The Customs Union and the GATT

8

The provisions of the General Agreement on Tariffs and Trade (GATT 1947/1994) are **not opposing** the formation of a regional customs union (Article XXIV GATT); in particular, the **most-favoured-nation-clause** does not cover the abolishment of internal tariffs in favour of third states (Article I GATT) because the internal market as a whole complies with the legal requirements as to regional customs unions according to the exceptional clauses of the GATT. According to Article XXIV GATT, a customs union shall be understood to mean a substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union, or at least with respect to substantially all the trade in products originating in such territories, and substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

II. Common external tariff

9

1. Common Customs Tariff (CCT)

The Customs Union encompasses the **implementation of a CCT**¹² in connection with trade in goods between the Union and third countries.

The common customs tariff duties can be modified autonomously (non-contractually) based on Article 31 TFEU and in agreement with third countries (in particular within the framework of the GATT) based on Article 207 TFEU. There are no relevant competences left for the Member States. 10

The CCT is **self-executing law**; the individual can appeal to it.¹³ 11

The CCT consists of the **combined nomenclature** (CN) and the **rates of duty**. The CN is a method for designating goods and merchandise as a systematic list of commodities. It is comprised of the **Harmonised System** (HS) nomenclature with further subdivisions, which came into force on 1 January 1988. The agreement replaces the Convention establishing a customs cooperation Council signed in Brussels on 15 December 1950, which was binding on the Community.¹⁴ The relevant provisions of the CCT and 12

¹¹ OJ 1973 C 113/1.

¹² Legal definition in Article 4 para. 1 Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

¹³ ECJ Case 33/70 *Spa SACE* [1970] ECR 1213.

¹⁴ ECJ Case 38/75 *Nederlandse Spoorwegen* [1975] ECR 1439.

the non-tariff measures are shown in the integrated tariff of the European Communities (TARIC) to which reference is made by Article 5 Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

- 13 The tariff classification regulations of the Commission as well as the (non-binding) explanation reports of the Commission and of the World Customs Organization (formerly known as Brussels Tariff Council) are applicable for the **interpretation** of the tariff nomenclature. The Member States themselves cannot enact binding rules of interpretation.¹⁵

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2. Tariff law

Beyond the CCT, the establishment of a Customs Union requires harmonised or uniform rules of **substantive** (for instance provisions on the value of goods) and **procedural tariff law**. The TFEU (Articles 31, 207 TFEU) provides a competence norm only for the modification of the CCT (including the tariff nomenclature). Furthermore, the Council and the Commission at first relied on the general competence norm of Article 115 TFEU (for the enactment of directives) and Article 352 TFEU (for the enactment of regulations) but now all measures are based on Article 114 TFEU. Effective from 1 January 1994 onwards, the tariff law has been codified in Community law, and is now, as part of Union law. A regulation has laid down provisions for the implementation of the administrative procedures.¹⁶

15

3. Customs revenues

Customs revenues (and the absorption within the field of agriculture, Article 32 TFEU) are part of **the Union's own funds**.¹⁷ The fees are demanded by the customs authorities of the Member States.

16

III. Union goods

The TFEU does not provide a (legal) definition of the term 'goods', leaving it open to the interpreters of Union law, first and foremost the ECJ. The ECJ defined 'goods' as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.¹⁸ **Goods as Union goods** are covered by the rules on the free movement of goods if they originate in a Member State or if they come from third countries but are in free circulation in the Member States.¹⁹ Article 29 TFEU defines the conditions under which goods coming from third countries can be seen as freely circulating within the Member States. Difficult matters of classification arise concerning the product specifications of electricity, of water and gases or of services which are saved on sound or data carriers.²⁰ Agricultural products fall under the term of goods; however, a great number of exemptions is applicable here, too.

¹⁵ ECJ Case 74/69 *Krohn* [1970] ECR 451.

¹⁶ Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

¹⁷ See Article 311 TFEU.

¹⁸ ECJ Case 7/68 *Commission v Italy* [1968] ECR 423.

¹⁹ See Article 28 para. 2 TFEU.

²⁰ For details, see Schwarze/*Terhechte*, Article 28 AEUV mns. 20 et seq.

**Article 29 [Free circulation of products from third countries]
(ex Article 24 TEC)**

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

Article 29 TFEU adopts Article 24 TEC in its exact wording and determines conditions under which goods originating in a third country are in free circulation within the Member States and therefore are regarded as Union goods.¹

Union goods in this sense – the former term ‘Community goods’ can still be used, even though the EC has merged into the EU, since the substantive idea of ‘the Community as a legal community’ lives on – are products which come from a third country and fulfil three conditions: that (a) they comply with the import formalities, (b) Customs duties or charges having equivalent effect have been imposed on them and (c) these duties or charges have neither totally nor partially been paid back.

The **import formalities** include all formal and material rules that have to be fulfilled for customs approval. The basic provisions on the release into free circulation can be found in the aforementioned Customs Code.

Import duties are levied once the customs authorities have calculated and communicated the amount of duty to the debtor and the debtor has either paid the amount or a security for the amount has been provided by the debtor or the payment has been deferred.

The (lawfully) levied customs duties or charges having equivalent effect must **not have** been totally or partial **paid back**.

CHAPTER 1 THE CUSTOMS UNION

**Article 30 [Prohibition of customs duties]
(ex Article 25 TEC)**

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.

Bibliography: *Barents*, Charges of Equivalent Effect to Customs Duties, 15 CMLRev 1978, 415; *Hatje*, The Economic Constitution within the Internal Market, in: v. Bogdandy/Bast (eds), *Principles of European constitutional law*, 2nd ed. 2011, 589 et seq.; v. *Holt*, Tarifäre und nichttarifäre Handelshemmnisse, VR 2009, 5; *Lyons*, EC Customs Law, 2nd ed. 2008; *Oliver*, Free Movement of Goods in the European Union, 5th ed. 2010; *Sorensen*, Reconciling Secondary Legislation and the Treaty Rights of Free Movement, 36 ELRev 2011, 339; *Weatherill*, Recent Developments in the Law Governing the Free Movement of Goods in the EC's Internal Market, *European Review of Contract Law*, 2006, 90; *Weerth*, Customs Sanctions of the EU-27: A Detailed Analysis and a Preview on the Modernized Customs Code of the EU and the European Union Customs Code, 8 *Global Trade and Customs Journal* 2013, 42; cf. literature on Article 26 TFEU.

¹ See Article 28 TFEU.

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1

I. Foundations

Article 30 TFEU adopts Article 25 TEC without any changes. The Customs Union prohibits levying duties or charges having equivalent effect on imports and exports between the Member States. The elimination of customs duties between the original six Member States had been enshrined in Articles 12–17 EEC. This important objective of market integration was reached – earlier as expected – on 1 July 1968, by Council Decision (EEC) No 66/532 of 26 July 1966 concerning the abolitions of customs duties, the prohibition of quantitative restrictions between Member States and the application of the common customs tariff duties for products other than those set out in Annex II of the EEC Treaty. Simultaneously, the **Common Customs Tariff** (CCT) was introduced.¹ Since the end of the transitional period, the prohibition has been **directly applicable**, meaning that individuals can invoke the provision.² The baseline principles of the Customs Union require ensuring the free movement of goods within the Union in general and not only as far as **interstate commerce** is concerned.³ An economic area without internal barriers can only be realized by such a comprehensive **dismantling of restrictions**. In the *Lancry* decision, the ECJ made expressly clear that, in order to be considered as a customs duty, a charge does not need to be levied at a border.⁴ Even a regional frontier would be an obstacle contradicting the very aims of an internal market.

2

II. Aims

Customs duties, not positively defined in (primary) Union law, are those which are designated as such and which qualify as pecuniary charges imposed on a good in the moment of import or export if there is no corresponding duty for the same or similar domestic goods.⁵

3

III. Charges having equivalent effect

In its consistent case law, the ECJ defines charges having equivalent effect as any **pecuniary charge** – no matter how small and what its designation or its mode of application is – which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense.⁶

¹ See Article 28 TFEU mn. 3 and mns 9 et seq.

² ECJ Cases 26/62 *Van Gend & Loos* [1963] ECR I; C-17/91 *Lornoy* [1992] ECR I-6523.

³ ECJ Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* [1994] ECR I-3957.

⁴ ECJ Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* [1994] ECR I-3957.

⁵ ECJ Case 87/75 *Bresciani* [1976] ECR 129. See Streinz/*Kamann*, Article 30 AEUV mns 9 et seq.

⁶ ECJ Case C-45/94 *Cámara de Comercio* [1995] ECR I-4385.

This is the case even if the charge is not imposed for the benefit of the State and even 4 if it is not discriminatory or protectionist in its effect. This is furthermore true if the product upon which the charge is imposed is not in competition with any domestic products.⁷

An exception is made if the charge in question is an appropriate **remuneration** for a 5 service which establishes an **individual** advantage for the importer; a service offered in the general interest of the political community, however, does not suffice.⁸ Such remuneration must not exceed the costs of the service.⁹ Moreover, it must not be measured by the value of goods, which is irrelevant for the actual costs.¹⁰ Even if the remuneration is not an exact compensation or consideration for an individual service, it is not covered by Article 30 TFEU if it is **part of a general scale of charges applied by the relevant Member State**.¹¹

Prohibited charges having equivalent effect are for example: a statistical levy¹²; an 6 inspection charge¹³; a quality control charge¹⁴; customs clearance charges¹⁵; a public warehouse charge¹⁶; a compulsory contribution constituting 'a para-fiscal charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it wholly offset the burden'¹⁷; subjecting shipments of waste to other Member States to a mandatory contribution to the solidarity fund for the return of waste as established by the respective German law called *Gesetz über die Überwachung und Kontrolle der grenzüberschreitenden Verbringung von Abfällen* (*Abfallverbringungsgesetz*) of 30 September 1994¹⁸; a duty such as a national tax on consumption of fresh bananas imported directly from non-member countries¹⁹. Reference has to be made to the *Legros* case.²⁰ However, criminal sanctions due to illegal imports (such as of counterfeit currency) are not prohibited.²¹

The ECJ held that a charge which should serve to cover the costs of an official veteri- 7 narian control according to Directive 81/389/EEC of 12 May 1981 establishing measures necessary for the implementation of Council Directive 77/489/EEC on the protection of animals during international transport is **justified** because the following conditions were met: (a) the charges did not exceed the actual costs of the inspections imposed on the relevant products, (b) the inspections in question were – in the whole Community (now: Union) – obligatory and uniform for all the products concerned, (c) they were prescribed by Community (now: Union) law in the general interest of the Community (now: Union), (d) they promoted the free movement of goods, in particular by neutralizing obsta-

⁷ ECJ Joined Cases 2 and 3/69 *Diamantarbeiders* [1969] ECR 211.

⁸ ECJ Case C-16/94 *Dubois* [1995] ECR I-2421.

⁹ ECJ Case C-125/94 *Aprile* [1995] ECR I-2919.

¹⁰ ECJ Case 46/76 *Bahaus* [1977] ECR 5.

¹¹ See Schwarze/*Terhechte*, Article 30 AEUV mn. 18; also see mn. 9 below.

¹² ECJ Case 24/68 *Commission v Italy* [1969] ECR 193.

¹³ ECJ Case 314/82 *Commission v Belgium* [1984] ECR 1543.

¹⁴ ECJ Case 63/74 *Cadsky Spa* [1975] ECR 281.

¹⁵ ECJ Case 39/82 *Donner* [1983] ECR 19.

¹⁶ ECJ Case 133/82 *Commission v Luxembourg* [1983] ECR 1669.

¹⁷ ECJ Case C-72/92 *Scharbatke* [1993] ECR I-5509. Also see mn. 9 below.

¹⁸ ECJ Case C-389/00 *Commission v Germany* [2003] ECR I-2001.

¹⁹ ECJ Joined Case C-228/90, C-229/90, C-230/90, C-231/90, C-232/90, C-233/90, C-234/90, C-239/90, C-353/90 *Simba and others v Ministero delle finanze* [1992] ECR I-3713.

²⁰ ECJ Case C-163/90 *Legros* [1992] ECR I-4625. Concerning regional barriers, see also Joined Cases C-485/93 and C-486/93 *Kos* [1995] I-2655.

²¹ ECJ Case C-343/89 *Witzemann* [1990] ECR I-4477.

cles which could arise from unilateral measures of inspection adopted in accordance with Article 36 TFEU.²²

8

IV. Delimitation

Articles 28 and 30 TFEU take precedence over **Articles 34 et seq. TFEU** since they are the more specific provisions (*leges speciales*).²³

9 Article 110 TFEU (prohibition of discriminatory internal taxation) applies if the financial burden is part of a general internal contribution system which covers foreign and domestic products with similar characteristics at the same level of production.²⁴ Article 110 TFEU applies in case of a parafiscal levy if the benefits stemming from this kind of taxation only compensate parts of the financial burden on the domestic products. The establishment of such a parafiscal levy may constitute a State aid incompatible with the internal market if the conditions for the application of **Article 107 TFEU** are met – that being a matter which only the Commission is competent to determine in accordance with the procedure laid down for that purpose in Article 108 TFEU and which is subject to review by the ECJ.²⁵

10

V. Export duties

Export duties and all charges having equivalent effect amongst the Member States had to be eliminated by the end of the first stage of the transitional period [at that time Article 7 para. 1 EEC], which was on 31 December 1961 for the original six Member States.

11 An export duty having equivalent effect to a customs duty is given if it more excessively imposes financial burdens on the export of goods than on sales inside the country. Such a duty is furthermore given if the taxation or levy aims to fund activities tending to make the home market more profitable than exports or to favour the products held for sale within the domestic market in any other way (sectoral levy concerned with flower bulbs²⁶; levy concerning quality control charge on exportation²⁷; levy concerning fees charged in respect of plant health inspections on exportation²⁸; charges on tobacco export regardless their social objectives²⁹).

12

VI. Customs duties of fiscal nature

Customs duties of fiscal nature are duties, unlike a protective duty, which serve to obtain **revenues**. The general rules on customs of the TFEU automatically apply for customs duties of a fiscal nature.³⁰ Sentence 2 has declaratory effect only.

²² ECJ Cases 18/87 *Commission v Germany* [1988] ECR 5427; C-109/98 *CRT* [1999] ECR I-2237.

²³ ECJ Cases 7/68 *Commission v Italy* [1968] ECR 423; C-17/91 *Lornoy* [1992] ECR I-6523.

²⁴ ECJ Cases 314/82 *Commission v Belgium* [1984] 1543; C-45/94 *Cámara de Comercio* [1995] ECR I-4385; C-383/01 *De Danske Bilimportører* [2003] ECR I-6065.

²⁵ ECJ Case C-72/92 *Scharbatke* [1993] ECR I-5509; Case C-234/99 *Niels Nygård* [2002] ECR I-3657.

²⁶ ECJ Case 51/74 *van der Hulst* [1975] ECR 79.

²⁷ ECJ Case 63/74 *Cadsky Spa* [1975] ECR 281.

²⁸ ECJ Case C-111/89 *Bakker* [1990] ECR I-1735.

²⁹ Here on social fund for the tobacco workers: ECJ Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145.

³⁰ ECJ Case 7/68 *Commission v Italy* [1968] ECR 423.

**Article 31 [Common Customs Tariff]
(ex Article 26 TEC)**

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

The newly shaped Article 31 TFEU adopts Article 26 TEC with mandatory editorial 1 changes (qualified majority voting). It constitutes the competences for autonomous (meaning non-contractual) changes or suspensions of customs duties as established by the CCT.¹ Changes or suspensions relating to third countries which require an agreement with these countries or whose objectives are at least trade-related are based on Article 207 TFEU. Changes and suspensions for agricultural products (either autonomous or contractual) are based on Article 43 TFEU.

Beyond the limits of its wording, **other** changes of the CCT are based on Article 31 2 TFEU, too (for instance the nomenclature²).³

The **Council** decides by qualified majority⁴ on a Commission proposal⁵. 3

**Article 32 [Guiding criteria of tasks of the Commission]
(ex Article 27 TEC)**

In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:

- (a) **the need to promote trade between Member States and third countries;**
- (b) **developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;**
- (c) **the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;**
- (d) **the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.**

Article 32 TFEU traces back to Article 27 TEC, which is adopted nearly word by word; 1 just the term 'Community' has been replaced by 'Union' after the fusion of the three pillars. The article designates judicial guidelines for the measures and proposals of the Commission concerning the CCT.^{1*} These guidelines are binding on the whole Union because of their fundamental importance. The provision addresses the Commission; whether the Council shall also be bound is debated controversially.^{2*}

The **relevant aspects (guiding criteria)** are: support of trade with third countries;^{3*} 2 strengthening the competitiveness of enterprises; safeguarding all necessary supplies for the Union; prevention of serious disturbances; rational and effective development of the

¹ See Article 28 TFEU mns 9 et seq.; cf. CR/Waldhoff, Article 31 AEUV mn. 1.

² See Article 28 TFEU mn. 14.

³ See Schwarze/Terhechte, Article 31 AEUV mns 4 et seq.

⁴ See Article 16 para. 3 TEU.

⁵ See Article 293 TFEU.

^{1*} See Article 26 TFEU in particular.

^{2*} See GHN/Voß, Article 27 AEUV mns. 1 et seq.; GS/Lux, Article 27 EGV mn. 10.

^{3*} See Article 206 TFEU.

production; extension of the consumption within the Union. The overall *telos* of **integration** determining these aspects is **competitiveness⁴ of the Union and within the Union**. Competition, however, is not understood as an end in itself but as an **instrument**: it shall serve the common good.⁵

- 3 The aforementioned aspects or guiding criteria are, to some extent, diverse and may contradict each other. Therefore, a harmonising balance (following Konrad Hesse's German model of 'Praktische Konkordanz') has to be sought while applying the criteria. Consequently, the Commission (and the other institutions of the Union) have a rather extensive discretionary power, so that one might also want to speak of a **political margin of appreciation**.⁶

CHAPTER 2 CUSTOMS COOPERATION

Article 33 [Strengthening of customs cooperation] (ex Article 135 TEC)

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

1 I. Power to act

The article was introduced by the Treaty of Amsterdam and later modified by the Treaty of Lisbon. Its archetype within primary law is Article 135 TEC – now adopted with substantial changes and introducing a new systematic structure which became necessary in order to strengthen the **democratic legitimacy** of the Union. According to the Lisbon Reform Treaty, Council and Parliament are **true co-legislators**. Article 33 TFEU creates a special Union competence to regulate effective cooperation between the national customs authorities on the one hand and between these authorities and the Commission on the other hand. Such provisions on cooperation were, however, necessary even before Article 33 TFEU had been introduced. The Council passed them in Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. Article 114 and Article 352 TFEU can serve as the general competence rules for these customs cooperation provisions. Competence conflicts arising in this context were solved by Article 135 TEC and now by Article 33 TFEU.

2 II. Limitations

The competence of the Union is limited to 'the scope of the application of the Treaties', referring to the so-called **principle of conferral**. By referring to the principle of conferral,

⁴ See Article 3 para. 3 TEU.

⁵ Cf. Häberle, *Europäische Verfassungslehre*, 708 et seq.

⁶ ECJ Case 24/62 *Germany v Commission* [1963] ECR 63; Case 34/62 *Germany v Commission* [1963] ECR 131; Case C-150/94 *UK v Council* [1998] ECR I-7235.

Article 33 TFEU clarifies that the competences regarding customs cooperation – depending on the very aims of this cooperation – are still not completely ‘unified’. Since the establishment of the European Union, customs cooperation was a matter of the **intergovernmentally** organized field ‘Justice and home affairs’ (the so-called third pillar) in Article K.1 No 8 TEU (Nice). Today, after the fusion of the three pillars Police Cooperation and Cooperation in Judicial Matters are fully integrated into the Union. It is beyond question that the customs sector plays an important role for the Area of Freedom, Security and Justice and has an essential responsibility for safety precautions. For further details, see Articles 67 et seq. TFEU.

III. Procedure

3

Henceforth, all measures are adopted by the European Parliament and the Council through the **ordinary legislative procedure**. Thereby, the rights of the Parliament to actively and effectively participate in the Union’s policy-making are strengthened – most importantly in the context of the internal market. This strengthening of parliamentary power was not only necessary for reasons of democratic legitimacy but also because measures in the customs field may have an intense impact on fundamental rights and freedoms.

CHAPTER 3 PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 34 [Prohibition of quantitative restrictions] (ex Article 28 TEC)

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

Bibliography: *Barents*, New developments in measures having equivalent effect, 18 CMLRev 1981, 271; *Barnard*, The Substantive Law of the EU – The Four Freedoms, 4th ed. 2013; *Chalmers*, Free movement of Goods within the European Community: An unhealthy addiction to Scotch Whiskey?, 42 ICLQ 1993, 269; *id.*, Repackaging the internal market – The ramifications of the Keck judgement, 19 ELR 1994, 385; *Enchelmaier*, The ECJ’s recent case law on the free movement of goods: Movement in all sorts of directions, 26 YEL 2007, 115; *Gormley*, 2 Years after Keck, 19 Fordham Int. Law Journal 1996, 866; *Higgins*, The Free and Not so Free Movement of Goods since Keck, 6 Irish J. of Europ. L. 1997, 166; *Jaeckel*, Schutzpflichten im deutschen und europäischen Recht, 2001; *Lorenzmeier*, Wasser als Ware, 2008; *Oliver*, Free Movement of Goods in the European Union, 5th ed. 2010; *Oliver/Enchelmaier*, Free Movement of Goods: Recent Developments in the Case Law, 44 CMLRev 2007, 649; *Pernice*, Grundrechtsgehalte im Europäischen Gemeinschaftsrecht, 1970; *Perisin*, Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO, 2008; *Poiates Maduro*, The Saga of Article 30 EC Treaty: To Be Continued, 5 MJ 1998, 298; *Shuibhne*, The free movement of goods and Article 28 EC: an evolving framework, 274 ELRev 2002, 408; *Snell*, The Notion of Market Access: a Concept or a Slogan?, 47 CMLRev 2010, 437; *Sorensen*, Reconciling Secondary Legislation and the Treaty Rights of Free Movement, 36 ELRev 2011, 339; *Spaventa*, Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos, 34 ELRev 2009, 34; *Stachel*, Schutzpflichten der Mitgliedstaaten für die Grundfreiheiten des EG-Vertrages unter besonderer Berücksichtigung des Grundrechtsschutzes in der Gemeinschaft, 2006; *Tryfondiou*, Further Steps on the Road to Convergence among the Market Freedoms, 35 ELRev 2010, 36; *Weatherill*, Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation, 36 CMLRev 1999, 51; *Wenneras/Boe Moen*, Selling arrangements,

Keeping Keck, 35 ELRev 2010, 387; *White*, In search of the Limits to Article 30 of the EEC Treaty, 26 CMLRev 1989, 23; *Wilsher*, Does Keck Discrimination Make any Sense? An Assessment of the Non-discrimination Principle within the European single Market, 33 ELRev 2008, 3.

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1

I. General remarks

Article 34 TFEU is – as was its predecessor Article 28 TEC – the **central provision** to guarantee the free movement of goods. The free movement of goods itself is an important **pivot of the internal market and of European economic integration as such**. The provision, deliberately and with a strong systematic impetus, opens the chapter on the freedoms of the internal market. In the technological era of the internet, the trade in services admittedly has become more and more important. Consequently, the free movement of goods and services¹ are **complementary freedoms encompassing the free movement of products** nowadays. Article 34 TFEU provides for the fundamental prohibition of quantitative restrictions on imports and all measures having equivalent effect (the so-called **non-tariff barriers**) between the Member States. Article 35 TFEU establishes a parallel prohibition on exports between Member States. The complementary prohibitions also cover goods in transit.² Article 36 TFEU lays down the necessary (explicit) exceptions. A special provision on State monopolies, which may produce restrictive effects, is established by Article 37 TFEU.

2 Article 34 TFEU is **directly applicable**, meaning individuals may invoke the guarantee and rely on it.³ According to the ECJ's understanding, the fundamental freedoms also contain a **moment of fundamental rights**.⁴ The prohibition of quantitative restrictions on imports is also binding for the institutions of the Union.⁵

3 The provisions of the TFEU on customs and measures having equivalent effect (Article 30 TFEU), on taxes (Article 110 TFEU) and on State aids (Article 107 TFEU)⁶ are special regulations (*leges speciales*) to Article 34 TFEU. The merely ancillary delivery of goods (lottery advertisements to draw the customers' attention to a lottery) falls within the scope of the overall freedom at stake (here: a lottery as covered by the free movement

¹ See Articles 56 et seq. TFEU.

² See Article 36 s. 1 TFEU; ECJ Case 2/73 *Geddo* [1973] ECR 865.

³ ECJ Case 74/76 *Ianelli* [1977] ECR 557; see Article 3 para. 3 TEU.

⁴ Like this, see already *Pernice*, Grundrechtsgehalte im Europäischen Gemeinschaftsrecht, 1970.

⁵ ECJ Case C-114/96 *Kieffer* [1997] ECR I-3629.

⁶ ECJ Case 18/84 *Commission/France* [1985] ECR 1339.

of services).⁷ Article 34 TFEU is not applicable if the relevant field has been harmonised by secondary Union law.⁸ However, the secondary law must live up to the principles enshrined by Article 34 TFEU as well as the **principle of proportionality**; and, moreover,⁹ the secondary law has to be read in the light of the fundamental rights and freedoms.⁹ Governmental measures of general economic policy are subject to Articles 120 et seq. TFEU.

II. Scope of application

4

The prohibitions of Articles 34 and 35 TFEU concern non-tariff barriers in trade **between the Member States**. The trade with third countries is not covered; it is subject to the EU's common commercial policy (for this, see Article 207 TFEU) and is governed by the public international law regime of the WTO – with respect to the free movement of goods in particular the WTO's 'first pillar', the GATT 1947/1994.

Article 28 para. 2 TFEU defines the object of the free movement of goods within the 5 Union. The freedom includes all **Union goods**, meaning goods originating in Member States and furthermore goods coming from third countries but being in free circulation in the Member States.¹⁰ Waste, whether recyclable or not, is regarded as a good, too.¹¹ Electricity is also regarded as a good according to Article 34 TFEU.¹² Concerning the products from third countries, the former Article 134 TEC allowed for exceptions under certain conditions, which had to be approved by the Commission. As far as trade in arms, munitions and war material is concerned, Article 346 para. 1 lit. b and Article 346 para. 2 TFEU apply as *leges speciales*. Difficult questions concerning their quality as goods arise when it comes to embryonic stem cells; to services which are saved on sound or data carriers; or to lottery tickets.¹³

III. Prohibition of quantitative restrictions

6

Quantitative restrictions are governmental measures limiting the amount of imports and exports (quotas). These limits may be construed in various ways: by reference to value, to physical quantity or to some other factor. This covers prohibitions of import and export as well as prohibitions of goods in transit.¹⁴

IV. Measures having equivalent effect

7

The second part of Article 34 TFEU is most important in practice. It prohibits all **'measures having equivalent effect'**. In that field, the legislative powers of the Member States have been limited to a great extent. The ECJ found this particularly necessary to effectively guarantee the free movement of goods without any unnecessary limitations.

⁷ ECJ Case C-275/92 *Schindler* [1994] ECR I-1039.

⁸ ECJ Case C-297/94 *Bruyère* [1996] ECR I-1551.

⁹ ECJ Joined Cases C-427/93, C-429/93 and C-436/93 *Paranova* [1996] ECR I-3457.

¹⁰ See Article 28 TFEU mn. 16.

¹¹ ECJ Case C-2/90 *Commission v Belgium* [1992] ECR I-4431; Case C-155/91 *Commission v Council* [1993] ECR I-93.

¹² ECJ Case C-393/92 *Almelo* [1994] ECR I-1477. For the discussion whether water is regarded as goods or not see *Lorenzmeier, Wasser als Ware*, 2008.

¹³ For details, see *Schwarze/Terhechte*, Article 28 mns 24 et seq.

¹⁴ ECJ Case 2/73 *Geddo* [1973] ECR 865.

1. *Dassonville* formula

The broad definition of the ECJ, known as the *Dassonville* formula, states that ‘all trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially intra-Community trade (today intra-Union trade) are to be considered as measures having an effect equivalent to quantitative restrictions’. With this broad formula, the ECJ responded to attempts of the Member States which tried to establish barriers in trade being – prima facie – indiscriminate but causing in fact a complete market exclusion of the relevant good. The free movement of goods was consequently extended from a **ban on discrimination** to a **prohibition of restrictions**. Very soon the ECJ applied this broad formula to the other freedoms of the internal market, too.¹⁵ One might want to speak of a jurisdictional ‘spill over’.

9 According to the *Dassonville* judgment, a provision on trade is every national measure which influences the movements of goods; a specific trade policy purpose of the measure is not necessary¹⁶. Since a potential negative impact on intra-Union trade is sufficient, there is no need to bring evidence that a negative impact actually took place. It is sufficient that the measure is **suitable** to hinder the interstate trade. This applies also to indirect effects. It should be strongly emphasized that an **intention to establish a trade barrier is not required**. In its earlier jurisprudence, the ECJ did not even hold it to be necessary that the negative impact of the trade barrier is noticeable.¹⁷ Contrary to these early findings, the ECJ more recently qualified a measure which had hindered the import of goods as ‘irrelevant’¹⁸.

10 The prohibition concerns **governmental** measures. Private measures hindering trade are typically covered by competition law¹⁹. Article 34 TFEU, however, applies to governmental provisions which allow private enforcement of trade-restrictive measures (for instance: industrial property protection) or which allow the prohibition of unfair competition or which indirectly support (or even boost) the sale of domestic (‘home-grown’) goods (for instance: the quality label ‘Brand quality made in Germany’ which was financed by public funds of the *Zentrale Marketing-Gesellschaft der deutschen Agrarwirtschaft*)²⁰. The Member State is furthermore obliged to take all necessary and appropriate measures against trade barriers resulting from actions by private individuals.²¹ In the case of a street blockade, however, the free movement of goods has to be weighed against the freedom of assembly being a fundamental right, now also enshrined in the CFREU.²² When deciding this case, the ECJ emphasized that the free movement of goods contains a **duty to protect**, requiring active protection by the Member States.²³

2. Range of the prohibition

The intention of the ECJ’s jurisprudence is clear: The Court interpreted the prohibition of measures having equivalent effect not only as a **ban on discrimination** but as a

¹⁵ See *Oppermann/Classen/Nettesheim*, § 22 mn. 10.

¹⁶ ECJ Case 13/78 *Eggers* [1978] ECR 1935.

¹⁷ ECJ Case C-126/91 *Yves Rocher* [1993] ECR I-2361.

¹⁸ ECJ Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467.

¹⁹ See Articles 101 et seq. TFEU.

²⁰ ECJ Case C-325/00 *Commission v Germany* [2002] ECR I-9977.

²¹ ECJ Case C-265/95 *Commission v France* [1997] ECR I-6959.

²² ECJ Case C-112/00 *Schmidberger* [2003] ECR I-5659.

²³ See *Jaekel*, Schutzpflichten im deutschen und europäischen Recht, 2001; *Stachel*, Schutzpflichten der Mitgliedstaaten für die Grundfreiheiten des EG-Vertrages unter besonderer Berücksichtigung des Grundrechtsschutzes in der Gemeinschaft, 2006.

prohibition of restrictions capable of hindering directly or indirectly, actually or potentially, intra-Union trade (see mn. 8 above).

a) Ban on discrimination

A **different** treatment of imported and domestic goods is prohibited. Such a distinction would obviously hinder the trade within the Union. The ban on discrimination covers national laws requiring a special import certificate²⁴ and national laws requiring certificates of origin of a product or certificates of authenticity of a product or of the quality of a product²⁵. The ban furthermore covers frontier controls²⁶; registered indications of origin and indications of origin in favour of domestic goods²⁷; granting State aids to public institutions only if these institutions promise to exclusively buy domestic goods²⁸; requiring that the owner is registered in the local trade register if she or he wants to sell imported second-hand goods by public auction²⁹; reserving a proportion of a public supply contract to undertakings located in a particular region of the national territory.³⁰ The ban also covers a State-run campaign to promote domestic goods³¹; a declaration awarding the quality label 'Brand quality made in Germany'³²; forbidding a trademark by a reseller for advertising purposes³³; the obligation that a marketing company must buy a large quantity of petroleum products each year from a refinery established in Greece in order to be entitled to transfer its storage obligation to that refinery in the following year, hindering the marketing of refineries situated in other Member States³⁴; a national legislation prohibiting the marketing of radio apparatuses which do not bear the national type-approval stamp³⁵; the requirement of different hallmarks struck on articles manufactured in Ireland or coming from another Member State³⁶.

Exemptions may only be justified under the conditions of Article 36 TFEU.

Article 34 TFEU wants to make the **discrimination** of imported goods from other Member States impossible, irrespective whether it is an open or disguised discrimination³⁷. This is reflected in the enumeration of examples in Directive 70/50/EEC, on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty. Article 2 Directive 70/50/EEC covers measures which make importation more difficult or costly than the disposal of domestic production (**open discrimination**). Article 3 Directive 70/50/EEC covers measures which are equally applicable to domestic and imported products, with their restrictive effect on the free movement of goods going beyond the effects intrinsic to trade rules (**disguised discrimination**). Due to the direct applicability of Article 34 TFEU, Directive 70/50/EEC is – after the transitional period has ended – no longer significant. Nevertheless, the ECJ sometimes used Directive 70/50/EEC in its later jurisdiction for the interpretation of Article 34 TFEU.

²⁴ ECJ Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747.

²⁵ ECJ Case 53/76 *Bouhelier* [1977] ECR 197; Case 8/74 *Dassonville* [1974] ECR 837.

²⁶ ECJ Case 159/78 *Commission v Italy* [1979] ECR 3247.

²⁷ ECJ Case 12/74 *Commission v Germany* [1975] ECR 181.

²⁸ ECJ Case 263/85 *Commission v Italy* [1991] ECR I-2457.

²⁹ ECJ Cases C-239/90 *Boscher* [1991] ECR I-2023; C-390/99 *Canal Satélite Digital* [2002] ECR I-607.

³⁰ ECJ Cases 351/88 *Bruneau* [1991] ECR I-3641; C-243/89 *Commission v Denmark* [1993] ECR I-3353.

³¹ ECJ Case 249/81 *Buy Irish* [1982] ECR 4005.

³² ECJ Case C-325/00 *Commission v Germany* [2002] ECR I-9977.

³³ ECJ Case C-335/95 *Dior* [1997] ECR I-6013.

³⁴ ECJ Case C-398/98 *Commission v Greece* [2001] ECR I-7915, 7932.

³⁵ ECJ Case C-429/00 *Radiosistemi* [2002] ECR I-5845.

³⁶ ECJ Case C-30/99 *Commission v Ireland* [2001] ECR I-4619.

³⁷ See Article 36 para. 2 TFEU.

b) Prohibition of restrictions

- 15 **aa) Judicially activist interpretation via judge-made law (*Cassis* Judgment).** In its fundamental landmark judgment *Cassis de Dijon*³⁸, the ECJ had to deal with a national law **equally** concerning domestic and imported goods for the first time. The case dealt with a German law governing the marketing of alcoholic beverages which set a minimum alcoholic strength of 25 % per litre for certain categories of alcoholic products. This regulation prohibited an importer from marketing *Cassis de Dijon*, a French liqueur with an alcoholic strength of between 10 % and 20 %, in Germany. The ECJ found this incompatible with Article 30 TEC (now: Article 34 TFEU). The ECJ stated that in the absence of Community (now: Union) rules, the Member States have to lay down the conditions on access to national markets for imported products. Obstacles to movement within the Community (now: Union) resulting from disparities between the national laws relating to the marketing of the products in question must be accepted. This **only** applies, however, to satisfy **mandatory requirements**. These mandatory requirements in particular encompass the **effectiveness of fiscal supervision**, the **protection of public health**, the **fairness of commercial transactions** and the **defense of the consumer (consumer protection)**. In the case of *Cassis de Dijon*, the ECJ could not find such mandatory, in their end **general-interest** oriented requirements, particularly because the ECJ assumed, according to its judgments in defense of consumers, that a consumer is an **empowered, reasonably well-informed and educated individual**.³⁹ Consequently, the national German law could not be applied to imported goods.
- 16 The ECJ exceeded the principle of (mere) equal treatment of imported and domestic goods in the State of destination (**State of destination principle**) in the interests of the **free movement of goods within the Union**. The rules of the State of destination only apply to the domestic goods without restrictions. They have to step back with regard to imported goods which already fulfil the legal requirements imposed by the Member State from which the good is imported (**State of origin principle**).
- 17 **bb) Restriction: ‘mandatory requirements’, again *Cassis*.** The rules of the State of destination only apply to imported goods as they satisfy ‘mandatory requirements’. These mandatory requirements pursue a public interest that overrides the free movement of goods. So far, the ECJ does not refer to the exemption of Article 36 TFEU but examines the existence of mandatory requirements within the scope of Article 34 TFEU⁴⁰. Concerning the requirement of the protection of public health, the ECJ uses Article 36 TFEU without any further explanation⁴¹. The maintenance of pluralism of the press can be considered as a mandatory requirement⁴², as well as the protection of the environment⁴³, and the information and protection of the consumer⁴⁴. Fundamental rights can also justify infringements of the free movement of goods and the other freedoms of the internal market.⁴⁵
- 18 A mandatory requirement has to meet the following **conditions**:

³⁸ ECJ Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

³⁹ See *Blaurock* JZ 1999, 801 et seq.; *Seibt*, GRUR 2002, 265 et seq.

⁴⁰ Like this, ECJ explicitly in Case 113/80 *Commission v Ireland* [1981] ECR 1625.

⁴¹ ECJ Case C-293/94 *Brandsma* [1996] ECR I-3159.

⁴² ECJ Case C-368/95 *Familiapress* [1997] ECR I-3689.

⁴³ ECJ Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301.

⁴⁴ ECJ Case C-390/99 *Canal Satellite Digital* [2002] ECR I-607.

⁴⁵ European: Case C-112/00 *Schmidberger* [2003] ECR I-5659, and national: Case C-36/02 *Omega* [2004] ECR I-9609.

- It has to pursue an objective which lies in the **public interest**. Such objectives might be, besides the ones stated within the *Cassis* judgment (see mn. 15 above), the remaining rights of Article 36 para. 1 TFEU as well as the protection of the working environment⁴⁶ and the protection of the natural environment.⁴⁷
- To achieve those goals, the law needs to be appropriate and necessary and proportionate in view of the significance of the free movement of goods.⁴⁸ A provision is not **proportionate** if a less intrusive measure meets the objective (for instance labelling instead of a complete ban on the movement of goods).
- The measure must be **non-discriminatory**⁴⁹; and must not be a disguised restriction on trade between the Member States.⁵⁰

c) General rules of business life, the *Keck* judgment

If the *Dassonville* formula is applied to governmental provisions which apply to domestic products and to imports from other Member States without distinction, the question arises if ‘general rules of business life’⁵¹, which are not related to the control of trade flows and which affect the functioning of the internal market⁵² and which only have indirect impact, are to be considered as trade barriers. These provisions, which do **not include specific obstructions** on the free movement of goods⁵³, do not fall into the scope of protection of Article 34 TFEU. This especially refers to those laws which could not be examined in the State of origin because the legal policy aim of the law is not a part of the goods as such.⁵⁴ Such rules are to be found in the areas of marketing, labour conditions etc. **Examples:** prohibition on offering certain spirits for consumption on the premises in places open to the public⁵⁵; prohibition of Sunday trading⁵⁶; national legislation prohibiting the employment of workers in retail shops on Sundays after 12 noon⁵⁷; prohibition of simultaneous exploitation of films in cinemas and in video-cassette form⁵⁸; rules on business opening hours⁵⁹.

The ECJ took into account that these special standards are not **aimed at products as such**. Consequently, the Court rejected their potentially restrictive effect on trade. In its *Keck* judgment⁶⁰, the ECJ expressly limited the scope of application of Article 34 TFEU. Only rules relating to goods should be within Article 34 TFEU, whereas rules concerning **selling arrangements** (such as reselling goods below the purchase price) were excluded. The ECJ held that restricting or prohibiting certain selling arrangements is not as such meant to hinder trade between Member States (within the meaning of that definition), as long as those provisions apply to all relevant traders operating within the national territory and as long as they affect the marketing of domestic products and of those from other Member States in the same manner, in law and in fact.⁶¹ Further **examples:** prohi-

⁴⁶ See Article 153 para. 1 TFEU.

⁴⁷ ECJ Case 302/86 *Commission v Denmark* [1988] ECR 4607; Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

⁴⁸ ECJ Case C-320/03 *Commission v Austria* [2005] ECR I-9871.

⁴⁹ ECJ Case C-2/90 *Commission v Belgium* [1992] ECR I-4431. See Article 36 para. 2 TFEU.

⁵⁰ ECJ Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617.

⁵¹ See *GS/Wägenbaur*, Article 28 EGV mns 84 et seq.

⁵² See Article 114 para. 1 TFEU.

⁵³ See *Steindorff*, ZHR 1986, 689.

⁵⁴ ECJ Case C-33/97 *Colim* [1999] ECR I-3175.

⁵⁵ ECJ Case 75/81 *Blesgen* [1982] ECR, 1211.

⁵⁶ ECJ Case 145/88 *Torfaen Borough Council v B & Q plc.* [1989] ECR 3851.

⁵⁷ ECJ Case C-332/89 *Marchandise* [1991] ECR I-1027.

⁵⁸ ECJ Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605.

⁵⁹ ECJ Joined Cases C-401/92 and C-402/92 *Boermans* [1994] ECR I-2199.

⁶⁰ ECJ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁶¹ ECJ Case C-405/98 *KO v GIP* [2001] ECR 1795.

bition of Sunday trading⁶²; national legislation which reserves the retail sale of products, irrespective of their origin, to authorized distributors⁶³; rules prohibiting the marketing of processed milk for infants by others than pharmacies⁶⁴; prohibition on advertising outside the pharmacy⁶⁵; rules prohibiting televised advertising in the distribution sector⁶⁶; prohibition of advertising directed at children⁶⁷; national legislation requiring prior packaging and specific labelling for the marketing of deep-frozen bread lawfully produced in a Member State and placed on the market in another Member State after further baking⁶⁸.

- 22 More recently, the ECJ further defined its *Keck* judgment: In the case *Deutscher Apothekerverbund*⁶⁹, the Court classified the German prohibition on the internet-sale of pharmaceutical products as a **selling arrangement**, but as a selling arrangement that had **discriminatory effect** because pharmacies from Member States other than Germany were not given the possibility to access the German national market for medicines (**complete market exclusion**). To justify this complete market exclusion, **mandatory requirements** serving the general interest were held to be necessary even though 'only' a selling arrangement was at stake.⁷⁰ In the *Alfa Vita Vassilopoulos* cases⁷¹, the ECJ had to deal with provisions concerning special bakery products (so called 'bake-off'-products). According to the ECJ's judgment in this case, Article 34 TFEU was to be interpreted as precluding national legislation which makes the sale of 'bake off' products subject to the same requirements as those applicable to the full manufacturing and marketing procedure for traditional bread and bakery products. Such a national legislation, the Court went on, was not just to be qualified as a selling arrangement but as an **import obstacle** and therefore an infringement of Article 34 TFEU.

23

3. Examples

Measures having equivalent effect (compared to quantitative restrictions) can result from indistinctly applicable national legislation on (for example):

- the **composition and ingredients of goods**⁷²;
- the **presentation and packing of goods**⁷³;
- the **description**⁷⁴ and the **labelling of goods**⁷⁵;

⁶² ECJ Joined Cases C-69/93 and C-258/93 *Punto Casa* [1994] ECR I-2355; Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno* [1996] ECR I-2975.

⁶³ ECJ Case C-387/93 *Banchero* [1995] ECR I-4663; Case C-162/97 *Nilsson* [1998] ECR I-7477.

⁶⁴ ECJ Case C-391/92 *Commission v Greece* [1995] ECR I-1621.

⁶⁵ ECJ Case C-292/92 *Hünernmund* [1993] ECR I-6787.

⁶⁶ ECJ Case C-412/93 *Leclerc-Siplec v TFI* [1995] ECR I-179.

⁶⁷ ECJ Joined Cases C-34/95, C-35/95 and C-36/95 *KO v De Agostini* [1997] ECR I-3843.

⁶⁸ ECJ Case C-416/00 *Morellato* [2003] ECR I-9343.

⁶⁹ ECJ Case C-322/01 *Deutscher Apothekerverbund* [2003] ECR I-14887.

⁷⁰ See *CR/Kingreen*, Article 34–36 AEUV mns 51 et seq.

⁷¹ ECJ Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE* [2006] ECR I-8135.

⁷² ECJ Case 178/84 *Purity requirement for beer* [1987] ECR 1227; Case C-42/90 *Bellon* [1990] ECR I-4863; Case C-358/95 *Morellato* (composition of bread) [1997] ECR I-1431; Case C-123/00 *Bellamy* (salt content of bread) [2001] ECR I-2795.

⁷³ For example: ECJ Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* (requirement of packaging for margarine) [1982] ECR 3961.

⁷⁴ For example: ECJ Case 178/84 *Purity requirement for beer* [1987] ECR 1227; Case C-269/89 *Sausage* [1990] ECR I-4169; Case C-210/89 *Cheese* [1990] ECR I-3697; Case C-315/92 *Clinique* [1994] ECR I-317; Case C-448/98 *Guimont* (Emmenthal cheese) [2000] ECR I-10663; Case C-12/00 *Commission v Spain* (chocolate) [2003] ECR I-459, 480.

⁷⁵ ECJ Case C-317/92 *Commission v Germany* [1994] ECR I-2039.

- the **quality control of goods**⁷⁶; requirement of certification for radio communications receivers, which are authorized in other Member States⁷⁷; for pesticides⁷⁸; alarm systems and networks⁷⁹; marine equipment⁸⁰;
- the **advertising of goods**⁸¹; the prohibition on the advertising of alcoholic beverages is affecting imported goods more than national goods because the consumer is more familiar with domestic products⁸²;
- **price regulations**⁸³
- **the exercise of property rights**⁸⁴.

Article 34 TFEU prohibits a **public undertaking** from being given the power to approve 24
telephone equipment which is intended to be connected to the public network and which has not been supplied by this public undertaking if the decisions of the public undertaking cannot be challenged before court. This interpretation must be extended to cases in which a public undertaking approves radio transmitters or receivers, whether or not they are intended to operate via the public network.⁸⁵ Article 34 TFEU also has to be interpreted, as the ECJ held in another case, ‘as precluding the prohibition, laid down by the rules of a municipality of a Member State on a trader importing fresh meat into the municipality from using its own means to transport and deliver its goods within the territory of the municipality in question unless it pays a local undertaking the amount corresponding to the services which that undertaking provides under an exclusive concession for handling in the municipal slaughterhouse and transporting and delivering the goods in question’⁸⁶. In these joined cases, the ECJ reemphasized that Article 34 TFEU has direct effect and creates rights for individuals which the national courts have to protect.

The recent jurisprudence concerning **bans on use** is particularly interesting. In gen- 25
eral, national bans on use are subject to Article 34 TFEU.⁸⁷ In the case *Commission v Italy*⁸⁸, the ECJ rejected to qualify a national legislature constituting a ban on use as a measure having equivalent effect (in the decided case a prohibition on mopeds, motorcycles, motor tricycles and quads towing a trailer was in question). Here, the ECJ took the opportunity to systematically structure its jurisprudence concerning measures having equivalent effect into a **three-level scheme**. It is about measures which (1) aim to achieve a different treatment of national and imported goods; which (2) exclude the marketability of goods which were produced lawfully in the State of origin and are circulating lawfully; which (3) hinder the access to the market of another Member State by any other means. When recently deciding similar cases on bans on use, the ECJ did not use the *Keck* formula (see mns 20 et seq.) but, by analysing the **objective justification** of the measure in question with a focus on its **appropriateness and proportionality**, expressly formulated the circumstances in which a measure having effect to quantitative restric-

⁷⁶ For example: ECJ Case 406/85 *Gofette* [1987] ECR 2525.

⁷⁷ ECJ Case C-80/92 *Commission v Belgium* [1994] ECR I-1019.

⁷⁸ ECJ Case C-293/94 *Brandsma* [1996] ECR I-3159.

⁷⁹ ECJ Case C-14/02 *ATRAL* [2003] ECR I-4431.

⁸⁰ ECJ Case C-455/01 *Commission v Italy* [2003] ECR I-12023.

⁸¹ For example: ECJ Case C-241/89 *SARPP* [1990] ECR I-4695; Case C-238/89 *Pall* (trade mark symbol) [1990] ECR I-4827; Case C-470/93 *Mars* (wrapping marked ‘+10 %’) [1995] ECR I-1923.

⁸² ECJ Case C-405/98 *KO v GIP* [2001] ECR I-1795.

⁸³ For example: ECJ Case 13/77 *Inno* [1977] ECR 2115; Case 82/77 *van Tiggele* [1978] ECR 25; Case 229/83 *Leclerc* [1985] ECR I; Case C-287/89 *Commission v Belgium* [1991] ECR I-2233; Joined Cases C-267/95 and C-268/95 *Merck* [1996] ECR I-6285.

⁸⁴ See Article 30 TFEU mns 8 et seq.

⁸⁵ ECJ Joined Cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267.

⁸⁶ ECJ Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni* [1993] ECR I-6621.

⁸⁷ ECJ Case C-265/06 *Commission v Portugal* [2008] ECR I-2245.

⁸⁸ ECJ Case C-110/05 *Commission v Italy* [2009] ECR I-519.

tions on imports within the meaning of Article 34 TFEU was (not) given, referring to the principles of **non-discrimination and of mutual recognition of products** lawfully manufactured and marketed in other Member States, as well as the **principle of ensuring free access of EU products to national markets** (such as in the above-mentioned ECJ Case *Commission v Italy* on an Italian law prohibiting mopeds, motorcycles, motor tricycles and quadricycles towing a trailer in the territory of a Member State⁸⁹; also in the ECJ Case *Mickelsson*, concerning the Swedish legislation implementing Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft, on the ban on the usage of Jet-skis on waters other than designated waterways⁹⁰; and in the ECJ Case *ANETT* on a Spanish law prohibiting tobacco retailers to import tobacco products from other Member States⁹¹). Whether or not the **Dassonville formula** and the **Keck judgment** will become obsolete as the analytical basis for the ECJ's future judicial review, or whether the new concept elaborated by the ECJ in its more recent case law in this context is to be understood as an alternative method, remains to be seen. The more precise the legal conditions are, the more unlikely the danger of a zero-sum game will become, with on the one hand extending legal conditions and on the other hand more and more new unwritten justifications being introduced at the same time.

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V. Harmonisation of national legislation

As far as the free movement of goods is harmonised by secondary law of the Union, the Union's legislation overrides national legislation (**supremacy of the Union law**). Insofar, the question of prohibition of national barriers on trade under Article 34 TFEU does not arise any longer. However, the harmonising national law itself has to comply with the material principles of Article 34 TFEU (especially the **principle of proportionality** and **fundamental human rights restrictions**).

27 **Article 114 TFEU** builds the basic competence for harmonising legal measures of the Union since the SEA entered into force on 1 July 1987. If Article 114 TFEU is not applicable, Article 115 TFEU and Article 352 TFEU might apply. Article 114 paras 4, 5 TFEU, however, allow keeping already existing legislation or adopting new national legislation if the national laws provides a higher level of protection than the harmonized Union law. It is beyond question that these national legislative acts have to satisfy the requirements of Articles 34 et seq. TFEU.

28 Following the ECJ's *Cassis* judgment, the harmonising laws of the Union have lost their originally decisive importance. As long as the equal treatment of imported and national goods was necessary (principle of State of determination), it was necessary to harmonise the national legislation concerning all relating matters (for instance composition, labelling, packing, advertising for certain goods). Since the principle of State of origin is decisive, now only a comparable need for harmonization of the **exemptions** remains ('**mandatory requirements**', see Article 36 TFEU), allowing national legislation concerning imported goods to be enacted.

29 In order to avoid later arguments on the admissibility of measures having equivalent effect and of measures to prevent (new) trade barriers, the Member States are obliged to **inform the Commission in advance** about the implementation of new technical stan-

⁸⁹ ECJ Case C-110/05 *Commission v Italy* [2009] ECR I-519.

⁹⁰ ECJ Case C-142/05 *Mickelsson* [2009] ECR I-04273.

⁹¹ ECJ Case C-456/10 *ANETT*, judgment of 26 April 2012, published in the online Reports of Cases under ECLI:EU:C:2012:241.

dards.⁹² Such a technical standard is not applicable for third parties if the Commission has not been notified of it prior to its adoption⁹³.

Article 35 [Quantitative restrictions on export] (ex Article 29 TEC)

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

Bibliography: *van Calster*, Export restrictions – a watershed for Article 30, 25 ELRev 2000, 335; *Koutrakos*, Exports of Dual-use Goods Under the Law of the European Union, 23 ELR 1998, 235; *Szydło*, Export Restrictions within the Structure of Free Movement of Goods – Reconsideration of an Old Paradigm, 47 CMLRev 2010, 753; cf. also literature on Article 34 TFEU.

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I. General remarks 1

The Draft Constitutional Treaty was supposed to tighten the provisions on the movement of goods, especially the restrictions on imports and exports. They should have been summarised to one provision. Thus, divergences on interpretation could have been rectified.¹ The Treaty of Lisbon did not take up these impulses but leaves everything as it was. Article 35 TFEU adopted Article 29 TEC word by word.

The regulatory approach of this provision is rather clear: Only if the **export** of goods 2 in other Member States is possible without hindrance of national institutions, adequate conditions for the internal market can be created within the Union. Article 35 TFEU phrases a prohibition of quantitative restrictions and measures having equivalent effect corresponding to Article 34 TFEU.² The provision is directly applicable.³ Exemptions are to be found in Article 36 TFEU.

II. Measures having equivalent effect 4

Whereas the term ‘quantitative restrictions’ (allocation; export ban) correlates with Article 34 TFEU⁴, the expression of the measures having equivalent effect in Article 35 TFEU is to be understood differently. The **Dassonville formula**⁵ might be applicable in principle.⁶ Trade barriers on export do not affect – unlike those on import – foreign but **nativ external trade**. The hindrance on export just concerns domestic goods, therefore goods which have their origin inland or goods which have their origin in other countries but which are in free circulation in the Member States.⁷ The purpose of Article 35 TFEU

⁹² Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

⁹³ ECJ Case C-303/04 *Lidl Italia* [2005] ECR I-7865.

¹ See Schwarze/Becker, Article 35 AEUV mn. 2.

² Also refusal of an export permit ECJ Case C-5/94 *Hedley Lomas* ECR 1996, I-2553.

³ ECJ Case C-83/78 *Pigs Marketing Board* [1978] ECR 2347; Case C-47/90 *Promalvin* [1992] ECR I-3669.

⁴ See Article 34 TFEU mn. 6.

⁵ See Article 34 TFEU mn. 8.

⁶ Cf. GHN/Leible, Article 35 AEUV mn. 7, also with reference to ECJ Case C-15/79 *Groenveld* [1979] ECR 3409.

⁷ See Article 28 para. 2 TFEU.

is **not to grant the domestic market an advantage** concerning the supply of goods compared with the markets of other Member States. The prohibition concerns the hindrance through barriers which are not existing for the domestic market and therefore refers to '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 domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the state in question'⁸.

- 5 Such quantitative restrictions for the interstate trade, which serve the goal of maintaining and optimising trade in the long-term, remain excluded from Article 35 TFEU. Methodically, this is a **teleological reduction**.⁹

Article 36 [Exemptions] (ex Article 30 TEC)

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.

Bibliography: *Barnard*, Trailing a New Approach to the Free Movement of Goods, 68 CLJ 2009, 288; *Chalmers*, Repacking the Internal Market – The Ramification of the *Keck* Judgment, 19 ELRev 1994, 385; *de Búrca*, Unpacking the Concept of Discrimination in EC and International Trade Law, in: Barnard/Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, 2002, 7; *Enchelmaier*, The Inexhaustible Question – Free Movement of Goods and Intellectual Property in the European Court of Justice's Case Law, 2002–2006, IIC 2007, 453; *Greaves*, Advertising Restrictions and the Free Movement of Goods and Services, 23 ELRev 1998, 305; *Koutrakos*, On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after *Keck*, 26 ELRev 2001, 301; *Millet*, Free Movement of Goods and Public Morality, New Law Journal 1987, 39; *Pecho*, Good-Bye *Keck*? A Comment on the Remarkable Judgement in *Commission v Italy*, C-110/05, 36 LJIE 2009, 257; *Scott*, Mandatory or Imperative Requirements in the EU and the WTO, in: Barnard/Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, 2002, chapter 10; *Sedemund*, Statement on the concept of the free movement of goods and the reservation for national action under Article 36 EEC Treaty, in: Barnard/Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, 2002, 25; *Slynn*, The concept of the free movement of goods and the reservation for national action under Article 36 EEC Treaty, in: Schwarze (ed.), *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty*, 1988, 17; *Weiler*, From *Dasonville* to *Keck* and Beyond: An Evolutionary Reflection on the Text and the Context of the Free Movement of Goods, in: Craig/de Búrca (eds), *The evolution of EU Law*, 1999, chapter 10; *Wenneras/Moen*, Selling Arrangements, Keeping *Keck*, 35 ELRev 2010, 387; *Wilsher*, Does *Keck* Discrimination Make any Sense? An Assessment of the Non-discrimination Principle within the European Single Market, 33 ELRev 2008, 3.

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⁸ ECJ Case C-155/80 *Oebel* [1981] ECR 1993; Case C-80/92 *Commission v Belgium* [1994] ECR I-1019.

⁹ Cf. jurisdiction of the ECJ Case C-535/03 *Unitymark Ltd.* [2006] ECR I-2689; also see Schwarze/Becker, Article 35 AEUV mns 15; concerning the justification of restrictive measures, see Schwarze/Becker, Article 35 AEUV mn 22 et seq.

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I. General remarks

1

1. Exemption

Article 36 TFEU constitutes an exemption for explicitly enumerated trade barriers. It is identically modelled after Article 30 TEC. The Treaty of Lisbon did not change the classic structure of the free movement of goods. It implicitly presupposes all relevant case-law of the ECJ but does not translate the judge-made law into the written law of the newly shaped Treaty, neither in detail nor in general. This can be considered as a shortcoming. The same continuity, however, had been displayed by draft-Article III-154 TECE. National trade barriers which violate the prohibitions of Articles 34, 35 TFEU can, as a restrictive exception, be justified under the conditions laid down in Article 36 TFEU. If harmonisation via directives¹ takes place, these directives, however, are *leges speciales*. They preclude the application of Article 36 TFEU.² As an exemption, Article 36 TFEU has to be interpreted narrowly, the list of exemptions in Article 36 TFEU being exhaustive (**principle of enumeration**).³

Import obstacles for other reasons (for instance environmental protection, consumer protection and other mandatory requirements in the public interest) can be justified within the scope of the **Cassis formula**. Such a justification presupposes that all these hindrances, obstacles or limitations apply to both domestic and imported goods without distinction.⁴ When Article 36 originally was conceived as a rather narrow ban on discrimination, the explicit exceptions enshrined in the equally narrow Article 36 TFEU were sufficient. The ECJ, however, has reshaped the free movement of goods conceiving it not only as a ban on discrimination, but as a general **prohibition of all kinds of restrictions**. Consequently, the strict explicit exception, meant to serve the ban on discrimination, did not suffice anymore. The ECJ consequently had to 'invent' – that is to say to dogmatically conceptualize – **unwritten justifications**. These justifications are to be interpreted restrictively in the light of the **principle of proportionality** and also taking into account the Union's own set of fundamental rights.

2. Impact

3

Article 36 TFEU cannot be qualified as a competence norm. It does not establish a special reservation in favour of the Member States – a reservation in the sense of their exclusive competence for the policies which are mentioned in the exemptions. The article does only refer to possible justifications for derogation regarding the prohibition of barriers on trade, having exceptional individual cases in mind.⁵ The Union remains authorised to harmonise these policies as far as it is necessary.⁶

¹ See Article 114 TFEU.

² ECJ Case C-112/97 *Commission v Italy* [1999] ECR I-1821.

³ ECJ Case 229/83 *Leclerc* [1985] ECR I.

⁴ See Article 34 TFEU mn. 15; ECJ Case 95/81 *Commission v Italy* [1982] ECR 2187.

⁵ ECJ Case 72/83 *Campus Oil* [1984] ECR 2727.

⁶ See Article 34 TFEU mns 26 et seq.

- 4 Consequently, the Member State concerned bears the ‘**burden of proof**’ that the conditions of the exemptions are fulfilled. The ECJ allows for a general margin of appreciation by the Member States when they have to assess whether or not national measures might be necessary.⁷ In the ECJ’s jurisprudence, however, this margin is often factually eliminated when the Court applies restrictive proportionality tests (see below mn. 14).⁸ The margin of appreciation granted is rather narrow.

5 II. Exemptions of non-economic nature

The exemptions under Article 36 para. 1 TFEU are, to use the words of the ECJ, such of ‘non-economic nature’. This is not to be taken literally (for instance the exemptions on the protection of industrial and commercial property). What the ECJ intends to describe is driven by the very purpose of the fundamental freedoms. The Member States are not allowed to rely on Article 36 TFEU in order to justify economic benefits for their national economic actors. This would contravene the very purpose of competitively open internal markets and simply be protectionist.⁹ The Member States are furthermore not allowed to rely on economic justifications in times of an economic crisis; that would, in the end, be protectionism driven by necessity but would still be protectionism.¹⁰ All in all, the exemptions must not have a **protectionist** effect.

6 1. Public security and public policy

The free movement of goods only disturbs the **public policy** and the (**internal and external**¹¹) **security** in very particular cases. Public security and public policy can be characterized as basic governmental principles established by the sovereign States with respect to the public interests. **Examples:** Export of silver coins which are no longer legal tender¹²; interruption of supplies of petroleum products¹³. Sampling frontier inspections (on-the-spot-checks) to prevent fraud are permitted.¹⁴ Disturbances of the public order as a consequence of economic disruption (wildcat strikes, roadblock) cannot be justified by Article 36 TFEU – unless they are the permissible **expression of fundamental rights**. In this context, the ECJ decided cases regarding the right to assemble, to express one’s opinion and to demonstrate.¹⁵

- 7 The trade in **arms, munitions and war material** (specific problem: ‘dual-use goods’, see Regulation No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items) is covered by Article 346 TFEU.

8 2. The protection of health and life

The exemption relating to the protection of health and life concerns regulatory instruments dealing with national health protection and accident prevention. However, the narrow scope of the principle of proportionality has to be respected whenever the exemption

⁷ ECJ Case 174/82 *Sandoz* [1983] ECR 2445.

⁸ ECJ Case 227/82 *van Bennekom* [1983] ECR 3883.

⁹ ECJ Case C-317/92 *Commission v Germany* [1994] ECR I-2039.

¹⁰ ECJ Case 7/61 *Commission v Italy* [1961] ECR 317.

¹¹ ECJ Case C-70/94 *Werner* [1995] ECR I-3189.

¹² ECJ Case 7/78 *Thompson* [1978] ECR 2247.

¹³ ECJ Case 72/83 *Campus Oil* [1984] ECR 2727; Case C-347/88 *Commission v Greece* [1990] ECR I-4747.

¹⁴ ECJ Case C-426/92 *Milch-Kontor* [1994] ECR I-2757.

¹⁵ ECJ Case C-112/00 *Schmidberger* [2003] ECR I-5659.

is applied (examples are the law of medicinal products¹⁶, food law¹⁷, and technical safety standards). National rules may restrict the sale of goods aiming at correcting malfunctions of the human body in a way that only economic actors who are specifically qualified and who have a significant diploma may sell these goods.¹⁸ The sale by mail order of medicinal products may not be prohibited if the medicinal products are approved on the domestic market and if they are non-prescriptional; the same is true for mail order advertising of medicinal products.¹⁹ A potential hindrance to the obligation to purchase a minimum percentage of electricity produced by renewable energy sources from national suppliers may be justified by the protection of public health or the protection of animals, the preservation of plants as well as the protection of the environment²⁰; **life and health**, in general, enjoy a **high priority** when it comes to their protection, see the ECJ case *Ahokainen v Leppik*²¹. In *Doc Morris II*²², the ECJ pointed out that the restriction to operate pharmacies only as a pharmacist was justified because of public health protection.

German authorities did not exceed the **bounds of their discretion** by classifying eye 9 lotions (which may be used as first aid) as medicinal products, even if those eye lotions were marketed in other Member States without the necessity of a statutory approval for medicinal products. In the absence of an encompassing harmonisation, differences in classifying products may continue to exist.²³ The requirement to guarantee public health in favour of medicinal purposes is a justification.²⁴ This also applies if a serious danger for the financial balance of the system of social security arises; these conditions are not met if the flat rate for the purchase of spectacles is not reimbursed by the social security system because the spectacles were purchased abroad.²⁵

National rules declaring that the use of food additives must be authorised are lawful. 10 The Member State has to set up a procedure allowing traders to obtain inclusion of the additive in question on the national list of permitted additives.²⁶

3. Protection of animals and the preservation of plants

11

The exemption affects the national veterinary and phytosanitary legislation and the conservation of biodiversity²⁷. The principle of proportionality is to be considered here, too.²⁸ The exemption does not only include the threat of individual animals and plants but **species protection** as such and therefore also the **conservation of species diversity**.²⁹

4. Protection of national treasures

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This exemption affects bans on export, export licenses and public rights of first refusal. Export duties are not justified.³⁰ Directive 93/7/EEC, amended by Directive 2001/38/EC,

¹⁶ Prohibition of advertising, ECJ Case C-320/93 *Eurim-Pharm* [1994] ECR I-5243.

¹⁷ Check-up, ECJ Case C-105/94 *Celestini* [1997] ECR I-2971.

¹⁸ ECJ Case C-271/92 *Contact lenses* [1993] ECR I-2899.

¹⁹ ECJ Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887.

²⁰ ECJ Case C-379/98 *Preussen Elektra* [2001] ECR I-2099.

²¹ ECJ Case C-434/04 *Ahokainen v Leppik* [2006] ECR I-9171.

²² ECJ Joined Cases C-171/07 and C-172/07 *Apothekenkammer des Saarlandes* [2009] ECR I-4171.

²³ ECJ Case C-290/90 *Commission v Germany* [1992] ECR I-3317.

²⁴ ECJ Case C-324/93 *Evans Medical Ltd.* [1995] ECR I-563.

²⁵ ECJ Case C-120/95 *Decker* [1998] ECR I-1831.

²⁶ ECJ Case C-95/89 *Commission v France* [1992] ECR I-4545.

²⁷ ECJ Case C-67/97 *Bluhme* [1998] ECR I-8033.

²⁸ See ECJ Case C-131/93 *Commission v Germany* [1994] ECR I-3303, concerning the total ban on importation of live freshwater crayfish; Case C-350/97 *Monsees* [1999] ECR I-2921, concerning the international transport of live animals for slaughter.

²⁹ See Schwarze/Brecker, Article 36 AEUV mn. 19.

³⁰ ECJ Case 7/68 *Commission v Italy* [1969] ECR 423.

regulates the return of cultural objects unlawfully removed from the territory of a Member State. It is a problem that there is no general definition of the **very ambiguous legal term ‘cultural object’**; anyway, it is up to the discretion of the Member States to decide the priority of cultural objects of national importance.

13

5. Protection of industrial and commercial property

The ‘protection of industrial and commercial property-exemption’ includes in particular patent law³¹, trade mark rights³², copyright law³³ and design patent law³⁴. Respective harmonization directives have priority as *leges speciales*.³⁵ Designations of origin fall under the protection of industrial and commercial property as far as the designations did not become generic.³⁶ Designations of origin are protections of commercial property and are therefore in line with Union law if they are necessary and proportionate to sustain the high reputation of a certain wine.³⁷ The ECJ emphasizes the distinction between the existence and the exercise of these laws. The **existence** is protected by Articles 345 and 36 TFEU; the **exercise** is protected to the extent that such restrictions are necessary to safeguard the rights which constitute the specific subject-matter of that property.³⁸ In general, the protection allows the beneficiary – to a different extent, depending on the applicable national law – to oppose to the import of the good in a certain Member State. Article 36 TFEU allows this trade-restrictive effect of the national protection law in principle, as far as the beneficiary shall be protected from fraudulent use by persons which are not legally entitled at all.³⁹ The respective industrial property right must not be used to hinder the import of goods, which were put into circulation into the market in another Member State either directly by this Member State or with its consent.⁴⁰ This will also apply if the right in question is not protected in that Member State⁴¹ but it will not apply where a compulsory license has been granted⁴² or where the use after expropriation of the trade mark has been granted⁴³ or if the patent holder is obliged to put the product on the market for another reason⁴⁴. The prohibition of unauthorised hiring-out of videocassettes is justified, even due to the fact that an author has put videocassettes into circulation in a Member State which does not provide specific protection for the right to hire them out.⁴⁵

Matters concerning the industrial property rights are regulated by numerous secondary law provisions.⁴⁶

³¹ ECJ Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147.

³² ECJ Case 16/74 *Centrafarm v Winthrop* [1974] ECR 1183; Case C-317/91 *Audi Quattro* [1993] ECR I-6227.

³³ ECJ Joined Cases 55/80 and 57/80 *GEMA* [1981] ECR 147.

³⁴ ECJ Case 144/81 *Keurkoop* [1982] ECR 2853.

³⁵ ECJ Case C-352/95 *Bourdon* [1997] ECR I-1729.

³⁶ ECJ Case C-3/91 *Exportur* [1992] ECR I-5529.

³⁷ Here: denominación de origen calificada Rioja, ECJ Case C-388/95 *Begium v Spain* [2000] ECR I-3123.

³⁸ ECJ Case 16/74 *Centrafarm v Winthrop* [1974] ECR 1183.

³⁹ Case 119/75 *Terrapin* [1976] ECR 1039.

⁴⁰ ECJ Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147; Case C-61/97 *Laserdisken* [1998] ECR I-5171; Joined Cases C-414/99 and C-416/99 *Davidoff* [2001] ECR I-8691; Case C-244/00 *van Doren* [2003] ECR I-3051: principle of exhaustion of the right conferred by the *trade mark*.

⁴¹ ECJ Case 187/80 *Merck* [1981] ECR 2063.

⁴² ECJ Case 19/84 *Pharmon* [1985] ECR 2281.

⁴³ ECJ Case C-10/89 *SA v HAG* [1990] ECR I-3711.

⁴⁴ ECJ Joined Cases C-267/95 and C-268/95 *Merck II* [1996] ECR I-6825.

⁴⁵ ECJ Case 158/86 *Warner Brothers* [1988] ECR 2605.

⁴⁶ For an overview see Schwarze/Becker, Article 36 AEUV mns 25 et seq.

III. Proportionality

14

As such, the exemptions regarding the general prohibition of quantitative restrictions and measures having equivalent effect for non-economic reasons have to be interpreted narrowly. According to the ECJ's consistent case law, these exceptions are only justified if they are **proportionate**. The principle of proportionality is to be qualified as a **general legal principle** of Union law.⁴⁷

The principle of proportionality requires the following three-step test: Any restriction 15 of a fundamental freedom must be justified by the achievement of a legitimate aim; it furthermore must not go beyond what is necessary for that purpose. The latter also means that these restrictions, when considering the non-economic exemptions on the one side and the requirements of the free movement of goods on the other side, need to be properly balanced (**proportionality in a restrictive sense**). The prohibition against the importation of medicinal products in quantities not exceeding normal personal need, available only on prescription in the importing Member State but prescribed by a doctor in another Member State, is disproportional.⁴⁸ **Fundamental rights** need to be considered when the principle of proportionality is interpreted. The ECJ does not only interpret fundamental rights as limits but furthermore as statutes which can themselves justify the infringement – in other words: **immanent limits of the fundamental freedoms**.⁴⁹

The justification of trade restricting national measures especially fails (necessity test) if 16 a **less restrictive measure** is available to achieve the objectives (for instance implementing a labelling requirement instead of the general prohibition of traffic). A national provision requiring the use of a specific language for the labelling, without allowing another language easily understood by purchasers to be used or allowing the purchaser to be informed by other means, is disproportionate.⁵⁰ National provisions must not 'crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them'.⁵¹

Further examples: Grounds of **public security** may justify a trade restricting national 17 measure with the aim of ensuring a minimum supply of petroleum products but the limits of a minimum supply may not be exceeded.⁵² A roadworthiness test for the purpose of registering an imported vehicle, so that it may be given a certificate of its conformity to the vehicle types approved in the importing Member State, is not a permissible national measure.⁵³

Regarding *health protection*, it is allowed to make the sale of foodstuffs enriched with vitamins and minerals subject to prior administrative authorisation but the authorisation may not be dependent on a needs test or the word of the importer as to the harmlessness of the substance⁵⁴; national authorities are allowed to ask traders to submit information in their possession which may be useful for the purpose of assessing the facts on the harmful effect on health⁵⁵. The obligation which subjects imported sterile medical supplies originating in other Member States to tests or laboratory analyses already carried out in those Member States, is inadmissible if the results of the prior examination in the

⁴⁷ See *Pache*, NVwZ 1999, 1033.

⁴⁸ ECJ Case C-62/90 *Commission v Germany* [1992] ECR I-2575.

⁴⁹ See Schwarze/Becker, Article 36 AEUV mn. 39 with further references.

⁵⁰ ECJ Case C-366/98 *Geffroy* [2000] ECR I-6579.

⁵¹ ECJ Case 178/84 *Commission v Germany* [1987] ECR 1227, mn. 32 with reference to Case 170/78 *Commission v United Kingdom* [1980] ECR 417.

⁵² ECJ Case 72/83 *Campus Oil* [1984] ECR 2727; Case C-398/98 *Commission v Greece* [2001] ECR I-7915.

⁵³ ECJ Case C-50/85 *Schloh* [1986] ECR 1855.

⁵⁴ ECJ Case C-192/01 *Commission v Denmark* [2003] ECR I-9693.

⁵⁵ ECJ Case C-42/90 *Bellon* [1990] ECR I-4863; see also Case C-293/94 *Brandsma* [1996] ECR I-3159.

Member State of origin has been made available to the national authorities of the importing Member State.⁵⁶ If the goods (in this case: fish) were already subject to a control by health authorities in the State of origin and such a certificate is enclosed, the State of destination is only allowed to carry out random checks to make sure that the certificates from the authorities of the State of origin are compliant to prevent fraud and to defy import of non-conformity goods. If there is no certificate enclosed, the authorities of the State of destination may submit those goods to systematic controls by health authorities in the suspicion of larva infestation.⁵⁷

18

IV. Ban on discrimination and prohibition of abuse

The purpose of Article 36 s. 2 TFEU is, by and large, already achieved by the **basic principle of proportionality**. Article 36 s. 2 TFEU **expressly** defines an absolute limit of trade restricting measures. The different treatment of imported and domestic goods may not be arbitrary⁵⁸; the protective measures may not be used for bypassing the free movement of goods⁵⁹. A national prohibition to import beer with a sulphur dioxide content of more than 20 mg/l from another Member State is inadmissible if the beer is in free circulation in that other Member State. The term 'technological requirement' may not be used to favour domestic manufacturing processes (disguised restriction of trade between the Member States). The term is to be interpreted with regard to the raw material used as well as with regard to the evaluation of the authorities of the Member State in which the product was lawfully produced and put on the market. In addition, the results and standards of international scientific research are to be taken into account (for instance the daily maximum limits approved from FAO and WHO).⁶⁰

- 19 The catalogue of written justifications, which apply to all measures, regardless of whether they have discriminatory effects or qualify as indiscriminate, are to be strictly separated from the unwritten **mandatory general interest** requirements of the *Cassis formula*, which only apply to **indiscriminate measures**.⁶¹

Article 37 [State monopolies] (ex Article 31 TEC)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return,

⁵⁶ ECJ Case C-373/92 *Commission v Belgium* [1993] ECR I-3107.

⁵⁷ ECJ Case C-228/91 *Commission v Italy* ECR 1993, I-2701.

⁵⁸ ECJ Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

⁵⁹ ECJ Case 40/82 *Commission v United Kingdom* [1982] ECR 2793; Case 27/80 *Fietje* [1980] ECR 3839.

⁶⁰ ECJ Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617.

⁶¹ See Article 34 TFEU mn. 15.

steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

Bibliography: *Béraud*, L'aménagement des monopoles nationaux prévus à l'article 37 du traité C. E. E. à la lumière des récents développements jurisprudentiels, *Rev. Trim. Dr. Eur.* 1979, 15 and 537; *Blum/Logue*, State Monopolies under EC Law, 1998; *Buendia Sierra*, Exclusive Rights and State Monopolies under EC Law, 1999; *Geradin* (ed.), *The Liberalization of State Monopolies in the EU and Beyond*, 2000; *Melloni*, La sentenza Rosengren: un duro colpo per il monopolio di Stato svedese di bevande alcoliche, *Diritto del commercio internazionale* 2007, 546; *Shuibhne*, Regulating the Internal Market, 2006; *Szyszczak*, The Regulation of the State in Competitive Markets in the EU, 2007.

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I. General remarks

1

In a **social market economy** based on **free competition**, State monopolies are dysfunctional and contradict the system. When and where they are nevertheless approved, they require specific justification. This was already expressed by Article 31 TEC, to which draft-Article III-155 TECE referred and which is now, identical in its wording, adopted by Article 37 TFEU. The prohibition to restrict the free movement of goods according to Articles 34–36 TFEU is constitutive for the internal market. All market participants are bound by it. The prohibition, however, could be circumvented if **State bodies** or **government agencies** themselves act as **market participants**, relying on their relevant monopolies, and thus disruptively influence cross-border trade by self-defined conditions and by advantages granted to them. Article 37 TFEU prevents this malfunction of a free and competitive market. As far as obstacles to the free movement of goods between the Member States are caused by State monopolies (this is to say by their specific functions), Article 37 TFEU is *lex specialis* to Articles 34–36 TFEU¹, also to Articles 107, 108 TFEU (subsidy of domestic products by monopoly policy), and to Article 43 TFEU.² Article 101 TFEU does not apply to the concession contract between public authorities and the distributor which exercises public authority.³ As far as general tax fees within a monopoly are concerned, Article 110 TFEU applies.⁴ The import and export from and to third countries not covered by this, are subject to the **common commercial policy**⁵ or subject to association and cooperation agreements⁶.

Article 37 para. 1 TFEU establishes a **duty to act**; Article 37 para. 2 TFEU encompasses a **duty not to act** (in other words: **to cease and desist**, a so-called **stand-still clause**). Article 37 TFEU does not grant a subjective right of its own vis-à-vis public authorities. On the contrary, Article 37 TFEU presupposes the rules on the free movement of goods and introduces specific regulations regarding the justification of an infringe-

¹ ECJ Case 119/78 *Peureux* [1979] ECR 975 on the predecessor Article 31 TEC.

² Price compensatory levy, ECJ Case 91/75 *Miritz* [1976] ECR 217.

³ ECJ Case C-393/92 *Almelo* [1994] ECR I-1477.

⁴ ECJ Case 4/81 *Andresen* [1981] ECR 2835.

⁵ ECJ Case 91/78 *Hansen II* [1979] ECR 935; see Article 207 TFEU.

⁶ See Article 16 EEA Agreement; Article 42 Decision 1/80 Association Council EC/Turkey.

ment. It is controversially discussed whether the article only enshrines a restrictive ban on discrimination or goes beyond that, introducing an extensive prohibition of restrictions.⁷ The obligation of para. 3 concerning agricultural products has become devoid since the expiration of the transitional period on 31 December 1969. It might only become relevant for candidate countries.⁸

3

II. Trade monopoly

The **concept of trade monopoly** is used differently in different contexts. It stands for:

- 4 – The **epitome of special rights** concerning the buying and selling of specific categories of goods. These special rights enable to influence or to control the import or export between the Member States directly or indirectly, in law or in fact (Article 31 para. 1 subpara. 2 s. 1 TFEU). A production monopoly (exclusive right to produce a specific good) does not necessarily qualify as a trade monopoly at the same time.
- 5 – The **institution** which is endowed with these special rights. Article 37 TFEU primarily concerns State institutions. The scope of para. 1 subpara. 2 s. 2 includes those monopolies which were **delegated** from the State to a different legal entity.⁹
- 6 A trade monopoly deals with the free movement of goods.¹⁰ Article 106 TFEU only applies to service monopolies but Article 37 TFEU applies to services as far as imported products are discriminated compared to domestic products.¹¹ However, an analogous application to service monopolies in general is not possible.¹²
- 7 Revenue-producing monopolies serve a special purpose (as the term illustrates: they aim at creating State revenues). Depending on its precise shape, the revenue-producing monopoly might qualify as a trade monopoly, too.

8

III. Duties of Member States

1. Already existing and newly introduced trade monopolies

Article 37 TFEU neither demands the abolition of existing trade monopolies¹³ nor does it prohibit the interdiction of new trade monopolies. Insofar, the economic decision-making competence of the Member State remains unaffected (see in particular Article 345 TFEU – rules governing the system of property ownership).

9

2. Effects of trade monopolies

However, Article 37 TFEU prohibits certain effects of the monopoly. The monopoly may not hinder the free movement of goods within the Union.¹⁴ The Union's preferences are decisive, not the preferences of one Member State. Therefore, the Union might replace the preferences of the Member States. Articles 28–36 TFEU comprise the relevant benchmark.¹⁵

⁷ See CR/Kingreen, Article 37 AEUV mn. 11.

⁸ See CR/Kingreen, Article 37 AEUV mn. 8.

⁹ ECJ Case C-393/92 *Almelo* [1994] ECR I-1477.

¹⁰ ECJ Case C-6/01 *Anomar* [2003] ECR I-8621.

¹¹ ECJ Joined Cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267.

¹² See CR/Kingreen, Article 37 AEUV mn. 6.

¹³ ECJ Case 91/78 *Hansen II* [1979] ECR 935.

¹⁴ ECJ Case 59/75 *Manghera* [1976] ECR 91.

¹⁵ ECJ Case C-189/95 *Franzén* [1997] ECR I-5909.

Accordingly, the *Dassonville* formula and the *Cassis* formula are to be taken into account.¹⁶ The ban on discrimination as established by Article 37 para. 1 TFEU is – respecting the very purpose of the norm – to be broadly interpreted ***effet utile principle***.

The ‘reverse discrimination’ of domestic goods is not covered.¹⁷

3. Transformation of trade monopolies 12

The Member States were obliged to change their trade monopolies during the transitional period accordingly (**‘transform’**). If and where this has not yet been done, the prohibition to hinder the free movement of goods is **directly applicable**, meaning an individual can appeal to it.¹⁸

4. Examples 13

The following is prohibited in this context:

- Granting of exclusive import, export and (concerning imported goods) marketing rights¹⁹; exclusive import controls (here: for electricity) may, however, be justified by Article 106 para. 2 TFEU²⁰;
- Levying a charge imposed only on products imported from another Member State for the purpose of compensating for the difference between the selling price of the product in the country from which it comes, and the higher price paid by the state monopoly, to national producers of the same product²¹;
- Binding of import by sales companies, purchase of domestic products as a discrimination of the exporters which are located in other Member States²²;
- Marketing at a selling price using public funds, which is abnormally low in comparison to the prices of imported goods²³;
- Official fixing of retail selling prices also for imported tobacco products deviating from the prices that were fixed by the producers or importers.²⁴ The fixing of uniform trade margins for retail with tobacco products of 8 % of the final selling price, without distinction between imported and domestic goods, is not an infringement²⁵; neither is the need of a designation of retail by the State monopoly administration (here: tobacco) if the authority does not intervene in the retailer’s choice of the source of his supply.²⁶
- Binding of the purchase of domestic products to domestic source materials.²⁷

TITLE III AGRICULTURE AND FISHERIES

Bibliography: *Adam*, La réforme de la Politique agricole commune de l’Union européenne ou l’évolutionnisme permanent du droit communautaire, 2001; *Brian*, Agriculture and the EU Environmental Law, 2009; *Cardwell*, The European Model of Agriculture, 2004; *Churchill/Owen*, The EU Common Fish-

¹⁶ See Article 34 TFEU mns 8, 15.

¹⁷ ECJ Case 119/78 *Peureux II* [1979] ECR 975.

¹⁸ ECJ Case 59/75 *Manghera* [1976] ECR 91.

¹⁹ ECJ Case 59/75 *Manghera* [1976] ECR 91.

²⁰ ECJ Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699.

²¹ ECJ Case 91/75 *Miritz* [1979] ECR 217.

²² ECJ Case 347/88 *Commission v Greece* [1990] ECR I-4747.

²³ ECJ Case 91/78 *Hansen II* [1979] ECR 935.

²⁴ ECJ Case 169/87 *Commission v France* [1988] ECR 4093.

²⁵ ECJ Case 78/82 *Commission v Italy* [1983] ECR 1955.

²⁶ ECJ Case C-387/93 *Banchero* [1995] ECR I-4663.

²⁷ ECJ Case 119/78 *Peureux II* [1979] ECR 975.

eries Policy, 2009; *Grant*, The Common Agricultural Policy, 1997; *Grimm*, Agrarrecht, 1995; *Hill*, Understanding the Common Agricultural Policy (Earthscan Food and Agriculture), 2012; *Jack*, Agriculture and EU Environmental Law, 2013; *Levidow/Carr*, GM Food on Trial: Testing European Democracy, 2010; *McMahon*, EU Agricultural Law, 2008; *Mögele/Erlbacher*, Single Common Market Organisation, 2011; *Norer*, Lebendiges Agrarrecht. Entwicklungslinien und Perspektiven des Rechts im ländlichen Raum, 2005; *Thiele*, Das Recht der Gemeinsamen Agrarpolitik, 1997; *Usher*, EC Agricultural Law, 2002.

Article 38 [Internal market, agriculture and fisheries] (ex Article 32 TEC)

1. The Union shall define and implement a common agriculture and fisheries policy.

The internal market shall extend to agriculture, fisheries and trade in agricultural products. ‘Agricultural products’ means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term ‘agricultural’, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.

2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.

3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.

4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.

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1 I. European agricultural policy in change

In the Treaty of Rome, creating the **European Economic Community** in 1957, the field of agriculture policy was considered as one of the most important economic areas, given the need for affordable food and a fair standard of living for farmers in the hardships of the after-war years. In contrast to other economic areas the Treaty therefore provided for the establishment of one or more market organisations which could be guided and financed by the Community. In the first years of the Community’s existence, the system of a **Common Agricultural Policy (CAP)** was very successful. But then it showed effects which could not be tolerated in the long run.

2 This quantitative and product oriented policy led to a significant and occasionally alarming **production surplus**, resulting *inter alia* in exploding expenditure and negative impacts on the interests of trading partners. It was in the early 1980s that the EC began to realize that this policy was in need of a fundamental reform – not least under the growing pressure of a ‘greening’ public opinion and political landscape.

3 Thus, in a long process, the **Rural Development Policy** became the ‘second pillar’ of the CAP side by side to the market management mechanisms as the ‘first pillar’. It was governed by the concept of sustainable agriculture. The farmers’ responsibilities were widened, covering fields of the environmental, social and cultural development of the

rural area. As a consequence, also the ‘first pillar’ had to be reformed. The support which so far was exclusively related to the agricultural production had to be supplemented or even replaced by direct support payments to the farmers as a compensation for their activities provided in the public interest. The efforts to achieve a **new European agricultural model**¹ were initiated since the middle of the 1980’s² and continued with the ‘Mac-Sharrey Reform’ in 1992, Agenda 2000 and the CAP reform in 2003 (‘Fischler Reform’); for details see below Article 40 mn. 20 et seq.

And finally, in 2011 the Commission presented a set of legal proposals for a **comprehensive CAP reform**, seeking on the one hand to further strengthen the competitiveness of the agricultural sector, to promote innovation, combat climate change and support jobs and growth in rural areas, and on the other hand to arrive at a simpler, more efficient and transparent CAP.³ After two years of public debate and intensive discussions within the EU institutions, on 17 December 2013 four basic EU regulations were adopted:

- Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)
- Regulation (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy
- Regulation (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy
- Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products

With the exception of the new direct payment structure, which was to enter into force in 2015, all aspects of the reform were applicable as from 1 January 2014.⁴ The reform does not only lead to a significant simplification of the entire corpus of EU agricultural law, but also to far-reaching policy changes: ‘Making direct payments fairer and greener, strengthening the position of farmers within the food production chain and making the CAP more efficient and more transparent’;⁵ these are the key objectives of the most recent reform.⁶

These **fundamental policy changes** have occurred **without** a substantial **amendment of the primary-law basis**. Even the ‘symbolic’ loss of the agricultural sector’s special position in the draft Constitutional Treaty by its systematic classification under ‘Other Policies’ has been revised by the Treaty of Lisbon. The emergence of new CAP structural targets comprised by the orientation to rural development as a ‘second pillar’, which supplements the common market management rules of the CAP (including e.g. the rules for direct payments to farmers) as the ‘first pillar’, can only be discovered in the rules of secondary Union law.

The Treaty of Lisbon clarified in the heading of Title III and in Article 38 para. 1 TFEU, that **fisheries policy has the same status** as agricultural policy; the adding of para. 1 subpara. 2 s. 3 – demanding an extensive interpretation of the terms ‘agricultural policy’ or ‘agriculture’ which is not resembled by the ordinary meaning of the terms – serves the same purpose.

¹ See also the Conclusions of the Luxembourg European Council, 12/13 December 1997, Doc. SN 400/97.

² 1984: milk quota; 1988: budget discipline.

³ See in particular: COM(2011) 625 final/2 (on rules for direct payment); COM(2011) 626 final/2 (on a common organisation of the markets in agricultural products (Single CMO Regulation); COM(2011) 627 final/2 (on support for rural development); COM(2011) 628 final/2 (on financing, management and monitoring); COM(2011) 629 final (on fixing certain aids and refunds).

⁴ See, however, Regulation 1310/2013 laying down certain transitional provisions for a smooth introduction of the new legal framework in 2014.

⁵ EU Commission Press Release IP/13/613 of 26 June 2013.

⁶ Cf. also Article 40 TFEU mn. 23.

- 7 The **new Member States**, which joined the EU on 1 May 2004, are included in the CAP from the outset. The common market organisation and the common pricing policy are applied directly – except for the gradual introduction of direct payments. Amendments in the secondary legislation concern the common Agricultural Market Organisations, the agricultural structures policy and the animal health and phytosanitary policy⁷. In this respect, single provisions were agreed upon regarding the common Agricultural Market Organisations and animal health and phytosanitary policy including animal welfare⁸. The basis for specific **transitional regulations** is provided also for **Bulgaria and Romania**, which joined the EU on 1 January 2006⁹ and for **Croatia**, which joined the EU on 1 July 2013, respectively¹⁰.

8 II. The term ‘agriculture’

The TFEU’s agricultural policy regulations concern according to Article 38 para. 1 TFEU ‘agriculture and trade in agricultural products’. **Agricultural products** are products of the soil, of stock farming and of fisheries and products of first-stage processing (para. 1 subpara. 2 s. 2).

- 9 This definition, although seeming accurate and operable on first sight, has no independent legal significance and is substantiated in a legally binding and final manner by the catalogue, which is referred to in para. 3. The only relevant factor is, whether the products concerned are listed in **Annex 1** of the TFEU. Changing this list without amending the Treaty was possible only within a preclusive time limit of two years after entry into force of the Treaty¹¹. Within this period this was done for certain sugars, ethyl alcohol of agricultural origin and vinegar. After these two years an amendment of this catalogue has never been made, not even on the occasion of later Treaty revisions.
- 10 Agricultural policies concerning further agricultural products not mentioned in the catalogue (so-called ‘non-Annex 1-products’, such as trees and forests) can only be pursued on the basis of Article 352 TFEU. Therefore, forestry measures cannot be based on Article 43 TFEU, unless the legal act concerned pursues a mainly agricultural objective, on which the accompanying forestry measures have incidental effects.¹²
- 11 The TFEU does not define the term ‘**agricultural holding**’. In this respect, the Member States have powers of discretion – subject to special secondary law¹³. For surveys purposes, ‘agricultural holding’ is defined as ‘a single unit, both technically and economically, which has a single management and which undertakes agricultural activities listed in Annex I within the economic territory of the European Union, either as its primary or secondary activity’.¹⁴ For **fisheries**, the registration of a ship in a Member State is relevant for its definition as a vessel having the nationality of a Member State¹⁵.

12 III. Agricultural law as *lex specialis*

According to **Article 38 para. 2** TFEU, the **general rules** laid down for the establishment and functioning of the internal market shall apply to agricultural products, unless

⁷ Article 20 of the 2003 Act of Accession with Annex II.

⁸ Article 24 of the 2003 Act of Accession with Annexes.

⁹ Article 41 of the 2005 Act of Accession.

¹⁰ Article 41 of the 2011 Act of Accession.

¹¹ ECJ Case 185/73, *König* [1974] ECR 607.

¹² See also ECJ Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139.

¹³ For example excluding industrial livestock breeders and keepers, ECJ Case 139/77 *Denkavit* [1978] ECR 1317; cf. Streinz/*Kopp*, Article 38 TFEU mn. 23.

¹⁴ Regulation (EC) No 1166/2008 Article 2 lit. a.

¹⁵ ECJ Cases C-280/89 *Commission v Ireland* [1992] ECR I-6185; C-286/90 *Poulsen* [1992] ECR I-6019.

agricultural legislation according to Articles 39–44 TFEU finds application. However, such legislative acts implementing agricultural policy may neither contravene the fundamental principles of the Single Market nor jeopardise the Treaty objectives.¹⁶ In case of a collision with the principles of free movement of goods such agricultural policy regulations may not be precluded, if they are necessary under exceptional circumstances and permissible within the framework of the common agricultural policy.¹⁷ As far as the common rules do not (yet) exhaustively regulate the agricultural issue, the general rules laid down for the establishment and functioning of the internal market shall apply, which prohibit governmental restrictions of free movement of goods.¹⁸

IV. Common Agricultural Policy (CAP)

13

The agricultural and fisheries policy (see Articles 38 paras 1 and 4, 41, 43 para. 2 TFEU) comprises the establishment and development of a common agricultural market (**market regulation policy**), agricultural structural policy (**rural development**), the **harmonization of laws** in the agricultural sector (e.g. food law, animal health and phytosanitary policy) and **quality policy** for agricultural products. The Union has the competence for implementing and developing the common agricultural policy (see Article 43 TFEU). The relations of the legislative competences of the Union and the Member States are governed by the general Union rules¹⁹.

The primary law provisions (in particular Articles 40, 43 para. 3 and Article 44 TFEU) are still characteristic for the previously dominating role of the market regulation policy. However, **Article 38 para. 4 TFEU** lays down an obligation to develop a **common agricultural policy** not only supporting the goals of an internal market for agricultural products, but also reaching beyond this objective.

At the latest in the context of the 2003 CAP reform the **agricultural structural policy** (**rural development policy**) was established as the ‘second pillar’ on an equal footing with the managing mechanisms of traditional market policy²⁰. Both pillars have since been considered as complementary, whereby the Union tries to realise an increasingly integrative and coherent policy for rural areas, which comprise over 90 % of the entire territory (with more than 50 % of the total population). In support, the Union takes intensified measures concerning acts of harmonisation and in particular quality control measures, taking account of the general public’s growing demands regarding food safety, food quality, product differentiation, animal welfare, environmental quality, as well as the conservation of nature and the countryside.²¹

V. Common fisheries policy

16

Formerly treated as a mere ‘appendix’ to the agricultural policy, the management of European fishing fleets and the conservation of fish stocks (‘common fisheries policy’)

¹⁶ Article 4 TFEU; see ECJ Joined Cases 80/77 and 81/77 *Ramel* [1978] ECR 927.

¹⁷ At that time, e.g., legal regulations concerning currency adjustment, ECJ Case 10/73 *Rewe* [1973] ECR 1175.

¹⁸ ECJ Cases 48/74 *Charmasson* [1974] ECR 1383; 68/76 *Commission v France* [1977] ECR 515; 232/78 *Commission v France, ‘Sheep’* [1979] ECR 2729.

¹⁹ Article 43 TFEU mn. 3.

²⁰ See currently in particular Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ 2013 No L277/1.

²¹ For details see European Council, Göteborg Conclusions June 2001, and Regulation (EU) No 1305/2013, Preamble recital 4.

has achieved a considerable degree of autonomy with regard to its big sister department: Fisheries policy has expressly become part of the heading of Part III Title III TFEU ('... and the fisheries'), it is explicitly mentioned on an equal footing with agriculture in Article 38 para. 1, s. 2 TFEU. In this respect it is of particular importance that policy- and law-making in the EU is expressly called upon to take into account the 'specific characteristics of this sector' (para. 1, s. 3). Actually, **characteristic elements** distinguishing fisheries from agriculture are the dwindling maritime resources, the mobility of economic operators and the living marine aquatic resources, structural and regional policy peculiarities and also the fishing activities of vessels outside of the Exclusive Economic Zone of Member States, which require coordination with third States.

- 17 The **Regulation (EU) No 1380/2013** on the **conservation and sustainable exploitation** of fisheries resources under the Common Fisheries Policy is the currently most important legal basis for fisheries law on EU level. It tries to 'ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.'²² Moreover, it seeks to have the CFP contribute to the Europe 2020 Strategy for smart, sustainable and inclusive growth, and help to achieve the objectives set out therein.²³ The Regulation is accompanied by **Regulation (EU) No 1379/2013** on the common organisation of the markets in fishery and aquaculture products.

18

VI. The legal framework: an overview

While Article 38 TFEU determines the subject of agricultural and fisheries policy, Article 39 TFEU defines its objectives. Article 40 TFEU is concerned with the common agricultural market organisation. Article 41 TFEU contains a specific competition law provision. The most important rule on competence for legislative acts of the EU on the agricultural sector can be found in Article 43 TFEU. Article 44 TFEU refers to counter-measures against distortion of competition due to national market measures.

Article 39 [Objectives of the common agricultural policy] (ex Article 33 TEC)

- (1) The objectives of the common agricultural policy shall be:
- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
 - (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
 - (c) to stabilise markets;
 - (d) to assure the availability of supplies;
 - (e) to ensure that supplies reach consumers at reasonable prices.
- (2) In working out the common agricultural policy and the special methods for its application, account shall be taken of:
- (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;

²² Regulation (EU) No 1380/2013, Article 2 para. 1.

²³ Regulation (EU) No 1380/2013, Preamble recital 4.

- (b) the need to effect the appropriate adjustments by degrees;
 (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

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I. General remarks**1**

Article 39 TFEU formulates the substantial **standards for the development of the common agricultural policy** and tries to take appropriate account of the interests of producers and consumers.

As the agricultural policy has developed from its beginnings its objectives have been 2 widened and specific targets have been emphasized very strongly. It is surprising that the recent treaty revisions were not taken as an occasion to extend the catalogue of objectives to, in the broadest sense, sustainable development of rural areas which has become so important that it is referred to as the ‘second pillar’ of agricultural policy, complementing the ‘first pillar’ which supports the traditional market measures and direct payments to the farmer. Some ‘core priorities’ are cited in the Preamble recital 4 of Regulation (EU) No 1305/2013 on support for rural development, relating e.g. to restoring, preserving and enhancing ecosystems that are related to agriculture and forestry, to the promotion of resource efficiency and the shift towards a low carbon economy in the agricultural, food and forestry sectors, or to animal welfare. The catalogue of objectives in Article 39 para. 1 TFEU does not adequately take account of this change in the agricultural policy.

For this reason, after the CAP reform, the recourse to general objectives of other EU 3 policies, in particular contained in cross-section clauses – like environmental protection (Article 191 TFEU), health protection (Article 168 TFEU), economic and social cohesion (Article 174 TFEU), consumer protection (Article 169 para. 2 TFEU), development co-operation (Article 208 TFEU) – may become important.

The determination of the objectives primarily **binds the Union legislator**¹. It has to be 4 relied on in interpreting Union law concerning agricultural policy².

Conflicts of objectives are not always avoidable and to some extent actually inherent 5 in the partially antagonistic interests (high income for the farmers – low consumer prices). The specific objectives must be taken into consideration appropriately in relation to each other. There is a broad discretion for their hierarchy in detail. Certain objectives may temporarily be given priority for political and economic reasons³.

¹ Cf. Streinz/Kopp, TFEU Article 39 mn. 2.

² ECJ Cases 147/81 *Merkur* [1982] ECR 1389; 68/76 *Commission v France* [1977] ECR 515; 114/76, *Bela-Mühle* [1977] ECR 1211.

³ ECJ Joined Cases 197–200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* [1981] ECR 3211; Cases 265/85 *Christmas butter* [1987] ECR 1155; C-353/92 *Greece v Council* [1994] ECR I-3411.

6

II. Objectives

Article 39 para. 1 TFEU specifies the objectives to be achieved by the common agricultural policy.

7 The **five specific objectives** are:

1. Increase in productivity

After the rapid technological progress rather soon led to counterproductive effects (surplus production), this objective has lost most of its importance; only endeavours for rationalization and increase in efficiency in the context of individual holdings within the broader context of rural development have retained their practical relevance.

8

2. Ensuring a fair standard of living for the agricultural community

Even though the means have changed in this respect – e.g. by decoupling from the (increase of) production and other interventionist measures in favour of direct income support –, this provision still defines a core issue of the common agricultural policy.

9

3. Stabilization of the markets

Creating a long-term balance between supply and demand⁴ and avoiding short-term over- and under-supply with the resulting price movements⁵ is still an important objective of the EU agricultural policy – despite a growing renunciation of the traditional interventionist instruments.

10

4. Assuring the availability of supplies

This objective, originally due to the shortfall in food supply in the 1950s, has both an internal perspective (sufficient (basic) food production within the EU) and an external perspective (ensuring the import of – at least seasonally – unavailable food in the EU). Beneficiaries of this objective are not only consumers. As the ECJ has held, also ‘the supply for the (manufacturing) industry cannot be excluded from these objectives’ without breach of the prohibition of arbitrary decision-making⁶.

11

5. Ensuring that supplies reach consumers at reasonable prices

The objective refers to the overall European market and not to the *status quo* of specific domestic markets.⁷ Taking into account the other objectives of the agricultural policy, the expression ‘reasonable prices’ does not demand to achieve the lowest price level possible⁸.

12

III. Special standards for working out the Common Agricultural Policy

By specifying particular characteristics of the agricultural sector, **Article 39 para. 2** TFEU may be held to offer a justification for the special role of this economic sector in

⁴ ECJ Case C-244/95 *Moskof* [1997] ECR I-6441.

⁵ ECJ Case 331/88 *Fedesa* [1990] ECR I-4023 mn. 26 et seq.

⁶ ECJ Case 131/87 *Commission v Council* [1989] ECR 3743.

⁷ ECJ Case C-280/93 *Germany v Council* [1994] ECR I-4973.

⁸ ECJ Case 34/62 *Germany v Commission* [1963] ECR 131.

Union law. However, the provision's actual function is to commit the European agricultural policy, as substantiated in its general objective in paragraph 1, to consider the specific basic conditions listed in paragraph 2 lit. a–c in its implementing practice.

Paragraph 2 lit. a is of special significance, allowing a **regional or social differentiation of agricultural policies** (as e.g. specific privileges for small producers), which otherwise would be problematic due to Article 40 paragraph 2 subpara. 2 TFEU. Paragraph 2 lit. b permits to make the necessary adaptations to new conditions of a common market by degrees, meaning as carefully as possible and without fixed time periods. Paragraph 2 lit. c draws attention to the retroactive effects of an agricultural policy closely interlinked with the economy as a whole.

**Article 40 [Common market organisation]
(ex Article 34 TEC)**

(1) In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established.

This organisation shall take one of the following forms, depending on the product concerned:

- (a) common rules on competition;**
- (b) compulsory coordination of the various national market organisations;**
- (c) a European market organisation.**

(2) The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Union.

Any common price policy shall be based on common criteria and uniform methods of calculation.

(3) In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

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1 I. The Common organisation of agricultural markets

In order to achieve the agricultural objectives (Article 39 para. 1 TFEU) within the framework of the internal market (Article 38 TFEU), Article 40 TFEU provides for a common Union-wide organisation of agricultural markets. The Common Agricultural Policy (CAP) is still the most integrated EU policy, which still claims approximately 40% (2013) of the total budget of the Union.

- 2 Depending on the product the market organisation may vary in its intensity. Para. 1, subpara. 2 of Article 40 TFEU provides for the following **three forms of organisation**:
- 3 – a **common system of rules** to avoid distortions of competition (see Article 42 TFEU) between the Member States; national provisions regulating the market concerned remain unchanged;
- 4 – the **compulsory coordination** of the various national market organisations to prevent restrictions of free movement of goods between the Member States. National market organisations ‘amount to a totality of legal devices placing the regulation of the market in the products in question under the control of the public authority with a view to ensuring’ the objectives of Article 39 para. 1 TFEU¹;
- 5 – the establishment of a common (‘European’) market organisation. In market organisation practice the **European market organisation** is the most important one.
- 6 Article 40 para. 2 subpara. 1 TFEU lists (not exhaustingly: ‘in particular’) the individual measures to regulate the common market organisation. Further measures may be restrictions of production² and sanction measures³.

7 II. Basic rules of market organisation

1. Objectives

Market organisation is limited to the objectives set out by Article 39 para. 1 TFEU (Article 40 para. 2 subpara. 2 TFEU). This formulation, however, does not exclude the consideration of further objectives⁴ within the framework of market organisation. It must rather be understood as meaning that the market organisation has to be limited to agriculture policy.

8 2. Prohibition of discrimination

The common organisation must exclude every form of discrimination between producers and consumers within the Union. This particular prohibition is ‘merely the **specific expression of the principle of equality** which is one of the general principles of Community law’⁵. The prohibition means that producers among themselves and con-

¹ See ECJ Case 48/74 *Charmasson* [1974] ECR 1383.

² Streinz/*Kopp*, Article 40, mn. 23 et seq.

³ ECJ Case C-240/90 *Commission v Germany* [1992] ECR I-5383.

⁴ Such as: environmental protection, Article 11 TFEU; consumer protection, Article 12 TFEU; animal protection, Article 13 TFEU (see the explicit mentioning of agriculture and fisheries policies); commercial policy, Article 207 TFEU.

⁵ ECJ Joined Cases 117/76, 16/77 *Ruckdeschel* [1977] ECR 1753; Case C-63/93 *Duff* [1996] ECR I-569.

sumers (also processors of different production stages) among themselves must not be treated differently, unless such treatment is objectively justified⁶. The prohibition is foremost addressed to the Union legislature and obliges it also to prevent discriminations by third parties, particularly by third countries, but also by Member States, in accordance with the applicable secondary law⁷. Article 39 para. 2 TFEU is also binding on the Member States, when they are implementing the market organisation⁸.

The explicitly mentioned requirement to base any common price policy on common criteria and uniform methods (Article 40 para. 2 subpara. 3 TFEU) is also merely a subset of the general principle of non-discrimination⁹.

The ECJ has assumed a violation of the prohibition of discrimination e.g. in the following cases: the cancellation of a production refund on maize for the manufacture of quellmehl, but not for pre-gelatinized starch¹⁰; introduction of a production levy on isoglucose corresponding to the production levies on sugar¹¹. On the other hand¹² the ECJ denied a discrimination against margarine manufacturers as compared with manufacturers of butter. No discrimination was found in the non-reimbursement of an internal tax imposed on the purchase or process of domestic products when they are exported, if the trader benefits from the tax, even if other traders, who do not benefit from it, do not have to pay the tax¹³. The prohibition of discrimination refers to the objectives pursued by the common organisation and not to the various conditions of production resulting from national rules, which are general in character and pursue other objectives¹⁴.

With respect to the principle of market unity a **regional differentiation** is only possible by reference to objective criteria, which ensure a proportionate division of the advantages and disadvantages for those concerned without distinction between the territories of the Member States¹⁵.

III. Common Market Organisation

1. Consolidation of market organisation legislation

The national market organisations, defined as the 'combination of legal institutions and measures on the basis of which the appropriate authorities seek to control and regulate the market'¹⁶, have, pursuant to the regulatory task of Article 40 para. 1 subpara. 1 TFEU, successively been replaced by respective common provisions at Union level. Restricted to single products, 22 common market organisations (including one for fishery products) existed in 2004, which encompassed over 90% of the agricultural production within the Union. In the course of the efforts made to simplify this increasingly complex, confusing and – with regard to the substance of the regulation – partly inconsistent sys-

⁶ ECJ Cases 5/73 *Balkan I* [1973] ECR 1091; C-56/99 *Gascogne Limousin viandes* [2000] ECR I-3079.

⁷ ECJ Case C-314/04 *Egenberger* [2006] ECR I-6331, mn. 57 concerning Article 29 para. 2 Regulation 1255/1999.

⁸ ECJ Case C-351/92 *Graff* [1994] ECR I-3361.

⁹ ECJ Case 179/84 *Bozzetti* [1985] ECR 2301.

¹⁰ ECJ Joined Cases 117/76, 16/77 *Ruckdeschel* [1977] ECR 1753.

¹¹ Joined Cases 103/77, 145/77 *Scholten-Honig* [1978] ECR 2037; price differentiation, ECJ Case 23/84 *Milk Marketing Boards* [1986] ECR 3625.

¹² ECJ Case 265/85 *Weihnachtsbutter* [1987] ECR 1116.

¹³ ECJ Joined Cases C-332/92, C-333/92, C-335/92 *Eurico Italia* [1994] ECR I-711.

¹⁴ Construction of a nature and archaeological park: Case C-309/96 *Annibaldi* [1997] ECR I-7493.

¹⁵ ECJ Cases 106/83 *Sermide* [1984] ECR 4209, 61/86 *Sheepmeat* [1988] ECR 431; see as well ECJ Case C-375/96 *Zaninotto* [1998] ECR I-6629.

¹⁶ ECJ Joined Cases 90/63, 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625.

tem of regulations by rendering it more transparent and comprehensible, as from 1 January 2008 the different market organisations were almost completely replaced by Regulation 1234/2007 establishing a single **common market organisation** for almost all products. This Regulation, in turn, has been replaced by **Regulation (EU) No 1308/2013** establishing a common organisation of the markets in agricultural products. The products concerned are all the products listed in Annex I of the Treaties except for fisheries and aquaculture products, which are covered by **Regulation (EU) No 1379/2013** concerning fishery and aquaculture products as listed in Annex I of this Regulation.

13

2. Instruments of market organisation

Article 40 para. 2 TFEU enumerates (non-exhaustingly: ‘in particular’) **four central legal instruments** of common market organisation (regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports). Before the CAP reforms of the 1990s the central controlling elements of common market organisation policy had been price fixings (target prices, intervention prices) and market-protecting interventions (intervention buying-in) inside and preferential arrangements for Union products in relation to the external area.

a) Price guarantee with intervention

14 This instrument consists of a guarantee purchase at a certain price.

15 Starting point of the price regulation is the **target price** (also: basic price, guide price) annually set by the Council. It indicates the price that the Council considers appropriate for a certain deficit region.

16 The **intervention price** (guaranteed price) is derived from the target price. It is also set by the Council. It is the price at which national intervention agencies buy and stock the products (from wholesalers). Compared to the target price the intervention price is reduced by the amount of fictional costs of transport. The stocked products may be denaturised, used for humanitarian purposes or sold by the Commission (by a tendering procedure).

b) Aids

17 Income aids shall compensate the reduction of market prices to ensure an appropriate living wage of farmers. They may be granted quantitatively or site-specifically. Other aids aim for example at supporting the marketing of products, the creation of producer groups or the shifting of a plant.

c) External protecting measures

18 As agreed upon by the GATT 1994, variable levies have been converted into fixed tariffs.¹⁷ Within the framework of a protective clause additional (absorption) duties may be charged temporarily.

19 The amount of **export refunds** (export subsidies) may vary according to the respective country of destination. The assessment is carried out by the Commission.¹⁸ The system of export refunds is regulated by Commission Regulation 612/2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products.

¹⁷ Council Regulation 3290/94.

¹⁸ See Article 202 TFEU mn. 22.

3. Reforms

20

The original mechanism of the Common Agricultural Policy, especially the obligation to unrestricted intervention, led to immense surpluses. At first, countermeasures consisted of e.g. the modification of the obligatory intervention¹⁹, the introduction of production quotas as well as a co-responsibility levy when their ceiling was exceeded. On 30 June 1992 the Council initiated a comprehensive **reform**²⁰. To ensure a better market equilibrium the EU prices were gradually adapted to the world market level; the loss of income caused by price-reductions and set-aside areas were compensated by **direct payments** to the producers.

The continuation of the agricultural reform – also in respect of the eastward enlargement of the Union – was sought for on the basis of the Commission initiative ‘**Agenda 2000**’. This led to the issuance of another package of regulations²¹. These regulations concerned the sectors arable crops, beef, milk and wine; they comprise provisions on the development of rural areas, the horizontal rules on direct payments as well as the provisions on financing the Common Agricultural Policy. According to these provisions the market support prices shall be further reduced in a gradual manner to bring the price level even closer to the level of world market prices; a partial compensation is effected by the increase of direct support. A new framework programme on rural development aims at the establishment of a stronger agricultural and forestry sector, improving the competitiveness of rural areas, environmental protection as well as the preservation of the rural heritage; it is *inter alia* supported by young farmer installation grants, vocational training assistance, an early retirement scheme, agro-environmental aid, support for investments for improving the processing and marketing of agricultural products as well as support for forest restoration projects.

In 2003 the EU Ministers of Agriculture decided on a **further reform** of the Common Agricultural Policy (CAP), which fundamentally changed the support mechanism. Now most of the aid is granted as ‘single farm payment’ (**‘single farm payment system’**) irrespective of the production volume (**‘decoupling’**). The single farm payment was introduced in 2005 (in individual cases at the latest in 2007). Only to avoid a cessation of production the Member States were allowed – to a limited extent – to maintain the linkage of aid to production. The new single farm payments are bound to the adherence to environmental, food safety and animal welfare standards as well as the requirement to keep all farmland in good agricultural and environmental condition (**‘cross-compliance’**). A reduction of direct payments for bigger farms should finance the new rural development policy (**‘modulation’**). Reforms especially in the milk and cereals sector should lead to an adjustment of the system of support mechanisms. A mechanism for financial discipline should ensure that the farm budget fixed until 2013 was respected.²²

Eventually a new reform package of Regulations was adopted in **December 2013**; it was for the first time that – according to the new ‘ordinary legislation procedure’ created by the Treaty of Lisbon – the European Parliament together with the Council was involved in adopting such Regulations in the field of agriculture. The reform aimed at realising the aims at first defined and proposed in November 2010 by the Commission’s Communication entitled ‘The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future’ which was forming part of the European Union’s

¹⁹ Such as temporal restriction of the purchase obligation; restriction of the full price guarantee on specific maximum quantities.

²⁰ On the reform process Streinz/Kopp Article 38 mn. 94 et seq.

²¹ OJ 1999 No L 160/1 et seq., OJ 1999 No L 179/1.

²² Former Council Regulation 1782/2003.

ten-year growth and jobs strategy endorsed by the Heads of State and Government in March 2010. This led to **four basic Regulations**²³ concerning direct payments, the single common market organisation, rural development and a horizontal regulation for financing, managing and monitoring the CAP.²⁴

On 11 March 2014 the Commission adopted the first package of acts implementing these Regulations.

24

4. Currency adjustment

Since the European Monetary Union came into force on 1 January 1999 currency fluctuations are no longer possible. As a consequence the former currency adjustment system²⁵ is no longer required. The euro exchange rate is also applicable to non-participating Member States.

Since the rate of exchange of the euro into national currencies may vary in the course of the period during which an operation is carried out, the rate applicable to the amounts concerned is determined taking into account the event through which the economic objective of the operation is achieved. The rate of exchange applied should be that applicable for the date on which that event occurs.²⁶ This operative event is specified by Articles 105 para. 2, 106–108 Regulation 1306/2013.

25

5. Implementation by the Member States

The common market organisation is implemented by the Member States (Article 4 para. 2 lit. a TFEU). Within the framework of Union provisions they issue national implementing acts on organisation and procedures.²⁷

26

When taking such actions the national authorities must comply with the relevant **Union law** including its general principles. They are required to interpret and apply their national provisions in a way that does not impair the effect of the provisions of Union law²⁸.

27

Some administrative tasks have been conferred to private economic operators by Union law (such as producer organisations, dairies).²⁹

28

IV. Financing

1. European funds

Article 40 para. 3 TFEU provides for the establishment of agricultural guidance and guarantee funds as central instruments to finance the objectives of Articles 39 para. 1 TFEU. The tasks performed by the European Agricultural Guidance and Guarantee Fund (EAGGF), which was already established in 1962³⁰, were split and transferred in 2005³¹ to two new funds, the **European Agricultural Guarantee Fund (EAGF)** and the **Euro-**

²³ Cf. above Article 38 TFEU mn. 4.

²⁴ Cf. Commission MEMO/13/937 of 25 October 2013.

²⁵ Council Regulation 2799/98, replaced by Regulation (EU) No 1306/2013.

²⁶ Cf. Preamble recital 65 of Regulation (EU) No 1306/2013.

²⁷ ECJ Case C-2/93 *BDBL* [1994] ECR I-2283.

²⁸ ECJ Case 94/71 *Schlüter* [1972] ECR 307; Joined Cases 205–215/82 *Deutsches Milchkontor* [1983] ECR 2366.

²⁹ On this see ECJ Case 187/83 *Nordbutter* [1984] ECR 2554. Regarding implementing powers see also Article 43 TFEU mn. 7 et seq.

³⁰ Regulation 25/1962.

³¹ Regulation 1290/2005, replaced by Regulation (EU) No 1306/2013.

pean Agricultural Fund for Rural Development (EAFRD). The relevant legal basis is now Regulation 1306/2013. The restructuring takes into account the fact that the rural development policy has become the second and ever-growing pillar of the common agricultural policy. It is conducted by the EAFRD. The reference in s. 2 of Article 178 TFEU to Article 43 TFEU has therefore become irrelevant. The **European Maritime and Fisheries Fund (EMFF)**³² constitutes a separate organisational frame for the financing of the common fisheries policy.

The **EAGF** finances **direct payments to farmers** as well as measures to regulate the agriculture markets, such as intervention measures and export refunds³³, whereas the **EAFRD** deals with the financing of the **programmes of the Member States** on rural development. According to the **Multiannual Financial Framework (MFF)** for the period 2014–2020, laid down by Council Regulation 1311/2013 and supplemented by the Commission (COM (2013) 928 final), the ceiling for direct payments and market-related expenditure (pillar 1) was set at Euro 312735 million, whereas the ceiling for rural development (pillar 2) was fixed at Euro 95577 million. The ceiling for the European Maritime and Fisheries Fund concerning this time period was set at Euro 6396,6 million. The amounts provided in the **EU-budget 2014** were Euro 43778,1 million (pillar 1), Euro 13991,0 million (pillar 2), and Euro 1017,3 million (EMFF).³⁴ The core elements of the common agricultural policy (especially refunds, interventions, direct payments within the EAGF and all expenditures within the EAFRD) are implemented in shared management between the Member States and the Commission; a centralised management is therefore limited to less important expenditures of the EAGF (see Articles 4 et seq. of Regulation 1306/2013).

The funds do not possess a legal personality of their own; they are **part of the general budget** of the European Union (see Article 3 para. 2 Regulation 1306/2013). The Commission exercises the administration of the funds and is assisted by the Committee on the Agricultural Funds consisting of representatives of the Member States and of the Commission (Articles 115 and 116 Regulation 1306/2013).

The **financing** of the common market organisation follows the principle of financial solidarity and is therefore usually provided by the Union only. On the other side the Union financing of structural policy measures consists of co-financing combined with financial contributions of the Member States; in relation to the beneficiary the Union contributes indirectly by reimbursing expenditures of the Member States.

In relation to the Union the executing **national authorities** merely act as paying agencies³⁵.

2. Clearance of the accounts

A final clearance of accounts between the Union and the Member States, concerning payments both in the field of the EAGF and the EAFRD, occurs once in a budget year by **decision of the Commission on the clearance of the accounts**.³⁶ The relevant criterion for the decision is whether the national (paying) agencies have complied with the procedural and substantive Union law provisions. The examination does also comprise a system analysis on whether national provisions and administrative practice adhere to Union

³² EFF, Regulation 1198/2006.

³³ Article 4 Regulation (EU) No 1306/2013.

³⁴ For more information see also *European Commission*, Multiannual financial framework 2014–2020 and EU budget 2014 – The figures, 2013.

³⁵ Article 7 Regulation (EU) No 1306/2013.

³⁶ Articles 51 and 52 Regulation (EU) No 1306/2013.

law in general. The costs of deficiencies (including erroneous interpretation of Union law) are to be borne by the Member States³⁷.

34

3. Recovery of undue payments

In the case of undue payments of Member States to beneficiaries the Commission orders the Member State to recover the payment. National provisions on the protection of legitimate expectation are applicable only with modifications provided by Union law.³⁸

35

V. Legal protection

Member States may challenge the decision on the clearance of the accounts, the refusal of payment or the recovery of aid with an action for annulment (Article 263 para. 1 TFEU)³⁹. The possibility to refuse payments of the Union exonerates the Commission from initiating infringement proceedings (Article 258 TFEU) against a Member State for breaching Union law.

36

An individual person may – if the negative decision by the Commission on the aid was not addressed to that person, but to the Member State – take legal actions only according to the respective national procedures against the Member State that took the decision on the measure. Under the conditions laid down by Article 267 TFEU a referral to the ECJ for a preliminary ruling may be possible.

Article 41 [Supporting measures]
(ex Article 35 TEC)

To enable the objectives set out in Article 39 to be attained, provision may be made within the framework of the common agricultural policy for measures such as:

- (a) an effective coordination of efforts in the spheres of vocational training, of research and of the dissemination of agricultural knowledge; this may include joint financing of projects or institutions;
- (b) joint measures to promote consumption of certain products.

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Article TFEU cites several exemplary measures qualified for supporting the objectives of a common agricultural policy (Article 39 para. 1 TFEU) within the CAP's framework.

2

I. Vocational training, research and agricultural research (lit. a)

Measures according to lit. a particularly aim at supporting rural development. Concerning the fields of vocational **training, research and dissemination of agricultural**

³⁷ ECJ Cases 820/79 *Belgium v Commission* [1980] ECR 3548; 1251/79 *Italy v Commission* [1981] ECR 221.

³⁸ See Article 6 TEU mn. 61.

³⁹ ECJ Cases C-48/91 *Netherlands v Commission* [1993] ECR I-5643; C-198/94 *Italy v Commission* [1996] ECR I-2797.

knowledge, it is **Regulation (EU) No 1305/2013** on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) which offers a comprehensive framework for promoting this objective.¹ In para. 12 of its Preamble the Regulation explains that '[t]he evolution and specialisation of agriculture and forestry and the particular challenges faced by micro and small and medium-sized enterprises ('SMEs') in rural areas require an appropriate level of technical and economic training as well as an increased capacity to access and exchange knowledge and information.' The Regulation demands that knowledge transfer and information actions should extend to workshops, coaching, demonstration activities, information actions and also short-term farm and forest-exchange schemes and visits.

Measures on **agronomic research** are developed by means of general EU research programmes (see Articles 179 et seq. TFEU) as well as by specific programmes within the agriculture sector. In its Article 5, Regulation No 1305/2013 stresses particularly the importance of strengthening the links between agriculture, food production and forestry on the one hand and research and innovation on the other hand, thereby including the purpose of improved environmental management and performance.

II. Measures to promote consumption (lit. b)

Article 41 lit. b TFEU refers directly only to 'joint' **measures** of the Union itself to **promote consumption and sales**, which may also relate to new markets in non-EU countries². Single Member States may also engage in sales promotion; however, due to the principle of free movement of goods this must not involve a direct or indirect, actual or potential preference³ of national products⁴.

Article 42 [Application of rules on competition and State aid] (ex-Article 36 TEC)

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council, on a proposal from the Commission, may authorise the granting of aid:

- (a) for the protection of enterprises handicapped by structural or natural conditions;
- (b) within the framework of economic development programmes.

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¹ On the distinction from the EU's ordinary competence for vocational training see ECJ Case 242/87, *Council v Commission* [1989] ECR 1425.

² Cf. Article 5 para. 3 Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) promoting food chain organisation, including processing and marketing of agricultural products, animal welfare and risk management in agriculture.

³ 'Dassonville formula', see Article 34 TFEU mn. 8.

⁴ ECJ Cases 249/81 *Buy Irish* [1982] ECR 4005; C-325/00 *CMA Gütezeichen* [2002] ECR I-9977.

1

I. Principles

Article 42 TFEU establishes a **special provision within the ambit of Article 38 para. 2 TFEU**: within the area of rules on competition the rule-exception relation in favour of a principal applicability of the internal market rules also in the agricultural sector is turned into its opposite. The general rules on competition by undertakings (Articles 101–106 TFEU) as well as on state aid (Articles 107–109 TFEU) are only applicable if and to the extent to which this was determined by a legal act according to Article 43 para. 2 TFEU, now to be adopted within the ordinary legislative procedure.¹ A respective legal act has to consider the agricultural policy objectives of Article 39 para. 1 TFEU. At first glance this may lead to a certain extent to the permanent codification of an exceptional position of the agricultural sector within competition and state aid law; in practice, however, the relevant regulations refer largely to the general rules again and leave room for narrow exceptions.²

- 2 A **common rule on competition and state aid** may be the least extensive form of a common market organisation (Article 40 para. 1 subpara. 2 lit. a TFEU).

3

II. Rules on competition for undertakings

Article 1 of **Council Regulation 1184/2006** ‘applying certain rules of competition to the production of and trade in agricultural products’ establishes the **applicability of the general competition rules** applying to undertakings (Articles 101–106 TFEU).

- 4 **Article 2 of Regulation 1184/2006** lays down **three exceptions**, which, however, have to be interpreted narrowly.³ They explicitly refer to Article 101 para. 1 TFEU (ban on cartel) only, whereas Article 102 TFEU (ban on abuse) is fully applicable also within the agricultural sector.

- 5 The **first exception** provides that the ban on cartels (Article 101 para. 1 TFEU) does not apply to provisions or practices forming an integral part of a **national organisation of agricultural markets**. Since national market organisations have become almost completely superseded by corresponding Union law (see Article 40 TFEU), this **exception** has lost its practical importance.

- 6 The **second exception** provides that the ban on cartels may not jeopardise the **attainment of the objectives of the common agricultural policy** as set out in Article 39 para. 1 TFEU. Insofar, however, the principle of proportionality comes into play. This principle is applied quite strictly by the European courts; it functions as a corrective (measures have to be ‘regarded as ‘necessary’ for attainment of the objective’).⁴

- 7 The **third exception in favour of farmers or farmers’ associations** (Article 2 para. 1, subpara. 2 of Regulation 1184/2006) has been specified by the ECJ as follows: ‘[There are] three cumulative conditions. For that derogation to be applicable it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage,

¹ ECJ Case C-280/93 *Commission v Germany* [1994] ECR I-4973.

² Streinz/*Kopp*, TFEU Article 42 mn. 2.

³ Explicitly on the identical previously applicable provisions, see CFI Cases T-70/92 and T-71/92 *Florimex* [1997] ECR II-693, mn. 152: ‘a derogation from the general rule [Article 101 TFEU] must be interpreted strictly’.

⁴ ECJ Cases T-70/92 and T-71/92 *Florimex* [1997] ECR II-693, mn. 171.

treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the common agricultural policy.⁵

Council Regulation 1184/2006 has lost much of its practical significance in view of the special rules concerning the common organisation of markets: the **Regulation 1308/2013** establishing a common organisation of the markets in agricultural products (in general), and **Regulation 1379/2013** on the common organisation of the markets in fisheries and aquiculture products.

III. State aid

According to **Article 3 Council Regulation 1184/2006** only certain procedural aspects of the general state aid rules are fully applicable also on the agricultural sector (Article 108 para. 1 and para. 3, s. 1 TFEU), but not the basic prohibition on state aid as stipulated in Article 107 TFEU. As the Regulation explains in its preamble, the Commission should be in a position to draw up a list of existing, new or proposed types of aid forming part of the development of the common agricultural policy, to make appropriate observations to the Member States and to propose suitable measures to them.

However, **Article 211 para. 1 Regulation 1308/2013** establishing a **single common market organisation** in agricultural products provides that Articles 107–109 TFEU apply to the production of, and trade in, agricultural products. Only as an **exception** to this principal rule, Article 211 of Regulation 1308/2013 states that the state aid provisions of the TFEU do not apply to payments made by Member States pursuant to

- either measures provided for in this Regulation which are partly or wholly **financed by the Union**, except for certain instances concerning Union wine support programmes (Article 212),
- or are allowed in the case of **specific payments** as defined in Articles 213 to 218 of this Regulation. These concern national payments across areas as diverse as for the distribution of products to children, for apiculture, for nuts, for reindeer in Finland and Sweden, for the sugar sector in Finland and for distillation of wine in cases of crisis.
- Neither do they apply to direct national payments to farmers in conformity with Regulation (EU) No 1307/2013 on **direct payments support schemes** (Article 13 of the Regulation).

As *lex specialis* these provisions take priority over the general state aid rules.⁶ Corresponding rules on state aid in the agriculture area are provided for in the Regulation (EU) 1305/2013 on support for **rural development** (Articles 80, 81 of the Regulation) and in the **fisheries area**.⁷ A comprehensive overview is provided by the Commission's **European Union Guidelines for State aid** in the agricultural and forestry sectors and in rural areas 2014 to 2020 (OJ 2014/C204/01).

The authorisation according to **Article 42 para. 2 TFEU** of the two explicitly enumerated types of aid by the Council on a proposal from the Commission is of **little practical importance**: Either state aid according to the rule of s. 1 is not subject to any authorisation procedure, or a specific provision for the agricultural sector applies, or an identical competence already arises from Article 107 para. 3 lit. e TFEU.

⁵ ECJ Case C-399/93 *Oude Luttikhuis* [1995] ECR I-4515.

⁶ ECJ Case 177/78 *McCarren* [1979] ECR 2161.

⁷ Cf. above Article 38 mn. 17.

Article 43 [Legislative powers]
(ex-Article 37 TEC)

1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title.

These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

4. In accordance with paragraph 1, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:

- (a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;
- (b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.

5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

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1

I. General remarks

Because of the all-encompassing competences of the Union within the agricultural sector as well as the high regulation intensity of this multifarious and rapidly changing economic sector Article 43 TFEU contains one of the **most important competence rules of Union law**. This is true both in regard to the quantity as well as to the amplitude of the economic governance effected by legal acts based on this single provision.

2 The unsuccessful structure of ex-Article 37 TEC was ‘repaired’ by the Treaty of Lisbon at least insofar as several **rules**, which had become **obsolete** a long time ago, were **de-**

leted. However, other parts of the provision – now paras 4 and 5 of Article 43 TFEU –, which had never attained practical relevance, survived for not very apparent reasons.

II. Legislative competences

3

1. Legal basis

Para. 2 of Article 43 TFEU specifies the material scope of the Union legislative competences. Although on the one hand it refers specifically to Article 40 TFEU (common market organisation), it extends the Union's powers on the other hand to adopt all other provisions, which are necessary to pursue the objectives of a common agricultural and fisheries policy as defined in Article 39 TFEU. Thus the Union is provided with **an extensive capability** covering the entire field of agriculture and fisheries policy as it is legally defined in Article 38 TFEU.¹ The Lisbon Treaty's new additional **enumeration of measures** of a rather technical character in para. 3 does not effect any change in the scope of Union powers; this provision deals with the Union's internal allocation of competences (Council/Parliament or solely Council).

2. Relationship with competences in other policy areas

4

The legislative power given by Article 43 TFEU, which pursues sector-specific objectives (Article 39 para. 1 TFEU), is to be distinguished from the general competences within the area of so-called **cross-sectional tasks** by the respective focal point of the subject matter. If it belongs to the agricultural sector it is irrelevant that the Union rule based on agricultural competences takes also account of non-specific agricultural policy objectives (such as environmental protection)². The fact that a regulation in the field of agriculture shall also promote environmentally friendly forms of production may not justify using Article 175 TFEU in addition to Articles 42 and 43 TFEU as legal basis for the respective regulation.³

Within the agricultural sector Article 43 TFEU takes priority over Articles 114, 115 TFEU (**approximation of laws**). The same applies to **specifically agricultural levies** in relation to Article 113 TFEU.

Compared with this Article 352 TFEU ('**flexibility clause**' supplementing Union competences in cases not envisaged in the Treaties) is applicable insofar as a regulation for products not contained in Annex I⁴ shall be adopted and other rules on competence are not available. One of the very rare examples of using Article 43 and 352 TFEU combined as the legal basis for a regulation was Regulation 3106/92 concerning food aid to Albania for humanitarian reasons.⁵ Apparently the different objectives were considered to be equally important.

3. Union and Member States legislative powers

7

According to Article 4 para. 2 lit. d TFEU it is the general rule of '**shared competence**' between the Union and the Member States which applies to the areas of agriculture and fisheries. Thus the Member States may legislate in the field of agricultural policy to the extent that the Union has not made use of its competence (Article 2 para. 2 s. 2 TFEU).

¹ ECJ Cases 68/86 *UK v Council* [1988] ECR 855; C-269/97 *Commission v Council* [2000] ECR I-2278.

² ECJ Cases 68/86 *UK v Council* [1988] ECR 855; C-11/89 *Commission v Council* [1989] ECR I-3764.

³ ECJ C-336/00 *Martin Huber* [2002] ECR I-7736.

⁴ Article 38 TFEU mn. 10.

⁵ Streinz/Kopp, TFEU Article 43 mn. 26.

Consequently, the Member States have become excluded from legislating particularly in the field of market organisation, where the Union has extensively made use of its powers⁶. The Union has, however, exclusive competence *ab initio* for conservation of marine biological resources (Article 3 para. 1 lit. d TFEU).⁷ Furthermore, the Union exercises fully exclusive competences in the field of agricultural trade with third countries as part of the common commercial policy (Article 3 para. 1 lit. e TFEU).

- 8 As far as shared competences are concerned, the **principle of subsidiarity** (Article 5 TEU) must be observed. This may be relevant particularly in the context of the constant reform policy activities in the field of agricultural legislation (see Article 2 para. 2 s. 3 TFEU).

9 III. Procedures

According to paras 1 and 2 of Article 43 TFEU the basic legal acts on agricultural policy, particularly the so-called '**Basic Regulations**' are adopted in accordance with the **ordinary legislative procedure** (Articles 289 para. 1, 294 TFEU), the European Parliament and the Council acting jointly (after consulting the Economic and Social Committee) on a proposal of the Commission.

- 10 In regard to legal acts of the next hierarchical level, as they have been established by long-term practice, paragraph 3 now constitutes an explicit legal basis in primary law for the Council acting on a proposal of the Commission and without involvement of the European Parliament. The so-called '**basic rules regulations**' actually are on the borderline between legislative acts in the proper sense and administrative measures. They concern rather technical or administrative measures. The obligatory proposal of the Commission provides a certain guarantee that legal acts according to paragraph 3 will be based rather on objective than on political considerations.
- 11 When making use of the competences according to paragraphs 2 and 3 the institutions involved can make use of **all forms of legal action** provided for by Article 288 TFEU. In practice regulations are clearly used most frequently.
- 12 The legislative competences of Parliament and Council neither preclude Parliament and Council (paragraph 2) nor the Council (paragraph 3) from continuing to **delegate extensive non-legislative powers to the Commission** to supplement or amend certain non-essential elements of the legislative act (Article 290 para. 1 TFEU). This may be necessary, because only the Commission is able to steadily and attentively watch the development of the agricultural markets and to act with the urgency required by the respective situation.⁸ A further possibility for engaging the Commission in the field of implementing Union acts can be found in exceptional cases, where uniform conditions are needed to guide implementing measures of the Member States (Article 291 para. 2 TFEU).

Article 44 [Countervailing charges] (ex Article 38 TEC)

Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of

⁶ See for example ECJ Case 166/82 *Commission v Italy* [1984] ECR 459.

⁷ For fisheries agreements see ECJ Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279; Case 804/79 *Commission v UK* [1981] ECR 1076.

⁸ ECJ Joined Cases C-296/93 and C-307/93 *France and Ireland v Commission* [1996] ECR I-795; Case C-374/96 *Vorderbrüggen* [1998] ECR I-8385.

similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export.

The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

Article 44 TFEU addresses the situation in a Member State, in which a **national market organisation** or internal rules having equivalent effect cause a market distortion affecting the competitive position of a similar¹ product in another Member State. In this case a **countervailing charge** required for the elimination of the distortion may be applied either on export of the products concerned by the Member State whose producers cause the effect, or by the other Member State on import (paragraph 1). According to the ECJ, it is not necessary to make a distinction according to whether or not the imbalances which it is sought to redress are the consequences of measures which are in conformity with European law.²

The collection of such charges must be **authorized by the Commission** (paragraph 2): the Commission not only examines whether the requirements of paragraph 1 s. 1 sub-s. 1 are met, thus finding whether the imposition of such a countervailing charge is justified in principle; the Commission is also in charge of ensuring that the duration and the amount of the charge does not exceed what is necessary for restoring a balance on the market.³ In view of the complexity of the data which may be taken into account this does not, however, exclude a flat-rate calculation method.⁴ The Commission's measures are fully litigable and thus may be controlled by the ECJ.⁵

Since the common market organisation as well as a few specific common market organisations (see Article 40 TFEU) cover almost all agricultural products, the **practical scope** of the rule is **limited**. Nonetheless, it is still not entirely obsolete.

TITLE IV

FREE MOVEMENT OF PERSONS, FREE SERVICES AND CAPITAL

CHAPTER 1

FREE MOVEMENT OF WORKERS

Bibliography: *Carlier*, La libre circulation des personnes dans l'Union européenne, *Journal de Droit Européen* 2009, 79; *Condinzani/Lang/Nascimbene*, Citizenship of the Union and Freedom of Movement of Persons, 2008; *Cousins*, Citizenship, residence and social security, *ELRev* 2007, 286; *de Genova/Peutz*, The deportation regime – sovereignty, space and, the freedom of movement, 2009; *Flynn*, The protection of workers' rights and the freedom of movement; compatible objectives in the EU legal order?, *Irish Journal of European Law* 2009, 159; *Lonbay*, Free Movement of Persons, Recognition of Qualifications and Working Conditions, *ICLQ* 47 (1998), 224; *Moore*, Freedom of movement and migrant workers' social security, *CMLRev* 2002, 807; *Neergaard/Szyszczak/van de Gronden/Krajewski*, Social Services of General Interest in

¹ Interpretation similar to Article 110 TFEU.

² ECJ Case 337/82 *St. Nikolaus Brennerei* [1984] ECR 1051 para. 17.

³ ECJ Case 337/82 *St. Nikolaus Brennerei* [1984] ECR 1051 para. 15.

⁴ ECJ Case 181/85 *France v Commission* [1987] ECR 689.

⁵ ECJ Case 337/82 *St. Nikolaus Brennerei* [1984] ECR 1051 para. 15.

the EU, 2013; *Walton-Roberts*, Territoriality and Migration in the EU Neighbourhood – Spilling over the Wall, 2014.

**Article 45 [Freedom of movement for workers]
(ex Article 39 TEC)**

- (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.

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I. General remarks

1

1. Overview

Articles 45 et seq. TFEU as the legal provisions of the Treaty guaranteeing the freedom of movement for workers are to be considered as ‘fundamental principles’¹ of the European Union.

Erecting the internal market does not only require to tear down trade barriers between countries in order to open up borders for a free flow of goods, but – more general – to allow the development of an Union wide economic performance based on the rules of the market, such as competition and allocation of resources. Establishing and ensuring the ‘functioning of the internal market’ (Article 26 para. 1 TFEU) consequently requires a larger scale of provisions.

Such provisions are Articles 45 et seq. TFEU. The freedom of movement for workers forms, accompanied by the free movement of goods (Articles 28 et seq. TFEU), the freedom of establishment (Articles 49 et seq. TFEU) and of services (Articles 56 et seq. TFEU) and the freedom of movement of capital and payment (Articles 63 et seq. TFEU) the legal framework of the economic integration in the European Union.

By 1 January 2010, 12.3 million EU-citizens were living in another Member State than their country of citizenship.² The legal basis for this migration is given in Articles 45 et seq. TFEU and related secondary legislation acts. Not only workers, but also their families, relatives and other EU-citizens are provided with the right of working and living in another Member State under the rule of Article 45 et seq. TFEU and the regulations and directives deriving from them.

The Lisbon Treaty, entered into force 1 December 2009, did not lead into any substantial changes of the Articles 45 et seq. TFEU. Nevertheless, the scope and shape of the freedom of the movement of workers is under constant transition due to changes on secondary legislation level.

2. Purpose

6

Articles 45 et seq. TFEU aim to guarantee employees the free choice of their place of work within the EU. Forming a ‘cog in the wheel’, mobility of workers is seen as a necessity for the functioning of the internal market as to be established and developed by the Treaty (Article 26 para. 1 TFEU). As part of the Union wide allocation of resources, also work as a factor of production shall be distributed to those industries, branches and fields of economic activity demanding it. Regarding the circumstance that work requires specific consideration of those needs of the individual behind the working capacity as a rational economic figure, it becomes clear that not only mobility but also further rights have to be installed in order to ease the crossing-border of an employee.

Formally reserved for the group of employed Union citizens, the right to free movement has therefore been extended over the past decades to further segments of the EU population.

¹ ECJ Case C-415/93 *Bosman* [1995] ECR I-5968, mn. 93.

² See *Eurostat*, Europe in Figures – Eurostat Yearbook 2012 (Publications Office of the European Union 2012), 139.

- 8 Articles 45 et seq. TFEU in general prohibit any discriminatory treatment of EU-citizens based on their nationality. Article 45 para. 2 TFEU puts the principle of non-discrimination of workers in concrete terms by guaranteeing comprehensive rights concerning employment, remuneration and general working conditions. Article 45 TFEU is flanked by several secondary legislation provisions, essential for the factual use of those rights.
- 9 Articles 45 et seq. TFEU are applicable to all employments proving a sufficiently close link to the EU territory.³ Nevertheless, the application of Articles 45 et seq. TFEU cannot be derogated only because employment activities are carried out outside of the European Union.⁴ Solely ‘internal activities’ confined in all respects within a single Member State are not governed by Union law and therefore do not fall into the sphere of freedom of movement for workers.⁵ Cases in which EU-citizens have exercised the right to free movement for workers and have been employed in another Member State are not to be considered as ‘internal activities’; instead Articles 45 et seq. TFEU are applicable towards their home country while returning.⁶
- 10 Posted workers on a business providing cross-border services of their employer in another Member State are not governed by Articles 45 et seq. TFEU.⁷

11 **3. Direct effect and secondary legislation**

The provision of Article 45 TFEU has a direct effect in the legal orders of the Member States and confers individual rights which the national courts must protect.⁸ Based on Articles 46 and 48 TFEU, the free movement for workers has been essentially developed by secondary legislation. Since 1968, Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community had been the principal elaboration of the free movement for workers. Due to substantially amendments and adaptations over the past decades, the regulation has been replaced by Regulation (EU) 492/2011 on freedom of movement for workers with the Union in the interests of clarity and rationality in 2011.⁹ In the process of transformation from the formally exclusively granted rights of Articles 45 et seq. TFEU to workers to the general principles of free movement for all EU-citizens (Article 20 TFEU), Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States has been established. Extending the set of secondary legislation acts to the field of social security, the former Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community had been established and subsequently developed since 1971 and finally replaced by Regulation (EC) No 883/2004 on the coordination of social security systems.

- 12 Today, the existing legislation on the free movement of all EU-citizens (cf. Articles 20, 21 TFEU and Directive 2004/38/EC), including the right to move and reside freely within the EU, can hardly be distinguished from those rights granted to workers exclu-

³ For the territorial scope cf. Article 52 TEU, Article 349 TFEU and Article 40 Regulation 492/2011.

⁴ ECJ Cases C-60/93 *Aldewereld* [1994] ECR I-2999, mn. 14; 287/83 *Prodest v Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153, mn. 6.

⁵ ECJ Cases C-332/90 *Stehen* [1992] ECR I-353, mn. 9 et seq.; C-60/91 *Batista* [1992] ECR I-2102; C-94-96 *Uecker* [1997] ECR I-3171; Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalios and Others v Greek State* [1998] ECR I-4239, mn. 22; Case C-18/95 *Gerechthof's Hertogenbosch v Netherlands* [1999] ECR I-345, mn. 26.

⁶ ECJ Case C-419/92 *Scholz* [1994] ECR I-517, mn. 9.

⁷ ECJ Joined Cases C-49/98, C-50/98, C-52/98 – C-54/98 and C-68/98 – C-71/98 *Finalarte* [2001] ECR I-7884, mn. 53.

⁸ ECJ Case 41/74 *van Duyn* [1974] ECR 1347, mn. 25 et seq.

⁹ Cf. Article 41 Regulation 492/2011.

sively under Articles 45 et seq. TFEU (or Articles 49 et seq. TFEU for self-employed workers).

4. Derogations according to the Acts of Accession 2003, 2005 and 2011

13

Welcoming a new Member State to the European Union also means welcoming a new group of potential workers. The idea of those workers competing for jobs in their labour markets regularly causes resentments in society and politics in the present Member States. Replying to these resentments, the European Union decided to allow restrictions to the eligibility for employment for workers from new Member States.

Therefore the Acts of Accession of 2003 and 2005 and the Accession Treaty of 2011 have formed legal exceptions allowing the present Member States to install transitional provisions for the free movement of workers from the entering countries. The exceptions are part of the Accession Treaties and are to be found in the annexes.¹⁰

14

The legal regulations for the transitional provisions in the Annexes of the Treaties 2003, 2005 and 2011 are widely identical in respect of their composition and mechanisms. Thereafter, the Member States are eligible to apply national measures or those resulting from (former) bilateral agreements to regulate access to their labour markets by nationals of the new members for two years, following the date of accession. Articles 1 to 6 Regulation 492/2011 are derogated in these cases. The provisions only apply in relation to the freedom of movement for workers (Articles 45 et seq. TFEU) and the freedom to provide services involving temporary movement of workers (Articles 56 et seq. TFEU). Self-employed workers (Articles 49 et seq. TFEU) are excluded from these exceptions. Further privileges are granted to those nationals that have already legally worked in a present Member State. The maximum time for transitional measures is seven years (following the scheme '2 plus 3 plus 2'): After a two year period, present Member States may continue to apply restrictions until the end of five years following the date of accession. For another subsequent two years, national measures may be maintained by a present State, but only in case of 'serious disturbances of its labour market or threat thereof'¹¹. The Council reviews transnational measures before the end of the two year period following the date of accession (first phase) on the basis of a report from the Commission.¹² Upon request of the Member States concerned, the Commission provides the Council with one further report for review.¹³ The European Commission provides fully updated information about which rules apply to job seekers from new Member States, sorted by all present Member States on its website.¹⁴

15

In any case, present Member States applying transitional provisions for nationals of newly entered Member States must give preference to those workers over workers who are nationals of third countries in regard to the access to their labour markets.

16

¹⁰ See Annexes V to XIV of the Treaty concerning the accession of the Czech Republic, The Republic of Estonia, The Republic of Cyprus, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236/803 et seq.); Annex VI and VII of the Treaty concerning the accession of the Republic of Bulgaria and Romania (OJ 2005 L 157/278 et seq.); Annex V of the Treaty concerning the accession of the Republic of Croatia (OJ 2012 L 112/67).

¹¹ Cf., for example, Annex V of the Treaty concerning the accession of the Republic of Croatia (OJ 2012 L 112/67), mn. 5.

¹² COM (2003) 48 final and COM (2008) 765 final.

¹³ Cf. Report on the Functioning of the Transitional Arrangements on Free Movement of Workers from Bulgaria and Romania, COM (2011) 729 final.

¹⁴ The name of the domain is 'https://ec.europa.eu/eures'. Currently, the EURES database contains over 2.1 million job offers.

a) Act of Accession 2003

- 17 All transitional provisions for those Member States, having accessed the European Union on 1 May 2004¹⁵ on the basis of the act of accession 2003, have been terminated after a seven-year period on 30 April 2011. Only Germany, Austria and the United Kingdom had continued the restrictions of eligibility for employment on their labour markets in the last phase from 2009 till 2011. All other countries had ended measures before, by 1 May 2009.

b) Act of Accession 2005

- 18 While the first phase (1 January 2007–31 December 2008) and the second phase (1 January 2009–31 December 2011) have ended, the third phase allowing restrictions for nationals from Bulgaria and Romania was terminated on 31 December 2013. By the beginning of the first phase with the accession of Bulgaria and Romania on 1 January 2007 the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden decided to grant free access to their labour markets from the beginning on. Greece, Hungary, Portugal and Spain eliminated their restrictions by the end of the first phase (1 January 2009), Denmark on 1 May 2009. Upon request by 22 July 2011, the Commission authorised Spain to temporarily reinstall restrictions on 12 August 2011 till 31 December 2013 for workers from Romania ‘with reference to a serious disturbance of the Spanish labour market’.¹⁶ Ten countries (Kingdom of Belgium, Republic of Germany, Republic of Ireland, French Republic, Republic of Italy, Grand-Duchy of Luxemburg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria and the United Kingdom) continued to impose restrictions on the right of nationals from Bulgaria and Romania until the end of the third phase in the end of 2013. These restrictions varied in their intensity; some countries granted working permits upon request with no comprehensive requirements for a wide range of professions (e.g. Belgium, France and Luxembourg), while others made positions only available to qualified and/or experienced workers for occupations for which there is a shortage of workers (e.g. Austria, Germany, Netherlands, Malta, United Kingdom).

c) Act of Accession 2011

- 19 Since Croatia has become Member State to the European Union on 1 July 2013, it faces up to three phases of restrictions implied to its workers by a part of the present Member States.¹⁷ No restrictions for Croatian workers apply in 14 Member States (Bulgaria, Czech Republic, Denmark, Estonia, Ireland, Latvia, Lithuania, Hungary, Poland, Portugal, Romania, Slovakia, Finland and Sweden) from beginning on. As a measure of reciprocity Croatia installed restrictions to nationals of those present Member States that impose transitional measures on the eligibility for employment for Croatian nationals (which are Belgium, Germany, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, Netherlands, Austria, Slovenia and the United Kingdom).

¹⁵ Czech Republic, The Republic of Estonia, The Republic of Cyprus, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.

¹⁶ Cf. Commission Decision of 11 August 2011 authorising Spain to temporarily suspend to application of Articles 1 to 6 of Regulation 492/2011 with regard to Romanian workers (OJ 2011 L 207/22).

¹⁷ First phase: 1 July 2013–30 June 2015; second phase: 1 July 2015–30 June 2018; third phase: 1 July 2018–30 June 2020.

II. Free movement for workers

20

1. Relevant persons

a) Workers

The term 'worker' itself comes without definition in the Treaty. In accordance to the established case law of the ECJ, 'worker' as mentioned in Article 45 AEUV has a specific 'community meaning'¹⁸ and may not be interpreted restrictively.¹⁹ Therefore, defining 'worker' by references to the national laws of the Member States is illegitimate. Essential feature for the qualification as 'worker' is that a person performs activities which are effective and genuine for a certain period of time under the direction of another person in return for which he or she receives remuneration.²⁰ Activities on such a small scale, having to be regarded as purely marginal and ancillary, are excluded.²¹ The nature of the legal relationship between the employee and the employer is not decisive in regard to the application of Article 45 TFEU.²² Also part-time work finds protection under Article 45 TFEU,²³ while it is not of matter if they obtain remuneration lower than the minimum needed to make do with their income.²⁴

Also a temporary period of time, in which a national has worked in another Member State can confer on him or her the status of a worker, even if that period is short (e.g. two months).²⁵

The activity performed by an employed person must represent an economic activity within the meaning of Article 3 para. 3 TFEU,²⁶ since only then an activity falls within the scope of application of Union law in general and Article 45 TFEU in specific.²⁷ Nevertheless, an activity not pursuing economic objectives may fall under the provision of Article 45 TFEU as long as it is professional itself, such as certain forms of art or sport activities.²⁸

¹⁸ ECJ Case 53/81 *Levin* [1982] ECR 1035, mn. 11.

¹⁹ ECJ Cases 66/85 *Lawrie-Blum* [1986] ECR 2121, mn. 16; 197/86 *Brown* [1988] ECR 3205, mn. 21; C-3/90 *Bernini* [1992] ECR I-1071, mn. 14; C-413/01 *Ninni-Orasche* [2003] ECR I-13187, mn. 23; C-46/12 *Ankenævniet for Statens Uddannelsesstøtte* [2013] ECR I-0000, mn. 39.

²⁰ Cf. ECJ case-law in Cases 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, mn. 16 et seq.; 197/86 *Brown* [1988] ECR 3205; C-27/91 *Le Manoir* [1991] ECR I-5531 (concerning trainees); C-357/89 *Raulin* [1992] ECR I-1054 (concerning part-time work upon request); C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, mn. 32; C-337/97 *CPM Meeusen* [1999] ECR I-3289 (director of a company of which he is the sole shareholder is not carrying out his activity in the context of a relationship of subordination); ECJ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v ARGE Nürnberg* [2009] ECR I-4585.

²¹ Cf. ECJ Case C-337/97 *CPM Meeusen* [1999] ECR I-3289, mn. 13.

²² Cf. ECJ Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, mn. 16.

²³ ECJ Case 53/81 *Levin* [1982] ECR 1035, mn. 16.

²⁴ ECJ Cases 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, mn. 15; C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, mn. 22; C-384/10 *Hava Genc v Land Berlin* [2010] ECR I-931, mn. 20.

²⁵ Cf. ECJ Cases C-3/90 *Bernini* [1992] ECR I-1071, mn. 16; C-431/01 *Ninni-Orasche* [2003] ECR I-13187, mn. 32.

²⁶ ECJ Case C-176/96 *Lehtonen* [2000] ECR I-2681, mn. 43.

²⁷ ECJ Cases 13/76 *Donà v Maniero* [1976] ECR 1333, mn. 12; 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, mn. 10.

²⁸ Cf. for the field of professional soccer: ECJ Cases C-415/93 *Bosman* [1995] ECR I-4921; C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, mn. 27; for the field of professional basketball: Case C-176/96 *Lehtonen* [2000] ECR I-2681; other sports: Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, mn. 53 (judokas); Case C-519/04P *David Meca-Medina* [2006] ECR I-6991, mn. 22 (swimming).

b) Any national of a Member State

- 23 Article 45 guarantees free movement of workers only to nationals of the Member States,²⁹ although this does not explicitly come from the wording. Seen from a teleological and systematically point of view, including the text of the preamble and the circumstance that the freedom of establishment (Article 49 TFEU) and the freedom of services (Article 56 TFEU) are reserved rights for nationals from Member States, nothing else can apply.³⁰ Article 1 para. 1 Regulation 492/2011 explicitly reserves the right of eligibility for employment to 'any national of a Member State'. In opposite, Directive 2004/38/EC, regulating the freedom of persons in general in the EU, does not set out nationality requirements in some cases, such as for family members in Article 2 para. 2 Directive 2004/38/EC. Certain limitations derive from the protocols to the act of accessions.³¹ For further determinations, cf. Article 355 TFEU.
- 24 Therefore, nationals from third countries and stateless persons do not possess privileges and rights under Article 45 TFEU. Still, in certain cases stateless persons and refugees residing in a Member State as well as their survivors and the survivors of nationals of a Member State without own rights under Article 45 TFEU are covered by some branches of social security (cf. Article 2 Regulation 883/2004), such as sickness benefits, unemployment benefits and death grants (cf. Article 3 Regulation 883/2004). Furthermore, family members of nationals privileged under Article 45 TFEU hold rights that derive from the worker's right to freedom of movement.³² The conditions for the entry of refugees in the sense of the Geneva Refugee Convention into another Member State on the purpose of working are regulated in Directive 2004/83/EC of 29 April 2004 on minimum standards for persons who need international protection. Article 26 Directive 2004/83/EC requests Member States to give access to employment (employed or self-employed) following the general rules for beneficiaries of refugee immediately after the refugee status has been granted.
- 25 Third country nationals may also enjoy the freedom of movement for workers on the basis of association agreements between the European Union and their home country.³³ Due to its long lasting history and emerging problems over the past decades, the Association Agreement between the European Union (formerly the European Economic Community) and the Republic of Turkey from 1963³⁴ still builds a complex case of associating third country nationals. In Article 12 of this Agreement the contracting parties decided to progressively secure freedom of movement for workers between them. On this purpose the council of association was commissioned to implement necessary measures as foreseen in Articles 12 and 36 of the additional protocol of 1970 between the end of the 12th and the 22nd year after the entry into force of that agreement.³⁵ Until today, no such measures have been implemented. Since neither Article 12 nor Article 36 of the protocol have direct effect,³⁶ no rights or duties for the individuals can be deduced from them.

²⁹ ECJ case law since Case 238/83 *Meade* [1984] ECR 2631, mn. 7.

³⁰ Cf. Streinz/*Franzen*, Article 45 AEUV mn. 37.

³¹ E.g. Articles 2 and 6 Protocol No 3 on the Channel Islands and Isle of Man (OJ 1972 L 73/160).

³² Cf. below, mn. 50 et seq.

³³ Cf. Article 217 TFEU as competence norm for these association agreements.

³⁴ Association Agreement between the European Economic Community and Turkey of 12 September 1963 (OJ 1964 P 217/3687).

³⁵ Cf. Additional protocol of 23 November 1970 (OJ 1972 L 293/3).

³⁶ Cf. ECJ Case 12/86 *Demirel* [1987] ECR 3719, mn. 23: Article 12 sets out a programme and is not sufficiently precise and unconditional to be capable of governing directly the movement of workers.

Nevertheless, certain facilitations for Turkish nationals working legally in an EU Member State derive from Association Decisions 1/80 and 3/80 of the EEC-Turkey Association Council in accordance with ECJ case law (the overwhelming majority of these cases are under participation of German authorities).³⁷ Association Decision 3/80 as first step towards the implementation of Article 39 of the protocol, which provides for adoption of social security measures by the association council, is about to be replaced by a new decision 'in order to ensure the smooth functioning of the coordination of the social security systems of the Member States and Turkey'.³⁸ Of matter for Turkish nationals is also the extension of Regulation (EC) No 883/2004 to nationals of third countries who are not already covered by this regulation through Regulation (EU) No 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

Comprehensive rules on the free movement of persons between the European Union (formerly EC) and the Swiss Confederation (including the right of entry, of residence and of access to an economic activity on the principle of non-discrimination, cf. annex I for the free movement of persons) have been stated in an Agreement in 2002 as a part of seven agreements strengthening the cooperation between the Confederation and the Union.³⁹ Freedom rights are granted under certain conditions.⁴⁰ Switzerland recently pulled (18 April 2012) and extended (24 April 2013) the option to invoke the 'safeguard clause' (Article 12 of the Agreement) with respect to the EU-8 States (Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic, Hungary) as of 1 May 2012.⁴¹ Upon decision of the Swiss Federal Council, Switzerland extended the restrictions onto all workers from EU Member States as of 1 May 2013. Thereafter residences from EU Member States are now again subject to quotas after most of them have had enjoyed unrestricted movement before.⁴² By 1 June 2014 Switzerland must abolish all quantitative limits applicable to nationals of the Member States (except Bulgaria, Rumania and Croatia).⁴³

Most-favoured-nation clauses in agreements with third countries do not imply the right to invoke the guarantee of free movement under Articles 45 et seq. TFEU.

³⁷ ECJ Cases C- 237/91 *Kus* [1992] ECR I-6781 (right of residence); C-355/93 *Hayriye Eroglu* [1994] ECR I-5113 (right of residence); C-434/93 *Ahmet Bozkurt* [1995] ECR I-1475 (right to remain); C-171/95 *Recep Tetik* [1997] I-329 (Extension of a residence permit after voluntary termination of a contract of employment); C-351/95 *Selma Kadiman* [1997] ECR I-2133 (family unity); C-285/95 *Suat Kol* [1997] ECR I-3069 (Periods of employment under a residence permit fraudulently obtained); C-36/96 *Günaydin* [1997] ECR I-5143 (abuse of rights); C-383/03 *Ergül Dogan* [2005] ECR I-6237 (effect of prison sentence on the right of residence); C-337/07 *Altun* [2008] ECR I-10323 (right of residence of a child of a Turkish worker); C-187/10 *Baris Unal* [2011] ECR I-9045 (separation of partners); C-258/11 *Atilla Gülbahce* [2012] I-0000 (retroactive withdrawal of a residence permit).

³⁸ Cf. EU Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems, with a draft decision of the Association Council attached (OJ 2012 L 340/19).

³⁹ Cf. Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 21 June 1999 (OJ 2002 L 114/12).

⁴⁰ Cf. LB/Weerth, Article 45 AEUV mn. 34.

⁴¹ Cf. Decision of The Swiss Federal Council as of 18 April 2012

⁴² For the present EU-15 Member States and Malta and Cyprus free movement of persons was granted since 1 June 2007, for the EU-8 from 1 May 2011 on.

⁴³ Cf. Article 12 para. 1 of the (Swiss) Agreement.

2. Content

a) Principle of non-discrimination

Key element of the free movement of persons is the principle of non-discrimination based on nationality. The principle of non-discrimination in Article 45 para. 2 TFEU is the specification of the general concept of non-discrimination in Article 18 para. 1 TFEU. Therefore, a worker who is a national of another EU Member State has the right of national treatment. Any different treatment of workers based on their nationality is illegitimate. Neither whole labour market sectors nor single professions may be reserved to own nationals (exceptions apply; see mn. 59 et seq. and mn. 65 et seq. below). Article 45 para. 2 TFEU also protects the rights of a national of a Member State who is a permanently resident of a non-member country working for another Member State in the third country, as long as the employment relationship is governed by the legislation of the employing Member State.⁴⁴

b) Equal treatment requirement

- 30 The equal treatment requirement of Article 45 TFEU applies in particular to all working and employment relationships in view of remuneration, dismissal and – in case of occurring unemployment – reinstatement and re-employment.⁴⁵ It is not necessary to define whether the payment is made by virtue of an option or an obligation, either statutory or contractual.⁴⁶ Previous periods of comparable employment completed in the public service of another Member State are to be considered for promotions on grounds of seniority for employees of the service of a Member State.⁴⁷ The requirement of equal treatment also applies on tax refunding,⁴⁸ as well as individual tax privileges.⁴⁹
- 31 The right of Article 45 para. 3 lit. a TFEU to take up available work in the territory of another Member State with the same priority as nationals is detailed in Articles 1 to 6 Regulation 492/2011. EU-citizens do not require a work permit in another Member State, with exception of those governed by the derogations on the basis of the act of accessions.⁵⁰ Without prejudice to this principle, host Member States may require EU-citizens to register with the relevant authorities for periods of residence longer than three months.⁵¹ By 1 January 2014, all restrictions applied to nationals from Bulgaria and Romania were lifted, while workers with Croatian nationality will continue to face restricting measures in certain Member States until 30 June 2020 (cf. mn. 19 above and fn. 17).

c) Prohibition of covert forms of discrimination

- 32 Not only overt discrimination in respect of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria (such as origin,

⁴⁴ ECJ Case C-214/94 *Boukhalfa* [1995] ECR I-2253, mn. 22.

⁴⁵ Cf. Article 7 para. 1 Regulation 492/2011.

⁴⁶ ECJ Case 152/73 *Sotgiu* [1974] ECR 153, mn. 9.

⁴⁷ ECJ Cases C-15/96 *Schöning* [1998] ECR I-47, mn. 28; C-187/96 *Commission v Greece* [1998] I-1095; C-195/98 *ÖGB* [2000] ECR I-10532.

⁴⁸ ECJ Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685.

⁴⁹ ECJ Case C-385/00 *de Groot* [2002] ECR I-11838.

⁵⁰ Cf. mn. 13 et seq.

⁵¹ Cf. Article 8 para. 1 Directive 2004/38/EC (OJ 2004 L 158/95). Cf. Article 8 paras 2–5 for further requirements.

place of residence or diplomas) lead in fact to the same result, are prohibited.⁵² Such discrimination is given if an employed person whose children are resident in another Member State is being refused family benefits where employed persons whose children are resident in the Member State concerned are entitled to such benefits.⁵³ It is also illegitimate to limit the duration of employment contracts of foreign-language assistants, where in principle no such limit exists with regard to other teachers,⁵⁴ if the limitation is not individually justified by an objective reason.⁵⁵

Furthermore, provisions excluding natural persons who have no permanent residence or usual abode in the territory of a Member State from the benefit of procedures such as annual adjustment of deductions at source in respect of the wages tax and the assessment by the administration of the tax payable on remuneration from employment, are precluded under Article 45 para. 2 TFEU if the person concerned receives income there from employment.⁵⁶ It is legitimate to make favourable tax treatment for non-resident married couples subject to the condition that at least 90 % of their total income must be subject to tax in that Member State,⁵⁷ in particular if the worker who is resident in the Member State concerned receives almost the entire income of the household and the spouses are not separated either *de facto* or by virtue of a juridical decision.⁵⁸

A covert discrimination may also result from special obligations imposed on employers of workers who are nationals of other Member States, such as special calculations of employers' social security contributions.⁵⁹ A national law, under which the grant to employers of a subsidy for the recruitment of unemployed persons aged over 45 years is subject to the condition that the unemployed persons recruited has been a registered job seeker in that same Member State, precludes to Article 45 TFEU.⁶⁰ Provisions which make the deductibility of insurance contributions conditional on those contributions being paid in that State may be justified by the need to preserve the cohesion of the applicable tax system.⁶¹ National measures requiring the reimbursement of granted bonuses for complimentary retirement pensions on the termination of full liability to tax are precluded under Article 45 para. 2 TFEU as well as Article 7 para. 2 Regulation 492/2011.⁶²

The principle of non-discrimination is not only addressed to Member States but also to third parties, such as employers and trade unions. Discriminatory clauses in individual and collective agreements or other collective regulations concerning eligibility for employment, remuneration and other conditions of work or dismissal are null and void in respect of workers who are nationals of other Member States.⁶³ An employer who requires persons applying for work to provide evidence of their linguistic knowledge exclu-

⁵² ECJ Cases 152/73 *Sotgiu* [1974] ECR 153, mn. 11; C-175/88 *Biehl* [1990] ECR I-1779; C-279/89 *Commission v United Kingdom* [1992] ECR I-5785; C-278/94 *Commission v Belgium* [1996] ECR I-4328; C-57/96 *Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, mn. 44; C-35/97 *Commission v France* [1998] ECR I-5325, mn. 37; C-350/96 *Clean Car* [1998] ECR I-2521; C-155/09 *Commission v Greece* [2011] ECR I-65, mn. 45.

⁵³ ECJ Case C-266/95 *Merino Garcia* [1997] ECR I-3279, mn. 37.

⁵⁴ ECJ Joined Cases C-259/91, C-331/91 and C-332/91 *Allué* [1993] I-4309; Case C-272/92 *Spotti* [1993] ECR I-5185, mn. 21.

⁵⁵ ECJ Case C-272/92 *Spotti* [1993] ECR I-5185, mn. 21; Case C-90/96 *Petrie* [1997] ECR I-6527.

⁵⁶ ECJ Case C-266/93 *Schumacker* [1995] ECR I-225, mn. 59.

⁵⁷ ECJ Case C-391/97 *Gschwind* [1999] ECR I-5478, mn. 32.

⁵⁸ ECJ Case C-87/99 *Zurstrassen* [2000] ECR I-3353, mn. 26.

⁵⁹ ECJ Case C-27/91 *Le Manoir* [1991] ECR I-5531, mn. 13.

⁶⁰ ECJ Case C-379/11 *Caves Krier Frères Sàrl* [2012] ECR I-0000, mn. 55.

⁶¹ ECJ Case C-204/90 *Bachmann* [1992] ECR I-276, mn. 35.

⁶² ECJ Case C-269/07 *Commission v Germany* [2009] ECR I-7811, mn. 116.

⁶³ Cf. Article 7 para. 4 Regulation 492/2011.

sively be means of one particular diploma issued only in one particular province of a Member State precludes to Article 45 para. 2 TFEU.⁶⁴ A worker who is national of another Member State has equal rights in regard to membership of trade unions and exercise of union rights. He has the right to vote and be eligible for administration or management posts of a trade union,⁶⁵ including the participation in elections organized by bodies such as occupational guilds, if they perform similar functions as trade-union organizations.⁶⁶

- 36 A worker returning home after having exercised the right to free movement for workers in another Member State may invoke the same rights under Article 45 TFEU towards the home State as a national from another Member State;⁶⁷ for instance the right to have his social security contributions set at the same level as that of the contributions which would be payable by a worker who has continued to reside in the same Member State.⁶⁸ The rights to return include the right of a spouse of whatever nationality to enter and reside in Member State of destination, and at least the same rights as the spouse would be granted to under Union law if his or her spouse entered and resided in the territory of another Member State.⁶⁹ A national of a non-Member State married to a worker having the nationality of a Member State cannot rely on this right when that worker has never exercised the right to freedom of movement within the Union before.⁷⁰ The principle of non-discrimination does not require the same treatment of returning nationals who have worked in a non-Member State with its nationals who have worked in another Member State.⁷¹ A national provision prohibiting the use of a commuting worker's vehicle registered in another neighbouring Member State on the territory of the host Member State precludes to Article 45 TFEU.⁷²
- 37 Nationality clauses in the statutes of sporting associations which limit participation of non-national professional players preclude to the right of free movement of workers of those players. Excluding non-national players from certain matches may be justified for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are of sporting interest, e.g. matches between national teams from different countries.⁷³
- 38 Rules governing transfers have the potential to preclude to Article 45 TFEU if a club has to pay to the former club a transfer, training or development fee in order to employ a professional player in another Member State after the expiry of the former contract. Therefore, these rules can be justified only if they pursue a legitimate aim compatible with the Treaty and if they are in the reasons of public interest.⁷⁴ For instance the payment of compensation for training a young player at the end of his training can be justified by the objective of encouraging the recruitment and training of young players.⁷⁵

⁶⁴ ECJ Case C-281/98 *Angonese* [2000] ECR I-4161, mn. 46.

⁶⁵ See Article 8 para. 1 Regulation 492/2011.

⁶⁶ ECJ Case C-118/92 *Commission v Luxembourg* [1994] ECR I-1895, mn. 5.

⁶⁷ Cf. mn. 9.

⁶⁸ ECJ Case C-18/95 *Terhoeve* [1999] I-345, mn. 59.

⁶⁹ Established by ECJ case law: Cases C-370/90 *Singh* [1992] ECR I- 4265, mn. 45; C-109/01 *Akrich* [2003] ECR I-9607. Now codified in Directive 2004/38/EC, cf. below.

⁷⁰ ECJ Joined Cases C-64/96 and C-65/96 *Uecker* [1997] ECR I-3171, mn. 24.

⁷¹ ECJ Case C-297/92 *Baglieri* [1993] ECR I-5211, mn. 19.

⁷² ECJ Case C-232/01 *Van Lent* [2003] ECR I-11525, mn. 26 concerning a vehicle belonging to a leasing company established in that second Member State.

⁷³ ECJ Case C-415/93 *Bosman* [1995] ECR I-5968, mn. 127, justification for league or cup matches: Case C-438/00 *Kolpak* [2003] ECR I-4135.

⁷⁴ ECJ Case C-415/93 *Bosman* [1995] ECR I-4921, mn. 104.

⁷⁵ ECJ Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, mn. 45.

d) Flanking rights

The free movement of workers is flanked by those rights necessary for their exercise. 39 Therefore, Member States are obliged to guarantee 'in compliance with the principles of liberty and dignity' the best possible conditions for the integration of EU workers and their families in the host State.⁷⁶ These obligations are laid down in Article 45 para. 3 TFEU, Regulation 492/2011 and Directive 2004/38/EC. Employers who want to employ workers from another Member State may also rely upon these rights.⁷⁷

aa) Right of residence. Essential for the exercise of the freedom to pick up a work in 40 another Member State is the right of the worker to stay in a Member State on that purpose. The right of residence for workers from another Member States follows directly from Article 45 para. 3 lit. c TFEU. Articles 6 et seq. Directive 2004/38/EC present detailed rules for this right enshrined in Article 45 TFEU. Without prejudice to this principle, host Member States may require EU-citizens to register with the relevant authorities for periods of residence longer than three months.⁷⁸ Registration certificates issued on the occasion of necessary registration have only declaratory relevance. The certificate shall be issued immediately for five years (or shorter if envisaged period of residence is less), stating the name and address of the person and the date of registration,⁷⁹ when the applying Union citizen has presented a valid identity card or passport, a confirmation of engagement from the employer of certificate of employment, a proof that he or she is a self-employed person, or the proof that he or she satisfies the conditions laid down in Article 7 para. 1 Directive 2004/38/EC.⁸⁰ Failure to comply with these requirements may only be answered with 'proportionate and non-discriminatory sanctions'.⁸¹

No conditions or formalities besides the hold of a valid identity card or passport may 41 be imposed by a Member State for Union citizens that reside or move within their country for a period up to three months.⁸² This is necessary in order to promote the guarantees given in Article 45 para. 3 lit. a and b TFEU, whereby the exercise of these rights is not limited to the purpose of seeking a certain employment. At the end of the 3-months-period, Union citizens and their family may not be expelled for as long as he or she can present evidence that employment is further sought and that there is a genuine chance of being engaged.⁸³

The right of residence covers the whole territory of the host Member State.⁸⁴ Restriction- 42 s may only be imposed where the same limitations apply to the nationals of the host State.⁸⁵

Further motives, which may have prompted an EU worker to take up employment in 43 another Member State, are of no account as long as she or he pursues or wishes to pursue an effective and genuine activity.⁸⁶

⁷⁶ ECJ Case C-308/89 *Carmina di Leo* [1990] ECR I-4204, mn. 13.

⁷⁷ ECJ Case C-350/96 *Clean Car* [1998] ECR I-2521, mn. 25.

⁷⁸ Cf. Article 8 para. 1 Directive 2004/38/EC. Cf. Article 8 paras 2–5 for further requirements and Article 11 for the duration.

⁷⁹ Cf. Article 8 para. 2 Directive 2004/28/EC.

⁸⁰ Cf. Article 8 para. 3 Directive 2004/38/EC.

⁸¹ Cf. Article 8 para. 2 s 3 Directive 2004/38/EC.

⁸² Cf. Article 6 para. 1 Directive 2004/38/EC.

⁸³ Cf. Article 14 para. 4 lit. b Directive 2004/38/EC; previously stated by ECJ C-344/95 *Commission v Belgium* [1997] I-1035 in respect to former Directive 68/360/EEC.

⁸⁴ Cf. Article 22 Directive s 1 2004/38/EC; previously stated by ECJ Case 35/75 *Rutili* [1975] ECR 1219, mn. 46/49.

⁸⁵ Cf. Article 22 s. 2 Directive 2004/38/EC.

⁸⁶ ECJ Case 53/81 *Levin* [1982] ECR 1035, mn. 23.

44 The hosting Member State is not obliged to continue payment of social benefits granted by the home State, during the period in which the worker seeks work on its territory, since there is no necessary link between the right to employment benefit in the Member State of origin and the right to stay in the host State.⁸⁷ Furthermore, a national seeking employment is not yet a worker in the sense that she or he can enjoy the same social benefits as a worker exercising an effective and genuine occupational activity.⁸⁸ Nevertheless, it is upon the hosting Member State to grant those social benefits voluntarily to work seeking nationals from another Member State and their families during the first three months of residence or, in case of Article 14 para. 4 Directive 2004/38/EC, even longer.⁸⁹

45 **bb) Vocational education.** The principle of equal treatment deriving from Article 45 para. 2 TFEU also includes the right to have access to training in vocational schools and retraining centres under the same conditions as national workers.⁹⁰ During the time of vocational training, all Union citizens have the right of residence, derogating the 3-months-limitation for non-working nationals if they have comprehensive sickness cover and sufficient resources for themselves and their family members.⁹¹ A worker who embarks on vocational training retains the status of a worker if she or he is involuntarily unemployed or if the training is related to the previous employment.⁹² Therefore a worker leaving employment on the purpose of beginning a full-time study programme not related to the previous employment loses the status of a worker.

46 **cc) Social and tax advantages.** Under the same conditions as national workers, a worker who is national of another Member State shall enjoy the same social and tax advantages in the host Member State,⁹³ including the protection against dismissal for the seriously disabled⁹⁴ and the payment of a separation allowance.⁹⁵ The scope of advantages guaranteed by the principle of equal treatment extends to workers who are nationals of another Member State primarily because of their objective status as workers and as far as they seem to be suitable to facilitate their mobility within the Union, not necessarily because they are linked to a contract of employment,⁹⁶ for instance interest-free child-birth loans⁹⁷, fares reduction cards for large families⁹⁸, child-raise allowance⁹⁹, redundancy payments made from public funds¹⁰⁰. Neither the applicant's place of residence is relevant to determine to entitlement of such advantages¹⁰¹ nor can the duration of residence in the territory of the host Member State be a condition for the grant of a guaran-

⁸⁷ ECJ Case C-292/89 *Antonissen* [1991] ECR I-745, mn. 20; cf also *European Commission*, Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland (December 2013) <ec.europa.eu/social/BlobServlet?docId=11366&langId=en>.

⁸⁸ ECJ Cases 316/85 *Lebon* [1987] ECR 2811; C-278/94 *Commission v Belgium* [1996] ECR I-4307, mn. 40.

⁸⁹ Cf. also Article 24 Directive 2004/28/EC underlining that there is no obligation of the host Member State to do so.

⁹⁰ Cf. Article 7 para. 3 Regulation 492/2011.

⁹¹ Cf. Article 7 para. 1 lit. c Directive 2004/38/EC.

⁹² Cf. Article 7 para. 3 lit. d Directive 2004/38/EC, previously stated in Case C-357/89 *Raulin* [1992] ECR I-1054.

⁹³ Cf. Article 7 para. 2 Regulation 492/2011.

⁹⁴ ECJ Case 44/72 *Marsman* [1972] ECR 1243, mn. 5.

⁹⁵ ECJ Case 152/73 *Sotgiu* [1974] ECR 164, mn. 12.

⁹⁶ ECJ Case 207/78 *Even* [1979] ECR 2019, mn. 22.

⁹⁷ ECJ Case 65/81 *Reina* [1982] ECR 44, mn. 18.

⁹⁸ ECJ Case 32/75 *Cristini* [1975] ECR 1085, mn. 19.

⁹⁹ ECJ Case C-85/96 *Martinez Sala* [1998] ECR I-2691, mn. 65.

¹⁰⁰ ECJ Case C-57/96 *Meints* [1997] I-6689, mn. 33.

¹⁰¹ ECJ Case C-57/96 *Meints* [1997] I-6689, mn. 51.

teed minimum income.¹⁰² All rights and benefits needed for housing, including ownership, are granted under Article 9 para. 1 Regulation 492/2011 and therefore part of the freedom of movement for persons. In the case of call-up for military service¹⁰³ or return for other reasons¹⁰⁴ to the home Member State, the worker is not entitled to have contributions or advantages.

Distinctions must be made for commuters governed by conventions for the avoidance of double taxation.¹⁰⁵ 47

dd) Right to remain. Formerly governed by Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, Articles 16 and 17 Directive 2004/38/EC now include the main elements of this regulation on the right of workers to remain in the territory of a Member State, with further amendments. Regulation 1251/70 has been repealed by Regulation (EC) No 635/2006 of 25 April 2006 repealing Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State. The amendments mostly grant a more privileged status, namely that of the right of permanent residence under certain conditions. According to Article 16 para. 1 Directive 2004/38/EC, Union citizens who have resided legally for a continuous five-year period in the host Member State gain the right of permanent residence under derogation from the requirements of Articles 6 et seq. Directive 2004/38/EC. Nationals from another Member State enjoy the right of permanent residence under Article 17 Directive 2004/38/EC even before completion of a continuous period of five years if they retire in the host Member State. For the benefit of this right, workers or self-employed persons must have reached the age laid down by the law of that Member State for entitlement to an old age pension.¹⁰⁶ Workers who cease paid employment to take early retirement must have been working in that Member State at least the preceding twelve months and have resided there continuously for more than three years.¹⁰⁷ If there is no such age laid down by national law, the age condition is met once the worker has reached the age of 60.¹⁰⁸ No age or length condition of stay shall be imposed if the worker retired due to the incapacity of work as a result of an accident at work or an occupational disease.¹⁰⁹ 48

Periods of residence of a non-Member State national in the territory of a Member State before accession of the non-Member State concerned to the European Union must be taken into account for the purposes of the acquisition of the right of permanent residence under Article 16 para. 1 Directive 2004/38/EC, as far as there are no specific provisions in the Act of Accession.¹¹⁰ 49

ee) Other rights. The obligation of Member States to create best possible conditions for the integration of EU workers from other Member States does not preclude the requirement of national evidence of formal qualifications. Nevertheless, recognition requirements must be objectively justified and proportionate.¹¹¹ On a secondary legislation 50

¹⁰² ECJ Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5909, mn. 14.

¹⁰³ ECJ Case C-315/94 *de Vos* [1996] ECR I-1417, mn. 23.

¹⁰⁴ ECJ Case C-33/99 *Hassan Fahmi* [2001] ECR I-2452.

¹⁰⁵ ECJ Case C-336/96 *Gilly* [1998] ECR I-2793, mn. 36 et seq.

¹⁰⁶ Cf. Article 17 para. 1 lit. a subpara. 1 Directive 2004/38/EC.

¹⁰⁷ Cf. Article 17 para. 1 lit. a subpara. 1 Directive 2004/38/EC.

¹⁰⁸ Cf. Article 17 para. 1 lit. a subpara. 2 Directive 2004/38/EC.

¹⁰⁹ Cf. Article 17 para. 1 lit. b subpara. 2 Directive 2004/38/EC.

¹¹⁰ ECJ Joined Cases C-147/11 and C-148/11 *Czop and Punakova* [2012] ECR I-0000, mn. 35; Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-0000, mn. 63.

¹¹¹ Cf. for instance Recital 3 of the preamble to Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications.

level¹¹², the European Union has developed detailed regulations concerning the mutual recognition of professional qualifications¹¹³ and permits as well as licenses, such as driver licenses¹¹⁴. Certain peculiarities arise regarding formal matters of certificates of civil status.¹¹⁵

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3. Family members

The right of freedom of movement for workers in Article 45 TFEU is flanked with comprehensive rights of the worker's family members. With Directive 2004/38/EC and Regulation 492/2011, secondary legislation codifies comprehensive rights of employment, residence and education for family members.¹¹⁶ It must be distinguished between rights deriving from an own status as a Union citizen and rights deriving from the status as a family member of a worker. Differences arise most importantly in the field of social and tax matters. The derivative rights are notably relevant for family members who are nationals of a non-Member State, since these nationals generally do not hold own rights under Article 45 TFEU or any other provision in the Treaty.

a) Fundamental right to respect and protection of the family

52 The right to respect and protection of the family by Article 8 ECHR and Article 33 CFREU has the same legal value as the Treaties and therefore must be considered throughout the application of Union law.¹¹⁷

b) Beneficiaries

53 According to Article 2 para. 2 Directive 2004/38/EC, spouses of the worker, partners with whom the Union citizen has contracted a registered partnership, direct descendants of the worker or the spouse/partner who are under the age of 21 or are dependents and dependant direct relatives of the worker or the spouse/partner in the ascending line are beneficiaries of those rights codified in Directive 2004/38/EC. Registered partners as referred to in Article 2 para. 2 lit. b Directive 2004/38/EC were formerly not included in Article 10 para. 1 Directive 1612/68 (repealed by Article 41 Regulation 492/2011). Union law is not applicable in the context of marriages of convenience entered into in order to circumvent restrictions applying to entry and residence of nationals of non-Member States.¹¹⁸ Adopted children or minors in legal custody (for the duration they are with the legal guardian) are considered as dependants in the sense of Article 2 para. 2 Directive

¹¹² Cf. below commentary on Article 46.

¹¹³ As an example, see Directive 2005/36/EC.

¹¹⁴ Cf. Article 2 Directive 2006/126/EC of 20 December 2006 on driving licences.

¹¹⁵ Cf. ECJ Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, mn. 94 et seq.

¹¹⁶ Even before the adoption of Directive 2004/38/EC the ECJ recognised the importance of the protection of the family of nationals of Member States, cf. ECJ Case C-127/08 *Metock and Others* [2008] ECR I-6241, mn. 56 with further reference of the ECJ's case law.

¹¹⁷ Cf. Article 6 para. 1 TEU concerning the value of the Charter of Fundamental Rights of the European Union of 7 December 2000 and Article 6 para. 3 TEU concerning the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as general principles of the Union's law. The Treaty of Lisbon inserted the reference of Article 6 to the human rights documents; before the codification, the ECJ had recognised the fundamental importance of the right to respect and protect the family of Union citizens, cf. ECJ Case 249/86 *Commission v Germany* [1989] ECR 1290; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, mn. 97; Case C-127/08 *Metock* [2008] ECR I-6241, mn. 79.

¹¹⁸ Cf. ECJ Case C-109/01 *Akrich* [2003] ECR I-9607, mn. 57.

2004/38/EC.¹¹⁹ Article 7 para. 2 Directive 2004/28/EC explicitly extends the right of residence to family members who are not nationals of a Member State.¹²⁰ Therefore, rights granted to family members are not linked to their nationality.

c) Individual rights

aa) Right of residence. Any family member who is national of a Member State has a 54 right of residence for at least three months, regardless if she or he is working or is related to a worker. The exercise of this right for a period longer than three months requires comprehensive sickness insurance and sufficient financial resources for themselves and their family members,¹²¹ so that they or their family members do not become a burden on the social assistance system of the host Member State.¹²² Further freedoms relating to the right of residence are granted only to family members of a worker.¹²³ As any other Union citizen, family members who are nationals of a Member State may be required to register with the authorities for a period of residence up to three months.¹²⁴ Family members who are nationals of a non-Member State may be required to have an entry visa in accordance with Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement or national law, which is to be issued free of charge as soon as possible on the basis of an accelerated procedure.¹²⁵ A residence card called 'Residence card of a family member of a Union citizen'¹²⁶ is issued upon application for family members who are non-Member State nationals for a planned period of residence for more than three months.¹²⁷ The residence card must be valid for five years, or the envisaged period of residence if this period is less than five years.¹²⁸ The validity of the residence card is not affected by temporary absence not exceeding six months a year.¹²⁹ In general, the right of residence of a family member is not affected in the event of death, departure, divorce and annulment of marriage or termination of registered partnership of the Union citizen related to.¹³⁰ Outside the situations governed by Directive 2004/38/EC, a third-country national cannot claim a right of residence derived from a Union citizen.¹³¹

bb) Employment. According to Article 23 Directive 2004/38/EC, all family members 55 of a Union citizen who have the right of residence are entitled to take up employment or self-employment in the Member State of residence.¹³² Nevertheless, Article 23 Directive

¹¹⁹ Adopted children are comprehensively protected by Article 8 ECHR (ECtHR of 1 July 1975 (6482/74) – *X/Belgium and Netherlands*; ECtHR of 5 October 1982 (9993/82) – *X/France*, as well as ECtHR of 22 April 1997 (21830/93) – *X, Y u. Z/United Kingdom*).

¹²⁰ Cf. before codification in Directive 2004/38/EC: ECJ Case C-370/90 *Singh* [1992] ECR I-4265.

¹²¹ There is no requirement whatsoever as to the origin of the 'sufficient means', cf. ECJ Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, mn. 40 et seq.

¹²² Cf. Article 7 para. 1 lit. b and c Directive 2004/38/EC.

¹²³ Cf. below, formerly established principle by ECJ case law: Cases 59/85 *Reed* [1986] ECR 1303; 316/85 *Lebon* [1987] ECR 2836; C-243/91 *Taghavi* [1992] I-4401; C-310/91 *Schmid* [1993] I-3011.

¹²⁴ Cf. Article 5 para. 5 Directive 2004/38/EC.

¹²⁵ Cf. Article 5 para. 2 Directive 2004/38/EC, also Case C-503/03 *Commission v Spain* [2006] ECR I-1097, mn. 42.

¹²⁶ Cf. Article 10 para. 1 Directive 2004/38/EC.

¹²⁷ Cf. Article 9 para. 1 Directive 2004/38/EC.

¹²⁸ Cf. Article 11 para. 1 Directive 2004/38/EC.

¹²⁹ Cf. Article 11 para. 2 Directive 2004/38/EC with exception for absences due to important reasons, such as pregnancy or serious illness.

¹³⁰ Cf. Articles 12 and 13 Directive 2004/38/EC, certain restrictions apply.

¹³¹ ECJ Case C-40/11 *Yoshikazu Iida* [2012] ECR I-0000, mn. 82.

¹³² Formerly, Article 11 Regulation 1612/68 the right was granted only to spouses and children not older than 21.

2004/38/EC neither precludes a Member State from refusing to allow a family member who is a non-Member State national to rely on Union rules relating to the mutual recognition of diplomas nor to take into consideration all diplomas, certificates and other evidence of formal qualifications.¹³³

- 56 **cc) Education.** The worker's children obtain the right to be admitted to the host Member State's general educational, apprenticeship and vocational training courses under the same condition as nationals.¹³⁴ This right exceeds the scope of the right to non-discriminatory access to education (cf. Article 166 in accordance with Article 18 para. 1 TFEU). Article 7 para. 2 Regulation 492/2011 imposes the obligation on Member States to grant all education policy-initiated and social incentive measures to children of workers of another Member State. This includes education or training grant,¹³⁵ the costs of re-training,¹³⁶ and higher education scholarships for students.¹³⁷ A residence requirement for migrant workers and dependent family members in order to be eligible for portable funding is precluded by Article 45 TFEU and Article 7 para. 2 Regulation 492/2011.¹³⁸ Though, the objective of increasing the proportion of residents with a higher education degree in order to promote the development of the economy is a legitimate objective which can justify different treatment, whilst the requirement of permanent residence is not necessary to attain this objective.¹³⁹
- 57 The rights under Article 12 Regulation 492/2011 must be made accessible to children regardless to age or dependency, since the definition of 'child' in Article 12 is not subject to the same conditions as are the rights governed by Articles 2 para. 2 and 23 Directive 2004/38/EC.¹⁴⁰ Once the access to a State's general education system has been granted, the right does not cease in case the worker is no longer employed in the Member State concerned. The parent who is the child's primary carer has a corresponding right of residence on the basis of Article 10 Regulation 492/2011.¹⁴¹ The parent's derived right of residence in the host Member State comes to an end when the child reaches the age of majority and if he or she ceases to need the presence and care of that parent in order to be able to pursue and complete his or her education in the host Member State.¹⁴²
- 58 Directive 77/486/EEC on the education of the children of migrant workers, as an earlier attempt by the EU to promote a focus by Member States on the education of the children of migrant workers,¹⁴³ only deals with the education of children who are EU citizens and therefore leaves blank the substantial part of education of children who are third-country nationals. Hence, Directive 77/486/EEC is under review.¹⁴⁴ Nevertheless, besides Article 12 Regulation 492/2011, Article 14 para. 1 lit. a Directive 2003/86/EC of 22 September 2003 on the right to family reunification codifies the right to access to education

¹³³ Cf. ECJ Case C-229/07 *Mayeur* [2008] ECR I-8, operative part.

¹³⁴ Cf. Article 10 para. 1 Regulation 492/2011.

¹³⁵ ECJ Cases 9/74 *Casagrande* [1974] ECR 773; C-308/89 *Carmina di Leo* [1990] ECR I-4185.

¹³⁶ ECJ Case 39/86 *Lair* [1988] ECR 3200.

¹³⁷ ECJ Cases 235/87 *Matteucci* [1988] ECR 5611; C-3/90 *Bernini* [1992] ECR I-1071; C-337/97 *CPM Meeusen* [1999] ECR I-3289.

¹³⁸ ECJ Case C-542/09 *Commission v Netherlands* [2012] ECR I-0000, mn. 89.

¹³⁹ ECJ Case C-20/12 *Elodie Giersch* [2013] ECR I-0000, mn. 83.

¹⁴⁰ ECJ Case C-7/94 *Gaal* [1995] ECR I-1031, mn. 31.

¹⁴¹ ECJ Cases C-413/99 *Baumbast* [2002] ECR I-7136; C-480/08 *Teixeira* [2010] ECR I-1107, mn. 36 and 53; C-45/12 *ONAFTS* [2013] ECR I-0000, mn. 46 et seq.

¹⁴² ECJ Cases C-480/08 *Teixeira* [2010] ECR I-1107, mn. 87; C-529/11 *Olaitan Ajoke Alarape* [2013] ECR I-0000, mn. 29.

¹⁴³ Also see Green Paper of the Commission 'Migration & Mobility' of 3 July 2008 (COM (2008) 423 final, 3).

¹⁴⁴ Cf. Green Paper of the Commission 'Migration & Mobility' of 3 July 2008 (COM (2008) 423 final, 13).

of family members of a sponsor¹⁴⁵. The same rights derive from Article 11 para. 1 lit. b Directive 2003/109/EC of 25 November 2003 for children that are considered 'long-term residents'¹⁴⁶.

dd) Social and tax advantages. Family members enjoy the same social and tax advantages which are granted to workers according to Article 7 para. 2 Regulation 492/2011 (see mn. 45 et seq. above). These are, for instance, child-raise allowances¹⁴⁷, fares reduction cards for large families¹⁴⁸, allowances for handicapped adult children¹⁴⁹, guaranteed income to old people¹⁵⁰, and grants of a payment to cover funeral expenses¹⁵¹.

III. Limitations on grounds of public policy, public security or public health

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According to Article 45 para. 3 TFEU, the right of freedom of movement for workers may be limited on grounds of public policy, public security or public health. Similar reserves are set out by the freedom of establishment (Article 52 para. 1 TFEU) and the freedom of services (Articles 62 and 52 para. 1 TFEU).

The notions of 'public policy', 'public security' and 'public health' are autonomous legal terms of Union law and must therefore be interpreted in light of the aims of the EU legal order and of the Union in general. They must be narrowly construed.¹⁵² Public security covers both, the internal¹⁵³ and also the external security of a Member State.¹⁵⁴ An infringement of public policy means a violation of national provisions which regard the Member State's moral, religious or cultural fundamental convictions.¹⁵⁵ A limitation on these grounds therefore necessitates a present, genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹⁵⁶ For example, according to Article 29 para. 1 Directive 2004/38/EC, diseases justifying limitations of the freedom of movement of workers must have an epidemic potential as defined by the World Health Organisation (WHO).

The specific requirements for a limitation are governed by Articles 27 et seq. Directive 2004/38/EC. National authorities must justify measures by showing that the personal conduct of an individual indicates a specific risk of new and serious prejudice to the re-

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¹⁴⁵ According to Article 2 lit. c Directive 2003/86/EC, this means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him or her.

¹⁴⁶ Long-term resident status is granted to third-country nationals who have resided legally and continuously within a Member State's territory for five years, cf. Article 4 Directive 2003/109/EC; formal conditions apply, cf. Article 5 Directive 2003/109/EC.

¹⁴⁷ ECJ Case C-85/96 *Martinez Sala* [1998] ECR I-2691, mn. 65.

¹⁴⁸ ECJ Case 32/75 *Cristini* [1975] ECR 1085, mn. 19.

¹⁴⁹ ECJ Case 63/76 *Inzirillo* [1976] ECR 2068, mn. 18 et seq.

¹⁵⁰ ECJ Case 261/83 *Castelli* [1984] ECR 3213, mn. 12 et seq.

¹⁵¹ ECJ Case C-237/94 *O'Flynn* [1996] ECR I-2631, mn. 30.

¹⁵² ECJ Cases 41/74 *van Duyn* [1974] ECR 1347; 139/85 *Kempf* [1986] ECR 1741, mn. 13; C-33/07 *Jipa* [2008] ECR I-5157, mn. 23.

¹⁵³ ECJ Case 222/84 *Johnston v Chief Constable of the Ryal Ulster Constabulary* [1986] ECR 1651, mn. 26.

¹⁵⁴ ECJ Cases C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, mn. 22; C-423/98 *Albore* [2000] ECR I-6965, mn. 18; C-285/98 *Kreil* [2000] ECR I-69, mn. 15.

¹⁵⁵ ECJ Case C-275/92 *Schindler* [1994] ECR I-1039, mn. 60.

¹⁵⁶ ECJ Cases 36/75 *Rutili* [1975] ECR 1231; 30/77 *Bouchereau* [1977] ECR 2013, mn. 35; C-348/96 *Caifa* [1999] ECR I-11, mn. 24; C-50/06 *Commission v Netherlands* [2007] ECR I-4383, mn. 41; C-349/06 *Polat* [2007] ECR I-8167, mn. 33.

quirements of public policy.¹⁵⁷ Therefore, measures may not be ordered automatically on general preventive grounds following a criminal conviction.¹⁵⁸ Mass or group expulsions are illegitimate for the same reasons.

- 63 Besides the limitation of the right to entry of Union citizens and their family members, expulsions may be affected. Thus, Article 28 Directive 2004/38/EC limits the possibility to take expulsion decisions on grounds of public policy or public security. Overall, all measures taken on grounds of public policy or public security must comply with the principle of proportionality.¹⁵⁹ With the existence of possible restrictions to the right of entry and residence equal treatment with the nationals of the host Member State may never be fully installed, since entry and residence can under no circumstances be refused to own nationals. Nevertheless, a Union citizen may not be expelled from or denied access to the territory of another Member State on reasons of conduct which, when attributable to the host State's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.¹⁶⁰ Further, no expulsion decisions may be taken against Union citizens who have resided in the host Member State for the previous 10 years or who are minors (exception, if expulsion is necessary for the best interest of the child).¹⁶¹ Union citizens who have the right of permanent residence on the host Member State's territory may not be taken an expulsion decision against, except on serious grounds of public policy or public security.¹⁶²
- 64 An expulsion for the purpose of deterring other aliens on reasons of 'general preventive nature' is illegitimate.¹⁶³ A measure by a Member State's court ordering the expulsion for life of nationals found guilty on that territory precludes to Article 45 TFEU and Articles 32, 33 Directive 2004/38/EC.¹⁶⁴ According to Article 32 Directive 2004/38/EC, persons excluded on grounds of public policy or public security may submit an application for lifting the exclusion after three years from enforcement of the final exclusion order. The failure of a Union Citizen to comply with the formalities concerning entry, movement and residence of aliens in another Member State cannot justify a measure ordering expulsion or temporary imprisonment for that purpose.¹⁶⁵
- 65 Nevertheless, Member States may impose measures in the case of abuse of rights granted by Directive 2004/38/EC, for instance marriages of convenience.¹⁶⁶ All measures must be proportionate and in accordance with the procedural safeguards of Articles 30 and 31 Directive 2004/38/EC.¹⁶⁷

¹⁵⁷ ECJ Case C-349/06 *Polat* [2007] ECR I-8167, mn. 35; codified in Article 27 para. 2 Directive 2004/38/EC.

¹⁵⁸ ECJ Cases C-340/97 *Nazli* [2000] ECR I-957, mn. 61 and 63; C-383/03 *Dogan* [2005] ECR I-6237, mn. 24.

¹⁵⁹ Cf. Article 27 para. 2 Directive 2004/38/EC.

¹⁶⁰ ECJ Case C-41/74 *van Duyn* [1974] ECR 1337, mn. 22 and 23; Joined Cases C-115/81 and C-116/81 *Adoui and Cornuaille/Belgium* [1982] ECR 1665, mn. 9; Cases C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, mn. 40; C-349/06 *Polat* [2007] ECR I-8167, mn. 38.

¹⁶¹ Cf. Article 28 para. 3 lit. a and b Directive 2004/38/EC.

¹⁶² Cf. Article 28 para. 2 Directive 2004/38/EC.

¹⁶³ ECJ Case 67/74 *Bonsignore* [1975] ECR 297, mn. 7.

¹⁶⁴ ECJ Case C-384/96 *Calfa* [1999] ECR I-21, mn. 29.

¹⁶⁵ ECJ Case 48/75 *Royer* [1976] ECR 497, mn. 51.

¹⁶⁶ Cf. Article 35 Directive 2004/38/EC.

¹⁶⁷ Cf. Article 27 para. 2 Directive 2004/38/EC and ECJ Case C-127/08 *Metock* [2008] ECR I-6241, mn. 74 et seq.

IV. Exceptions to employment in the public service

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The freedom of movement for workers does not apply to employment in the public service, Article 45 para. 4 TFEU. The notion of 'public service' is to be defined solely according to Union law and principles. It must be interpreted in the light of the aims of the EU legal order and of the Union in general. Therefore, the national classifications of employees, such as officials, civil servants or workers, are of no significance. The legal nature of the relationship between the employee and the administration is also not relevant for the determination of the application of Article 45 para. 4 TFEU.¹⁶⁸ Those posts which involve direct or indirect participation in the exercise of powers conferred by public law and/or¹⁶⁹ those whose purpose is to safeguard the general interest of the State are to be considered as 'employment in the public service'.¹⁷⁰ Public service within the meaning of Article 45 para. 4 TFEU requires a special relationship of allegiance to the State, defined by the reciprocity of rights and duties which form the foundation of the bond of nationality.¹⁷¹ It is necessary that such rights are in fact exercised on a regular basis and do not represent a very minor part of the activity of the employee.¹⁷² Once a worker has been admitted into public administration of another Member State, Article 45 para. 4 TFEU cannot justify discriminatory measures against them with regard to remuneration or other conditions of employment.¹⁷³

The exception to employments in the public service generally does not apply in the 67 field of public distribution companies, especially in the fields of water, gas and electricity, in public health care services,¹⁷⁴ public education, sea and air transport, railways, local public transport, research for civilian purposes, telecommunication, radio and television sector, opera as well as local and municipal orchestras.¹⁷⁵ Nor are private security undertakings parts of the public sector.¹⁷⁶

Conditioned by the principle of proportionality, a worker from another Member State 68s must not be excluded from admission to public service, if it is sufficient that the Member State concerned reserves to its own nationals promotions or transfers to those post within a career bracket, which involve the exercise of power or the safeguarding of the general interest of the State.¹⁷⁷

¹⁶⁸ ECJ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, mn. 26.

¹⁶⁹ Cf. Streinz/Franzen, Article 45 AEUV mn. 148 on the relevance of the ECJ's different use of 'and' and 'or' in Cases C-225/85 *Commission v Italy* [1987] ECR I-2625; C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, especially mn. 36 in contrast to mn. 27.

¹⁷⁰ ECJ Cases 149/79 *Commission v Belgium* [1980] ECR 3881; 66/85 *Lawrie-Blum* [1986] ECR 2121, mn. 27; 225/85 *Commission v Italy* [1987] ECR 2625, mn. 10.

¹⁷¹ ECJ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, mn. 27.

¹⁷² ECJ Cases C-405/01 *Colegio de Oficiales* [2003] ECR I-10391, mn. 44; C-47/02 *Anker* [2003] ECR I-10447, mn. 63.

¹⁷³ ECJ Cases 152/73 *Sotgiu* [1974] ECR 153, mn. 4; C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10532, mn. 37.

¹⁷⁴ ECJ Case C-173/94 *Commission v Belgium* [1996] ECR I-3265, mn. 24.

¹⁷⁵ ECJ Cases C-290/94 *Commission v Greece* [1996], ECR I-3285, mn. 39; C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, mn. 50.

¹⁷⁶ ECJ Case C-114/97 *Commission v Spain* [1998] ECR I-6717, mn. 42.

¹⁷⁷ ECJ Case 225/85 *Commission v Italy* [1987] ECR 2625, mn. 10.

*Article 46 [Measures to bring about freedom of movement for workers]
(ex Article 40 TEC)*

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

- (a) by ensuring close cooperation between national employment services;
- (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
- (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
- (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

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1

I. General remarks

Article 46 TFEU entitles and obliges the European Parliament and the Council to set out all measures required to bring out about freedom of movement for workers by issuing directives and making regulations. Therefore, Article 46 TFEU builds the key enabling rule for the secondary legislation, which constitutes the comprehensive legal framework realising of the freedom of movement for workers.

2

II. Decision-making procedure

As a result to the Treaty of Lisbon of 2009, the European Parliament and the Council issue directives or make regulations in accordance with the ordinary legislative procedure of Articles 289 para. 1, 294 TFEU. Accordingly, the directives and regulations are adopted jointly by the European Parliament and the Council on a proposal from the Commission.

III. The legal acts

3

1. Free Movement Directive 2004/38/EC

The aim of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Free Movement Directive) is to leave behind a 'sector-by sector piecemeal approach' to the right of freedom of movement and residence and to facilitate the exercise of that right by providing a single legislative act.¹ Directive 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC have been repealed by the Free Movement Directive. Regulation 1612/68, meanwhile replaced by Regulation 492/2011, had been amended by this legislative act. By incorporating Directive 2004/38/EC into the Agreement on the European Economic Area² through Decision 158/2007 of 7 December 2007 of the EEA Joint Committee³, the provisions for the free movement of persons are also applicable towards the EEA States which are no EU-Member States and in favour of their nationals towards the EU-Member States.⁴ Third country nationals enjoy only limited rights in this context.

In the following of the Commission's Report of 10 December 2008 on the application of Directive 2004/38/EC, which found that the overall transposition of the Directive was rather disappointing,⁵ particularly as regards Chapter VI (restrictions on grounds of public policy and public security and Article 35 (measures to prevent abuse), the Commission issued a guidance for better transposition and application in 2009.⁶ So far, all Member States have at least reported transposition measures to the Commission.⁷

2. Regulation 492/2011 on the free movement for workers within the Union

5

Whilst Directive 2004/38/EC governs the rights of free movement and residence of Union citizens and their families in another Member State in general, Regulation 492/2011 focuses on the implementation of the regulatory objectives of Article 45 para. 3 lit. a-d and Article 46 TFEU.⁸ Regulation 492/2011 replaces Regulation 1612/68 of 15 October 1968 as a 'historic piece of legislation',⁹ which has been substantially amended several times over the decades and therefore, had to be codified in the interest of clarity and rationality.¹⁰ The mobility of labour is to be considered as a vehicle for the improvement of the Union workers' living and working conditions, their social advancement but also as a satisfaction of the requirements of the economies of the Member

¹ ECJ Case C-529/11 *Olaitan Ajoke Alarape* [2013] ECR I-0000, mn. 46; Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-0000, mn. 36 et seq.

² Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1/3).

³ Decision 158/2007 of 7 December 2007 of the EEA Joint Committee (OJ 2008 L 124/20).

⁴ Certain modifications apply, e.g. the concept of Union citizenship is not included, nor is the immigration policy part of the Agreement.

⁵ Transposition deadline: 30 April 2006.

⁶ Cf. Communication from the Commission on guidance for better transposition and application of Directive 2004/38/EC of 2 July 2009 (COM (2009) 313 final).

⁷ For an overview of these measures, cf. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72004L0038:EN:NOT accessed 25 September 2013.

⁸ Cf. recital (3) Regulation 492/2011.

⁹ Cf. Article 41 Regulation 492/2011 with which Regulation 1612/68 is repealed.

¹⁰ Cf. recital (1) Regulation 492/2011.

States.¹¹ Therefore, Regulation 492/2011 frames the legal conditions under which Union workers enjoy the right of eligibility for employment (Articles 1 to 6), the equal treatment with nationals concerning tax and social advantages and general working conditions (Articles 7 to 9) and the right of education for their children (Article 10); furthermore, several instruments for the cooperation and coordination between the Member States concerning measures for clearing vacancies in and controlling the balance of the labour market within the Union.¹²

6

3. Further legislation

Formerly, the secondary legislation regime flanking the right of free movement for workers in Article 45 TFEU has been overcomplicated due to a wide spread of provisions over several regulations and directives. Besides Directive 2004/38/EC and Regulation 492/2011 as acts of consolidation, Directive 2005/36/EC of 7 September 2009 on the recognition of professional qualifications consumed 15 directives governing the recognition of professional qualifications.¹³

7 Therewith, a single directive governs the guarantee of Union citizens to have access to the same professions and to pursue it in another Member State as nationals. Exceptions apply for the profession of lawyers (governed by Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services and Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis). Other specific provisions concerning the recognition of professional qualifications, such as those in the field of transport, insurance intermediaries and statutory auditors, remain unaffected by Directive 2005/36/EC.¹⁴

Article 47 [Exchange of young workers] (ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

1 The exchange of young professionals shall promote the functioning of the freedom of movement for workers within the European Union. Article 47 TFEU obliges the Member States to promote such an exchange, while the elaboration lies in the field of duties of the European Union. In the light of turbulences on the Member State's labour markets due to the 'Euro-crisis' since 2009, exchange programmes for young workers is given special attention. By March 2013, almost 6 million young people were unemployed, which is a percentage of over 23% in the euro area.¹ Therewith, the Commission proposed to provide exchange opportunities for an even larger number of young people by injection of national and EU funds.²

¹¹ Cf. recital (4) Regulation 492/2011.

¹² Cf. Articles 11 et seq. Regulation 492/2011.

¹³ Cf. Article 62, whereby Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC, 89/48/EEC, 92/51/EEC, 93/16/EEC and 1999/42/EC were repealed with effect from 20 October 2007 onwards.

¹⁴ Cf. recital (42) Directive 2005/36/EC.

¹ Cf. *European Commission*, EU measures to tackle youth unemployment (June 2013), 3.

² Communication from the Commission, Working together for Europe's young people – A call to action on youth unemployment' of 19 June 2013 (COM (2013) 447 final, 10 et seq.).

Recently, there are four main sub-programmes as part of the EU's 'Life Long Learning Programme'³: 'Comenius' for schools, 'Erasmus' for higher education, 'Leonardo da Vinci' for vocational education and 'Grundtvig' for adult education. The Life Long Learning Programme was budgeted with nearly seven billion euros for 2007 to 2013. The future of these funding programmes has been sealed by the Multiannual Framework 2014–2020 with a budget increase of 40%.⁴ On the basis of a European Parliament and Council proposition for a Programme called 'Erasmus for all' for Union action in the field of Education, Training, Youth and Sport,⁵ the former programme has been replaced by ERASMUS PLUS (or 'Erasmus +'). The existing programmes in the field of education (Comenius, Erasmus, Erasmus Mundus, Leonardo da Vinci, Grundtvig) and programmes for the funding of grassroot sports will all operate under the new ERASMUS PLUS.⁶ The programme is implemented for the period from 1 January 2014 to 31 December 2020.⁷

Legal basis for these programmes is to be found in Articles 165 and 166 TFEU.

3

**Article 48 [Securing of aggregations and payments
in the field of social security]
(ex Article 42 TEC)**

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;**
- (b) payment of benefits to persons resident in the territories of Member States.**

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or**
- (b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.**

³ Cf. Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning (OJ 2006 L 327/45); amended by Decision 1357/2008/EC of 16 December 2008 (OJ 2008 L 350/56).

⁴ Cf. Article 15 Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014–2020 (OJ 2013 L 347/884).

⁵ Cf. European Commission, Proposal for a Regulation establishing 'Erasmus for all' (COM (2011) 788 final).

⁶ Cf. Article. 2 para. 3 Regulation 1311/2013.

⁷ Cf. Article. 2 para. 2 Regulation 1311/2013.

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1

I. General remarks

The area of social policy still is a matter of national discretion.¹ Nevertheless, the improvement of working and living conditions of the workers in the Union requires collaboration in the field of the Member States' social systems. Otherwise, the freedom of movement was affected if workers exercising their right to freedom of movement lose social security advantages guaranteed to them by the laws of a Member State.² Article 48 TFEU does not require harmonization but coordination of the national social security systems.³ For this purpose, the European Parliament and the Council hold legislative and regulatory competence.

- 2 Following Article 48 TFEU, the Union legislator is obliged to set two minimum standards in order to unionise conditions and legal consequences of the social security benefits guaranteed by the Member States' social systems: Firstly, insurance: residence or employment periods that are conditional for the benefit of social advantages must be aggregated.⁴ Secondly, social benefits gained by workers must be exportable from one Member State to another.
- 3 Coordination in contrast to harmonization aims to complement the national social systems by the provisions is necessary for the freedom of movement.⁵ Substantive and procedural differences between the social security systems of individual Member States remain unaffected.⁶ Secondary legislation based on Article 48 TFEU rather fulfils the function of a comprehensive multilateral social security agreement.⁷
- 4 The European Parliament and the Council enjoy a wide discretion in regard to the choice of the most appropriate measures for achieving the provisions of Article 48 TFEU.⁸

¹ Cf. Article 1 TFEU; ECJ Case C-70/95 *Sodemare* [1997] ECR I-3422, mn. 20.

² ECJ Cases C-165/91 *Van Munster* [1994] ECR I-4661, mn. 27; C-262/97 *Engelbrecht* [2000] ECR I-7321, mn. 37.

³ ECJ Case C-340/94 *de Jaeck* [1997] ECR I-495, mn. 18.

⁴ ECJ Case C-244/97 *Lustig* [1998] ECR I-8701, mn. 31.

⁵ ECJ Cases C-356/89 *Stanton Newton* [1991] ECR I-3017, mn. 18; C-12/93 *Drake* [1994] ECR I-4347, mn. 12.

⁶ ECJ Case C-340/94 *de Jaeck* [1997] ECR I-495, mn. 18.

⁷ Cf. already GTE/*Langer*, Article 42 EGV mn. 16.

⁸ ECJ Case C-360/97 *Nijhuis* [1999] ECR I-1946, mn. 30.

II. Procedure

5

The procedure foreseen by Article 48 TFEU has been amended by the Lisbon Treaty 2009. Measures to be taken are adopted by the European Parliament and the Council according to the ordinary legislative procedure (Article 289 para. 1 and Article 294 TFEU). The former requirement of a unanimous decision of the Council has been dropped by the amendment. Anyhow, each member of the Council may declare that – with regard to important aspects of its social security system – draft legislation is referred to the European Council already in the ordinary legislative procedure.⁹ The ordinary legislative procedure is then suspended until the European Council refers the draft back to the Council.¹⁰ If no action is taken by the European Council within four months, the former proposed act is deemed not to have been adopted.¹¹

III. Secondary legislation

6

1. ‘Modernised Coordination’

Since 1 May 2010, the former secondary legislative regime for the coordination of the national social security systems governed by Regulation 1408/71 on the application of social security schemes and Regulation (EEC) 574/72 of 21 March 1972 on the implementation of Regulation 1408/71 has been completely revised. Therewith, by implementing the ‘modernised coordination’ as the first major reform since the 1970’s regulations, Regulation 1408/71 and Regulation 574/72 were replaced by Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004, lately modified by Regulation (EU) 1244/2010 of 9 December 2010 amending Regulation 883/2004 and Regulation 987/2009, Regulation (EU) 465/2012 of 22 May 2012 amending Regulation 883/2004 and Regulation 987/2009 and Regulation (EU) 1224/2012 of 18 December 2012 amending Regulation 883/2004 and Regulation 987/2009. Regulation 1408/71 had remained in force for the purpose of Regulation 859/2003 extending the provisions of Regulation 1408/71 and 574/72 to nationals of third countries,¹² until Regulation 859/2003 was replaced by Regulation 1231/2010 with effect of 1 January 2011. Since then, the new regime (Regulation 883/2004 and Implementing Regulation 987/2009) is also a source of rights to nationals of third countries who are not already covered by the regulations solely on the ground of their nationality.¹³ The extension for third-country nationals does not apply for Denmark and the United Kingdom, whilst Regulation 859/2003 continues to apply in the UK. According to Article 1 of Annex II of the Agreement between the European Union, its Member States and the Swiss Confederation¹⁴, the modernised coordination applies also

⁹ Cf. Article 48 para. 2 s. 1 TFEU.

¹⁰ Cf. Article 48 para. 2 s. 3 lit. a TFEU.

¹¹ Cf. Article 48 para. 2 s. 3 lit. b TFEU.

¹² Cf. Article 90 para. 1 lit. a Regulation 883/2004.

¹³ Cf. Article 1 Regulation 1231/2010. Families and survivors are covered as well if they are legally residents in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

¹⁴ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 21 June 1999 (OJ 2002 L 114/12), amended by Decision 1/2012 of the Joint Committee of 31 March 2012 replacing Annex II of the Agreement (OJ 2012 L/103/51).

in relation to Switzerland as from 1 April 2012. In relation to the EEA countries Norway, Iceland and Liechtenstein, the new regime applies as from 1 June 2012.¹⁵

- 7 The 'modernised coordination' is the answer to a more and more complex set of rules that evolved from amendments and updates of the secondary legislation¹⁶, developments at Union level, the judgments of the Court of Justice and changes in legislation at national level. The current regime intends to realise a more modern and simple coordination of the social systems.¹⁷ Whilst the basic concept of coordination of Regulations 1408/71 and 574/72 has not been changed, administrative procedures, such as data-processing services for exchanging data between institutions, have been revised and improved in order to guarantee a comprehensive exercise of the Union citizens' rights.

8

2. Purpose

The regulations coordinate the various national social security systems and assure the non-discrimination of workers from another Member State (or third-State¹⁸) in relation to the nationals of the host Member State. The provisions of the regulations are to be interpreted with regard to the objectives of Article 48 TFEU, implementing the freedom of movement for workers.¹⁹ To this end, the 'modernised coordination' provides a set of rules founded on the prohibition of discrimination on grounds of nationality or residence and upon the maintenance of a worker's rights, gained by the virtue of one or more social security systems which are or have been applicable to him.²⁰

- 9 According to Article 3 Regulation 883/2004, the legal framework for the coordination applies to the following branches of social security: sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits. A matter of social security is given if one of these benefits is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position.²¹ In general, it is not necessary that a social scheme granting social benefits is contributory.²² Regulation 883/2004 neither applies to social and medical assistance nor compensations for victims of war and military action or their consequences, victims of crime, assassination or terrorist acts, victims of damage occasioned by agents of the Member State in the course of their duties and victims who have suffered a disadvantage for political or religious reasons or for reasons of descent.²³ Regulation 883/2004 is applicable to special schemes for civil servants under certain conditions (cf. Articles 49 and 60 TFEU).

- 10 The distinction between social benefits in terms of Article 3 Regulation 883/2004 and social assistance is often difficult to make. The notion 'benefit' in this context must be interpreted in light of the aims of the EU legal order and of the Union in general. Therefore, the constituent elements of the particular benefits, in particular its purposes and the conditions on which they are granted, must be taken into account, not whether a benefit

¹⁵ Cf. Annex VI of the Agreement on the European Economic Area (OJ 1994 L 1/327), amended by Decision 76/2011 of the EEA Joint Committee of 1 July 2011 (OJ 2011 L 262/33).

¹⁶ There were 29 amendments between 1973 and 2008.

¹⁷ Cf. recital (3) Regulation 883/2004.

¹⁸ Cf. below, mn. 10.

¹⁹ ECJ Case C-244/97 *Lustig* [1998] ECR I-8701, mn. 30.

²⁰ ECJ Case 69/79 *Jordens-Vosters* [1980] ECR 75, mn. 11; Joined Cases C-95/99–C-98/99 and C-180/99 *Khalil* [2001] ECR I-7413, mn. 67.

²¹ ECJ Cases C-111/91 *Commission v Luxembourg* [1993] ECR I-817, mn. 29; C-185/96 *Commission v Greece* [1998] ECR I-6601, mn. 25.

²² Cf. Article 3 paras 2 and 3, and Article 70 Regulation 883/2004.

²³ See Article 3 para. 5 Regulation 883/2004.

is classified as a social security benefit by the national rules.²⁴ The notion of 'social advantages' in Article 7 para. 2 Regulation 492/2011 contains a wider spectrum of social matters than those benefits of Article 3 Regulation 883/2004. Those rights remain unaffected.

3. Beneficiaries

11

Article 2 Regulation 883/2004 opens up its provision as a source of rights to nationals of a Member State, stateless persons and refugees who reside legally in a Member State, their families and survivors. The scope of application is therefore open to all Union citizens, working, non-working and self-employed, whilst the former Regulation 1408/71 did require the status of a worker.

4. Determination of the legislation applicable

12

Persons eligible to enjoy social benefits under Regulation 883/2004 are entitled and obliged under the legislation of a single Member State for this purpose only.²⁵ Due to the former requirement of the status of a worker, for the determination of the legislation applicable the Member State, in which the worker was employed, this was essential. Now, it must be distinguished according to the provisions of Article 11 para. 3 lit. a–e Regulation 883/2004. For employees, self-employed, civil servants, persons called or re-called for military or civilian service the legislation of the Member State wherein they are pursuing their activity, to which the administration they are subject to belongs, or which called or re-called them to military or civilian service is applicable. For unemployed, the legislation of that Member State is applicable under which they receive unemployment benefits in accordance with Article 65 Regulation 883/2004. Special rules apply to flight or cabin crew members (cf. Article 11 para. 5 Regulation 883/2004: the legislation of the Member State in which the airline is home based) and for employees and self-employed who are either sent to another Member State by their employer or pursue activities temporarily (no longer than 24 months) in another Member State.²⁶ Persons pursuing activities in two or more member States are governed by the provisions of Article 11–16 Regulation 883/2004.

5. Principles of coordination

13

a) Non-discrimination and equal treatment

The principle of non-discrimination and equal treatment is essential to EU's internal market concept in general (cf. Article 18 TFEU) and to Articles 45 et seq. TFEU in particular, which is stated explicitly in Article 4 Regulation 883/2004. Persons privileged under Regulation 883/2004 do not only enjoy the same rights but also have the same obligations under the legislation of a Member State like nationals. The rule of equal treatment prohibits not only overt but also all forms of covert discrimination which, by applying other distinguishing criteria, achieves in fact the same result.²⁷ The requirement of residency for eligibility to child-raise allowance of children of a migrant worker must be

²⁴ ECJ Case C-78/91 *Hughes* [1992] ECR I-4859, mn. 14.

²⁵ Cf. Article 11(1) Regulation 883/2004.

²⁶ Cf. Article 12 paras 1 and 2 Regulation 883/2004.

²⁷ The criterion of residence, for instance, may give rise to covert discrimination based on nationality; cf. ECJ Cases C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-1779; C-151/94 *Commission v Luxembourg* [1995] ECR I-3685; C-35/97 *Commission v France* [1998] ECR I-5325, mn. 23.

considered as such a covert discrimination.²⁸ Objective justifications for such a difference in treatment are not given.²⁹

b) Aggregation

- 14 The competent national institutions of the Member States must take into account and therefore aggregate all periods of insurance, employment, self-employment or residence if the completion of certain periods is conditional for the acquisition, retention, duration or recovery of the right to a benefit, the coverage of legislation or the access to or the exemption from compulsory, optional continued or voluntary insurance.³⁰ In principle, these periods completed in another Member State must be considered as they were periods completed in the Member State concerned. Periods devoted to child-rearing completed in another Member State by a frontier worker must be taken into account for the purpose of the grant of an old-age pension.³¹ It must be determined by the national competent institution and – in case of conflict – by the national court whether a period is to be considered under Article 6 Regulation 882/2004.³²
- 15 Social security matters as defined in Article 3 Regulation 883/2004 and therefore relevant for an aggregation are comprehensively set out in Title III of Regulation 883/2004. Articles 17 et seq. Regulation 883/2004 lay down the detailed rules for these social benefits and their aggregation. Article 48 TFEU and Regulation 883/2004 aims to create by coordination a ‘unified career’ for social security purposes for the Union citizens and the other beneficiaries under the regime.³³

c) ‘Export of benefits’

- 16 As another basic principle for the coordination based on the principle of equal treatment, Article 7 Regulation 883/2004 rules that cash benefits granted under the legislation of one or more Member States cannot be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of fact that the beneficiary or his family members reside in another Member State. Detailed rules are to be found in Articles 17 et seq. Regulation 883/2004.³⁴

d) Portability of pension rights

- 17 The portability of pension rights is a key element for the promotion of the mobility of workers and their families. Therefore, provisions concerning pensioners and members of their families are of great practical importance in the application of the regulations. According to Article 1 lit.w Regulation 883/2004, ‘pension’ does not only mean pensions but also lump-sum benefits substituting them, reimbursement of contributions and revaluation increases or supplementary allowances. Articles 23–30 Regulation 883/2004 coordinate the reception of pensions under the legislation of one or more Member States from the Member State of residence.³⁵ Even if a person is not entitled to pension benefits un-

²⁸ Cf. ECJ Case C-225/10 *Juan Pérez García* [2011] ECR I-10111, mn. 37.

²⁹ ECJ Case C-4/95 *Stöber* [1997] ECR I-531, mn. 39.

³⁰ Cf. Article 6 Regulation 883/2004.

³¹ ECJ Case C-135/99 *Elsen* [2000] ECR I-10409, mn. 36.

³² Cf. Joined Cases C-88/95, C-102/95 and C-103/95 *Losada* [1997] ECR I-869, mn. 37 et seq.

³³ Cf. ECJ Case C-165/91 *Van Munster* [1994] ECR I-4661, mn. 29.

³⁴ Cf. e.g. ECJ Cases C-160/96 *Molenaar* [1998] ECR I-880, mn. 44 concerning sickness benefit in cash; C-20/96 *Snares* [1997] ECR I-6057, mn. 42 concerning benefits closely linked with the social environment; C-326/00 *Ioannidis* [2003] ECR I-1725, mn. 34 concerning prior authorisations for hospital treatments immediately necessary in another Member State.

³⁵ Cf. Article 23 Regulation 883/2004.

der the legislation of the Member State of residence, he or she receives such benefits in so far he or she would be entitled thereto under the legislation of that Member State competent in respect of his or her pension.³⁶ The amount of pensions deducted from all the pensions paid to a person from more than one Member State cannot be greater than the amount deducted in respect of a person who receives the same amount of pension from the competent Member State.³⁷ The person entitled to a pension or supplementary allowance under the legislation of a Member State different from the Member State of their residence must submit a claim either to the competent institution or to the institution of the place of residence, which then sends it to the competent institution.³⁸ The amount of benefit is calculated by the competent institution according to Articles 52, 56 Regulation 883/2004 and Article 42 Regulation 987/2009.

The system of coordination of Regulation 883/2004 and Regulation 987/2009 does not consider the coordination of supplementary pension rights. However, supplementary pension schemes have become a significant part of the social protection system, since Member States have addressed the problem of demographic ageing.³⁹ Whilst Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Union is more a measure of safeguarding and facilitating the exercise of supplementary pension rights of migrant workers, the Commission has recognised that a comprehensive legal framework is necessary to ensure that the pre-existing rules do not hamper the freedom of movement for workers. Since the first proposal in 2005⁴⁰ the legislative procedure persists due to several changes and amendments by the institutions involved. The last Commission's proposal of 2007⁴¹ was discussed on 20 June 2013 by the Council. The draft directive aims to facilitate the exercise of the right of the freedom of movement by reducing the obstacles created by certain rules concerning supplement pension schemes linked to an employment relationship.⁴²

e) Administrative and informatory improvements

Regulation 883/2004 establishes an Administrative Commission which encourages the use of new technologies in order to facilitate the freedom of movement of persons, in particular by developing modern procedures for exchanging information and adapting the information flow between institutions.⁴³ Furthermore, a Technical Commission for Data Processing which ensures the management of EU projects using data services has been installed.⁴⁴ On the basis of Article 4 Regulation 987/2009, the administrative commission installed provisions for the practical arrangements for a transitional period for the data exchange via electronic means on 12 June 2009,⁴⁵ as set out by Article 4 Regulation 987/2009.⁴⁶ By 1 May 2014, the EESSI (Electronic Exchange of Social Security In-

³⁶ Cf. Article 24 para. 1 Regulation 883/2004.

³⁷ Cf. Article 30 Regulation 987/2009, cf. also Article 53–55 Regulation 883/2004 for overlapping benefits.

³⁸ Cf. Article 40 Regulation 987/2009.

³⁹ Cf. *European Commission*, Amended proposal of a directive on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary rights (COM (2007) 605 final).

⁴⁰ COM (2005) 507 final.

⁴¹ COM (2007) 603 final.

⁴² Cf. Article 1 of the draft directive (COM (2007) 603 final, 15).

⁴³ Cf. Article 72 lit.d Regulation 883/2004.

⁴⁴ Cf. Article 73 Regulation 883/2004.

⁴⁵ Cf. Decision No E1 of 12 June 2009 of the Administrative Commission for the Coordination of Social Security Systems (OJ 2010 C 106/9).

⁴⁶ Cf. also Article 95 Regulation 987/2009 for a transitional period for electronic data exchange.

formation) system performs for the improvement of the communication of data between institutions. On this purpose, SEDs (Structured Electronic Documents) have been developed. Former 'E-forms' shall disappear. Only in some cases required information will be issued to citizens in the form of a portable document. EESSI also functions as an online Institution Directory, helping to find social security institutions in Europe.⁴⁷

- 20 In 2002, the Commission established the 'SOLVIT' network with purpose to deliver fast, effective and informal solutions to problems individuals and businesses encounter when their EU rights in the internal market are being denied by public authorities.⁴⁸ The SOLVIT network is coordinated by the Commission and operated by the Member States. Therefore, SOLVIT also functions as an online problem solving network for the field of misapplication of Regulation 883/2004 and Regulation 987/2009.

21 **6. Institutional aspects**

The Administrative Commission as laid down in Article 71 Regulation 883/2004 is attached to the European Commission and consists of a government representative from each of the Member States. A representative of the European Commission attends the meetings in an advisory capacity.⁴⁹

- 22 According to Article 75 para. 1 Regulation 883/2004, the Council establishes an Advisory Committee for the Coordination of Social Security Systems. The members of the Advisory Committee are appointed by the Council, whilst it is chaired by a representative of the European Commission.⁵⁰ The Committee consists of one government representative, one representative from the trade unions and one representative from the employers' organisation from each Member State. Upon the request of the European Commission, the Administrative Commission or its own initiative, the Council examines general questions of the coordination of social security systems and formulates opinions on such matters for the Administrative Commission.⁵¹
- 23 The coordination of the communication between the competent authorities of the Member States is governed by Article 76 Regulation 883/2004.

CHAPTER 2 RIGHT OF ESTABLISHMENT

Article 49 [Freedom of establishment] (ex Article 43 TEC)

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 compa-

⁴⁷ Cf. <http://ec.europa.eu/social/main.jsp?catId=868&langId=en>.

⁴⁸ Cf. Commission recommendation of 17 September 2013 on the governing SOLVIT (COM (2013) 5869 final, 4).

⁴⁹ Cf. Article 71 para. 1 Regulation 883/2004.

⁵⁰ Cf. Article 75 para. 1 Regulation 883/2004.

⁵¹ Cf. Article 75 para. 2 Regulation 883/2004.

nies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Bibliography: *Apps*, Damages claims against trade unions after Viking and Laval, 34 European Law Review 2009, 141; *Autenne*, Cartesio, 45 Cahiers de Droit Européen 2009, 91; *Barnard*, Unravelling the Service Directive, 41 CMLRev 2008, 323; *Buxbaum* (ed.), European business law. Legal and economic analyses on integration and harmonization, 1991; *Greenwood*, Nationality and the Limits of the Free Movement of Persons in Community Law, 8 YEL 1988, 185; *Hancher/Sauter*, One Step Beyond? From Sodemare to Docmorris – The EU's Freedom of Establishment Case Law Concerning Healthcare, 47 CMLRev 2010, 117; *Johnston/Syrpis*, Regulatory Competition in European Company Law After 'Cartesio', 34 European Law Review 2009, 378; *Roth*, From Centros to Überseering: Free Movement of Companies, Private International Law and Community Law, 52 ICLQ 2003, 177; *Panayi*, Corporate Mobility in Private International Law and European Community Law, 28 Yearbook of European Law 2009, 123; *Schindler*, Cross-Border Mergers in Europe – Company Law is catching up!, European Company and Financial Law Review 2006, 109; *van de Gronden*, Free Movement of Services and the Right of Establishment: Does EU Internal Market Law Transform the Provision of SSGI? Social Services of General Interest in the EU, 2013, 123; *van der Mei*, Free Movement of Persons within the EC: Cross Border Access to Public Benefits, 2002; *Vossestein*, Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment, 6 European Company Law 2009, 115; *Weiss*, Free movement of persons within the European Community, 2nd ed. 2007; *White*, Workers, Establishment and Services in the European Union, 2004.

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I. General remarks

1

1. Basic idea

Article 49 TFEU literally adopts the wording of Article 43 TEC concerning the freedom of establishment. The systematic rearrangement of the freedom of establishment, which was suggested by draft-Articles III-137 et seq. TECE (free movement of persons as market-relevant expression of the general free movement of Union citizens in a systematic order before the free movement of goods), is not revived. The freedom of establishment deals with the freedom of **self-employed persons**. Activities in the framework of the movement of capital are excluded (Articles 49 para. 2, 63–66, 75 TFEU). The field of traffic is subject to Articles 90 et seq. TFEU, which contain special provisions. Rules on the free movement of establishment do not apply to facts with an exclusive domestic nexus.¹ The term 'establishment' is broadly defined: It implies the possibility for natural

¹ ECJ Case C-17/94 *Gervais* [1995] ECR I-4353.

or legal persons of the Union to participate in the economic area of another Member State in a stable and steady way, whereby the economic and social interdependencies in the field of self-employed activities are supported;² meaning the **permanent residence** of people willing to permanently establish (and reside) in another Member State than their State of origin. All companies which are established in a Member State in the sense of Article 49 TFEU are covered by this provision even if the subject of their activities in that State consists in services directed towards third countries.³ The ECJ took the view that **an activity** is to be qualified as **cross-border activity** even if the purpose of the establishment of a company in another Member State is only to establish a branch in the State of origin and to unfold the main business activities in that State.⁴

2

2. Overview

Article 49 TFEU contains the fundamental regulatory content of the freedom of establishment of natural persons; Article 54 TFEU extends the scope of application to companies (legal persons). Article 50 and Article 53 TFEU empower the Council to legislate. Article 51 TFEU excludes activities connected with the exercise of official authority from the freedom of establishment. A general reservation (**exemption**) with regard to public policy, public security and public health can be found in Article 52 TFEU.

3

3. Direct applicability

Since the transitional period ended on 31 December 1969 (at that time: Article 7 para. 1 EEC), the ban on discrimination⁵ within the freedom of establishment is directly applicable, meaning that equal national treatment is guaranteed, even if the implementing rules have not yet been enacted.⁶ The differences of the national legal systems (in particular national provisions concerning professional licenses) nevertheless remain untouched in general.⁷ They can only be removed by legal harmonization (for instance by mutual recognition of diplomas and certificates which are required for the take-up of a profession in the Member States, Article 53 TFEU).

4

Provisions of former **establishment treaties** between the Member States are ousted by Article 49 TFEU. Establishment treaties with third countries are not covered by the free movement of Article 49 TFEU; the Union insofar has the competence to regulate within the framework of association agreements only⁸.

5

II. Favoured categories of people

1. The self-employed person

The freedom of establishment covers the legal status of **non-employees** (**'self-employed'**). The particular nature of the activity is irrelevant. The provision covers commercial activities as well as activities within the so-called independent professions⁹. Taking into account the very purpose of the TFEU, particularly its guarantees and rules for the internal market, the activity needs to be an economic activity. Therefore, the remuneration

² ECJ Case C-55/94 *Gebhard* [1995] ECR I-4165.

³ ECJ Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

⁴ ECJ Case C-212/97 *Centros* [1999] ECR I-1459; also Case C-167/01 *Inspire Art* [2003] ECR I-10155.

⁵ See Article 18 para. 1 TFEU.

⁶ ECJ Case 2/74 *Reyners* [1974] ECR 631; Case 38/87 *Commission v Greece* [1988] ECR 4415.

⁷ ECJ Case C-61/89 *Bouchoucha* [1990] ECR I-3551; Case C-55/94 *Gebhard* [1995] ECR I-4165.

⁸ See Article 217 TFEU.

⁹ See Article 53 para. 2 TFEU.

must not be completely insignificant. The ECJ also wants to include self-employed prostitutes into the scope Article 49 TFEU.¹⁰

The set-up and management of undertakings is equated to self-employed persons (Article 49 para. 2 TFEU). Acquisition of stakes in companies: Article 55 TFEU. It follows from Article 49 para. 2 TFEU that a national of a Member State who gains determining influence on a company through the amount of the stakes she or he owns makes use of her or his freedom of establishment; if the determining influence is missing, it is a case of the free movement of capital (so-called portfolio investment).¹¹

2. Citizenship

Beneficiaries of the provision are natural persons if they are citizens of another Member State (Article 49 para. 1 TFEU).¹² For persons of dual nationality, the citizenship of the third state is not taken into account.¹³ Companies are equated to citizens of a Member State under the conditions of Article 54 TFEU. Nationals of a Member State who work, want to work or have worked in another Member State can invoke the right of free movement against their country of origin (see below mn. 22). An **exclusive discrimination of nationals** is regularly not prohibited by Article 49 TFEU. However, exemptions are indicated in recent judgments of the ECJ, for example if the awarding of a public service concession might lead to a potential discrimination of also foreign party interests because it completely lacks a tender¹⁴; the parties of the cases were all nationals¹⁵.

III. Right to free establishment

1. Ban on discrimination

The beneficiary has the right to start and to continue an activity in a self-employed capacity (including the establishment, starting and running of businesses) in the state of residence, namely under the same conditions and enjoying the same rights as the citizens of that State (requirement of equal treatment with nationals, also referred to as 'national treatment'). Insofar, the general ban on discrimination because of reasons of citizenship as established in Article 18 para. 1 TFEU is specified. The ban on discrimination is **directly applicable** since the transitional period ended.¹⁶

The equal treatment requirement does not only address the Member States or their public authorities¹⁷ but also private individuals (e.g. associations, companies), at least in so far as they have the power to enact 'collective rules' with the normative quality of general laws¹⁸. This is referred to as the **horizontal** or **third-party effect** of the fundamental freedoms. This ECJ's jurisprudence concerning the free movement of workers can be transferred to the freedom of establishment, too.¹⁹

¹⁰ ECJ Case C-268/99 *Jany* [2001] ECR I-8615. See Article 52 TFEU mn. 2.

¹¹ ECJ Case C-251/98 *Baars* [2000] ECR I-2787.

¹² ECJ Case C-147/91 *Ferrer* [1999] ECR I-4097.

¹³ ECJ Case C-369/90 *Micheletti* [1992] ECR I-4239.

¹⁴ ECJ Case C-458/03 *Parking Brixen* [2005] ECR I-8585; Case C-231/03 *Coname* [2005] ECR I-7287; Case C-410/04 *ANAV* [2006] ECR I-3303.

¹⁵ See also Schwarze/Schlag, Article 49 AEUV mn. 42.

¹⁶ ECJ Case 2/74 *Reyners* [1974] ECR 631.

¹⁷ ECJ Case 271/82 *Auer II* [1983] ECR 2727: The membership in a professional association must not be reserved to citizens of the State of residence.

¹⁸ ECJ Case 36/74 *Walrave* (sports association) [1974] ECR 1405; Case C-309/99 *Wouters* (professional body) [2002] ECR I-1577.

¹⁹ ECJ Case C-415/93 *Bosman* [1995] ECR I-4921.

- 10 Any kind of distinction because of citizenship is inadmissible. This holds true for specific professional provisions (single-practice rule barring access to the professions where a practice is maintained in another Member State²⁰); professional qualification for tourist guides required by national rule and only for nationals²¹ as well as for other regulative areas which might contain obstacles for the self-employed activity (prohibition of tender in a tendering procedure for the allocation of public property belonging to a municipality to make the acceptance of applications conditional upon nationality²²; exemption from tax relating to immovable property from a company constituted under national law²³; residence requirements for maternity allowance²⁴; nationality requirement for the owner for the registration of vessels²⁵; advance payment of corporation tax on profits distributed by a subsidiary to its parent company only if the parent company has its seat in that Member State²⁶). The principle of **equal treatment with nationals (or national treatment)** obliges the Member State which has concluded a bilateral double taxation agreement with a third country to grant the benefits provided for in this agreement to companies having their registered office in a Member State and to do so under the same conditions as established by the agreement.²⁷ It is also forbidden for the country of origin to hinder the establishment of any of its nationals or of companies established under its national legislation in another Member State; a tax legislation limiting the possibility of deducting losses incurred in the Member State concerned for companies which have a permanent establishment in another Member State is not permissible.²⁸
- 11 The Council named the following categories of regulations in its **General Programme** (Section III A), which is based on Article 50 para. 1 TFEU:
- 12 – Prohibitions and obstacles which relate directly to the take-up and pursuit of self-employed activities of the nationals of other Member States. Examples are: the prohibition of the pursuit of specific activities by foreigners; the requirement of a specific permission for foreigners; the imposing of additional conditions; the requirement of a previous stay²⁹ or an additional probationary period; the deposit of a financial guarantee; the disadvantage at the access of measures concerning the professional training.
- 13 – Prohibitions and obstacles which exclude or limit only the power of foreigners to exercise rights which are **usually related** to a self-employed activity. Examples are: the conclusion of agreements; participation in public contracts; the participation in State aids; the access to courts; the joining of professional associations.
- 14 **‘Hidden discrimination’** – meaning descrimination that is not based on citizenship as criterion in the pertinent law but nevertheless in fact affects only foreigners (e.g. if a law is based on the place of origin) – is forbidden if it is not justified by specific reasons.³⁰ **Examples:** granting public contracts or other agreements only to companies in which all or a majority of the shares are either directly or indirectly in public or State ownership³¹; granting repayment supplement on overpaid tax to companies which are resident for tax

²⁰ ECJ Case C-351/90 *Commission v Luxembourg* [1992] ECR I-3945.

²¹ ECJ Case C-375/92 *Commission v Spain* [1994] ECR I-923.

²² ECJ Case 197/84 *Steinhauser v Biarritz* [1985] ECR 1819.

²³ ECJ Case C-1/93 *Halliburton* [1994] ECR I-1137.

²⁴ ECJ Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817.

²⁵ ECJ Case C-62/96 *Commission v Greece* [1997] ECR I-6725.

²⁶ ECJ Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727.

²⁷ ECJ Case C-325/00 *Commission v Germany* [2002] ECR I-9977.

²⁸ ECJ Case C-141/99 *AMID* [2000] ECR I-11619.

²⁹ ECJ Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817; Case C-337/97 *Meeusen* [1999] ECR I-3289.

³⁰ See General Programme of the Council, Section III B.

³¹ ECJ Case 3/88 *Commission v Italy* [1989] ECR 4035; for the limits see Case 305/87 *Commission v Greece* [1989] ECR 1461.

purposes in that State only (whilst refusing the supplement to companies resident for tax purposes in another Member State)³²; obligation under national legislation to use a spelling of a Greek name whereby its pronunciation is modified and the resulting distortion exposes the risk of confusion with other persons³³; restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office is in that State (and not in another Member State)³⁴; application of a higher rate of income tax on persons who work and reside in two different Member States than on taxpayers engaged in the same activity who are also residents of the Member State in which they work, unless justified by the need to ensure the cohesion of a Member State's tax system³⁵; different treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the freedom of establishment and therefore is prohibited in principle but may be justified if it is necessary to safeguard the coherence of the relevant tax system³⁶.

2. Abolition of general obstacles (prohibition of restrictions)

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Exceeding the requirement of non-discrimination, the Member States have a duty to **promote** the freedom of establishment. The promotion includes the abolition of obstacles which result from the differences between the Member States within their national provisions for the admission of a profession and their exercise. A restriction is permitted because of reasons overriding the general public interest (for example: provision of national law prohibiting, where there is a risk of confusion, the use of a trade name as the specific designation of an undertaking)³⁷. In the cases *Gebhard*³⁸ and *Deutsche Paracelsus Schulen*³⁹, the ECJ developed four conditions which have to be fulfilled for national measures which hinder or make the fundamental freedoms of the Treaty less attractive: (a) application on a non-discriminatory basis; (b) justification by overriding reasons based on the general interest; (c) suitability to attain the pursued aim; (d) necessity for the attainment of the aim. For a better understanding, it may be referred to some judgments of the ECJ: Case C-442/02 *Caxia Bank France*⁴⁰; Case C-9/02 *Lasteyrie du Saillant* (minor restrictions)⁴¹; Case C-196/04 *Cadbury Schweppes*⁴² und Case C-470/04 *Almelo*⁴³; Case C-65/05 *Commission v Greece*⁴⁴ und Case C-345/05 *Commission v Portugal*⁴⁵; Case C-152/05 *Commission v Germany* (conditions for the grant of a subsidy for the construction or purchase of a dwelling for personal occupation)⁴⁶, in particular point 2 of the summary of the respective judgement of 17 January 2008 is meaningful: 'A Member State which excludes, in accordance with its legislation, dwellings in another Member State from eligibility for the subsidy for owner-occupied dwellings granted to persons liable to unlimited taxation on income, fails to fulfill its obligations under Articles 18, 39 and 43

³² ECJ Case C-330/91 *Commerzbank* [1993] ECR I-4017.

³³ ECJ Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

³⁴ ECJ Case C-101/94 *Commission v Italy* [1996] ECR I-2691.

³⁵ ECJ Case C-107/94 *Asscher* [1996] ECR I-3089.

³⁶ ECJ Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779.

³⁷ ECJ Case C-255/97 *Pfeiffer* [1999] ECR I-2835.

³⁸ ECJ Case C-55/94 *Gebhard* [1995] ECR I-4165.

³⁹ ECJ Case C-294/00 *Deutsche Paracelsus Schulen* [2002] ECR I-6515.

⁴⁰ ECJ Case C-442/02 *Caxia Bank France* [2004] ECR I-8961.

⁴¹ ECJ Case C-9/02 *Lasteyrie du Saillant* [2004] ECR I-2409 (minor restrictions).

⁴² ECJ Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995.

⁴³ ECJ Case C-470/04 *Almelo* [2006] ECR I-7409.

⁴⁴ ECJ Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

⁴⁵ ECJ Case C-345/05 *Commission v Portugal* [2006] ECR I-10633.

⁴⁶ ECJ Case C-152/05 *Commission v Germany* [2008] ECR I-39 on conditions for the grant of a subsidy for the construction or purchase of a dwelling for personal occupation.

TEC. That legislation has a deterrent effect on persons liable to unlimited taxation on income in that Member State who have the right to freedom of movement under Articles 18, 39 and 43 TEC and who wish to build or purchase a dwelling for their own occupation in another Member State. Such a restriction cannot be justified by the aim of encouraging the building of dwellings in the territory of that Member State in order to ensure an adequate supply of housing, in so far as it goes beyond what is necessary to attain that objective.⁴⁷

- 16 The fact that applicable provisions of one Member State seem to be less strict does not mean that provisions of another Member State are not applicable because they are automatically disproportionate. Only the fact that a Member State has enacted a rule with a different protective aim than another Member State does not have decisive impact on the interpretation or the necessity and proportionality of the provision.⁴⁷

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3. Examples

- A general prohibition of **secondary establishment** for lawyers, physicians and dentists is not applicable as far as it has a transboundary effect. The prohibition therefore does not hinder the lawyer which is established in another Member State to set up a secondary establishment in another Member State.⁴⁸ The lawyer must not be obliged to social security contributions for self-employed persons if he is integrated in a social security system in his or her State of origin and he or she does not receive additional social protection.⁴⁹ The same applies to physicians and dentists⁵⁰ and to auditors⁵¹. The ECJ therefore refers to the intent and purpose of Article 49 para. 1 s. 2 TFEU.
- 18 – When examining the **ability** for a profession according to the national rules, the question whether the qualifications of another State of origin are equivalent is to be reviewed particularly.⁵²
- 19 – If the knowledge and skills, which were acquired in the State of origin, are only partly equivalent to the knowledge and skills required by the State of destination, the party concerned needs to be given the opportunity to prove the additional qualifications.⁵³ The recognition of a qualification from a third country by a Member State is not binding for other Member States.⁵⁴
- 20 – The equivalence of a qualification which was acquired in another Member State can be asserted also by the citizen of the State of residence.⁵⁵
- 21 The freedom of establishment for the founding of branches is hampered by a national law under which branches of a building firm only apply as part of the construction industry if their employees render over 50 percent of the total work hours to constructional services.⁵⁶ The requirement of registration in lists of certain professions is hampering, too.⁵⁷

⁴⁷ ECJ Case C-294/00 *Deutsche Paracelsus Schulen* [2002] ECR I-6515.

⁴⁸ ECJ Case 107/83 *Klopp* [1984] ECR 2971.

⁴⁹ ECJ Case C-53/95 *Kemmler* [1996] ECR I-703.

⁵⁰ ECJ Case 96/85 *Commission v France* [1986] ECR 1475.

⁵¹ ECJ Case C-106/91 *Ramrath* [1992] ECR I-3351.

⁵² ECJ Joined Cases C-193/97 and C-194/97 *de Castro* [1998] ECR I-6747.

⁵³ Case C-340/89 *Vlassopoulou* [1991] ECR I-2357 (lawyers); Case C-104/91 *Aguirre* [1992] ECR I-3003 (real estate agents).

⁵⁴ ECJ Case C-319/92 *Haim* [1994] ECR I-425.

⁵⁵ ECJ Case 71/76 *Thieffry* [1977] ECR 765; Case 115/78 *Knoors* [1979] ECR 399.

⁵⁶ ECJ Case C-493/99 *Commission v Germany* [2001] ECR I-8163.

⁵⁷ ECJ Case C-79/01 *Payroll Data Services* [2002] ECR I-8923.

IV. Accompanying rights

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1. Right of residence

There is a need for flanking rights to guarantee the effectiveness of the free movement of persons. The right to entry and residence is the **direct** result of Article 49 TFEU. The provisions of the Treaty concerning the freedom of movement require an unlimited right to residence for their complete realisation. The residence permit granted by a Member State in individual cases can only be declaratory. The fundamental principles of rules for entry and residence to avail the right of establishment were formulated by the Council in **Directive 73/148/EEC** on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. This directive was amended by **Directive 2004/38/EC** on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. In cases of violations of formal requirements, non-proportional sanctions may not be imposed.⁵⁸

The realisation of the freedom of establishment requires, similar to the freedom of 23 workers, that family members of the beneficiary are included in the right of residence. Their legal status derives – similar to the rights of workers⁵⁹ – from the legal status of the beneficiary. Union law concerning the entry and residence also applies to the spouses of the citizens of the Member States. The fundamental rights of the family influences the fundamental freedoms. Family members also only need to present a valid identity card or passport on entry.⁶⁰ A right to take up an employment is guaranteed by Article 11 Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, now replaced by Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.⁶¹

Since the right of residence shall only enable the activity in a self-employed capacity, 24 the question under which conditions the beneficiary may stay in the Member State, even if the aforesaid activity has ended, needs to be answered separately. This was originally done by Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (repealed by the aforementioned Directive 2004/38/C, see mn. 22 above).

2. Social security

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Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems is applicable in the field of social security. It amends all earlier regulations and applies for employees as well as for self-employed persons. Basic element is the fundamental principle of the equal treatment with nationals (national treatment).

V. Limits of the freedom of establishment

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Article 52 TFEU contains the limits of the freedom of establishment. The article applies, whether having a discriminatory or non-discriminatory effect, for restrictions of

⁵⁸ ECJ Case C-193/94 *Skanavi* [1996] ECR I-929.

⁵⁹ See Article 45 TFEU mn. 29.

⁶⁰ ECJ Case C-459/99 *MRAX* [2002] ECR I-6591.

⁶¹ See Article 45 TFEU mn. 37.

any nature. For non-discriminatory measures, the *Cassis* formula applies additionally: Such measure might be justified by overriding reasons of public interest (mandatory requirements).⁶² It has not yet been decided whether the *Keck* formula can be transferred to the right of establishment. Possible restrictions are to be interpreted in the light of the principle of proportionality.⁶³ The fundamental rights apply as limits of their own and as limits to the proportionality test (*Schrauben-Schrauben*).

**Article 50 [Measures to attain freedom of establishment]
(ex Article 44 TEC)**

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

- (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
- (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;
- (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
- (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
- (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);
- (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
- (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;
- (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

⁶² ECJ Case C-524/04 *Test Claimants* [2007] ECR I-2107.

⁶³ ECJ Case C-446/03 *Marks & Spencer* [2005] ECR I-10837.

Bibliography: *Andenas/Wooldrige*, European Comparative Company Law, 2012; *Buxbaum* (ed.), European business law. Legal and economic analyses on integration and harmonization, 1991; *Clarke*, International Corporate Governance: a Comparative Approach, 2007; *Hirte/Teichmann* (eds), The European Private Company – Societas privata Europaea (SPE), 2013; v. *Hulle/Gesell* (eds), European Corporate Law, 2006; *Kempny*, Coordination and Creation: two Aspects of European Company Law, 2010; *Papadopoulos*, The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Mergers Directive, 23 European Business Law Review 2012, 517.

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I. General remarks

1

Originally, the article contained procedures and legal acts of the Communities (today: Union) leading to the suspension of the restrictions on the right of establishment at the end of the transitional period. Since now, after the end of the transitional period, the prohibitions of restrictions on the right of establishment are directly applicable, the right to enact legislation is of a very limited significance only: It comes into play as far as the coordination of national provisions overriding the ban on discrimination beyond the scope of Article 49 TFEU is concerned. Today's Article 50 TFEU resembles Article 44 TEC. The Treaty of Lisbon introduced substantial changes regarding the law-making process. According to Article 50 para. 1 TFEU, the ordinary legislative procedure applies; Article 50 para. 2 TFEU empowers, in addition to the Council and the Commission, the European Parliament – a change which was already suggested by draft-Article III-138 TECE. By accepting this change, the **level of democratic legitimacy** is continuously strengthened in core areas of European company law. This process of increasing democratic legitimacy had already started when Article 44 para. 1 TEC (Maastricht) introduced the codecision procedure.

II. General programme

2

According to the old version of para. 1, the Council had to develop a general programme to abolish restrictions to the right of establishment. It was a legal act without external effects, providing for a reasonable basis for the implementation of the freedom of establishment. Even though this basis was not necessary, it had a welcoming and binding effect on the institutions of the EEC.

The Council enacted the General Programme for the abolition of restrictions on the freedom of establishment on 18 December 1961.¹ The duty to develop a programme was already given up without any replacement by the Treaty of Amsterdam. Until today, the original programme is a helpful tool for the interpretation of older directives.

III. Council directives and directives by the European Parliament

4

Since Article 44 para. 1 TEC had adopted the codecision procedure, Council directives were decided upon and enacted according to this procedure (Article 251 TEC). The

¹ OJ 1962 32/62.

amendment of Article 50 TFEU by the Treaty of Lisbon was a consequent next step. Directives are now decided upon and enacted according to the ordinary legislative procedure. Until the end of the transitional period, the aims and purposes of Articles 49 and 50 TFEU should have been realized. This happened with a great extent and impact (for trade, handcraft and industry). As far as directives, which should eliminate the relevant legal obstacles, had not yet been issued, the later issuing became obsolete for obvious reasons. At the end of the transitional period, the primary law prohibition of restrictions became directly applicable. Directives, however, can still be a meaningful tool as far as they mean to facilitate the effective use of the right of establishment by harmonising national laws of the Member States. Thus, they remain an important instrument for the further integration of European Business and Company Law.

5

IV. Terms of reference

Article 50 para. 2 TFEU names – in a non-exhaustive manner – single tasks that serve to realise the freedom of establishment.

- 6 **lit. a:** priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade; the provision is obsolete since the end of the transitional period;
- 7 **lit. b:** close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned; this has little practical meaning because the cooperation of European authorities today exceeds the simple exchange of information by far;
- 8 **lit. c:** abolishing discriminating administrative procedures and practices²; however, a competence for enacting procedural rules is not connected with this abolishment;
- 9 **lit. d:** take-up of a self-employed activity by a worker who resides already in the foreign Member State; the self-employed person is equated to a migrant worker; exceeding its wording, the provision also applies to family members of self-employed market citizens;
- 10 **lit. e:** acquisition and use of land and buildings situated in the territory of another Member State as far as this does not conflict with the agricultural principles (Article 39 para. 2 TFEU)³; potential overlaps with ex Article 239 TEC are irrelevant since the provision was deleted;
- 11 **lit. f:** abolition of obstacles to set-up agencies, branches and subsidiaries⁴ and for the entering of workers of the headquarters into their executive and advisory bodies. The staff can rely on the free movement of workers (Article 45 TFEU) if they are citizens of other Member States. Staff coming from a third country is also included by the provision; tax discrimination⁵ and social insurance⁶;
- 12 **lit. g:** coordination of protective national company law. This does not concern the abolition of restrictions of the right of free establishment in the spirit of equal treatment with nationals but the (de facto) facilitation for the set-up and management of companies (Article 49 para. 2 TFEU), especially through provisions on the change of the company's registered office and by harmonising protective company laws in favour of companies and creditors as well as other third parties⁷. The provision is the legal basis for several

² For instance public procurement, ECJ Case 3/88, *Commission v Italy* [1989] ECR 4035.

³ See ECJ Case 197/84 *Steinhauser v Biarritz* [1985] ECR 1819; Case 305/87 *Commission v Greece* [1989] ECR 1461; C-302/97 *Konle* [1999] ECR I-3099.

⁴ See Article 49 para. 1 TFEU.

⁵ ECJ Case 270/83 *Commission v France* [1986] ECR 273.

⁶ ECJ Case 79/85 *Segers* [1986] ECR 2375; Case 143/87 *Stanton* [1988] ECR 3877.

⁷ ECJ Case C-97/96 *Daihatsu* [1997] ECR I-6843.

directives in the field of company law; it controls the Europeanisation of the national legal systems of company law; a legal basis for creating **trans- respectively supranational company forms** ('Societas Europaea') is not provided by the provision; communications and directive proposals of the Commission aim at the simplification of the entrepreneurial environment including the necessary reduction of administrative burdens⁸;

lit. h: No distortion of the conditions of establishment by aids granted by Member States. As far as aids are permitted (Articles 112 et seq. TFEU), conditions of establishment must not be changed in favour of or at the expense of nationals namely neither by the State of residence nor by another Member State.⁹

Looking at a detailed overview containing all measures which were based on Article 50 TFEU and also concerning directive proposals it becomes clear how effectively the 'unification' of the company law has been proceeding through the regulatory instrument of the directive; the **Europeanisation** in the field of company and business law as a normative principle to shape the European legal order is far advanced regarding the construction of a European legal area¹⁰.

Article 51 [Exercise of official authority] (ex Article 45 TEC)

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.

Bibliography: *Lasok*, The Professions in the European Community: The Treaty Framework, 29 Colum. J. Transnat'l L. 1991, 41; *Zumbansen*, No Need To Be Italian: ECJ Hands Down Third Case Related To Nationality Requirements For Private Security Guards, 10 German Law Journal 2001, 5.

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I. General remarks

1

Article 51 TFEU is modelled after the former exemption clause of Article 45 TEC and draft-Article III-139 TECE. Article 51 para. 1 TFEU delimits the scope of the freedom of establishment. It does so if and as far as an activity is connected with the **exercise of official authority**. Due to this delimiting effect, the clause is not only qualified as a justification but as a real exemption. The limitation of the scope, using the same wording as in Article 45 para. 1 TEC, is to be interpreted **restrictively**. Article 51 para. 2 TFEU permits further exemptions. According to the old version of Article 45 para. 2 TEC, only a Coun-

⁸ Communication from the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, 10 July 2007, COM (2007) 394; proposals COM (2008) 194 final and COM (2008) 195 final.

⁹ ECJ Case 63/86 *Commission v Italy* [1988] ECR 29 on social housing.

¹⁰ See *Kämmerer*, EuR 2011, 27 et seq.

cil decision with a qualified majority was necessary; but now the European Parliament needs to participate within the ordinary legislative procedure. The exemption clause has not yet been used, probably because of its undefined wideness within the effective integration scheme of the internal market.¹

2

II. Exercise of public authority

The exercise of public authority refers to the exercise of public authority and competences **stricto sensu**. Thus, the exemption clause is to be strictly interpreted; it definitely is to be interpreted more strictly than the term 'public service' as enshrined in Article 45 para. 4 TFEU. The latter and more broadly interpreted term also includes the safeguarding of the general interests of the State. Such activities, however, might be excluded from the scope of application of the freedom of establishment according to Article 51 para. 2 TFEU.

3 The decision, whether or not an activity necessarily implies the exercise of public power **stricto sensu**, lies within the **discretionary power** of the Member States. Union law, however, strictly limits this scope of discretion, leading to a prevention that the freedom of establishment is rendered ineffectively.² The limits are determined by the purpose of the provision to enable the Member States to reserve such activities to their own citizens, which require a special 'civic' loyalty of the 'citoyen' towards her or his State.

4 Overall, the **exemption clause** is to be interpreted very narrowly. The restriction of the freedom of establishment must not exceed its proper **purpose**. It must include only those activities, which in themselves are directy and specifically connected with the exercise of official authority³. If a special profession or field of activity can be separated incidentally from the exercise of public authority or the activity, the exemption just includes the part where public law prerogatives are exercised. Thus, the activity of a lawyer (or even a public notary) is not excluded from the freedom of establishment as a whole; legal advice and legal assistance as well as legal presentation in court are not included in the exemption but indeed the exercising of notary functions (in the very strict sense) or regulatory powers as a member of the bar association.⁴ Further examples: public auctions; gamekeepers; defended security guards; not: private security companies, which are not directly and specifically taking part in the exercise of public power.⁵

5

III. Further exemptions

The Council may (within the ordinary legislative procedure in accordance with the Parliament) exclude further activities from the scope of the freedom of establishment under Article 51 para. 2 TFEU. Explicit criteria are not named by the rather indefinite provision. Future exemptions, however, have to be proportional (in a broad sense). They have to be pit against the basic aims of the Treaty concerning the free movement if the scheme of the freedom as such shall not be rendered ineffective.⁶ Only a provision which

¹ See LB/Scheurer, Article 51 AEUV mn. 5.

² ECJ Case 2/74 *Reyners* [1974] ECR, 631.

³ ECJ Case C-42/92 *Thijssen* [1993] ECR I-4047.

⁴ ECJ Case 2/74 *Reyners* [1974] ECR 631; see above mn. 3 at the end.

⁵ ECJ Case C-114/97 *Commission v Spain* [1998] ECR I-6717; Case C-283/99 *Commission v Italy* [2001] ECR I-4363. For further examples (for instance veterinary or established automobile garage), see Schwarze/Schlag, Article 51 AEUV mn. 8.

⁶ ECJ Case 2/74 *Reyners* [1974] ECR 631.

serves the safeguarding of general interests can be taken into consideration. In legal practice, the provision has not become important yet.

Article 52 [Public policy; public security; public health]
(ex Article 46 TEC)

- 1. 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.
- 2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Bibliography: *Forsthoff*, Die Tragweite des Rechtfertigungsgrundes aus Article 46 Abs. 1 EG für die Niederlassungsfreiheit, die Dienstleistungsfreiheit und für Gesellschaften, EWS 2001, 59; *Hailbronner*, Die Unionsbürgerrichtlinie und der ordre public, ZAR 2004, 299; *Hatzopoulos*, Regulating Services in the European Union, 2012, 146 et seq.; *id.*, The Economic Constitution of the EU Treaty and the Limits between Economic and Non-Economic Activities, 23 European Business Law Review 2012, 973.

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I. General remarks 1

Article 52 TFEU traces back to Article 46 TEC. Substantial changes have neither been envisaged by the Lisbon Reform Treaty nor by draft-Article III-140 TECE. Only the procedure under Article 52 para. 2 TFEU had to be adapted to the new law-making mechanisms of the Union. Replacing the old codecision procedure according to Article 251 TEC, the ordinary legislative procedure is now applicable.

Article 52 TFEU contains the so-called **ordre public-reservation** in the field of the freedom of establishment. This reservation, see the reference in Article 62 TFEU, also applies to the free movement of services. As far as the free movement of workers is concerned, Article 45 para. 3 TFEU enshrines a parallel exemption. A similar reservation is even included in Article 36 TFEU concerning the free movement of goods. It clearly distinguishes between economic reasons and public reasons (public policy, public health, public security reasons): cf. for instance the protection of the domestic movie production as ‘culture policy’¹. A behavior of whatever kind does not seem to be serious enough for a disturbance of the public order if the Member State does not fight the corresponding behavior of its own citizens (for example: self-employed prostitutes²).

Article 52 para. 1 TFEU is no general clause but is to be interpreted as strictly as Article 51 TFEU. In distinction to Article 51 TFEU, however, Article 52 para. 1 TFEU has to be applied at the level of justification. The ascertainment of standards in secondary law concerning the terms of public policy and security can be taken from **Directive 2004/** 3

¹ ECJ Case C-17/92 *Fedicine* [1993] ECR I-2239; also Case C-484/93 *Svensson* [1995] ECR I-3955.
² ECJ Case C-268/99 *Jany* [2001] ECR I-8615. See *Lenze*, EuGRZ 2002, 107: The attempt to legalise prostitution was not driven by the intention to establish this profession as a normal or even desirable profession for women but it should minimize the negative concomitants of illegal prostitution.

38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It concerns the right of the Union citizens to reside and to move in the sovereign territory of the Member States, and it codifies many standards so far developed by judge-made law. The terms ‘public security’ and ‘public policy’ are **autonomous terms** of Union law; however, the ECJ grants the Member States a certain margin of appreciation. In order to give the Member States a reason for issuing measures, there has to be an actual and sufficiently severe danger. This danger must affect basic interests of society and must be of such a kind that the Member State would have also taken measures against its own citizens.³ Whole sectors of economy must not be excluded by an inadmissible reinterpretation of the exemption clause in Article 52 TFEU.⁴ Regarding public health, only those diseases are covered which show epidemic potential in the sense of the WHO.⁵

4

II. Authorisation of the Council

Article 52 para. 2 TFEU contains an authorisation of the European Parliament and the Council for the harmonisation of national provisions by directives. The ordinary legislative procedure is applicable.

- 5 Based on the former law, the Council has used its legislative competence concerning the right of entry (immigration law) and residence law (**Directive 64/221/EEC** on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health). In so far, the same rules as for workers were applicable. Directive 64/221/EEC was also applicable to persons having the right to remain (Directive 75/34/EEC and Directive 75/35/EEC) in the territory of another Member State after they completed their self-employed activity. These directives were repealed by Directive 2004/38/EC.⁶

Article 53 [Mutual recognition of diplomas; coordination legislation] (ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Bibliography: *de Witte*, Setting the Scene: How did Services get to Bolkenstein and Why?, EUI Working Papers Law 2007/20; *Ehlermann*, The Internal market following the Single European Act, 24 CMLRev 1987, 361; *Garben*, EU Higher Education Law: The Bologna Process and Harmonization by Stealth, 2011: *id.*, On Recognition of Qualifications for Academic and Professional Purposes, 16 Tilburg Law Review 2011, 127; *Möstl*, Preconditions and Limits of Mutual Recognition, 47 CMLRev 2010, 405; *van Riemsdijk*,

³ ECJ Case 30/77 *Bouchereau* [1977] ECR 1999.

⁴ ECJ Case C-514/03 *Commission v Spain* [2006] ECR I-963.

⁵ Cf. *Schwarze/Schlag*, Article 52 AEUV mn. 9 with further references.

⁶ See Article 49 TFEU mn. 22.

Obstacles to the Free Movement of Professionals: Mutual Recognition of Professional Qualifications in the European Union, 15 *European Journal of Migration and Law* 2013, 47; *Wallnofer*, Is the Non-Recognition of Private Diplomas Objectionable, 4 *Vienna Online Journal on International Constitutional Law* 2010, 682.

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I. General remarks

1

Article 53 TFEU enshrines the central legislative competence for the mutual recognition of certificates of qualification. Without this legal basis, the free movement of persons within the internal market would be deficient. The predecessor of Article 53 TFEU within primary law was Article 47 TEC. Article 53 para. 1 TFEU substitutes the former codecision procedure under Article 251 TEC with the newly introduced ordinary legislative procedure. The scope of para. 1 is widened by the integration of draft-Article III-141 para. 1 lit. b TECE into the reshaped Article 53 TFEU. It now also comprises the competence for the coordination of the relevant (legal and administrative) provisions of the Member States.¹ By integrating both competences, **recognition** and **coordination**, into the thus consolidated para. 1, the former para. 2 has become obsolete. The consolidation is most welcome for systematical reasons: there is no doubt that recognition and coordination pursue the same objective and build up what could be described as a 'complementary' relationship.² The former para. 3 is replaced by para. 2 – identical in its wording.

Article 53 TFEU effectuates the freedom of establishment significantly. Even though 2 the freedom of establishment guarantees the equal treatment of nationals and non-nationals in the first place (prohibition of any overt or covert discrimination on the grounds of nationality), it is not limited to this (directly applicable) rule. Also national legislation which is **indistinctly applied** to both, nationals and non-nationals who want to enter the market and then pursue self-employed activities, can potentially prevent non-nationals from doing so. This is especially true for the acquisition of qualification certificates, which are typically obtained by exams taken under national law. This is also true for other comparable requirements (for instance trainee periods). If the non-national fulfilled the relevant requirements in another Member State and if these requirements are equivalent to the domestic ones, it would contradict the very imperative and purpose of the freedom of establishment if that qualification was not recognized domestically. Even more important: The freedom of establishment could not be realized effectively at all. Not to be mistaken: It might still be necessary (for securing high standards of qualification and high quality of services) to stick to the requirement of a domestic qualification³; in doing so, however, the qualifications already achieved in the non-national's State of origin have to be taken into account, too⁴. This duty to recognize only prevails if the domestic and the foreign requirements are equivalent. The recogni-

¹ See *VHvH/Khan/Eisenhut*, Article 53 AEUV mn. 1.

² See *Schwarze/Schlag*, Article 53 AEUV mn. 2.

³ ECJ Case 136/78 *Auer* [1979] ECR 437; restrictive Case C-285/01 *Burbaud* [2003] ECR I-8219.

⁴ ECJ Case 71/76 *Thieffry* [1977] ECR 765; Case C-375/92 *Commission v Spain* [1994] ECR I-923; Case C-55/94 *Gebhard* [1995] ECR I-4165.

tion of a diploma must not be dependent on reciprocity.⁵ To facilitate the freedom of establishment while taking into account these difficulties, Article 53 TFEU provides for the enactment of directives, which either harmonise the qualification requirements of each Member State or assess the equality of different national qualification requirements or simply stipulate the mutual recognition of diplomas.

3 II. Recognition of certificates of qualification

Article 53 para. 1 TFEU authorises the European Parliament and the Council to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications, which were acquired or recognized and which are significant for the take-up or pursuit of a self-employed activity. Covered are, for example, diplomas which confirm the admission to a specific profession; examination certificates of school or professional education; certificates of a trainee programme.

4 The instrument of mutual recognition pursues the aim that the foreign qualification certificate is treated in the same way as a corresponding domestic qualification certificate would be treated.⁶ The host Member State is – by primary law – bound to the statements in the qualification certificate and to further information delivered by the home Member State.⁷

5 In case of medical, allied and pharmaceutical professions, the enactment of a directive mandatorily presupposes the coordination of all relevant conditions for the exercise of these professions (para. 2). Secondary law had already made some progress in the past; now, the different secondary law instruments are consolidated and integrated into the Directive on the Recognition of Professional Qualifications (see mn. 10 below).

6 III. Coordination of the legal and administrative regulations

The second alternative of Article 53 para. 1 TFEU empowers the European Parliament and the Council to ‘**coordination**’, meaning the enactment of directives to harmonise national laws and administrative rules which cover the taking-up and pursuit of self-employed activities. Hereby, the different requirements which – at least potentially might – oppose the freedom of establishment of non-nationals, even if they are treated like nationals, shall be reduced. Among these requirements, there are professional training conditions and conditions on the access to a certain profession.

7 The aforementioned coordination directives are adopted within the **ordinary legislative procedure**.

8 IV. Directives

First, the legal development – before the adoption of Directive 2005/36/EC on the recognition of professional qualifications (**Directive on the Recognition of Professional Qualifications**) – shall be outlined; then the consolidating function of the directive itself shall be addressed (see mn. 10 below).

9 The pertinent directives on trade, handcraft, industry and agriculture provided by the General Programme had more or less been enacted until the transitional period ended.

⁵ ECJ Case C-142/01 *Commission v Italy* [2002] ECR I-4541 on the diploma of a ski instructor.

⁶ ECJ Case C-110/01 *Tennah-Durez* [2003] ECR I-6239.

⁷ ECJ Joined Cases C-193/97 and C-194/97 *de Castro* [1998] ECR I-6747.

The national provisions concerning the **training and qualification certificates of medical professions** had been harmonised to a great extent, too. Concerning banks and insurances, see Article 58 para. 2 TFEU.

Until the enactment of Directive 2005/36/EC on the recognition of professional qualifications, the system could be qualified as a horizontal, trans-sectoral approach which did not refer to specific training contents but relied on formal criteria. It was mainly reflected in three legal acts: the already mentioned Directive 89/48/EEC on university diplomas (at least three years of higher education), which established a so-called 'first general system'; Directive 92/51 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (education below three years of higher education); and finally, Directive 99/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, establishing the so-called 'third general system'. In addition, there were plenty other so-called 'area-specific' directives. Despite the demand of generality and cohesiveness, this approach had created a confusing mixture of divergent recognition mechanisms.

The scope of the Directive on the Recognition of Professional Qualifications is determined by the term 'regulated profession'. The term is legally defined in Article 3 para. 1 lit. a Directive 2005/36/EC.⁸ According to this definition, the taking-up, exercise and pursuit of a profession can be made – either by law or by administrative regulations – conditional on the possession of specific professional qualification. Six different levels of qualification are introduced, from the simple certificate of competence up to university education which lasts at least a minimum of four years (legal definition in Article 11 Directive 2005/36/EC).⁹ The Directive furthermore clearly distinguishes between establishment and services: Article 5 para. 2 Directive 2005/36/EC states the relevant assessment criteria such as duration, frequency, periodical return and continuity of the services. These criteria resemble the jurisprudence of the ECJ and especially the argument which the Court had developed to distinguish between the freedom of establishment on the one side, and the free movement of services on the other side.¹⁰

According to the exercise of a profession, the so-called country of origin principle applies (Article 5 para. 3 Directive 2005/36/EC). As a result, the service provider needs to get acquainted with the relevant provisions of that State. The service recipient, on the other hand, can rely on the provider's compliance with a legal system which the recipient is familiar with.

It is the very aim of the above mentioned comprehensive Directive on the Recognition of Professional Qualifications to systematize and consolidate the system. A great number of area-specific directives were suspended respectively substituted. The enactment of the new directive was highly controversial. It took place against the votes of Germany and Greece; Luxembourg abstained from voting. The recognition systems (except for lawyers) are integrated into one single legal instrument which is based on a 'sectoral regulation concept'.¹¹ Other secondary legal acts (see mns 14 to 16 below) are applicable in addition to the Directive on the Recognition of Professional Qualifications.

In order to deal with the difficulties of coordinating standards being very specific for a certain profession, the (still valid) **Directive 89/48/EEC** on a general system for the recognition of higher-education diplomas awarded on completion of professional education

⁸ See CR/Kluth, Article 59 AEUV mn. 34.

⁹ See in particular Kluth/Rieger, EuZW 2005, 486 et seq.

¹⁰ See CR/Kluth, Article 59 AEUV mn. 36.

¹¹ See CR/Kluth, Article 59 AEUV mn. 35.

and training of at least three years' duration does not refer to specific training contents anymore but to the duration and to the level of the respective training. The directive uses these criteria to establish the irrefutable assumption that the quality and the contents of the different professional training schemes are equal (**principal of mutual trust**). A diploma in the sense of this directive is the statement of passing an exam; denomination is not a decisive matter.¹² The directive addresses the access to **professions regulated by national law**. This means professions whose taking-up or pursuit is directly or indirectly regulated by law that is to say by laws or by administrative regulations.¹³ Also provisions of a collective (labor) agreement may be interpreted as such rules if they have a general scope.¹⁴ Because of the differences in professional training and education, the aforementioned directive on university diplomas allows for compensatory measures (a three year adaption period or a suitability test).

- 15 **Directive 98/5/EC** to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained remains in force but was amended by Directive 2006/110/EC adapting Directives 95/57/EC and 2001/109/EC in the field of statistics, by reason of the accession of Bulgaria and Romania.¹⁵ The directive paves the way for the permanent exercise of a lawyer's activity in another Member State. According to the Directive, every lawyer has the right to permanently pursue legal activities in any other Member State but only carrying **the professional title she or he originally received** in her or his home Member State (and using that Member State's official language). If a lawyer, in such a case, wants to represent clients in court or work as a defense lawyer, the activity can be based on the condition that the aforesaid lawyer only acts in agreement with another lawyer who is admitted to the bar in the host Member State.¹⁶ If the lawyer wants to act under the professional title as foreseen in national law (**'full integration'**), however, she or he can always take the **suitability test** provided by the directive on high-education diplomas; the lawyer can be **released** from this suitability test if she or he can prove professional legal activities for at least three years under the law of the host Member State. If the legal activities during this period of three years concerned national law only to a smaller extent, this shortcoming can be compensated by other activities or initiatives (for instance participation in classes and seminars about the law of the host Member State¹⁷).
- 16 For the total field of services within the internal market, **Directive 2006/123/EC** on services in the internal market (the 'Services Directive') applies. It essentially codifies the relevant jurisprudence of the ECJ but to some extent goes progressively beyond that and thus remains highly controversial.¹⁸

Article 54 [Equal treatment of companies] (ex Article 48 TEC)

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

¹² ECJ Case C-285/01 *Burbaud* [2003] ECR I-8219.

¹³ ECJ Case C-164/94 *Aranitis* [1996] ECR, I-135; Case C-294/00 *Deutsche Paracelsus Schulen* [2002] ECR I-6515.

¹⁴ ECJ Case C-234/97 *Fernandez* [1999] ECR I-4773.

¹⁵ Concerning the 'Services Directive' and its meaning for the profession of lawyers, see Article 56 TFEU.

¹⁶ For this function, see ECJ Case 2/74 *Reyners* [1974] ECR 631.

¹⁷ ECJ Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

¹⁸ In detail, see Article 56 TFEU mns 8–10.

within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Bibliography: *Adenas/Woolldridge*, European Comparative Company Law, 2009; *Buxbaum*, Is There a Place for a European Delaware in the Corporate Conflict of Law, *RabelsZ* 2010, 1; *de Kluiver*, Inspiring a new European company Law? – Observations on the ECJ’s Decision in Inspire Art from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member States, *ECFR* 2004, 121; *Dyrberg*, Free full movement of companies in the European Community at last, *European Law Review* 2003, 528; *Grundmann*, European Company Law. Organization, Finance, and Capital Markets, 2nd ed. 2011; *Ringe*, The European Company Statute in the context of Freedom of Establishment, 7 *Journal of Corporate Law Studies* 2007, 185; *Ringe*, Company Law and Free Movement of Capital, 69 *Cambridge Law Journal* 2010, 3; *Roth*, From Centros to Überseering: Free Movement of Companies, *Private International Law and Community Law*, 52 *ICLQ* 2003, 177; *Sethe/Winzer*, Der Umzug von Gesellschaften in Europa nach dem Cartesio-Urteil, *WM* 2009, 536; *Szydło*, The Right of Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishment, 7 *European Company and Financial Law Review* 2010, 414; *Vossgeist*, Cross-border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment, 6 *European Company Law* 2009, 115.

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I. General remarks

1

Article 54 TFEU adopts Article 48 TEC without any substantial changes. It takes into account that legal persons and independent bodies of persons play an important role in the internal market, as big as – if not bigger than – the role of natural persons.¹ The freedom of establishment (see the wording of Article 49 TFEU) seems to be tailor-made for natural persons in the first place. The freedom is granted to the citizens of the Member States². Only natural persons are entitled to the right of citizenship *stricto sensu*. Under Article 54 TFEU, companies and other associations of persons shall – under certain conditions – enjoy the same right(s) and thus be **treated in the same way** as natural persons. This equal treatment is especially important in view of the new establishment (so to speak the ‘setting-up’) of companies, the cross-border transfer of a company’s registered office, the setting-up of subsidiaries, branches or agencies or any other cross-border measure restructuring a company.³

¹ See Streinz/Müller-Graff, Article 54 AEUV mn. 1.

² See Article 49 para. 1 s. 1 TFEU.

³ See Schwarze/Jung, Article 54 AEUV mn. 1.

2

II. Beneficiaries

1. ‘Companies’

The following companies are treated equally with natural persons⁴: companies established under private law; companies established under commercial law including cooperatives; ‘other’ legal persons established either under private or under public law. That broad definition includes companies which do not or have partial legal capacity (such as the ‘Gesellschaft bürgerlichen Rechts’, a partnership under German civil law). Included are therefore – irrespective of their legal personality – **all legal actors which are sufficiently independent and which are not legal persons.**⁵

- 3 Only those personal associations remain excluded which do not pursue an economic purpose, for instance the so-called ‘Idealverein’ (‘ideal association’) in Germany as well as other non-profit associations. However, the objective economic activity is sufficient to evaluate whether or not an association pursues economic aims. A distinct intention of making profit is not necessary (see the explicit mentioning of cooperatives). It is not relevant whether there is a non-profit purpose (the ‘ideal purpose’) going beyond the association’s economic aims.

4

2. Conditions

Personal associations are treated equally with the citizens of a Member State under the following two conditions:

- 5 • They need to be established (set-up) according to the law of a Member State.
 6 • They need to have either their registered office or their central administration or their principal place of business within the territory of the Union.
- 7 The registered office is the (formal) seat which is mentioned in the statutes. Based on the General Programme⁶, one could have thought that the ‘seat according to the statutes’ would be sufficient only if the company had a **real and continuous link** to the Member State concerned; a mere ‘offshore company’ (as it is possible under Dutch law for instance) would then not meet this criterion. This view, however, was rejected by the ECJ.⁷ The Court held that the General Programme demands an actual and permanent connection to the economy of a Member State only in cases that the company had nothing but its seat according to the statutes within the Union; this is, according to the ECJ’s decision, not the case if the actual administrative headquarters were not in the State of establishment but in another Member State.⁸
- 8 The **central administration** is located where the activities of the association’s management bodies primarily take place. The principal place of business is located at the place of the main personal and material resources of the company or association.
- 9 It is insignificant whether or not the persons who actually control the company (partners, principal shareholders) are citizens of a Member State.⁹

⁴ See Article 54 s. 2 TFEU.

⁵ See Streinz/Müller-Graff, Article 54 AEUV mn. 2.

⁶ German version: OJ 1962 No 2/36; English version: English special Edition (2nd Series) IX. 3.

⁷ ECJ Case 79/85 *Segers* [1986] ECR 2375; Case C-212/97 *Centros* [1999] ECR I-1459.

⁸ ECJ Case C-208/00 *Überseering* [2002] ECR I-9919.

⁹ ECJ Case C-221/89 *Factortame* [1991] ECR I-3905; Case C-212/97 *Centros* [1999] ECR I-1459.

III. Freedom of establishment

10

Article 54 s. 1 TFEU grants to the companies/associations which are covered by its scope the freedom of establishment in the same way as it is granted to natural persons being citizens of a Member State (Article 49 TFEU).

1. Transfer of a registered office

11

Companies may transfer their registered office, the central administration or the principle place of business – without being forced to dissolve the company in the State of origin and to set-up newly in the State of destination – to another Member State; restrictions can only be justified by overriding reasons in the general interest or because of Article 52 para. 1 TFEU.¹⁰ The duty to obtain a permission of the financial authorities of the State of destination based on fiscal reasons could still be justified in the ECJ case *Daily Mail*.¹¹ In contrast, the company law of the State of destination (seat theory instead of foundation theory) had to give way in the ECJ case *Überseering*: A company founded under Dutch law needed to be treated as having legal capacity in Germany, even though its whole capital, subsequent to the founding of the company, was purchased by German citizens who were resident in Germany and who administered the company from Germany. The requirement to set-up the same company in Germany would be equal to the negation of the freedom of establishment.¹²

2. Branches

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The favoured companies, under the protection of the ban on discrimination and prohibition of restrictions, are allowed to maintain agencies or branches in another Member State¹³, set-up subsidiaries or purchase shareholdings of existing companies (see Article 55 TFEU).¹⁴ The simple fact that a company has its registered office in the Member State in which it does not unfold activities but these are rather exercised by the branch in another Member State does not constitute an abuse of rights.¹⁵

In the case *Cartesio*¹⁶, the ECJ ruled that, at the current stage of Union law, a law of a Member State which prohibits companies incorporated under the law of that Member State whilst retaining its status as a company governed by the law of the Member State of incorporation to transfer their seat to another Member State did not violate Articles 43 and 48 TEC. But the ECJ explained in an important obiter dictum that, besides this, the departure of a company is protected by the freedom of establishment. Although the freedom of establishment does not guarantee the departure under protection of its legal status, the freedom of expatriation is strengthened a lot in comparison to the case of *Daily Mail* (see mn. 11 above).¹⁷

¹⁰ See Streinz/Müller-Graff, Article 54 AEUV mn. 15.

¹¹ ECJ Case 81/87 *Daily Mail* [1988] ECR 5483.

¹² ECJ Case C-208/00 *Überseering* [2002] ECR I-9919.

¹³ ECJ Case C-212/97 *Centros* [1999] ECR I-1459.

¹⁴ ECJ Case 270/83 *Commission v France* [1986] ECR 273.

¹⁵ ECJ Case C-167/01 *Inspire Art* [2003] ECR I-10155; discrimination of an establishment of a company in another Member State because of unequal treatment of taxes: Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651; national provisions preventing the deduction by a parent company of the losses incurred in another Member State by a subsidiary established in that state: Case C-446/03 *Marks & Spencer* [2005] ECR I-10837; Case C-347/04 *ITS Reisen GmbH*, [2007] ECR I-2647.

¹⁶ ECJ Case C-210/06 *Cartesio* [2008] ECR I-9641.

¹⁷ See *Sethe/Winzer*, WM 2009, 536 et seq.

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IV. European company law

As an alternative to the harmonisation of national company law on the basis of Article 50 para. 3 lit. g TFEU in conjunction with Article 50 para. 2 TFEU, the Commission tries to create company forms under the law of the Union (legal basis: Article 352 respectively Article 114 TFEU).

15

1. European Economic Interest Grouping (EEIG)

Regulation (EEC) No 2137/85 of 25 July 1985 (in force since 1 July 1989) created the possibility to establish a European Economic Interest Grouping (EEIG). The EEIG shall facilitate the economic cross-border cooperation of persons and companies which are established in different Member States. It does not have the purpose to take profits for itself. Its activity needs to be in connection with the economic activities of its members. Members can be, besides the companies within the meaning of Article 54 s. 2 TFEU, also natural persons, which exercise a commercial, business, agricultural or self-employed activity within the Union or deliver other services. A founding treaty and the entry in a register which is determined by the Member State are needed for the set-up. The Member States determine if the registered EEIG has its own legal personality. The company name needs to contain at least the words 'European Economic Interest Grouping' or the abbreviation 'EEIG'; other elements to be included in the name may be imposed by the provisions of national law applicable in the Member State in which the grouping has its official address.¹⁸

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2. European Company (SE) and European Cooperative Society (SCE)

Regulation (EC) No 2175/2001 on the statute of the European Society (Societas Europaea, SE) established a European company form which shall allow companies acting within the whole Union to do so without establishing a network of subsidiaries, to which different national regulations would apply. Advantages should occur by lower costs for legal and administrative procedures, a single legal structure and a uniform management. The Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees amends the regulation with regard to the participation of employees.

17

The same applies to the **statute of the European Cooperative Society (Societas Cooperativa Europaea, SCE)** established by **Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)**, which shall facilitate the activities for national cooperatives within the whole Union. This statute was amended by a directive with regard to the participation of employees (Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees).

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3. Future prospects for further supranational company forms

Already in the beginning of the 1990s, the Commission proposed the statute for a European non-profit association, as well as the statute for a European mutual society.¹⁹ There was the idea of establishing a European Private Company (SPE) based on the model of the German company form 'GmbH' (limited liability company) respectively the model of the English 'Limited Company' for small and medium-sized businesses.²⁰

¹⁸ ECJ Case C-402/96 *EITO* [1997] ECR I-7515.

¹⁹ For detailed references, see Schwarze/Jung, Article 54 AEUV mn. 69.

²⁰ Cf. Teichmann, Die Europäische Privatgesellschaft (SPE) – Wissenschaftliche Grundlegung, in: Gesellschaftsrechtliche Vereinigung (VGR) (eds), Gesellschaftsrecht in der Diskussion, 2009, 55 et seq.

V. Recent secondary law developments concerning the freedom of establishment of independent shareholders

19

Two directives concerning the financial market are to be mentioned because of their relevance for the freedom of establishment: **Directive 2006/48/EC** relating to the taking-up and pursuit of the business of credit institutions (recast) and **Directive 2009/110/EC** on the taking-up, pursuit and prudential supervision of the business of electronic money institutions amending Directive 2005/60/EC and Directive 2006/48/EC and repealing Directive 2000/46/EC. The last mentioned directive wants to achieve the coordination of the protecting rules which the companies within the meaning of Article 54 TFEU have to meet in the interest of the partners or third parties in the Member States. The purpose is to design these rules equally.

Article 55 [Ban on discrimination of equity participation] (ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

Bibliography: *Usher*, The Law of Money and Financial Services in the EU, 3rd ed. 2011.

Article 55 TFEU **specifies the principle of non-discrimination** as generally enshrined **1** in Article 18 para. 1 TFEU with regard to equity investment. The provision is directly applicable. The wording of its predecessor (Article 294 TEC) was adopted but systematically rearranged. The impulse towards a new systematic structure in the context of the freedom of establishment was already provided by draft-Article III-143 TECE. The goal of Article 294 TEC, which was of minor importance after the expiration of the transitional period, was a particularly fast market liberalisation and, consequently, a 'liberalisation' of the law of equity investment¹. Article 55 TFEU has a rather clarifying function: Not only the establishment and management of a company (thus in particular the operative business) but also mere equity investments fall under the scope of Article 54 TFEU and are therefore covered by the freedom of establishment.² The term 'equity investment' is to be interpreted broadly (silent partnership, sub-participation, usufruct over a share, also if held in escrow³).

The provision stipulates the **principle of national treatment**. Belgium violated this **2** principle by reserving 51 % of the capital of a non-public television broadcasting corporation, which was addressing the entire Flemish community, for the publishers of a Dutch speaking newspaper whose company's registered office was located in the Dutch speaking area or in the bilingual area of Brussels.⁴ Violations can also be caused by nationality and seat requirements for the entry in a register of shipping.⁵

¹ See VHvH/Khan/Eisenhut, Article 55 AEUV mn. 1.

² See Streinz/Müller-Graff, Article 55 AEUV mn. 2.

³ See Schwarze/Jung, Article 55 AEUV mn. 5 with further references.

⁴ ECJ Case C-211/91 *Commission v Belgium* [1992] ECR I-6757.

⁵ ECJ Case C-62/96 *Commission v Greece* [1997] ECR I-6725; Case C-334/94 *Commission v France* [1996] ECR I-1307; Case C-221/89 *Factortame* [1991] ECR I-3905.

3 A restriction regarding the principle of national treatment is permitted by the emergency clause of Article 346 para. 1 lit. b TFEU.⁶

CHAPTER 3

SERVICES

Article 56 [Freedom to provide services]

(ex Article 49 TEC)

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.

Bibliography: *Adamson*, Free Movement of Lawyers, 1998; *Barnard*, Unravelling the Service Directive, 41 CMLRev 2008, 323; *Barquero Cruz*, Free Movement and Private Autonomy, 24 ELR 1999, 603; *Biondi*, In and Out of the Internal Market: Recent Developments on the Principle of Free Movement, 19 YEL 1999/2000, 469; *Blanpain* (ed.), Freedom of Services in the European Union, 2006; *id.*, Freedom of Services in the EU: A Social Catastrophe – Are there Lessons to Be Learned from the Belgian Experience?, 3 European Labour Law Journal 2011, 19; *Breuss/Fink/Griller* (eds), Services Liberalisation in the Internal Market, 2008; *Bronkhorst*, Freedom of establishment and freedom to provide services under the EEC-Treaty, 12 CMLRev 1975, 245; *Callies*, Die Dienstleistungsrichtlinie, 2007; *Connor*, Market Access or Bust – Positioning the Principle within the Jurisprudence of Goods, Persons, Services, and Capital, 13 German Law Journal 2012, 679; *Ehlers* (ed.) Europäische Grundrechte und Grundfreiheiten, 3rd CMLRev ed. 2009; *Friedmann/Mestmäcker* (eds), Rules for Free International Trade in Services, 1990; *Hansen*, Full Circle: Is There a Difference Between the Freedom of Establishment and the Freedom to Provide Services?, 11 EBLRev 2000, 83; *Hatje*, Die Dienstleistungsrichtlinie – Auf der Suche nach dem liberalen Mehrwert, NJW 2007, 2357; *Hatzopoulos*, Regulating Services in the European Union, 2012; *id.*, The Court’s Approach to Services (2006–2012): From Case Law to Case Load, 50 CMLRev 2013, 502; *Lee*, Liberalisation of Legal Services in Europe: Progress and Prospects, 30 Legal Studies 2010, 186; *Leible* (ed.), Die Umsetzung der Dienstleistungsrichtlinie 2008; *Snell*, True Proportionality and Free Movement of Goods and Services, EBLRev 2000, 50; *Steindorff*, Freedom of Services in the EEC, 11 Fordham International Law Journal, 1987, 347; *van Gerven*, Le droit d’établissement et la libre prestation des services, 1969; *Woods*, Free Movement of Goods and Services within the European Community, 2004.

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1

I. General remarks

Article 56 TFEU traces back to Article 49 TEC, its predecessor in primary law. A substantial change is caused by the introduction of the ordinary legislative procedure in para. 2; apart from that, the original wording is adopted only with editorial changes due to the Lisbon mandate. Overall, a great continuity is apparent in the field of all funda-

⁶ See GHN/*Schweitzer*, Article 294 EGV mn. 5.

mental freedoms. Ever since, the freedom to provide services has focused on cross-border services within the territory of the Union (Article 52 TEU, Article 349 TFEU) in the context of **self-employed activities**. It supplements the freedom of economic activity in terms of activities provided in another Member State **without a permanent establishment** there. The rules on the free movement of workers (Articles 45 et seq. TFEU) apply to all kinds of employed activities (meaning dependent work under an employer's supervision), even if only of temporary nature. The free movement of services supplements the free movement of goods as far as in both cases cross-border services (in a broader sense) are concerned. Both freedoms can be categorized as complementary **freedoms of product trade**¹. The right to the free movement of goods (Articles 34 et seq. TFEU) is *lex specialis* to the free movement of services as every product (from the first steps of production to advertising and selling) is made by an abundance of immaterial 'services'.

The prohibition of restriction on the free movement of services is **directly applicable**.² 2 The ECJ correctly classifies it as a '**fundamental principle of the Treaty**'³. It has changed from a principle of non-discrimination to a comprehensive prohibition of restriction, due to the ECJ's case-law.⁴

II. Beneficiaries

3

The freedom to provide services favours nationals of a Member State that are established in a Member State as **service providers** (active freedom to provide services) or as **recipients of services** (passive freedom to receive services). Telecommunication services (internet etc.) with neither the service provider nor the recipient of the service crossing a border *in persona* are included. Companies (within the meaning of Article 54 TFEU) actually having their registered office in a Member State are considered to be equivalent⁵. Nationals of a third country who are established within the Union can be treated equally to nationals of a Member State; this is decided by the European Parliament together with the Council in accordance with the ordinary legislative procedure (Article 56 para. 2 TFEU). A corresponding provision has not yet been enacted.

According to Article 56 para. 1 TFEU, service providers and service recipients shall be 4 established in different Member States, meaning that services must be provided within EU territory and shall have a cross-border character (in a broader sense) without border crossing in *persona* being required⁶; Article 56 TFEU applies whenever a service provider offers services in a Member State other than that in which he is established.⁷

III. Overview

5

Articles 56, 57 TFEU contain the basic rules regarding the freedom to provide services. Article 58 TFEU declares exceptions and special provisions on transport policy and on the movement of capital; further exceptions: Article 62 TFEU in conjunction with

¹ See also CR/Kluth, Articles 56/57 AEUV mn. 2.

² ECJ Case 33/74 *van Binsbergen* [1974] ECR 1299.

³ ECJ Case 279/80 *Webb* [1981] ECR 3305.

⁴ Cf. Schwarze/Holoubek, Articles 56, 57 AEUV mns 69 et seq.

⁵ See Article 62 TFEU mn. 7.

⁶ See Article 57 TFEU mn. 5.

⁷ ECJ Case C-379/92 *Peralta* [1994] ECR I-3453; Case C-255/93 *Commission v France* [1994] ECR I-4949.

Articles 51, 52 TFEU. According to Article 59 TFEU, the Council has a general legislation power. As long as restrictions are permitted, Article 61 TFEU prohibits discrimination of any kind against nationals of other Member States. Article 60 TFEU contains a declaration of intent with regard to further liberalisation. Besides, Article 62 TFEU refers to provisions on freedom of establishment.

6 The Euratom Treaty⁸ contains special provisions on service related regulations within its scope of application.

7 Special provisions shall apply to associated territories of the Member States.⁹ Such provisions can be stipulated by international treaties with **third countries**, too (especially: agreements of association, Article 217 TFEU). However, their content must be interpreted according to the objective and purpose of the agreements, which is not necessarily identical with the freedom to provide services within the meaning of Article 56 TFEU.

8 IV. In particular: Services Directive

In secondary legislation, the freedom to provide services is especially regulated by the highly controversial Directive 2006/123/EC on services in the internal market (**'Services Directive'**).¹⁰ The Directive as a proactive instrument wanted to contribute to the so-called **'Lisbon agenda'** which intended to make Europe the most competitive knowledge-based economy in the world by 2010 (an over-ambitious aim as shown by reality). The **internal market** shall be **completed** also in the context of the freedom to provide services.

9 The Directive provides for the implementation by the Member States until 28 December 2009. It shall **apply to all services** supplied in a Member State by providers established in another Member State, see Article 2 para. 1 Services Directive. However, it also contains **exceptions**: for instance in criminal law or in labour law, see Article 1 para. 2 and Article 2 para. 2 lit. a–l, Article 3 para. 2 Services Directive; other excluded sectors are: non-economic services of general interest, for instance the operation of educational and cultural establishments; financial services; electronic communications services and networks; healthcare services; gambling activities; activities which are connected to the exercise of official authority; services in the field of transport, including port services; services of temporary work agencies; social services relating to childcare and support of persons in need; the field of taxation.

10 The Services Directive widely refrains from applying the **country of origin principle** in the field of temporary provision of services, which is contrary to the original draft and which has been strongly criticised (cf. Article 16 Services Directive; the title of the relevant chapter does not contain the concept of the country of origin principle any more).¹¹ The Services Directive has established single points of contact for service providers for the beginning of their services in the host Member State (one-stop-shop-principle).¹² The single point of contact is meant to facilitate the required administrative procedures and shall serve as the only authority which the service providers have to deal with. Legal services have been widely excluded from the Services Directive and are regulated by special secondary legislation. It remains to be seen to what extent activities respectively eco-

⁸ The consolidated version of the Euratom Treaty can be found in OJ 2010 C 84/1.

⁹ See Article 198 TFEU mn. 5.

¹⁰ The conceptual amendments of the final directive in comparison to the original draft are seen critically; cf. the editorial comments in CMLR 2005, 307.

¹¹ See Article 16 Services Directive; Ehlers/*Pache*, § 11 mns 101 et seq.

¹² Again Ehlers/*Pache*, § 11 mn. 110.

conomic sectors not covered by the Directive today will be included in the scope of the Services Directive in future.¹³

Article 57 [Services] (ex Article 50 TEC)

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.

Bibliography: *Classen*, Die Grundfreiheiten im Spannungsfeld von europäischer Marktfreiheit und mitgliedstaatlichen Gestaltungskompetenzen, EuR 2004, 416; *Hilf/Oeter*, WTO-Recht, 2nd ed. 2010; in addition, see the literature to Article 56 TFEU; *Schütz/Bruha/König*, Casebook Europarecht, 2004; *Micklitz*, Fernabsatz und e-commerce im Schuldrechtsmodernisierungsgesetz, EuZW 2001, 133.

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I. The concept of service

1

1. General remarks

Apart from editorial changes due to the Lisbon mandate, Article 57 TFEU adopts the exact wording of Article 50 TEC; in sentence 3 the wording does not read ‘State’ any longer but the more specific expression ‘Member State’ is chosen. This is a parallel development to draft-Article III-145 TECE. Article 57 TFEU formulates the concept of ser-

¹³ See *Hatje*, NJW 2007, 2357 et seq.

vices as catch-all element, not accurately reflecting the reality of a modern service society. Especially goods and services are equilibrated in their economic significance, at the level of international law expressed by the GATS (General Agreement on Trade in Services) under the roof of the WTO.¹ Although the wording may imply Article 57 TFEU being an exception clause², de facto a central element of the free movement of products is developed. In this context, the ECJ emphasized that the freedom of services has an independent scope of application and is not only a subsidiary catch-all freedom.³

- 2 The term 'service' is an original expression of Union law which cannot be specified by adopting the Member States' civil law or economic definitions.⁴ Services within this meaning, aiming at participation in economic activity, shall be considered to be profit-orientated services, as far as they are not subject to the provisions relating to the free movement for goods (Articles 34 et seq. TFEU), capital (Articles 63 et seq. TFEU) and persons (Articles 45 et seq., Articles 49 et seq. TFEU), which all give precedence to the freedom of services because of speciality. Accordingly, a service is not qualified as service under the Treaties if the service consists of moveable goods (for instance recordings, films, books)⁵; if the service consist of physical capital or rights (free movement of capital); if the service is provided by employed persons (free movement of workers); if the service is provided on the basis of an establishment in the other Member State (freedom of establishment); it is sufficient that the presence in another Member State consists of an office managed by a person who is independent but authorised to act on a permanent basis for the undertaking not only for a single service but as an agency.⁶ In contrast, the temporary setting up of a structure (office, surgery, law office) necessary for providing the relevant service is not an establishment.⁷ Services lacking any economic motivation, especially the aspect of remuneration (e.g. voluntary social commitment) do not fall under the material scope of application. The supply of sports betting services via the internet is covered by the freedom of services as well.⁸
- 3 If the provider (only) wants to evade the professional rules that have to be observed in case of establishment, cross-border activities entirely or mainly directed towards the territory of another Member State do not fall within the provisions on the freedom of services but within the provisions on the freedom of establishment.⁹ For the criteria of frequency and continuity that could question the temporary nature of a service, see also the *Schnitzer* case¹⁰.
- 4 For further questions on demarcation regarding the free movement of goods, see Cases C-71/02¹¹, C-36/02¹², C-20/03¹³; regarding the free movement of capital, see Case C-452/04¹⁴.¹⁵

¹ See Hilf/Oeter/Michaelis, WTO-Recht, § 20, 409 et seq.

² See also Schütz/Bruha/König, 714.

³ ECJ Case C-452/04 *Fidium Finanz* [2006] ECR I-9521.

⁴ See CR/Kluth, Article 56/57 AEUV mn. 7.

⁵ ECJ Case 155/73 *Sacchi* [1974] ECR 409.

⁶ ECJ Case 155/73 *Sacchi* [1974] ECR 409.

⁷ ECJ Cases C-55/94 *Gebhard* [1995] ECR I-4165; C-190/95 *ARO Lease* [1997] ECR I-4383; C-298/99 *Commission v Italy* [2002] ECR I-3129.

⁸ ECJ Case C-243/01 *Gambelli* [2003] ECR I-13031.

⁹ ECJ Case 155/73 *Sacchi* [1974] ECR 409; Case C-148/91; *VOO* [1993] ECR I-487; Case C-23/93 *TV 10* [1994] ECR I-4795.

¹⁰ ECJ Case C-215/01 *Schnitzer* [2003] ECR I-14847.

¹¹ ECJ Case C-71/02 *Karner* [2004] ECR I-3025

¹² ECJ Case C-36/02 *Omega* [2004] ECR I-9609.

¹³ ECJ Case C-20/03 *Burmanjer* [2005] ECR I-4133.

¹⁴ ECJ Case C-452/04 *Fidium Franz* [2006] ECR I-9521.

¹⁵ For further references, see Schwarze/Holoubek, Articles 56, 57 AEUV mn. 32.

2. Self-employed activity

5

The service must be provided in self-employment. Sentence 2 exemplarily lists possible types of activities: activities of an industrial character, of a commercial character, of craftsmen, of the professions. This also includes trading in futures¹⁶, broadcasting of television programmes¹⁷, cable broadcasting¹⁸, the conclusion of insurance contracts¹⁹ and leasing²⁰.

3. Commercial activity

6

The service must be ‘normally provided for remuneration’, thus it has to be of a commercial nature.²¹ This is the case with universities which are essentially financed from private funds (in particular by the students) and seeking to make profits but not with universities financed from public funds.²² A respective freedom of payments is a necessary consequence of the freedom of services.²³ Unenforceable obligations (gambling debts) are also considered as remuneration.²⁴ In case the characteristic of remuneration is lacking and thus the service is not qualified as service under the Treaties, the principle of non-discrimination set out in Article 18 TFEU may still be applicable.²⁵

4. Cross-border activity

7

The service must be related to the internal market, meaning it must be a cross-border activity. A service that is only related to the national market is not covered by Articles 56 et seq. TFEU.²⁶

II. Freedom of services

8

1. Types of freedom of services

a) The (active) freedom to provide services

The active freedom to provide services is the ‘normal case’ as provided for in Article 57 s. 3 TFEU. In this case, a person originally working in one Member State travels to another Member State to provide services there. **Example:** The building contractor accomplishes work in another Member State; the commercial or insurance agent travels to customers in another Member State; the doctor visits the patient in another Member State; the lawyer visits the client or travels to court in another Member State. Restrictions imposed by the Member State on the service provider have to meet the requirements of the freedom to provide services.²⁷

¹⁶ ECJ Case 15/78 *Koestler* [1978] ECR 1971.

¹⁷ ECJ Case 52/79 *Debauve* [1980] ECR 833.

¹⁸ ECJ Case 62/79 *Coditel* [1980] ECR 881.

¹⁹ ECJ Case 205/84 *Comission v Germany* [1986] ECR 3755.

²⁰ ECJ Case C-451/99 *Cura Anlagen* [2002] ECR I-3218.

²¹ See Article 49 TFEU mn. 5.

²² ECJ Case C-109/92 *Wirth* [1993] ECR I-6447.

²³ ECJ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

²⁴ ECJ Case C-498/99 *Town & County Factors* [2002] ECR I-7173.

²⁵ ECJ Case C-147/03 *Commission v Austria* [2005] ECR I-5969.

²⁶ Also see *Classen*, EuR 2004, 416 et seq.

²⁷ ECJ Case C-60/00 *Carpenter* [2002] ECR I-6279.

b) The (passive) freedom to receive services

- 9 The freedom of services also covers cases of cross-border use of services in which the service recipient travels to the service provider in another Member State. **Example:** The patient undergoes medical treatment in another Member State²⁸, the tourist supplies accommodation and tourist guides services²⁹, the student takes lessons at a commercial university³⁰. However, the transfer of residence to another Member State, in order to receive services there for an indefinite period of time, is not covered.³¹

c) The free movement of products (corresponding services)

- 10 In this case, neither the service provider nor the service recipient cross borders but rather the service as product is transmitted across the border (corresponding service). **Examples:** Participation in a correspondence course; written legal advice; radio and television broadcasting, also via cable television³²; advertising for a lottery³³; granting of presentation licences to film distributors³⁴; financial services³⁵; services relating to e-commerce³⁶.

d) Foreign services

- 11 The provision also applies to situations in which service provider and service recipient are established in the same Member State but the service is provided in another Member State, or even has to be provided there due to its very nature. Textbook examples are the tourist guide cases³⁷.

12 2. Content of the freedom of services**a) Principle of non-discrimination**

The service provider shall not be discriminated against nationals of the State of destination on grounds of nationality (principle of national treatment³⁸).³⁹

- 13 The service recipient who travels to the service provider (for instance as a tourist) shall not be discriminated on grounds of nationality as well.⁴⁰ For example: In case of a serious injury caused during a tourist stay, the tourist can claim public law compensation from the Member State that this Member State provides for victims of violent crimes.⁴¹ Indi-

²⁸ ECJ Joined Case 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; Case C-368/98 *Vanbraekel* [2001] ECR I-5363; Case C-372/04 *Watts* [2006] ECR I-4325.

²⁹ ECJ Case 186/87 *Cowan* [1989] ECR 195; Case C-348/96 *Calfa* [1999] ECR I-11.

³⁰ ECJ Case C-109/92 *Wirth* [1993] ECR I-6447.

³¹ ECJ Case C-70/95 *Sodemare* (old people's homes) [1987] ECR I-3395.

³² ECJ Case C-23/93 *TV 10* [1994] ECR I-4795.

³³ ECJ Case C- 275/92 *Schindler* [1994] ECR I-1039.

³⁴ ECJ Case C-17/92 *FDC* [1993] ECR I-2239.

³⁵ ECJ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

³⁶ Cf. *Micklitz*, EuZW 2001, 133 et seq; for further examples, see *Schwarze/Holoubek*, Articles 56, 57 AEUV mns. 40 et seq.

³⁷ Such as ECJ Case C-398/95 *SETTG* [1997] ECR I-3091.

³⁸ ECJ Case 33/74 *van Binsbergen* [1974] ECR 1299; Case 39/75 *Coenen* [1975] ECR 1547; Case C-375/92 *Commission v Spain* [1994] ECR I-923; Case C-20/92 *Hubbard* [1993] ECR I-3777 (security of legal costs in case of foreign plaintiff).

³⁹ Cf. Article 49 TFEU mn. 8 et seq.

⁴⁰ ECJ Case C-45/93 *Commission v Spain* [1994] ECR I-911; Case C-388/01 *Commission v Italy* [2003] ECR I-721 (entrance fee for museum visit).

⁴¹ ECJ Case 186/87 *Cowan* [1989] ECR 195.

rect discrimination occurs in case of preferential harbour dues for ships flying the flag of the port State⁴²; in case of higher facility charges for flights within the EU than for domestic flights⁴³; also in case of the allocation of a quota of boat moorings for boat owners established in another Member State⁴⁴. Synchronisation licences for imported films shall not be combined with the obligation to distribute films produced in the national language.⁴⁵ It is not permitted to allow the feeding of television programmes of another Member State's broadcasters in cable television network only on condition that the broadcast will be in the language of the Member State the broadcaster is established in; on condition that the feeding of programmes of non-public broadcasting stations is made subject to prior administrative authorisation that can be linked with legal obligations; on condition that cultural productions that have to reach a legally-prescribed proportion in the non-public broadcasters' programme are defined in a discriminatory manner.⁴⁶ Taxes imposed on satellite dishes provide special (discriminating) advantages to domestic radio and cable television broadcasting.⁴⁷ The reimbursement of costs of a dental treatment in another Member State shall not be subject to the authorisation of the insured person's social insurance carrier.⁴⁸ This applies, in principle, to outpatient medical care if it was not to be expected that the financial equilibrium of the national social security systems would be seriously disrupted and thus the level of protection of public health could be jeopardised.⁴⁹ In contrast, the legal requirement of prior authorisation in case of clinical care in another Member State was justified on that ground⁵⁰ if the decision is based on objective and non-discriminatory criteria which are known in advance⁵¹. Social assistance on housing (interest rate subsidies) shall not be dependent on the establishment of the credit institute in a Member State. This shall also apply to the different taxation of endowment policies depending on the place of establishment of the insurance company.⁵² The provision of financial guarantees for an employee established in another Member State shall not be dependent on involving a domestic credit institution.⁵³ The taxation of gross income for non-residents is not permitted if the net income of residents is taxed.⁵⁴

b) Elimination of general obstacles (prohibition of restrictions)

The ECJ no longer interprets the freedom of services just as principle of non-discrimination but as comprehensive prohibition of restrictions.⁵⁵ Because of the general obligation of the Member States to **promote** the freedom of services⁵⁶, they are also obliged to eliminate obstacles resulting from differences in their provisions applicable to every legal subject irrespective of nationality. The characteristic of the freedom of services that the active and the passive freedom mean a selective (temporally) activity only and

⁴² ECJ Case C-18/93 *Corsica Ferries* [1994] ECR I-1783.

⁴³ ECJ Case C-70/99 *Commission v Portugal* [2001] ECR I-4845.

⁴⁴ ECJ Case C-224/97 *Ciola* [1999] ECR I-2517.

⁴⁵ ECJ Case C-17/92 *FDC* [1993] ECR I-2239.

⁴⁶ ECJ Case C-211/91 *Commission v Belgium* [1992] ECR I-6757.

⁴⁷ ECJ Case C-17/00 *De Coster* [2001] ECR I-9445.

⁴⁸ ECJ Case C-158/96 *Kohll* [1998] ECR I-1931.

⁴⁹ ECJ Case C-385/99 *Müller-Fauré* [2003] ECR I-4509.

⁵⁰ ECJ Case C-157/99 *Smits* [2001] ECR I-5473.

⁵¹ ECJ Case C-385/99 *Müller-Fauré* [2003] ECR I-4509.

⁵² ECJ Case C-118/96 *Safir* [1998] ECR I-1897.

⁵³ ECJ Case C-410/96 *Ambry* [1998] ECR I-7875.

⁵⁴ ECJ Case C-234/01 *Gerritse* [2003] ECR I-5933.

⁵⁵ Cf. Streinz/Müller-Graff, Article 56 AEUV mn. 70.

⁵⁶ See Article 49 TFEU mn. 15 on the 'freedom of establishment.'

that the corresponding services have similarities with the free movement of goods, led to the fact that the obligation to eliminate general obstacles became directly applicable law, more than in the case of the freedom of establishment. All restrictions that are able to prevent or impede the activities of a service provider established in another Member State that provides services there shall be eliminated, though applying without distinction.⁵⁷ The prohibition of restrictions does not only address the Member State in which the service is provided but also the Member State that it is provided from.⁵⁸ Thus, a company can rely on the freedom to provide services towards the Member State it is established in, as far as the services are provided for service recipients established in another Member State.⁵⁹

- 15 In the field of professional activities, such obstacles are (for example) the requirement to be established in the State of destination⁶⁰, a Member State's rule concerning the access to a profession, the principle of territoriality on legal representation, the requirement of a solvency certificate, the Member State's call on travel agencies not to hire self-employed tourist guides⁶¹. The modalities of an adhesion claim are no obstacles.⁶²
- 16 An **obstacle** to the exercise of the freedom to provide services is permissible **only** by requirements that do not discriminate against nationality or place of establishment and (a) serve the public interest⁶³, (b) are appropriate to achieve the objectives pursued and do not go beyond what is necessary to achieve the objectives⁶⁴, (c) the public interest is not protected by the rules to which the person providing the service is subject in his or her Member State of origin⁶⁵, and which (d) are proportionate with regard to the importance of the freedom to provide services⁶⁶. The conditions of a requirement of establishment must be reviewed particularly strictly as it makes the exercise of the freedom to provide services impossible as a whole.⁶⁷ Within a comprehensive proportionality assessment especially the Union's fundamental rights have to be taken into account as limiting the scope of potential justifications.⁶⁸
- 17 The ECJ denied, for example, the **justification of the following requirements**: requirement of establishment for legal advisory professions⁶⁹; requirement of establishment for insurance companies⁷⁰; different taxation of an insurance in case the insurance company is not established in the Member State⁷¹; requirement of insurance for a cross-border car leasing with an insurer established in the same Member State⁷²; if a leasing company seated in another Member State needs to have a headquarter in Austria or needs to agree with the registration of a car in Austria on the name of the lessee⁷³; requirement of a domestic branch office for temporary work agencies, lodging of a security

⁵⁷ ECJ Case C-43/93 *Vander Elst* [1994] ECR I-3803.

⁵⁸ ECJ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

⁵⁹ ECJ Joined cases C-430/99 and C-431/99 *Sea-Land Service* [2002] ECR I-5235.

⁶⁰ ECJ Case C-101/94 *Commission v Italy* [1996] ECR I-2691.

⁶¹ ECJ Case C-398/95 *Ergasias* [1997] ECR I-3091.

⁶² ECJ Case C-177/94 *Perfili* [1996] ECR I-161.

⁶³ ECJ Cases C-43/93 *Vander Elst* [1994] ECR I-3803; C-384/93 *Alpine Investments* [1995] ECR I-1141; C-398/95 *Ergasias* [1997] ECR I-3901.

⁶⁴ ECJ Case C-204/90 *Bachmann* [1992] ECR I-249.

⁶⁵ ECJ Case 279/80 *Webb* [1981] ECR 3305.

⁶⁶ ECJ Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221.

⁶⁷ ECJ Case C-43/93 *Vander Elst* [1994] ECR I-3803.

⁶⁸ ECJ Case C-514/03 *Commission v Spain* [2006] ECR I-963.

⁶⁹ ECJ Case 427/85 *Commission v Germany* [1988] ECR 1123; Case C-131/01 *Commission v Italy* [2003] ECR I-1659.

⁷⁰ ECJ Case 205/84 *Commission v Germany* [1986] ECR 3755.

⁷¹ ECJ Case C-422/01 *Ramstedt* [2003] ECR I-6817.

⁷² ECJ Case C-451/99 *Cura Anlagen* [2002] ECR I-3193.

⁷³ ECJ Case C-451/99 *Cura Anlagen* [2002] ECR I-3193.

at a domestic bank⁷⁴; duty of a transit haulier to register in a business register⁷⁵; the duty to register in the register of qualified craftsmen for service providers is no compelling reason of public interest if the service will be delayed or complicated thereby; however, it shall not lead to any additional administrative costs or obligatory payment of contributions to the Chamber of Crafts⁷⁶; territoriality of legal representation by lawyers within the limits laid down by Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services⁷⁷; registration into the register of patent agents⁷⁸; an imperative for an address of service of a representative registered in the national territory inland for a non-resident patent lawyer⁷⁹; certain advertising restrictions for television broadcasting⁸⁰; requirement of licensing for the control of the patent period under the *Rechtsberatungsgesetz* (German Legal Advice Act)⁸¹; requirement of a qualification test for tourist guides entering with a tourist group for guidance tours to other places than museums or historical monuments⁸²; the exclusion of self-employed tourist guides to protect the professional life⁸³; preference for local/national companies in placing of public contracts⁸⁴. A Member State may not require from a service provider employing third-country nationals to obtain work permits for them at the national Immigration Office regularly and habitually or to bear the costs for it⁸⁵; the establishment of employer contributions (so-called 'bad weather stamps') in the receiving State if comparable contributions were already paid in the host Member State⁸⁶. Because of the specific nature of lotteries (need to protect consumers and the social order), it is subject to the Member States' discretion whether lottery activities shall be prohibited or restricted, as far as prohibitions or restrictions are non-discriminatory.⁸⁷ From the case-law on consumer protection, for instance against misleading advertising, see case C-65/05⁸⁸; for the functionality of the administration of justice, see joined cases C-94/04⁸⁹ and C-202/04⁹⁰.

It remains questionable whether the *Keck*⁹¹ judgment of the ECJ can be transferred to the freedom of services. The ECJ is rather sceptical with regard to that question but left it open in the case *Alpine Investments*⁹². A transfer appears to be structurally possible but is stretched to its limits when the market access would be completely frustrated.

⁷⁴ ECJ Case C-279/00 *Commission v Italy* [2002] ECR I-1446.

⁷⁵ ECJ Case C-264/99 *Commission v Italy* [2000] ECR I-4417.

⁷⁶ ECJ Case C-58/98 *Corsten* [2000] ECR I-7919; Case C-215/01 *Schnitzer* [2003] ECR I-14847.

⁷⁷ ECJ Cases 292/86 *Gullung* [1988] ECR 111; C-294/89 *Commission v France* [1991] ECR I-3591.

⁷⁸ ECJ Case C-131/01 *Commission v Italy* [2003] ECR I-1659.

⁷⁹ ECJ Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351.

⁸⁰ ECJ Case 352/85 *Kabelregelung* [1988] ECR 2085; Joined Cases C-34/95, C-35/95 and C-36/95 *KO* [1997] ECR I-3843.

⁸¹ ECJ Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221.

⁸² ECJ Case C-154/89 *Tourist Guides* [1991] ECR I-659.

⁸³ ECJ Case C-398/95 *Ergasias* [1997] ECR I-3091.

⁸⁴ ECJ Case C-362/90 *Commission v Italy* [1992] ECR I-2353.

⁸⁵ ECJ Case C-43/93 *Vander Elst* [1994] ECR I-3803; Joined Cases C-317/01 and C-369/01 *Abatay* [2003] ECR I-12301.

⁸⁶ ECJ Case C-272/94 *Guiot* [1996] ECR I-1905.

⁸⁷ ECJ Case C-275/92 *Schindler* [1994] ECR I-1039; for gambling, see also Case C-6/01 *Anomar* [2003] ECR I-8621.

⁸⁸ ECJ Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

⁸⁹ ECJ Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421.

⁹⁰ For numerous further examples, see Schwarze/*Holoubek*, Articles 56, 57 AEUV mns 107 et seq.

⁹¹ See Article 34 TFEU mns 20 et seq.

⁹² ECJ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

19

3. Accompanying rights

For entry, departure and residence, see Article 49 TFEU mn. 22. The service provider has the right to travel together with his staff in another Member State. The transfer of staff shall not be linked to the obligation to obtain a work permit.⁹³ This also applies to third-country nationals.⁹⁴ The freedom to travel also applies to the service recipient (in this case necessarily a Union citizen) who travels to the service provider. She or he may not be prevented by her or his home State to make the required payments either.⁹⁵ Preventing the entry and residence of a Union citizen's wife who is a third-country national and who takes care of the children of the husband's first marriage in his home State, is a violation of the freedom of services of a Union citizen who travels to other Member States for business purposes.⁹⁶ The described rights of free movement are more than annex rights today. They result from the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Free Movement Directive) as well as Regulation (EU) No 492/2011 on freedom of movement for workers within the Union and directly from the Union citizens' right to move and reside freely within the territory of the Member States (Article 21 TFEU). Thereby, the EEC Treaty's restriction to market citizens has been overcome.

Article 58 [Transport services; movement of capital]
(ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

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1

I. General remarks

The Treaty of Lisbon adopts the former Article 51 TEC into Article 58 TFEU without any substantial changes. The provision contains special rules for cross-border services in the field of transport (para. 1) and services connected with movements of capital (para. 2).

2

II. Transport

The Articles 90–100 TFEU apply as special provisions for services in the field of transport. The articles contain the scope of the freedom to provide services (Article 90 TFEU),

⁹³ ECJ Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.
⁹⁴ ECJ Case C-43/93 *Vander Elst* [1994] ECR I-3803.
⁹⁵ ECJ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.
⁹⁶ ECJ Case C-60/00 *Carpenter* [2002] ECR I-6279.

its direct applicability (Article 91 TFEU) and the legislative competence of the Council and the Commission (also Article 91 TFEU). However, this does not mean that the basic principle of the free movement of services would be totally inapplicable in the field of transport.¹ The exemption does not include the traffic related assistant freedoms. On the question of the applicability of the freedom to provide services to the free sea transport, see case *Agip Petroli*².

III. Movement of capital

3

As far as services in the field of banks or insurances are connected to the movement of capital, the provisions of the free movement of capital apply. If, exceptionally, a connection to the movement of capital is missing, only Articles 56 et seq. TFEU apply.

The TFEU does not contain a detailed definition of services which are connected to the movement of capital. A clue for the **banking sector** is provided by paragraph 2 in combination with Annex I of the Directive 73/183/EEC on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions. Several coordination directives were enacted for the facilitation of the movement in the banking sector.

The service of **insurance** consists in taking over a risk with respect to the policy holder which resides in another Member State. It is connected to the movement of capital because the origination of the claim of the insurance policy as be interpreted to be part of the movement of capital.

The directives enacted for this purpose concern life insurance (Directive 2002/83/EC concerning life assurance); direct insurance and co-insurance (excluding life insurance) (Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)); motor liability insurance (Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability).³

Article 59 [Liberalisation measures] (ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

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¹ ECJ Case C-92/01 *Stylianakis* [2003] ECR I-1291.

² ECJ Case C-456/04 *Agip Petroli* [2006] ECR I-3395.

³ Concerning the general Services Directive, cf. Article 56 TFEU mn. 8.

1

I. General remarks

Article 59 TFEU traces back to Article 53 TEC: Its para. 2 remains identical; according to para. 1, the European Parliament and the Council act in accordance with the ordinary legislative procedure after the Economic and Social Committee is consulted. The legislative power concerns the abolition of restrictions of the freedom to provide services. Legal instrument is the directive. Since the transitional period ended on 31 December 1969, the prohibition of restrictions according to Articles 56, 57 TFEU is directly applicable. Therefore the right to issue directives has lost its importance. Indirect obstacles which result from the application of the principle of the State of destination are to be overcome on the legal basis of harmonisation according to Articles 53, 62 TFEU. Article 59 para. 2 TFEU remains just a 'historical reminiscence' which confirms again how strongly the EEC was oriented to the free movement of goods.⁴

2

II. Directives

The European Parliament and the Council issue directives to realize the freedom to provide services and with regard to the liberalisation of a special service in accordance with the ordinary legislative procedure (Article 289 TFEU) and after consulting the Economic and Social Committee.

- 3 There are numerous directives concerning the freedom to provide services and the freedom of establishment. As far as directives concern the abolition of restrictions, they have a declaratory effect because of the direct applicability of Articles 56, 57 TFEU. This shall not apply if they are dealing with the harmonization in the field of the exceptionally permitted restrictions.⁵

***Article 60 [Further liberalisation]
(ex Article 53 TEC)***

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

- 1 The Treaty of Lisbon changes Article 53 TEC into Article 60 TFEU. The modifications which are made were already created by draft-Article III-148 TECE. The expression 'The Member States declare' is changed into the more proactive 'The Member States shall endeavour'. Apart from that, the original legislative contents stay the same.
- 2 Article 60 TFEU contains (considering the indefiniteness of its conditions) a not binding declaration of intent ('The Member States shall endeavour') of the Member States, to remove restrictions on the freedom to provide services overriding the status which is provided in the directives (see Article 59 para. 1 TFEU). Because the freedom to provide

⁴ Cf. LB/Seyr, Article 59 AEUV mn. 2.

⁵ See Article 57 TFEU mn. 14.

services is directly applicable¹ since the transitional period ended, this provision remains only applicable to exceptionally permitted restrictions.² A Commission recommendation as provided by para. 2 has not yet been enacted. Despite its programmatically direction of impact, the provision did not achieve practical significance – neither before nor after the transitional period ended on 31 December 1969. The fact that it was not deleted might be that it can serve as a help for interpretation one day.³

**Article 61 [Transitional scheme]
(ex Article 54 TEC)**

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

The former Article 54 TEC becomes Article 61 TFEU. There are no substantial 1 changes (none were foreseen in draft-Article III-149 TECE either). The original provision contained a most-favoured-nation treatment demand for the transitional period in favour of the service providers (services within the meaning of Article 56 para. 1 TFEU). For (still) permitted restrictions a distinction between different foreign service providers based on their nationality is inadmissible; so is a distinction based on their place of residence, too. The BENELUX Treaty (see Article 350 TFEU) – as a special provision – formed an exemption.

Since the prohibition of restrictions is directly applicable, the provision has only been 2 applicable on (all the same) permitted restrictions.^{1*} For national restrictions, which are not permitted, the question of equal treatment does not arise. This is simply due to the fact that – given the primacy of Union law – the freedom to provide services overrules a national restriction (see Article 4 TEU). In practice, the provision is obsolete today and should have been deleted^{2*}, especially because it creates the suggestion of an outstanding position of the freedom to provide services in terms of the most-favoured-nation treatment which is, in fact, of equal importance for other fundamental freedoms, too.

**Article 62 [Mutatis mutandis application of provisions on
freedom of establishment]
(ex Article 55 TEC)**

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

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¹ See Article 56 TFEU mn. 2.

² See Article 57 TFEU mn. 14.

³ See LB/Seyr, Article 60 AEUV mn. 2.

^{1*} See Article 57 TFEU mn. 14.

^{2*} See VHvH/Khan/Eisenhut, Article 61 TFEU.

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1 I. General remarks

The Treaty of Lisbon adjusts the **reference norm** of the old Article 55 TEC to the new regulatory scheme. Draft-Article III-150 TECE had the same function. There are no changes concerning the contents of the provision in Article 62 TFEU, first of all because the structure and the concept of the fundamental freedoms remain completely unchanged. The active and passive freedom to provide services¹ is similar to the freedom of establishment. This similarity, in particular concerning the fact that the protected services are *personal* services, justifies the reference to certain provisions of the freedom of establishment in order to regulate the freedom to provide services. The reference concerns: the authorised persons (equal treatment of certain companies and legal persons, Article 54 TFEU); making the freedom to provide services more effective by harmonisation directives (Article 53 TFEU); restrictions as to the exercise of official authority (Article 51 TFEU); and the *ordre public*-reservation of the State of destination (Article 52 TFEU).

2 II. Exercise of official authority (Article 51 TFEU)

The freedom to provide services in a Member State does not extend to activities which are necessarily connected to the **exercise of official authority** in that Member State. The Member State is allowed to reserve such activities for its own citizens. Controversially discussed are (inter alia) the activities of lawyers as notaries² or the official price fixing of stockbrokers, also the recognition of motor vehicle examination by domestic garages as an obligatory examination³. Regarding the limited discretionary power of the Member States whenever they assign professional activities as an exercise of official authority, reference has to be made to Article 51 TFEU mn. 3. According to Article 51 para. 2 TFEU, the Council can (based on the ordinary legislative procedure and thus together with the Parliament) exempt further activities from the scope of the freedom to provide services.⁴ This has not happened yet.

3 III. Reservation of public policy, security and health
(Article 52 TFEU)

The provision, which serves the protection of the **ordre public** of a Member State, allows this Member State to provide special rules for foreigners on grounds of public policy, security and health. Such grounds are, for instance: the preservation of a determined extent of the medical and nursing care of the population⁵; the guarantee of port safety by an exclusive licence to a local mooring service⁶; the prohibition of an advertisement for a training as a natural healing practitioner if it concerns the modalities of the training

¹ See Article 57 TFEU mns 8, 9.
² See ECJ Joined Cases C-47/08, C-50/08, C-51/08, C-52/08, C-53/08, C-54/08 and C-61/08 *Commission v Belgium* [2011] ECR I-4105.
³ See ECJ Case C-55/93 *van Schaick* [1994] I-4837.
⁴ See Article 51 TFEU mn. 5.
⁵ Case ECJ C-158/96 *Kohll* [1998] ECR I-1931.
⁶ Case ECJ C-266/96 *Corsica Ferries* [1998] ECR I-3949.

which are prohibited in this Member State in accordance with the TFEU.⁷ The advertising of a lottery must not be prohibited if the Member State has permitted a lottery of this Member State itself.⁸ The Council is authorised together with the European Parliament to enact harmonisation directives in accordance with the ordinary legislative procedure.⁹ It has made use of this especially by Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

The term ‘public policy’ has to be **interpreted narrowly**. The ECJ requests the existence of an actual and sufficiently serious danger; furthermore the danger needs to concern the fundamental interest of society.¹⁰ Especially in the light of the fundamental rights of the Union, a restrictive interpretation has to be asked for where an infringement of human rights otherwise would be at stake. However, where fundamental legal positions being constitutive for the human rights architecture of a Member State are concerned – such as human dignity according to Article 1 para. 1 Grundgesetz (German Constitution) –, the ECJ allows the Member State concerned to enact stricter reservations than required by a common European understanding of these fundamental human rights positions.¹¹

IV. Directives on recognition and coordination (Article 53 TFEU)

The requirement of a diploma, certificate and other evidence of formal qualifications and the necessity to meet other conditions for the access to a profession in a Member State, in or for which citizens provide a cross-border service, can be a limitation on the free movement of services (example: admission as a lawyer to a certain court) if the requirement is not overcome by the direct applicability of the freedom to provide services anyway. Insofar, the Council, together with the European Parliament and in accordance with the ordinary legislative procedure, can issue directives on coordination and recognition to abolish such obstacles. These directives may provide for the mutual recognition of diplomas and other evidence of formal qualifications which were acquired in the respective Member State and which take into account all other prerequisites having been fulfilled there.¹²

The Council has issued a great number of directives, which affect, besides the freedom of establishment, the freedom to provide services, too.¹³ Directive 2006/123/EC on services in the internal market (Services Directive) is of special importance.¹⁴

Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services remains important – despite the consolidated Services Directive – concerning the facilitation of the actual exercise of the free movement of services of lawyers.¹⁵

In the field of **public procurement**, directives were issued on the freedom to provide services, the freedom of establishment and the free movement of goods (regarding the

⁷ ECJ Case C-294/00 *Deutsche Paracelsus Schulen* [2002] ECR I-6515.

⁸ ECJ Case C-275/92 *Schindler* [1994] ECR I-1039.

⁹ See Article 52 TFEU mn. 4.

¹⁰ See, for instance, ECJ Case C-466/98 *Commission v UK* [2002] ECR I-9427.

¹¹ ECJ Case C-36/02 *Omega* [2004] ECR I-9609.

¹² See Article 53 TFEU mns 8 et seq. for the Directive on the recognition of professional qualifications; references to further secondary legislative acts can be found in *Schwarze/Holoubek*, Article 62 TEC mn. 7 as well as Articles 56, 57 AEUV mn. 22.

¹³ See, once more, Article 53 TFEU mns 8 et seq.

¹⁴ Therefore Article 56 TFEU mns 8 et seq.

¹⁵ Concerning the case of the establishment of a layer in another Member State, see Article 53 TFEU mn. 15.

latter one based on today's Article 114 TFEU), which shall ensure equal access to the award of public contracts and to the possibility of a judicial review of those awards for companies of other Member States. The principles of competition and transparency have to be considered in that regard. The public procurement systems of the Member States are coordinated by framework regulations for this purpose, namely (a) for the field of public construction contracts (Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, repealing the former system of directives, especially Directive 93/36/EEC coordinating procedures for the award of public supply contracts; Directive 92/50/EEC concerning all other procurements as to repairs, maintenance and passenger transport; and Directive 93/36/EEC coordinating procedures for the award of public supply contracts), (b) concerning water, energy and transport supply and regarding the telecommunication sector (Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors). The enactment of the just mentioned coordination directives in 2004 (Directive 2004/13/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector) was supposed to facilitate the European awarding system and to make it more flexible. The main goal of the directives is, at least according to the ECJ's view, to open the national markets for a real bidding competition, which minimises the danger of preferring domestic bidders.¹⁶ Rules on **judicial review** are included in the 'monitoring directives', meaning Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors as amended by Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

- 9 Companies are allowed to rely on the exercise of their freedom to provide services when they post their employees abroad for the provision of these very services (for example: construction workers in the construction business).¹⁷ Therefore a social dumping by the use of cheap workers can lead to a mass-unemployment in the State of destination. To avoid this, **Directive 96/71/EC** concerning the posting of workers in the framework of the provision of services (Posted Workers Directive), permits mandatory rules of minimum wage and minimum conditions in the State of destination which are binding on companies operating cross-borders.¹⁸ It also needs to be noted that the scope of protection of the freedom to provide services includes posting citizens of third countries as workers abroad.¹⁹ It shall also be noted in the context of the Posted Workers Directive that Germany was sentenced by the ECJ due to wrongly calculated parts of the minimum wage.²⁰

¹⁶ For instance ECJ Case C-26/03 *Stadt Halle* [2005] ECR I-1.

¹⁷ See Article 57 TFEU mn. 19.

¹⁸ Concerning the Services Directive, see again Article 56 mns 8 et seq. See also the judgements of the ECJ in Case C-341/05 *Laval* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

¹⁹ See *VHvH/Khan/Eisenhut*, Article 62 AEUV mn. 2; the free movement of workers does not apply in this context, see ECJ Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191.

²⁰ ECJ Case C-341/02 *Commission v Germany* [2005] ECR I-2733.

V. Equal treatment of companies (Article 54 TFEU)

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By reference to Article 54 TFEU, the companies mentioned there, as well as legal persons, are treated equally to natural persons being citizens of a Member State if the conditions provided by this provision are met. However, if a company establishes a contact office which is not connected to the concrete service, it is not the freedom to provide services that is relevant but the freedom of establishment.²¹

CHAPTER 4 CAPITAL AND PAYMENTS

Article 63 [Freedom of movement of capital and payments] (ex Article 56 TEC)

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

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

Bibliography: Andenas/Gromley/Hadjjemmanuil/Harden (eds), European Economic and Monetary Union: The Institutional Framework, 1997; Berghaler, The Relationship Between International Monetary Fund Law and European Union Law: Influence, Impact, Effect, and Interaction Between Autonomy and Dependence, 2013, 159; Dahlberg, Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital, 2005; Devuyst, The European Union's Competence in International Trade after the Treaty of Lisbon, 39 Georgia Journal of International and Comparative Law 2011, 639; Dimopoulos, The Compatibility of Future EU Investment Agreements with EU Law, 39 Legal Issues of Economic Integration, 2012, 447; Fleischer, Case C-367/98, Commission of the European Communities v. Portuguese Republic (Golden shares); C-483/99, Commission of the European Communities v. French Republic (Golden shares); and C-503/99, Commission of the European Communities v. Kingdom of Belgium (Golden shares). Judgments of the Full Court of 4 June 2002, 40 CMLRev 2003, 493; Flynn, Coming of Age: The Free Movement of Capital Case Law 1993–2002, 39 CMLRev 2002, 773; Hindelang, The Free Movement of Capital and Foreign Direct Investment, 2009; James/Micklitz/Schweitzer, The Impact of the Financial Crisis on the European Economic Constitution, EUI Law Working Paper 05, 2010; Kilian, Vereinbarkeit des VW-Gesetzes mit Europarecht, NJW 2007, 3470; Lavranos, New Developments in the Interaction between International Investment Law and EU Law, 9 Law & Practice of International Courts and Tribunals 2010, 409; Moens/Trone, Free Movement of Capital, 4 Ius Gentium: Comparative Perspectives on Law and Justice 2010, 131; Mohamed, European Community Law on the Free Movement of Capital and the EMU, 1999; Nunnenkamp, Liberalization and Regulation of International Capital Flows, 2001; Oliveti, The Free Movement of Capital in the Light of the Treaty of Lisbon, The EU's external dimension in direct tax matters, 2010; Schweitzer, Sovereign Wealth Funds: Market Investors or 'Imperialist Capitalists'? The European Response to Direct Investment by Non-EU State-Controlled Entities, European Yearbook of International Economic Law 2011, 79; Snell, Free Movement of Capital: Evolution as a Non-Linear Process, in: Craig/de Búrca (eds), The Evolution of EU Law, 2011, 18; Swann, The Economics of Europe. From Common Market to European Union, 9th ed., 2000; Usher, Capital Movements and the Treaty on European Union, 12 YEL 1992, 35; Vranes, State Measures Protecting Against 'Undesirable' Foreign Investment. Issues in EU and International Law, 67 Zeitschrift für öffentliches Recht 2012, 639; Wellge, Weg mit dem VW-Gesetz!, EuZW 2003, 429.

²¹ ECJ Case 205/84 *Commission v Germany* [1986] ECR 3755.

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1

I. General remarks

Article 63 TFEU guarantees, similar to its primary law predecessor, the free movement of capital and payments as a fundamental freedom of the internal market. It includes – being a unique feature within the context of the ‘four freedoms’ – transactions within the Union and transactions with third States. The prohibition of restrictions is sufficiently clear and determined as well as is not dependent on implementing measures. It is **directly applicable**.¹ The general regulatory ideas of Directive 88/361/EEC for the implementation of Article 67, which deals with capital transactions, had significantly influenced Article 63 TFEU. Insofar, the directive found a new textual basis in primary law and could develop the *acquis communautaire* in the field of the free movement of capital. The jurisprudence of the ECJ, of course, had also a very strong impact on the *acquis*’ progressive development.

2 Article 65 TFEU contains exceptional rules in favour of measures of the Member States regarding transactions within the Union; Articles 64, 66 (only capital transactions) and 60 (embargo) TFEU provide some special regulations for capital and payment transactions with third States. For the purchase of agricultural land concerning the Czech Republic, Slovakia, Hungary, Lithuania, Latvia, Estonia and Poland restrictive transitional regulations apply/applied. Slovakia was allowed to apply the general economic protection clause (Article 49 TFEU) until 1 May 2011. The Czech Republic, Poland and Cyprus were allowed to hold up existing restrictions during a transitional period of five years for the purchase of second homes. According to Protocol No 6, Malta can – as already Denmark on the basis of Protocol No 16 of 1992) – maintain the applying regulations concerning the purchase of second homes of non-residents which have not resided in Malta for a minimum period of five years.

3

II. Capital transfer and payments

1. Capital transfer

The purpose of the free movement of capital is the protection of investment financing within the Union. This fundamental freedom shall enable a cost-oriented location of production in the Union by a basically free circulation of the investment capital.² The **term ‘capital transfer’ is not defined by the TFEU**. It has been shaped broadly in the legislative practice of the Council. Consequently, it includes all transactions concerning money or real capital which are not directly caused by the free movement of goods or the freedom to provide services (as payments corresponding a good or a service received).³

¹ ECJ Joined Cases C-358/93 and C-416/93 *Bordessa* [1995] ECR I-361.

² See *Schweitzer/Hummer/Obwexer*, *Europarecht, Recht der Europäischen Union*, 2007, 369.

³ See *GS/Kiessel*, Article 56 EGV mn. 1.

Already the two directives on capital transfer from 1960 and 1962 identified **transactions** which were included into capital transactions in their relevant annexes. According to these, the following transactions belong to the core area of capital transactions: middle and long-term borrowing without connection to trade or services transactions (as stated in List C), the emission and the placing of securities and the trade with non-marketable securities. Outside this core area, there are the direct investments, the purchase of real estate, the so-called capital transactions with personal character, the granting of credits which have a connection to trade and services transactions (according to List A) and the trade with marketable securities (according to List B). Another category is formed by short-term capital transactions that can be easily disturbed (List D), which include the so-called speculation and flight capital. Today, **Annex I to Directive 88/361/EEC**⁴ is applicable with the following categories: (i) direct investments; (ii) real estate investments; (iii) transactions with securities, which are normally traded on the capital market; (iv) transactions of share certificates of organisms of collective investments; (v) transactions of securities and other instruments which are normally traded on the money market; (vi) current and deposit transactions with financial institutions; (vii) credits with connection to trade transactions or services, where residents are involved; (viii) loans and financial credits; (ix) sureties and other guarantees and liens; (x) transfer payments to fulfil insurance contracts; (xi) capital transfer with personal character; (xii) import and export of assets; (xiii) other capital transfer.

The ECJ decided that, according to Article 49 s. 2 TFEU, a citizen of a Member State who has decisive influence in a company (because of the amount of shares he or she owns) makes use of her or his freedom of establishment and not of the free movement of capital; only if she or he acts without decisive influence, she or he acts within the scope of the free movement of capital.⁵

2. Payment transactions

Capital movements that qualify as payments in return for a transaction, for instance in the field of the free movement of goods or the freedom to provide services, are not included in the free movement of capital. Payment transactions (sometimes described as a fifth freedom) are subject to those rules which apply to the main service respectively the main activity. This emphasizes the character as an annex freedom. The provision of Article 63 para. 2 TFEU, however, can cause a higher level of liberalisation.

III. Prohibition of restrictions

In contrast to the provisions of the TEEC, already Article 56 TEC, as introduced by the Treaty of Maastricht, did not aim at activities of residents, neither do Article 63 TFEU nor did draft-Article III-156 TECE (summarizing the free movement of capital and payments in one paragraph). The freedom of Article 63 TFEU is not only a ban on discrimination. This is already made expressly clear by its wording. The whole field of capital movement and payments between the Member States as well as between the Member States and third countries shall be free of **any kind of restrictions**. The **Dassonville formula**⁶, as originally shaped by the ECJ concerning the free movement of goods, applies

⁴ ECJ Case C-484/93 *Svensson* [1995] ECR I-3955; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

⁵ ECJ Case C-251/98 *Baars* [2000] ECR I-2787; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-208/00 *Überseering* [2002] ECR I-9919.

⁶ See Article 34 TFEU mn. 8.

accordingly⁷; the ECJ explicitly favours a wide understanding of the *Dassonville* formula here: any measure which hinders the free movement of capital movement and payments directly or indirectly, actually or potentially, shall be covered. Exemptions respectively interferences with the prohibition of restrictions need to be based either on overriding reasons of general interests or on the grounds expressly stated in Articles 64–66 and 75 TFEU.⁸ The application of the *Keck* formula is discussed, too. The parallel structure of the ‘freedoms’ favours an analogous application. Thus, the free movement of capital and payments shall not be applicable to mere ‘procedural arrangements’ (in parallel to the ‘selling arrangements’).⁹ The ECJ, however, applies a stricter standard.¹⁰ Any justification of a restriction needs to be proportionate; in particular, the fundamental rights of the Union have to be taken into account.

- 8 Prohibited restrictions may concern foreign exchange-related but also non-exchange-related barriers, such as the prohibition to sell certain securities to non-residents, cash deposit requirements, limitation of shares for foreign nationals as well as an authorisation requirement for shares of residents and non-residents exceeding a previously fixed amount; concerning the last case, the prohibition does even exceed a mere removal of discrimination of the financial market participants because of their nationality.¹¹ It is also prohibited to generally restrict the purchase of voting stocks of a company.¹² Furthermore prohibited is a provision laying down that an accessory mortgage must be registered in domestic currency¹³; likewise the prohibition of acquisition of loans issued abroad by residents¹⁴; or the exclusion of tax advantages for the transfer at undervalue of shares to companies in which the transferor has a holding¹⁵. An authorisation requirement for the purchase of a build-up plot for non-residents only is a discrimination of nationals coming from other Member States restricting the free movement of capital between the Member States.¹⁶
- 9 It is permitted to apply a general, non-discriminatory authorisation requirement for second residences in respect of regional planning objectives which are of general interest, such as sustaining a permanent resident population or sustaining economic activities (independent from tourism) in certain areas.¹⁷ In this context, a procedure of previous **notification** is permitted, comparable to the one that can be found in the Salzburg Land Transfer Law (as already stated above, a procedure of previous **authorisation** is not permitted).¹⁸ Further aspects regarding the Accession Treaties are dealt with above (see mn. 2 above).
- 10 The tax law-related decisions of the ECJ such as the *Lenz* case¹⁹ concerning the distinction between a permitted discrimination according to Article 65 para. 1 lit. a TFEU and an arbitrary and therefore prohibited discrimination according to Article 65 para. 3 TFEU are of high relevance for manifold restrictions regarding the free movement of

⁷ Cf. LB/Schürmann, Article 63 AEUV mn. 224; see VHVH/Khan/Eisenhut, Article 63 AEUV mn. 18, who speaks of a standardisation as a ‘general and comprehensive prohibition of restrictions’; see also ECJ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

⁸ ECJ Case C-452/01 *Ospelt* [2003] ECR I-9743.

⁹ See VHVH/Khan/Eisenhut, Article 63 AEUV mn. 19.

¹⁰ ECJ Case C-98/01 *Commission v UK* [2003] ECR I-4641.

¹¹ ECJ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

¹² ECJ Joined Cases C-463/00 and C-98/01 *Commission v Spain* [2003] ECR I-4581.

¹³ ECJ Case C-222/97 *Trummer* [1999] ECR I-1661; Case C-464/98 *Westdeutsche Landesbank* [2001] ECR I-173.

¹⁴ ECJ Case C-478/98 *Commission v Belgium* [2000] ECR I-7587.

¹⁵ ECJ Case C-436/00 *Riksskatteverket* [2002] ECR I-10829.

¹⁶ For more details, see Schwarze/Glaesner, Article 63 AEUV mns 19 et seq.

¹⁷ ECJ Case C-302/97 *Konle* [1999] ECR 3099.

¹⁸ ECJ Joined Cases C-515/99, C-519/99, C-524/99, C-526/99, C-540/99 *Reisch* [2002] ECR I-2157.

¹⁹ Case C-315/02 *Lenz* [2004] ECR I-7063.

capital. Also, decisions on the so-called ‘golden shares’ are equally important.²⁰ All in all, the ECJ solved the ‘golden shares’ cases with recourse to the free movement of capital (not the freedom of establishment). The Court held that a provision has to be seen as a restriction if it may hinder the purchase of shares of a company and prevent (potential) investors from other Member States from their (potential) investments.²¹ The ECJ nevertheless accepted and acknowledged the following compelling reasons of general interest, which state actors must explicitly refer to: While safeguarding the energy supply in crises is qualified as a reason of general interest in this regard, unspecified interests as an employee or the threat of job losses are not (in the context of the above-mentioned decision concerning the German Volkswagen law, the ECJ rejected these interests with reference to the participation of employees in the board of directors and with special regard of suitability and necessity); protection of minority shareholders is also seen as a reason of general interest (but rejected if the measure may neither be suitable nor necessary).²² In *Federconsumatori*²³, the ECJ stated that the right of exercising disproportionate control (disproportionate compared to the respective amounts of shares being held), which is reserved for public institutions, is a violation of Union law.

For details concerning capital market law, restrictions on the movement of capital (for example by Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)²⁴ and the further implementation by secondary law, compare the ‘main features of the European Financial Market’²⁵, also in relation to third countries.²⁶ 11

Article 64 [Exemptions of transactions with third states] (ex Article 57 TEC)

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

²⁰ ECJ Case C-367/98 *Golden Shares Portugal* [2002] ECR I-4731; Case C-483/99 *Golden Shares France* [2002] ECR I-4781; Case C-503/99 *Golden Shares Belgium* [2002] ECR I-4809; Case C-463/00 *Golden Shares Spain* [2003] ECR I-4581; Case C-98/01 *Golden Shares UK* [2003] ECR I-4641; Case C-174/04 *Golden Shares Italy* [2005] ECR I-4933; Joined Cases C-282/04, C-283/04 *Golden Shares Netherlands* [2006] ECR I-9141; Case C-112/05 *Volkswagen-Gesetz* [2007] ECR I-8995; Joined Cases C-463/04, C-464/04 *Federconsumatori* [2007] ECR I-10419.

²¹ See Wellige, EuZW 2003, 429.

²² See Kilian, NJW 2007, 3470.

²³ ECJ Case C-464/04 *Federconsumatori* [2007] ECR I-10419.

²⁴ OJ 2005 No L 309/15.

²⁵ See Schwarze/Glaesner, Article 63 AEUV mns 94 et seq. and mns 47 et seq.

²⁶ See Schwarze/Glaesner, Article 63 AEUV mns 111 et seq.

3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

- 1 Article 64 TFEU resembles Article 57 TEC to a great extent: Para. 1 remains substantially unchanged. Para. 2 introduces the ordinary legislative procedure. Para. 3 replaces the last sentence of Article 57 para. 2 TEC, which is based on the textual model of draft-Article III-157 para. 3 TECE.
- 2 The free movement of capital towards third countries can – in accordance with Article 64 TFEU – be subject to restrictions. Member States of the EEA are not treated as ‘third countries’.¹
- 3 Article 64 para. 1 TFEU concerns all exemption clauses of the Union, which already **existed on 31 December 1993**. The clauses in question need to be in connection with direct investments (delimitation to portfolio investments), with the establishment of companies, the delivery of financial services or the admission of securities to the capital market.² Therefore, provisions on reciprocity can be further applied, as for example contained in Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (Second Banking Coordination Directive) or Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive). Article 64 para. 1 TFEU was amended by Article 18 para. 1 Act of Accession 2003, now containing a special provision for Estonia and Hungary. Later on, also an exception for Bulgaria was made.
- 4 The Council and the Parliament can enact **new rules** for capital transactions with third states within the ordinary legislative procedure.
- 5 According to Article 64 para. 3 TFEU, the Council can only decide in a special legislative procedure (in unanimity and after consulting the European Parliament) if measures are concerned that would – within Union law – result in a step backwards regarding liberalisation of capital transactions with third countries. Frequently, the **Dassonville formula** is referred to in order to make sure whether a measure is qualified as a step back behind the status-quo ante.³ Anyway, a comprehensive analysis as to the different impacts on the specific economic sector’s needs is desirable.⁴

Article 65 [National restrictions] (ex Article 58 TEC)

1. The provisions of Article 63 shall be without prejudice to the right of Member States:

- (a) **to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;**
- (b) **to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of fi-**

¹ ECJ Case C-452/01 *Ospelt* [2003] ECR I-9743.

² ECJ Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-4821.

³ See GHN/*Ress/Ukrow*, Article 63 AEUV mn. 134.

⁴ See *Ohler*, Europäische Kapital- und Zahlungsverkehrsfreiheit, 2002.

financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Bibliography: *Bleckmann*, Die Ausnahmen der Dienstleistungsfreiheit nach dem EWG-Vertrag, EuR 1987, 32; *Dietlein*, National Approaches towards a Financial Transaction Tax and Their Compatibility with European Law, 21 EC Tax Review 2012, 207; *Papadopoulos*, Infringements of Fundamental Freedoms within the EU Market for Corporate Control, 9 European Company and Financial Law Review 2012, 221; *Wendt*, A Common Tax Base for Multinational Enterprises in the European Union, 2009.

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I. General remarks

1

Article 65 TFEU traces back to Article 58 TEC and finds its ‘constitutional’ role model in draft-Article III-158 TECE. Draft-Article III-158 para. 4 TECE is added as a new para. 4. The provision recognises the continuous **competence of the Member States** to maintain certain rules for capital and payment transactions among each other and in relation to third countries, or even to introduce such as an exemption of the prohibition of restrictions. The norm is to be interpreted restrictively since it is an exceptional rule; the restrictive interpretation in particular has to meet the requirements of the principle of proportionality. The national provisions need, of course, to consider the implications of the Union’s **fundamental rights** and may not qualify as means of arbitrary discrimination or as disguised restrictions of the free movement of capital and payments (para. 3).

II. The exemptions

2

1. Tax law

The rules of national **tax law**, which **distinguish** according to the taxpayer’s place of residence or to the place of the capital investment, remain unaffected. Without harmonisation of direct taxes, the general differentiation between resident taxpayers and non-

resident taxpayers as well as between capital investors within the country and investors abroad does not have to be abandoned. The final protocol on the Maastricht Treaty contains a declaration that serves as interpretation aid in which the Treaty Conference confirms that this particular right of the Member States does **only** apply to rules existing at the end of 1993; apart from that, fiscal provisions that distinguish between the place of residence or place where the capital is invested, shall no longer be permitted. By this prohibition of deteriorating the status quo, an aggravated tax competition between the Member States shall be avoided. Concerning the taxation of interest payments, Directive 2003/48/EC on taxation of savings income in the form of interest payments (Savings Directive) is applicable.

3

2. Protection of the legal order

The Member States remain competent to take all indispensable measures to prevent **violations** of their laws and administrative provisions, especially in the field of tax law and banking supervision law. This applies also to notification procedures that serve as information for the administration or that are done just for statistical purposes. If a previous notification is sufficient, an authorisation process is not essentially needed.¹ A restricting measure is disproportionate if it has its background in the general assumption that tax evasion or tax avoidance may occur.²

4

The Member States may take further measures that are justified by reasons of public order and security. For this, a genuine and sufficiently serious threat that concerns a non-economic fundamental interest of society is an essential requirement.³ A justification based on general financial interests of a Member State to protect its financial interests, exceeding the reasons mentioned in Article 65 TFEU, is not permitted. Economic reasons cannot serve as justification of restrictions. This also applies to the objective of choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production.⁴ The requirement of an authorisation procedure for the purchase of immovable property in an area of military importance by nationals from another Member State may only be justified if otherwise the military interests of the Member State concerned would be exposed to **real, specific and serious risks**.⁵ A system of previous official authorisation has to be proportionate. It is only permissible if a subsequent registration does not suffice as a less restrictive measure. The system has to be based on objective and non-discriminating criteria, which are made known in advance to the undertakings concerned; all persons affected by a certain restrictive measure must have a legal remedy available to them.⁶

5

III. Other fundamental freedoms

The so-called principle of parallelism of the fundamental freedoms is applicable.⁷ Restrictions on the **freedom of establishment** and the free movement of capital caused by measures of the Member States that are compatible with the TFEU in all other respects

¹ ECJ Joined Cases C-358/93, C-416/93 *Bordessa* [1995] ECR I-361.

² ECJ Case C-478/98 *Commission v Belgium* [2000] ECR I-7613.

³ ECJ Case C-54/99 *Scientology* [2000] ECR I-1335.

⁴ ECJ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

⁵ ECJ Case C-423/98 *Albore* [2000] ECR I-5965.

⁶ ECJ Case C-367/98 *Commission v Portugal* [2000] ECR I-4731; Case C-483/99 *Commission v France* [2002] ECR I-4781.

⁷ Cf. *Bleckmann*, EuR 1987, 32.

remain applicable.⁸ This is assumed to be true also for the relation of free movement of capital and the freedom to provide services.⁹ The Member States may refer to **every exceptional provision** in the range of **every fundamental freedom**.

The provisions on free movement of capital are no obstacle to a public prohibition of an established broadcasting organisation from participating in the capital of a company to be established in another Member State and from providing that company with a bank guarantee if the broadcasts of that company are intended to be received, in particular, in the territory of the first Member State and if those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.¹⁰

IV. National solo efforts (para. 4)

Article 65 para. 4 TFEU extends the legal scope for national solo efforts in the range of restrictive fiscal measures in relation to third countries. Article 65 para. 4 TFEU determines procedural requirements that have to be fulfilled before a Member State is allowed to take the prescribed measures concerning third countries if no decision according to Article 65 para. 3 TFEU has been made. The principle of unanimity applies.

Article 66 [Temporary safeguard measures] (ex Article 59 TEC)

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

Article 66 TFEU traces back to Article 59 TEC and was copyedited only. The provision takes functional disorders of the economic and monetary union (for example caused by speculative capital transactions) into consideration.¹ The Council may **restrict** the movement of capital to and from third countries **in the short term** if the cross-border capital movement would cause or threaten to cause serious difficulties for the functioning of the economic and monetary union. The interference has to be based on **exceptional circumstances**. The measures must be strictly necessary and may not apply more than six months (**temporally limited ultima ratio**). The principle of proportionality is (as already implied by the wording ‘serious difficulties’, ‘not exceeding six months’, ‘strictly necessary’) to be applied very strictly.²

The Council takes its decision with qualified majority on a proposal from the Commission and after consulting the European Central Bank. Even in urgent cases the Council is not entitled to take preliminary safeguard measures.³

⁸ See Articles 65 para. 3, 49 para. 2 TFEU.

⁹ See Article 58 para. 2 TFEU.

¹⁰ ECJ Case C-148/91 VVOO [1993] ECR I-487.

¹ See Schwarze/Glaesner, Article 66 AEUV mn. 1.

² See CR/Bröhmer, Article 66 AEUV mn. 7, not expressively mentioning the principle of proportionality but interpreting the expressions used in the TFEU.

³ See GHN/Ress/Ukrow, Article 66 AEUV mn. 17. On the compatibility of this provision with international agreements: Schwarze/Glaesner, Article 66 AEUV mns 6 et seq.

TITLE V AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1 GENERAL PROVISIONS

Article 67 [Principles] (ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for co-ordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Bibliography: *Alegre*, Criminal law and fundamental rights in the European Union, 3 European Human Rights Law Review 2003, 325; *Andersson*, Targeted Sanctions: How to Enforce Institutionalized Fear and Maintain the Rule of Law, in: Ambos (ed.), Europäisches Strafrecht post-Lissabon, 2011; *Bazzocchi*, The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice, 8 Ius Gentium: Comparative Perspectives on Law and Justice 2011, 177; *Blanke*, The Protection of Fundamental Rights in Europe, The European Union after Lisbon, 2012, 159; *Brinkmann*, An Area of Freedom, Security and Justice: Five Years After its Creation: The Immigration and Asylum Agenda, 10 ELJ 2004, 182; *Coutts*, Stephen David, The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration, 7 Croatian Yearbook of European Law and Policy 2011, 87; *Den Boer* (ed.), The Implementation of Schengen – First the Widening, Now the Deepening, 1997; *Denza*, The Intergovernmental Pillars of the European Union, 2002; *id.*, The 2000 Convention on mutual assistance in criminal matters, CMLRev 2003, 1047; *Di Federico*, Fundamental Rights in the EU: Legal Pluralism and Multi-Level Protection After the Lisbon Treaty, 8 Ius Gentium: Comparative Perspectives on Law and Justice 2011, 15; *Dörr*, Das beschleunigte Vorabentscheidungsverfahren im Raum der Freiheit, der Sicherheit und des Rechts, EuGRZ 2008, 349; *Eckes*, EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions, 2009; *Eckes/Konstadinides*, Crime within the Area of Freedom, Security and Justice. A European Public Order, 2011; *Gaja*, The Review by the European Court of Human Rights of Member States' Acts Implementing European Union Law: 'Solange' Yet Again?, in: Dupuy et al. (eds), Festschrift Tomuschat, 2006, 517; *Guild/Carrera/Eggenschwiler*, The Area of Freedom, Security and Justice ten years on: Successes and future challenges under the Stockholm Programme, 2010; *Hailbronner*, Immigration and Asylum Law and Policy of the European Union, 2000; *Kau*, Justice and Home Affairs in the European Constitutional Process, in: Griller/Ziller (eds), The Lisbon Treaty, 2008, 223; *Kostakopoulou*, An open and secure Europe? Fixity and fissures in the area of freedom, security and justice after Lisbon and Stockholm, 19 European Security 2010, 151; *Kotzur*, Grundfragen einer Europäischen Sicherheitspolitik, EuR 2009, Beiheft 3; *Kuijper*, The evolution of the third pillar from Maastricht to the European Constitution: institutional aspects, 41 CMLRev 2004, 609; *Ladenburger*, Police and Criminal Law in the Treaty of Lisbon. A

New Dimension for the Community Model, 4 European Constitutional Law Review 2008, 20; *Lenaerts*, The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice, 59 International and Comparative Law Quarterly 2010, 255; *Mitsilegas*, The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, 31 Yearbook of European Law 2012, 319; *Monar/Morgan* (eds.), The Third Pillar of the European Union, 1994; *Müller-Graff* (ed.), Europäische Zusammenarbeit in den Bereichen Justiz und Inneres, 1996; *id.*, Der Raum der Freiheit, der Sicherheit und des Rechts, 2005; *Nettesheim*, Grundrechtskonzeption des EuGH im Raum der Freiheit, der Sicherheit und des Rechts, EuR 2009, 24; *Oppermann* (ed.), Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland, 2005; *Peers*, EU Justice and Home Affairs Law, 3rd ed. 2011; *Peers*, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, 41 CMLRev 2004, 5; *Ruffert*, Der Raum der Freiheit, der Sicherheit und des Rechts in schwierigem Terrain – Kontinuierliche Verfassungsgebung in schwierigem Terrain, in: Pernice (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung?, 2008, 169 et seq.; *Stadler*, Grenzüberschreitender kollektiver Rechtsschutz in Europa, JZ 2009, 122; *Teißen-Colly*, The European Union and asylum: an illusion of protection, 43 CMLRev 2006, 9; *Theobald*, Von der Europäischen Union zur 'Europäischen Sicherheitsunion?', 1997; *Thym*, Europäische Einwanderungspolitik: Grundlagen, Gegenstand und Grenzen, in: Hofmann/Tillmann (ed.), Europäisches Flüchtlings- und Migrationsrecht. Eine kritische Zwischenbilanz, 2008; *Vennemann*, The European Arrest Warrant and its Human Rights Implications, 63 ZaöRV 2003, 103; *Wagner*, Zur Vereinheitlichung des Internationalen Privat- und Zivilverfahrensrechts sieben Jahre nach In-Kraft-Treten des Amsterdamer Vertrags, EuZW 2006, 424; *Walker* (ed.), Europe's Area of Freedom, Security and Justice, 2004; *Weyembergh*, Approximation of criminal laws, the Constitutional Treaty and the Hague Programme, 41 CMLRev 2004, 1567; *Wielsch*, Die europäische Gefahrenabwehr – Stand und Perspektiven europäischer Polizeiarbeit nach dem Maastrichter Vertrag, 1998; *Wolff*, The new EU's Internal Security Architecture Implementation Challenges, in: Laursen (ed.), The EU's Lisbon Treaty: Institutional Choices and Implementation, 2012, 63; *Wouters/Naert*, Of Arrest warrants, terrorist offences and extradition deals: an appraisal of the EU's main criminal law measures against terrorism after 11 September, 41 CMLRev 2004, 909.

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I. Historical development and objective of the provision

1

According to the integration objective as enshrined in Article 3 para. 2 TEU¹, the European Union wants to be an 'area of freedom, security and justice' for its citizens. Already in 1999 the European Council of Tampere had purposefully and emphatically used the triad of **freedom** as the very basis of European integration, **security** as indispensable precondition of freedom and **justice** as the overall ideal of any legal order and thus any legal community.² An 'area', however, is also territorially limited; it is defined by the dichotomy of **inclusion** and **exclusion** (most explicitly visible in asylum policies and the recent humanitarian tragedies which happened off the Italian Coast nearby the island of Lampedusa). A legal community is always a community of those who belong to it and belongingness itself has integrative and disintegrative effects. When in the Schengen framework (14 June 1985) border controls between the Members of the

¹ See *Ruffert*, in: Pernice (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung?, 2008, 169 et seq.

² *Brinkmann*, 10 ELJ 2004, 182 et seq.

Schengen Treaty were abolished, at the same time security measures for the Schengen area as a whole had to be increased. One might speak of a 'spill over' of intensive security measures. The Treaty of Amsterdam later on implemented the Schengen acquis into Union law. Today, it is a binding standard for all new Member States (see Article 7 of Schengen Protocol No 17, allowing, however, a special position of Denmark, the UK and Ireland).³

2 Already ex-Article 29 TEU and Articles 61–69 TEC had pursued the gradual establishment of an area of freedom, security and justice within the primary law provisions of the Union (and not only within a separate treaty regime – the Schengen system). The Treaty of Amsterdam, in respect to provisions dealing with 'visas, asylum, immigration and other policies related to free movement of persons' (former Articles 61–69 TEC, now Articles 66, 67, 78, 72, 74, 81 TFEU, Articles 67–69 TEC were repealed) incorporated those provisions into the European Treaties and thereby brought them to a **supranational level**. Merely the area of police and judicial cooperation, which was considered to be especially important in view of the idea of national sovereignty, was meant to remain in the then third pillar which was still organised intergovernmentally. Draft-Article III-257 TECE saw the area of freedom, security and justice as something that had already been established and based its regulative profile on this assumption (re-shaping the already existing model). It has to be furthermore noted that the area of freedom, security and justice **is based on and shaped by** human rights guarantees. Even though the Reform Treaty of Lisbon abandoned the challenging ambition to become a constitutional treaty for the Union, the area organised this way remains nevertheless a '**constitutional area**': based on liberty (freedom), guided by the rule of law, deducing security from freedom (and not vice versa) and aiming the positive law towards justice. Deriving from the 'constitutional objective' of Article 3 para. 2 TEU, the 'Security Union' could and still can develop new contours.⁴ Therefore, legislative and operational cooperation between the Union and the Member States but also among the Member States themselves shall be organised in this area.

3 The area of freedom, security and justice is primarily supposed to create the security policy requirements to guarantee the free movement of persons within the Union. Those are primarily 'compensation measures' for the creation of an '**area without internal borders**' according to Article 26 para. 2 TFEU, including the elimination of controls of persons when crossing the borders. This elimination can naturally not be restricted to Union citizens; it encompasses third-country nationals as well. This, however, must be compensated by **alternative security mechanisms**. It is necessary to establish an intensified cooperation among the Member States in respect of cross-border activities within the territory of the Union as well as reliable protection of the external borders towards third countries. However, in regard to protecting their identity and sovereignty, the different legal orders and traditions of the Member States must be respected.

4 **II. Essential innovations regarding the area of freedom, security and justice in general**

The area of freedom, security and justice is now regulated by Title V of Part Three of the TFEU. Prior to the Lisbon reform, the provisions had been divided between Title VI TEU (the intergovernmental third pillar) and Title IV TEC. Before analysing the

³ Articles 3 and 4 Schengen Protocol No 17.

⁴ See Ruffert, in: Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, 170.

single provisions of the newly shaped Title V, the essential innovations that the TFEU in general brings about for the area of freedom, security and justice deserve a brief description⁵:

- Police and Judicial Cooperation in Criminal Matters as part of Title V TFEU is transferred into the supranational Union law (Article 67 para. 3 TFEU); the respective legislative instruments (directive, regulation) und processes apply to the cooperation in criminal matters, too;
- Establishment of a new competence for measures regarding passports, identity cards, resident permits (by abolishing Article 18 para. 3 TEC);
- Determination of strategic guidelines in the field of internal security by the European Council (Article 68 TFEU);
- Establishment of a specific evaluation competence (Article 70 TFEU);
- Establishment of a competence for a consistent border control system (Article 77 para. 1 lit. c, para. 2 lit. d TFEU);
- Establishment of a competence on the introduction of consistent asylum regulations instead of mere minimum standards (Article 78 TFEU);
- Adoption of the principle of mutual recognition of judgments and decisions in the ‘constitutional law of the Union’ (Article 81 para. 1 and Article 82 para. 1 TFEU);
- Establishment of a European Public Prosecutor’s Office by means of the special legislative procedure (Article 86 TFEU);
- Introduction of a procedure to safeguard the principles of subsidiarity and proportionality when powers are being exercised; national parliaments are enabled to monitor and yield a positive impact on the adherence of the principles (so called ‘early warning system’, see Article 69 TFEU).

III. The content of provisions, affected policy areas

5

1. Border controls on the internal borders (para. 2)

An area without internal borders can be established only if the control of persons at the internal borders is eliminated. It is the task of the Union to safeguard that national deviances remain undone and the **Schengen acquis** will be implemented in its entirety, including the accession countries. The free movement of the Union citizens is lifted into a new dimension and – very important for the citizens’ awareness of integration – can be experienced on a day-to-day basis: The Union citizens can, for instance, personally realise what it means to travel without border controls and enjoy this freedom.

The establishment of the Schengen acquis should be kept in mind: An especially intensified collaboration among a close circle of Member States was established at first outside the framework of the European Union. For this reason, the participants signed, in **Schengen**, an intergovernmental **Agreement** on the gradual abolition of border checks at their common borders on 14 June 1985 as well as the Convention implementing the Schengen Agreement on 19 June 1990. Those treaties together with the regulations adopted on their basis were implemented into the framework of the European Union. Both the United Kingdom and Ireland are not bound by the Schengen acquis⁶ but may upon application partially or completely be admitted (Article 4 Schengen Protocol). The countries joining the European Union take on the Schengen acquis on the day of their acces-

⁵ See Ruffert, in: Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, 171.

⁶ See, for the possibility to participate in secondary law measures, ECJ Joined Cases C-77/05 *UK and Ireland v Council* [2007] ECR I-11459.

sion (see Article 3 Act of Accession 2003). A certain part of the rules is applicable from this day onwards. Another part of the rules enters into force after a decision of the Council (see Article 77 TFEU).

- 7 By means of Decision 1999/436/EC, the Council had already determined a legal basis in the area of former Title VI TEU for the following provisions of the Schengen Implementation Convention (SIC): provisions on the information and prosecution in the area of human trafficking (Article 27 paras. 2 and 3 SIC); provisions on the cooperation of the police, especially on cross-border surveillance and pursuit (Articles 39–47 SIC); on mutual assistance in criminal matters (Articles 48–53 SIC), on the application of the principle of *ne bis in idem* (Articles 54–58 SIC); on the extradition (Articles 59–66 SIC); on the transfer of the enforcement of criminal judgments (Articles 67–69 SIC); on the combat against narcotic drugs (Articles 70–73, partially Article 76 SIC). Further assignments were made in respect to the protection of personal data outside the Schengen Information System (Articles 126 et seq. SIC). The assignment of the provisions on the Schengen Information System (Articles 92–119 SIC) were postponed.

8 **2. Asylum, immigration, external border control (para. 2)**

Unprotected internal borders enable legal immigration but at the same time give rise to illegal migration and facilitate all forms of **transnational criminality**. This is why the Member States need to cooperate in respect to their asylum and immigration policy as well as in respect to the protection of the external borders. Founded on the **solidarity** amongst the Member States, this approach has to safeguard the interests of third-country nationals, equally those of stateless persons, in an appropriate manner.

9 **3. Police cooperation (para. 3)**

Police cooperation, and the judicial cooperation in criminal matters alike, refer to prevention and combat against – both organised and unorganised – criminality. The adherence to the principle of subsidiarity (Article 5 para. 1 TEU), though, limits common actions usually to serious cross-border crimes. Moreover, the provision addresses the prevention and combat of **racism and xenophobia**. The measures to be taken are not defined more closely (see however Article 18 para. 1 TFEU). Furthermore, see the Joint Action to combat racism and xenophobia dated 15 July 1996⁷ and Council Regulation 1035/97/EC on the establishment of a European monitoring centre for racism and xenophobia (based on former Article 284 TEC, now Article 337 TFEU, and Article 308 TEC, now Article 352 TFEU).

10 **4. Judicial cooperation in civil and criminal matters (paras 3 and 4)**

The judicial cooperation embraces both **criminal and civil justice** including mutual judicial assistance. The cooperation uses the support of the European Judicial Cooperation Unit (Eurojust), created in 2002. Measures in the area of criminal justice are the mutual recognition of judgements and, if necessary, the approximation (harmonisation) of criminal laws. As such approximation (harmonisation) of criminal laws is a **considerable interference** with national sovereignty – in fields being very sensitive for the Member States –, it has been explicitly mentioned that such measures are admissible only as long as they are limited to the necessary minimum (principle of proportionality).

⁷ OJ 1996 L 185/5.

IV. Legal protection

11

The TFEU did not only integrate the area of freedom, security and justice even further into a supranational legal framework, it also abandoned the restraints on legal protection. Article 35 TEU (old version) and Article 68 TEC were deleted without replacement, serving the **common European rule of law** very well. Also, the protection of individual rights, which was so far in deficit, has been strengthened. Henceforth, the tasks of the ECJ are increasing considerably. Especially in respect to measures with a strong human rights impact, proceedings with an extensive length of duration are to be prevented and immediate legal protection has to be offered.⁸ The decision by the ECJ in the *Segi* case may serve as an example for a deficient protection of fundamental rights in proceedings regarding counter terrorism measures within the second and third pillar.⁹

Article 68 [Strategic guidelines]

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Bibliography: *Labayle*, L'Espace de liberté, sécurité et justice dans la Constitution pour l'Europe, R. T. D. E. 2005, 437; *Piris*, The Lisbon Treaty, 2010.

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I. General remarks, historical development

1

Article 68 TFEU has no archetype in the former Community law. It derives from draft-Article III-258 TECE. The guideline competence is a typical intergovernmental element which lives on in the 'constitutional' Union. It also reveals that **intergovernmental forms of cooperation** are present beyond the CFSP. A point of reference respectively initiation of the current guideline policy is the **Tampere Programme**, adopted at the EU summit of Tampere (15 and 16 October 1999) which, however, expired in the meantime. In terms of domestic and security policy the programme created an important basis for the area of freedom, security and justice as well as it brought the political integration substantially forward. The **Tampere Programme** itself is an enhancement of the **Vienna Action Plan** of 3 December 1998¹: Council and Commission wanted to use the opportunities created by the Treaty of Amsterdam to outline the area of freedom, security and justice and to form the basis for its definition by primary Union law.

In respect to the draft TECE, the European Council presented the so-called **Hague Programme** on 4 and 5 November 2004. The programme encompasses the primary policy fields in the area of freedom, security and justice and was intended to strengthen them. Of special importance thereby are asylum policy (common European asylum sys-

⁸ See VHvK/*Rosenau/Petrus*, Article 67 TFEU mn. 14.

⁹ ECJ Case C-355/04 *Segi v Council* [2007] ECR I-1657; see also *Eckes*, EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions, 2009, 346.

¹ OJ 1999 C 19/1.

tem, common asylum authorities until 2010), migration, border control, integration, counter terrorism, combat organised crime, police and judicial cooperation as well as judicial cooperation in the field of civil law. Moreover, many work orders were directed to the Commission.

3 II. The guideline competence

The guideline competence of the European Council does not fit very easily into the framework of Union's acts and neither into the so-called 'institutional balance'.² The political competence to initiative, planning and design is primarily vested in the Commission, and not in the Council. As the guideline competence does not provide for a parliamentary involvement, a danger of a democratic deficit would exist if the guidelines were fully binding. This is because all activities within the legislative and operative programme planning are realised by guidelines. The promulgation of guidelines is regulated by Article 26 para. 1 TEU, which stipulates the sole competency of the European Council in this respect. If the guideline competence is nevertheless attributed solely to the Council, then the Council is strategically the primarily responsible actor – and de facto also the Member States (respectively their executive branches) have an immense influence via the Council.

Article 69 [Principle of subsidiarity]

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Bibliography: Barrett, 'The King is Dead, Long Live the King': the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments, 33 ELRev 2008, 66; Estella, The EU Principle of Subsidiarity and its Critique, 2002; Häberle, Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre, 119 AöR, 1994, 169; Kumm, Constitutionalising Subsidiarity in Integrated Markets, 12 ELJ 2006, 503; Ruffert, Demokratie und Governance in Europa, in: Bauer/Huber/Sommermann (eds), Demokratie in Europa, 2005, 319 et seq.; Sander, Subsidiarity Infringements before the European Court of Justice, 12 Columbia Journal of European Law 2006, 517.

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1 I. General remarks, historical development

The provision does not have an equivalent in former Community Law. It was created by draft-Article III-259 TECE and adopted by Article 69 TFEU without changing its wording. After having set aside the pillar architecture and after having strengthened the elements of supranationalisation, it was of central concern to the Member States to increase the democratic influence of the national Parliaments in the area of freedom, security and justice. Both the criminal and police sector are the cornerstones of State sover-

² Cf. Article 13 TEU mns 13 et seq.

eignty and now both fall under what was called the 'Community umbrella' – post-Lisbon to be renamed as the 'Union umbrella'. For this reason it was of utmost importance to underpin the '**watchdog role**' of national Parliaments by an **area-specific strengthening** of the subsidiarity principle.¹

II. Legal relevance

2

The involvement of national Parliaments intends to reduce the often criticized democratic deficit of the European Union. It also aims at the creation of a specific **democratic responsibility to cooperate** amongst the legislators within the European Union.² Parliamentary involvement is more precisely shaped by the Second Protocol on the application of the principles of **subsidiarity** and **proportionality**.³ The subject matters of Article 69 TFEU, however, encompass shared competences in terms of Article 4 para. 2 lit. j TFEU. Those competences are governed by the principle of subsidiarity (Article 5 TEU). Strictly speaking, a further emphasis of the principle such as in Article 69 TFEU is redundant and legally unnecessary. This could, on the one hand, be criticized as a **systematic deficit**. The political significance on the other hand is obvious. The provision has to be understood as a **symbolic affirmation** and, therefore, subsidiarity needs to be considered with specific care in the area of freedom, security and justice not only when interpreting the Treaty provisions but as an overall structural principle of fundamental nature.⁴

Article 70 [Evaluation of Union policies implementation by Member States]

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Bibliography: *Baker/Harding*, From Past Perfect to Future Perfect? A Longitudinal Study of the Third Pillar, 34 ELR 2009, 25; *Husabo/Strandbakken*, Harmonisation of Criminal Law in Europe, 2004; Communication from the Commission to the Council and the European Parliament 'Evaluation of EU Policies on Freedom, Security and Justice', COM (2006) 332 final; *Mayoral*, Democratic Improvements in the European Union under the Lisbon Treaty: Institutional Changes Regarding Democratic Government in the EU, European Union Democracy Observatory, Robert Schuman Centre for Advanced Studies, European University Institute, 2011; *Mitsilegas*, The European Union and the Globalisation of Criminal Law, 12 Cambridge Yearbook of European Legal Studies 2009–2010, 337; *Möstl*, Preconditions and Limitations of Mutual Recognition, 47 CMLRev 2010, 405.

¹ Cf. VHVH/Rosenau/Petrus, Article 69 AEUV mn. 1; Böse, Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts, ZIS 2010, 76.

² See Ruffert, in: Bauer/Huber/Sommermann (ed.), Demokratie in Europa, 2005, 319 et seq.

³ Cf. VHVH/Rosenau/Petrus, Article 69 AEUV mn. 4

⁴ Cf. VHVH/Rosenau/Petrus, Article 69 AEUV mn. 3; also Grimm, Das Grundgesetz als Riegel vor einer Verstaatlichung der Europäischen Union, 48 Der Staat 2009, 475.

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1 I. General remarks, historical development

Article 70 TFEU is new to the primary law of the Union. For the first time its content was proposed by draft-Article III-260 TECE. The complicated wording makes the provision difficult to be read and understood. As regards the content, the provision describes a **field-tested system of mutual control**, the so-called **peer review**.¹

2 II. Legal meaning

Article 70 TFEU establishes a **mode of evaluation** (and monitoring). It is designed to detect flaws in the implementation of the policies within the area of freedom, security and justice at an early stage. The objective is to ensure a **political process supported by self-control**. That form of control exceeds mere ‘result monitoring’. It aims at monitoring and evaluating the whole policy making process. Moreover, it is intended to increase the willingness of Member States to implement the Union policies. Due to preventive control, implementation deficits are meant to be abandoned as of the very beginning. The purpose of the evaluation is therefore different from that of the infringement proceedings, which are initiated by the Commission as ‘guardian of Union law’. The introductory passage ‘Without prejudice to Articles 258, 259 and 260’ confirms this finding. (Preventive) control and infringement proceedings are distinct from one another.

3 Especially accentuated is the mechanism of **mutual recognition**, which is more typical and determining for the area for freedom, security and justice than (full) harmonisation. A political process attended by control is meant to ensure (and also ease) **mutual recognition**; this is all the more important in areas where Member States usually express (national sovereignty) reservations and do not fully comply with their duty of recognition. Since the control mechanisms qualify as administrative procedures, participation of the European Parliament is not provided for. However, the European Parliament as well as national Parliaments need to be informed of the evaluation results under Article 70 s. 2 TFEU. This is the only way to ensure the necessary democratic basis through an early involvement of **well-informed representatives** in the process of policy-making and policy-shaping.

*Article 71 [Standing committee on internal security]
(ex Article 36 TEU)*

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

¹ Cf. VHVH/Rosenau/Petrus, Article 70 AEUV mn. 2.

Bibliography: *Hendry*, The Third Pillar of Maastricht: Cooperation in the Field of Justice and Home Affairs, 36 GYIL 1993, 295; *Nagy*, The Present and Future of the Police and Judicial Cooperation in the European Union, 148 Studia Iuridica Auctoritate Universitatis Pecs Publicata 2011, 205; *Piris*, The Lisbon Treaty, 2010.

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I. General remarks, historical development 1

Article 71 TFEU, on the one hand, replaces Article 36 TEU (old version), and on the other hand implements the changes introduced by draft-Article III-261 TECE. Apart from editorial alterations, the provision adopts the wording and merely changes ‘**Coordination Committee**’ into ‘**Standing Committee on Operational Coordination on Internal Security**’, in short ‘**Standing Committee**’.¹ In contrast to Article 36 para. 2 TEU (old version), the involvement of the Commission is not expressly mentioned any longer. Instead, however, the optional involvement of the bodies, offices and agencies concerned is expressly allowed now (sentence 3).

The model (and work) of the prior Coordination Committee shall not be forgotten. ² This committee focused on internal security, too. It was designed for the coordination tasks stipulated in Article 34 para. 1 TEEC (reversed by today) and consisted of high ranking officials. Besides its coordination activity, it was its task to address statements to the Council, either by or without request of the Council. Additionally, it had to contribute to the preparations of the Council in the area of Article 29 TEU (old version) – in the meantime replaced by Article 67 TFEU.² The Standing Committee, in contrast, is an **integral part of the Council** and ensures its strategic priorities from an **internal perspective**.³

II. Task profile 3

The work assignment of the committee is clearly formulated: It is its task to intensify and coordinate the **operative collaboration** of the authorities amongst the Member States. The representatives of the other competent authorities that are concerned with coordination tasks as to internal security may also be consulted: such as the Commission, Europol, Eurojust, European Agency for the Management of External Borders (Frontex), European Police Chiefs Task Force, the EU Joint Situation Center SitCen.⁴ Legislative tasks, as it was the case with its predecessor, do not belong to the responsibilities of the new committee. After the amalgamation of the three pillars into a unified Union, Article 240 TFEU takes over the legislative part. This setup also provides for **checks and balances within the Council** executive and legislative coordination tasks are separated from one another.

Sentence 4 safeguards the information of the European Parliament as well as of the national Parliaments. Like for instance Article 70 s. 2 TFEU, this arrangement pursues parallel objectives. The necessary democratic basis is to be ensured through an early in- ⁴

¹ Council Decision 2010/131 on setting up the Standing Committee.
² See GHN/Röben, Article 71 AEUV mn. 7.
³ See VHvH/Rosenau/Petrus, Article 71 AEUV mn. 3.
⁴ See VHvH/Rosenau/Petrus, Article 71 AEUV mn. 3.

volvement of **well-informed representatives** in policy-making and policy-shaping; moreover, only well informed Parliaments (that is to say well-informed deputies) can live up to their **control assignments**.

Article 72 [National responsibilities]
(ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Bibliography: *Colombi Giacchi*, Internationales Privatrecht, ordre public européen und Europäische Grundrechte, 2008; *Föhlisch*, Der gemeineuropäische ordre public, 1997; *Hobbing*, A farewell to open borders? The Danish approach. CEPS Paper in Liberty and Security in Europe, 2011; *Kaunert*, The Area of Freedom, Security and Justice: The Construction of a 'European Public Order, 14 European Security 2005, 459; *Kessedjian*, Public Order in European Law, 1 Erasmus Law Review 2007, 25; *Picheral*, L'ordre public européen, 2001.

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1 I. General remarks, historical development

Article 72 TFEU formulates a classical **ordre public clause**. It is identical to Article 33 TEU (old version) as well as Article 64 para. 1 TEU and has a constitutional archetype in draft-Article III-262 TECE.

2 II. Law and order and internal security

The provision clarifies that within the area of freedom, security and justice, national competencies to adopt measures in order to maintain **law and order** and to **safeguard internal security** are not affected (**non-affected clause** in favour of the competences of the Member States). Both terms are such of European Law and thus to be construed **autonomously** by the ECJ. As it is the case with all derogation rules, restraint and a restrictive application should apply. Merely **substantial perils** for law and order and the internal security may legitimise a deviation from the law of the Union.¹ Otherwise, the laboriously-achieved state of integration would be put at stake (at least at risk) and Member States would be released from their commitments to the law of the Union in that specific field.² However, internal security is not without any links to external security interests; on the contrary, both aspects are interdependent and to some extent even intertwined. Therefore, **concerns with regard to foreign affairs** may also be taken into consideration (see Declaration No 19 of the Amsterdam Final Act).

¹ See Streinz/Weiß, Article 72 AEUV mn. 3.

² See VHvH/Rosenau/Petrus, Article 72 AEUV mn. 1.

Article 73 [Cooperation of Member States]

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Bibliography: *Menéndez*, Governance and Constitutionalism in the European Order, in: Birkinshaw/Varney (eds), *The European Legal Order after Lisbon*, 2010, 65; *Monar*, The Area of Freedom, Security and Justice, in: v. Bogdandy/Bast (eds.), *Principles of European Constitutional law*, 2nd ed. 2011, 551 et seq.; *O'Neill*, A Europe That Protects: Moving to the Next Stage of Cross-Border Law Enforcement Cooperation, 84 *Police Journal* 2011, 125; *Walker* (ed.), *Europe's Area of Freedom, Security and Justice*, 2004.

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I. General remarks, historical development 1

The newly created article neither derives from the previous Community Law nor the draft TECE. It was worked out by the **Intergovernmental Conference** in 2007. In Community Law – Article 66 TEC – as well as in draft-Article III-263 TECE, which imported the former provision of the Community Law, the administrative cooperation was linked to the measures enacted by the Council (adoption of regulations). Now, it is the decision of the Member States themselves as well as their own responsibility to cooperate bilaterally. This is also a consequence of overcoming the pillar architecture. Even though the entire PJC became supranational, there are still areas within this framework that respect national sovereignty and leave room, or even create new space, for intergovernmental cooperation. The ‘**cooperative constitutional State**’¹ can thus be seen as an indispensable prerequisite for effective European integration.

II. Administrative cooperation on behalf of internal security 2

The forms of cooperation are manifold. They range from exchange of personnel to real institutionalisation.² For the purpose of illustration one should be reminded of a selection of forms of cooperation, founded on the basis of Article 74 TFEU³: the European Judicial Network in civil and commercial matters; the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), founded on 26 October 2004 by Council Regulation (EC) 2007/2004; the establishment of a coastal patrol network, the European image store system FADO to fight organised criminality, the European Union Network for asylum practitioners (EURASIL), the Visa Information System (VIS). Moreover, and following these

¹ On this, see most recently the German landmark monograph by *Häberle*, *Der kooperative Verfassungsstaat – aus Kultur und als Kultur*, 2013.

² See *CR/Rossi*, Article 73 AEUV mns 2, 4.

³ See *Schwarze/Herrnfeld*, Article 74 AEUV mns 6 et seq. with examples of the measures taken until now.

the Schengen Information System (SIS II)²; the Council Regulation 377/2004 of 19 February 2004 establishing a **network of integration liaison officers**; the Council Regulation 2007/2002 of 26 October 2004 establishing a **European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – Frontex**; the **Visa Information System (VIS)**, developed by Regulation 767/2008; the **exchange of relevant information required by the Member States’ Migration Management Services in their fight against illegal immigration: ICONET**; Council Decision 2005/267/EC of 16 March 2005 on the establishment of a secure web-based **Information and Coordination network for Member States’ Migration Management Services**.

**Article 75 [Measures against financing terrorism]
(ex Article 60 TEC)**

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Bibliography: *Ackermann/Reder*, Geldwäscheprävention in Kreditinstituten nach Umsetzung der Dritten EG-Geldwäscherichtlinie, WM 2009, 200; *Brkan*, The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future, EU External Relations Law and Policy in the Post-Lisbon Era, 2012, 97; *Bultermann*, Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf judgements of the CFI of the European Communities, 19 Leiden Journal of International Law 2006, 753; *Cortright/Lopez*, Sanctions and the search for security: Challenges to UN action, 2002; *Dawes/Kunoy*, Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases, 46 CMLRev 2009, 73; *Eckes*, Controlling the Most Dangerous Branch from Afar: Multilayered Counter-Terrorist Policies and the European Judiciary, European Journal of Risk Regulation, 2011, 505; *Kotzur*, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft, EuGRZ 2006, 19; *id.*, Kooperativer Grundrechtsschutz in der Völkergemeinschaft, EuGRZ 2008, 673; *Nettesheim*, UN Sanctions Against Individuals – A Challenge to the Architecture of European Union Governance, 44 CMLRev 2007, 567; *van Elsuwege*, The Adoption of ‘Targeted Sanctions’ and the Potential for Inter-institutional Litigation after Lisbon, 7 Journal of Contemporary European Research 2011, 488.

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² OJ 2001 L 328/1 and 328/4.

1 I. General remarks, historical development

Since 11 September 2001 (09/11), measures to prevent the financing of terrorism, irrespective of the international, European or national law character, are a top priority on the agenda of international security policy. For this reason, the United Nations established a system of ‘smart’ respectively ‘targeted’ sanctions. They are, in contrast to the classical embargo measures, not directed against States and thus in practice against the entire population of the relevant States but against individuals.¹ The duty to implement the obligations is either vested in the Member States or the regional organisations they are attached to, depending on the respective competences and responsibilities.

2 Before the Treaty of Lisbon came into effect, it was the responsibility of the Union to deal with measures against the financing of terrorism. Taking into account the international developments, already draft-Article III-160 TECE intended to implement the evolution on the international plane. As did already Article 60 TEC, it allowed for limitations of the movement of capital and payments **for non-economic** but politically implied **reasons** (especially issues of security). Draft-Article III-160 TECE, however, was not as broadly formulated as Article 60 TEC and was limited to measures to fight and prevent terrorism (see EC Resolutions 2580/2001 and 881/2002 as well as Directive 2005/60, based on Article 95 TEC). More far reaching areas, such as ‘organised criminality’ or ‘human trafficking’, were not implemented despite earlier considerations reaching out in this direction. Now, Article 75 TFEU adopts both the wording and the regulatory content of draft-Article III-160 TECE. Similar to the former provision, it is not merely **lex specialis to the general embargo provisions** relating to the external relations but also deals with the movement of capital and payments within the Union.²

3 II. Penalty measures

In an exemplary but non-exhaustive manner, the penalty measures are described by Article 75 TFEU. It refers to the freezing of funds, financial assets or economic gains. Moreover, it clarifies that the respective owners do not have to be States (which definitely belong to the legal persons of public law) but can be natural or legal persons, groups or non-State entities. The provision refers to property and possession of the financial assets, not to the nationality or the seat of the non-State actors. The catalogue of examples takes up the practice of the United Nations of listing terror suspects and freezing their assets (see e.g. the UN Security Council Resolutions 1267 (1999) and 1333 (2000) against the Taliban and Osama Bin Laden).

4 III. Penalty procedure

Article 75 TFEU lays down a two-stage process at primary law level. First of all the Council has to create the rule of law-oriented (that is to say constitutional) basis. Upon the proposal of the Commission (para. 2) the Council has to initiate the concrete measures which are to be implemented within the framework specified in para. 1. The ordinary legislative procedure applies in this respect. Regulations define the legal framework for administrative measures. Concrete measures can be adopted only on such a legal ba-

¹ See Cortright/Lopez, Sanctions and the search for security: Challenges to UN action, 2002.

² See VHVH/Khan/Eisenhut, Article 75 AEUV mns 1 et seq.

sis from secondary Union law.³ The previous opinion, approved by the ECJ⁴, that smart sanctions limited by the rule of law and being subject to judicial review are admissible, found its primary law confirmation in Article 75 TFEU.

IV. Legal protection

5

Para. 3 requires both for the framework of the sanctions that is described by a regulation as well as for the concrete measures the possibility for a judicial review. Thus, the constitutional principle to have an **effective remedy** has been valued in this context. With regard to the immense impact that smart sanctions have on fundamental rights, this appears to be **indispensable**. Too extensive powers of the Council have to be limited – also when and even if it implements compulsory resolutions of the UN Security Council.⁵ In respect to the fundamental rights, Declaration No 25 on Articles 75 and 215 of the Treaty on the Functioning of the European Union⁶ deserves special mentioning. It points out that the respect for the fundamental rights and freedoms requires the safeguarding of judicial protection of the individual person or the affected entity. The United Kingdom issued the ‘Unilateral Declaration’ No 65 annexed to the Lisbon Conference Final Act on Article 75 TFEU stating that in respect of the area of freedom, security and justice the UK will take part in the adoption of all proposals made under Article 75 TFEU.

Article 76 [Right to take initiatives]

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

- (a) on a proposal from the Commission, or**
- (b) on the initiative of a quarter of the Member States.**

Bibliography: *Nagy*, The Present and Future of the Police and Judicial Cooperation in the European Union, 148 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 2011, 205; *Wolff*, The new EU’s Internal Security Architecture Implementation Challenges, in: Laursen (ed.), *The EU’s Lisbon Treaty: Institutional Choices and Implementation*, 2012, 63 et seq.

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I. General remarks, historical development

1

Article 76 TFEU takes into account that criminal and police matters are now subject to **supranationalism** and that the ‘third pillar’ as **separate intergovernmental infrastructure** has ceased to exist. The new norm adopts the former text of draft-Article III-265 TECE only with editorial changes. In previous Community Law there had been no pen-

³ See VHVH/Khan/Eisenhut, Article 75 AEUV mn. 4.

⁴ ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

⁵ Landmark decisions are ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, see *Kotzur*, EuGRZ 2006, 19 and *Kotzur*, EuGRZ 2008, 673 et seq.

dant to Article 76 TFEU. Article 34 TEU (old version) dealt with the measures and procedures that were utilized by the Union to fulfil its tasks stipulated in Title VI. However, this provision took into account that matters associated with the ‘third pillar’ constituted a mere **intergovernmental cooperation**. The Member States were obliged to coordinate themselves in the Council on their own responsibility. This task was supported by the Council by means of various sorts of resolutions that have been described in Article 34 para. 2 TEU (old version). The intergovernmental character of the resolutions defined also their prerequisites as well as their effects. The ‘**supranationalisation**’ of the Police and Judicial Cooperation in Criminal Matters under the Lisbon Reform Treaty has led to the application of the ordinary legislative procedure (Article 294 TFEU) in this area as well. The democratic legitimacy is strengthened. The general procedural structures remain the same, **including the monopoly of the right to initiative of the Commission**. However, some modifications became effective. An example: Article 76 TFEU provides for the right of initiative of a quarter of the Member States.¹

2

II. Legal meaning

Article 76 TFEU still constitutes an exception to the monopoly of the Commission to the right of initiative. Initiatives by single Member States, however, are not possible any longer but require a **quorum** (a quarter of the Member States). This is to prevent **unilateral** national actions and non-communicated single initiatives (particularism of interests). On the other side, Member States still have the opportunity to conduct coordinated initiatives in this area that is especially sensitive to national sovereignty. There exists a **diversity of interests** in respect to **supranational** and **intergovernmental** elements that reflects the current state of integration. It has to be kept in mind that according to the Treaty of Maastricht the right of initiative in respect to matters of police and judicial cooperation was vested in the Member States (see Article K. 3 para. 2 second indent TEU Maastricht version). It was not until the Treaty of Amsterdam that the right of initiative of the Commission was incorporated into Union law (Article 34 para. 2 TEU Amsterdam version). The Council now adopts decisions with a double-qualified majority (Article 16 para. 3 TEU), whereby qualified majority is defined as a dual majority of at least 55% of the Member States and at least 65% of the Union’s population. Initiatives of Member States even require a **reinforced qualified majority** of 72% (Article 238 para. 2 TFEU). By means of such a threshold, a domination of special interests of certain Member States is prevented from the outset. Especially ‘larger’ Member States cannot jointly overrule ‘smaller’ Member States. Therefore, the common good (*bonum commune*) within the area of freedom, security and justice is at the same time to the **benefit of the entire Union** – it is a ‘*bonum commune Europaeum*’.

CHAPTER 2.

POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77 [Border protection policy] (ex Article 62 TEC)

1. The Union shall develop a policy with a view to:

- (a) **ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;**

¹ Cf. Schwarze/Herrnfeld, Article 76 AEUV mn. 2.

- (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
- (c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

- (a) the common policy on visas and other short-stay residence permits;
- (b) the checks to which persons crossing external borders are subject;
- (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- (d) any measure necessary for the gradual establishment of an integrated management system for external borders;
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Bibliography: Aleinikoff/Chetail (eds), *Migration and International Legal Norms*, 2003; Anderson/Bort (eds), *The Frontiers of Europe*, 1998; Baldaccini/Guild/Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, 2007; Costello, *Administrative Governance and the Europeanisation of Asylum and Immigration Policy*, in: Hofmann/Türk (eds), *EU Administrative Governance*, 2006, 287; Goudappel/Raulus (eds), *The Future of Asylum in the European Union. Problems, Proposals and Human Rights*, 2011; Groenendijk/Guild/Minderhoud, *In Search of Europe's Borders*, 2003; Guild, *Immigration Law in the European Community*, 2001; Hathaway, *The Rights of Refugees under International Law*, 2005; Kaunert/Lonard, *The development of the EU asylum policy: venue-shopping in perspective*, 19 *Journal of European Public Policy* 2012, 1396; Laas, *Die Entstehung eines Europäischen Migrationsverwaltungsraumes*, 2008.

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I. General remarks, historical development

1

Article 77 TFEU deals primarily with the freedom of movement of persons within the internal market. The freedom within the **internal** (single) market corresponds with a necessity to control the **external** borders. On the one hand it has to be safeguarded that persons – irrespective of their nationality – will not be controlled while crossing the internal borders. On the other hand the free movement of persons within the internal mar-

ket requires effective controls on persons as well as effective surveillance of crossing of the external borders. An 'integrated system of external border management' is therefore a (future) objective of integration. Taking into account such a double interest of free movement as well as effective safeguarding of borders, Article 77 TFEU adopts in its paragraphs 1, 2 and 4 the wording of draft-Article III-265 TECE. This provision again had its archetype in Article 62 TEC. Paragraph 3 of Article 77 TFEU, in contrast, brings about a substantial alteration. The Union is from now on entitled to adopt measures in respect of passports, residence titles or other related documents.

2 **II. The previous standard: the Schengen acquis**

So far, the Schengen acquis is the reference framework for a European border control system on internal and external borders of the Union. The Schengen Agreement (SA), dating from 14 June 1985, and the Schengen Convention (SC), dating from 19 June 1990, are the legal bases for the reduction of checks on persons at the internal borders of the Member States. Both agreements were concluded prior to a Union law provision on the very issue and were consciously not confined in their scope to Member States of the Union. States belonging to the Schengen Agreement, a treaty under public international law, are: Belgium, Germany, France, Greece, Italy, Luxemburg, The Netherlands, Portugal, Spain (26 March 1995); Austria (1 December 1997); Denmark, Finland, Island, Norway, Sweden (1 December 2000); Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic, Hungary (21 December 2007). Switzerland applies the SA even though it is not a Member to the European Union at its land borders since 12 December 2008 and since 29 March 2009 at the air borders. Denmark, Ireland and the United Kingdom negotiated special regulations. **Iceland** and **Norway** are – as members of the Nordic Passport Union – associated with the Schengen States regarding the so-called Schengen acquis'

- 3 The SC, containing the fundamental operative provisions of the Schengen system, deals in detail with the following subjects: abolition of checks at internal borders and movement of persons (Title II); police and security (Title III); the Schengen Information System (Title IV), transport and movement of goods (Title V); protection of personal data (Title VI) and Executive Committee (Title VII). Already Article 1 of the **Protocol integrating the Schengen acquis into the framework of the European Union** (Schengen Protocol) entitled the contracting States to create an intensified (intergovernmental) cooperation within the framework of those agreements and connected provisions (Schengen acquis); see the annex to the protocol for details. In the meantime, the cooperation takes effect within the institutional and legal framework of the European Union. Future Member States will have to comply with the Schengen standard.
- 4 Upon entry into force of the Amsterdam Treaty, the Schengen acquis was binding to the contracting States with immediate effect (Article 2 para. 1 Schengen Protocol). However, the application of the Schengen provisions required their special '**implementation**' by the Schengen Executive Committee (see the joint statement No 1 to the SC dated 19 June 1990). Presently, the procedural provisions are outdated to a large extent and the material matter has been shifted to the ordinary legislative procedure. The parliamentary power to codecide leads to a strengthening of democratic legitimisation that was long overdue.

III. The abolition of internal borders

5

According to Article 77 para. 1 lit. a TFEU, the Union has to safeguard that individuals (Union citizens as well as third-country nationals) **will not be checked** when crossing internal borders. The appropriate measures are listed in the Schengen Convention, which together with the Schengen Protocol became part of the Union law (the so-called *acquis communautaire*). **Internal borders** are the common borders of the Member States as well as their airports for internal flights and the seaports for regular ferry services exclusively to and from the territory of the Member States without any stops at ports outside this territory. **Border checks** are such controls that are carried out solely on the occasion of an intended border crossing (see Article 1 SC). The check for a special reason (e.g. criminal prosecution) remains unaffected. This Union policy was already reflected in Article 62 para. 1 TEC and expresses a new self-image of free movement within the Union. The aim of a complete freedom of movement has not been achieved yet. The Schengen territory is not identical with the territory of the European Union.

IV. External border control

6

The **internal freedom of movement** is only possible to the extent that it is protected by an **effective external border regime**. This aim is being pursued – by means of a steady integration – by Article 77 para. 1 lit. b and c TFEU. They constitute a separate Union policy. Relevant provisions had been enshrined in **Articles 3 et seq. SC**. According to the Protocol on external relations of the Member States with regard to the crossing of external borders, those provisions did not contradict the competence of the Member States to negotiate and conclude treaties and agreements with third parties (non-Member States). Such agreements had to be in line with the Community (now Union) law as well as with other international treaties. The provision guaranteed a **parallel treaty making power** of the Member States (now **Article 218 TFEU**).

The objective is to improve the border checks, coordinated entry and departure procedures, and mainly also **harmonised visa regulations**. A special issue is constituted by the aligned access to **biometrical data**. This is dealt with in Regulation 2252/2004, which lays down the standards for security features and biometrics in travel documents issued by the Member States. The regulation requires a digitized image on a data carrier. The fundamental rights and data protection implications of such a practice should be borne in mind – all the more after the recent espionage scandals caused by the ‘National Security Agency’ of the USA (*Snowden affair*).¹

Most important objective of integration is the establishment of an **integrated management system for external borders**. Already at the summit of the European Council in Sevilla in 2002, here the conclusions 31 and 32, demanded for a consistent and high standard of protection and surveillance. The management system for external borders shall be maintained by the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), Council Regulation 2007/2004. It has its seat in Warsaw and is operative since 1 May 2005. Further objectives are determined by the Programme of The Hague (Article 68 para. 2 TFEU): The Council shall assemble a team of national experts in order to assist Member States if needed; the formation of a corps of

¹ The Guardian, London, of 10 June 2013: *Greenwald/MacAskill/Poitras*, Edward Snowden: the whistleblower behind the NSA surveillance revelations.

border guards is in discussion, even though due to national sovereignty reservations and probably also to financial considerations the political will to eventually establish such a corps has been missing (yet).² Despite of this ‘unionalisation’, the responsibility of the Member States as to initiatives and intergovernmental cooperation is still in place. Of practical relevance are, especially, the cooperation with **Europol** and **Eurojust**.

9

V. Common visa policy

A coherent system of external border controls requires a common policy in terms of visa and other short-term residence permits. The visa policy of the Member States has steadily to be replaced by a policy of the Union. Already existing legal acts by the Union shall systematically be transformed into a common code on visas. In the long run the Program of The Hague will unfold its influence (Article 68 para. 2 TFEU). Ideas are, for instance, a common visa application centre, attached to the European External Action Service and the enhancement of a Visa Information System (VIS, see Article 74 para. 3 TFEU). The first EU Common Visa Application Centre opened in Moldova in 2007.³ By means of such measures the so-called visa shopping (obtaining a visa in the Member State with the lowest requirements for obtaining a visa; obtaining several visa for different Member States) shall be prevented.⁴

- 10 Archetypes as well as a potentially usable future infrastructure can again be found in the Schengen acquis and its incorporations into the law of the European Union: There are also provisions on **short stay visas** (maximum three month). Those provisions particularly comprise (1) registers on third countries in respect to their visa requirements (Regulation 539/2001); (2) the procedures and prerequisites for issuing of visas by Member States (see Article 13, 14 SIC; Regulation 415/2003 on the issue of visas at the border, including the issue of such visas to seamen in transit); (3) the uniform format for visas (see Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals (see Articles 10 et seq. SIC). When such competency provisions of the Union are being applied, foreign policy considerations of the Union but also of the Member States should be taken into account, too (Declaration No 16 issued at the Amsterdam Closing Conference). According to the Schengen system, conditions had been laid down under which third-country nationals enjoy **freedom to travel** when being in the Union for no longer than three months (see Articles 19 et seq. SIC).

11 VI. Determining measures in the ordinary legislative procedure (para. 2)

For the purposes enumerated in para. 1, the Parliament and the Council adopt measures according to the ordinary legislative procedure (para. 2). The ordinary legislative procedure consolidates, on the one hand, the outdated procedural law. In accordance with Article 67 TEC, a complex situation has been created, consisting of many kinds of rights to initiative and rights of proposal, unanimity and qualified majority as well as of Council decisions and codecision procedures. On the other hand, the ordinary legislative procedure catches up with a comprehensive ‘codecision-making’ power of the Parliament, which was, from a democratic perspective, long time overdue. This strengthened democratic input is indispensable for the transfer of the third pillar into the law of the Union and the associated **supranationalisation**.

² Cf. VHvH/Rosenau/Petrus, Article 77 AEUV mn. 10.

³ See the European Commission's press release – IP/07/561, 25 April 2007.

⁴ Cf. VHvH/Rosenau/Petrus, Article 77 AEUV mn. 12.

Para. 2 explicitly states once more the measures that are mentioned in para. 1 – just in a different order: a common policy for visa and other residence permits; checks of persons at the external borders; temporarily limited freedom to travel for third-country nationals; gradual introduction of an integrated control system for the external borders (organisational and institutional); eventually the elimination of checks at the internal borders, irrespective of the nationality of the person who wishes to pass the border (para. 1 names this ‘**nucleus of Schengen**’ as first priority). 12

VII. Measures according to para. 3

13

Para. 3 contains a substantial innovation compared to both the recent primary law and the draft TECE. The Union receives new powers (competences) in respect to the passport system in its entirety (passports, identity cards, residence permits or any other such documents), even though this is an area that lies originally in the sphere of the **sovereign States** and qualifies as highly ‘sovereignty-sensitive’. Because of the principle of subsidiarity, this competence is restricted to necessities deriving from the free movement of the Union citizens (Article 20 para. 2 lit. a TFEU), this is to say necessities that are being shared across the entire Union. The provision states that the Union’s citizens have the right to freely move and stay in the territory of all the Member States. Insofar this power can be described as a ‘wrapping-up competence’ of the Union in regard to the right of free movement of the Union citizens. This competence will only apply as long as ‘the treaties do not provide for other competences’ as *leges speciales*. For the exercise of the powers, the provision does not stipulate the ordinary but a **special legislative procedure**. After consulting the European Parliament, the Council decides unanimously. The unanimity rule is a concession to **sovereignty reservations** of the Member States.

VIII. The clarification according to para. 4

14

Para. 4 serves merely clarification purposes and stresses an international and constitutional matter of course. The geographical determination of the external borders is a matter of sovereignty and thus an original matter of the Member States. It furthermore has to be seen as a matter which is **guided** as well as **limited** by public international law. The Union, neither being a State nor wanting to become a State, consequently cannot claim any competences in this respect.⁵

Article 78 [Asylum policy] (ex Articles 63, points 1 and 2, and 64(2) TEC)

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

⁵ See VHVH/Rosenau/Petrus, Article 78 AEUV mn. 18.

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) Partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Bibliography: *Costello*, Administrative Governance and the Europeanisation of Asylum and Immigration Policy, in: Hofmann/Türk (eds), EU Administrative Governance, 2006, 287; *Fry*, European Asylum Law: Race-to-the Bottom Harmonization, 15 Journal of Transnational Law & Policy 2005–2006, 97; *Guild/Harlow* (eds), Implementing Amsterdam: Immigration and Asylum Rights in EC Law, 2001; *Häberle*, Gemeineuropäisches Verfassungsrecht, EuGRZ 1991, 261; *Hailbronner*, European Immigration and Asylum Law after the Amsterdam Treaty, 35 CMLRev 1998, 1047; *id.*, Immigration and Asylum Law and Policy of the European Union, 2000; *id.*, Asyl- und Ausländerrecht, 3rd ed. 2013; *Junker*, Burden Sharing or Burden Shifting – Asylum and Expansion in the European Union, 20 Georgetown Immigration Law Journal 2005–2006, 293; *Papadimitriou/Papageorgiou*, The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities, 18 Journal of Refugee Studies 2005, 299; *Pirjola*, European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language, 11 European Journal of Migration and Law 2009, 347; *Toner/Guild/Baldacinni*, EU Immigration and Asylum Law and Policy, Whose Freedom, Security and Justice?, 2007; *Weber*, Migration im Vertrag von Lissabon, ZAR 2008, 55.

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1

I. General remarks, historical development

Since the border controls at the internal borders were abolished, asylum seeker, refugees and immigrants have benefited from a **factual freedom of movement** within the territory of the Union. Therefore, the question of entry into one of the Member States became an issue of common interest for all Member States. This was displayed clearly by Article 63 TEC. The Lisbon Treaty, adopting the wording of draft-Article III-266 TECE, replaced the TEC rules by Article 78 TFEU. This included, inter alia, important advancements in regard to the legislative process: All measures in respect of a **common European Asylum System** are to be adopted in the ordinary legislative process.

The **integration dynamics** of Article 78 TFEU reflect the new self-understanding of the asylum and refugee policy. Open internal borders require an effective but also coherent protection of the external borders of the Union. This requires the policy making to be transferred from the Member State level to the Union level, as already stipulated in the Tampere Programme of 15 and 16 October 1999¹. The **protection of nationals of third countries** is an obligation under both constitutional and human rights law. The Union, **open-minded towards international law**, has taken on this task through Article 78 para. 1 s. 2 TFEU when it explicitly refers to the Geneva Conventions of 28 July 1951, the Protocol on the status of refugees of 31 January 1967 and other relevant treaties, thereby orienting its policies on the standards of international law. There is certainly no intention to build a 'Fortress Europe'² in the field of asylum and refugee policy.

II. The common policy on asylum, subsidiary protection and temporary protection of third-country nationals (para. 1)

The concept of the Union in terms of asylum and refugee policy is open towards the international law regime. It acknowledges, as shown above (see mn. 2), the application of the **Geneva Convention on Refugees** of 28 July 1951, the Protocol of 31 January 1967 and other relevant treaties. Moreover, consultations with the UN High Commissioner for Refugees (UNHCR) and other relevant Organisations are contemplated (see Declaration No 17 annexed to the Final Act of the Amsterdam Treaty Conference). The concept clarifies that, besides granting asylum to political refugees, the Union policy also covers all aspects of subsidiary and temporary protection of third-country nationals, as far as these third-country nationals need international protection and therefore require an appropriate (**residence permit**) status within the Union.

Initially it was the Dublin Convention of 16 June 1990 which laid down the rules and procedure in order to **determine the Member State** that should be **responsible** to examine the application for asylum. Since 2013 it is Regulation 604/2013 (Dublin III) replacing Regulation 343/2003 (Dublin II) which determines the Member State responsible for the examination of the applications for asylum. According to Protocol 22 annexed to the Treaty of Amsterdam, the regulation is not applicable to Denmark. It is, however, on account of specific agreements, applicable as national law to the EFTA-States Switzerland, Liechtenstein, Norway and Iceland.

The Dublin III Regulation is complemented by Regulation 603/2013, replacing Regulation 2725/2000 (**Eurodac**) on the improvement of the identification of asylum seekers. Eurodac, installed on 15 January 2003, is an electronic central database in which fingerprints of asylum seekers or any foreign national or stateless person found illegally present within a Member State of the European Union are saved, thereby diminishing the danger of '**asylum-shopping**'. The Eurodac Regulation cannot be applied to the United Kingdom and to Ireland³ or to Denmark⁴. Its application is, however, extended to Switzerland, Liechtenstein, Norway and Iceland.

In the past, the Council laid down only **minimal standards** for the reception of asylum seekers (Directive 2003/9) and for the qualification and status of asylum seekers (Directive 2004/83) or on the procedures for granting and withdrawing the refugee status (Directive 2005/85/EC). These provisions on minimum standards are being replaced step

¹ See Article 68 TFEU mn. 1.

² See *Weber*, ZAR 2008, 55 et seq.

³ Protocol 21 annexed to the Final Act of the Amsterdam Treaty Conference.

⁴ Protocol 22 annexed to the Final Act of the Amsterdam Treaty Conference.

by step by common rules in the course of developing the Common European Asylum System (see below mns 8 et seq.).

- 6 In respect to the common level of fundamental rights protection, Protocol No 24 on **asylum for nationals of Member States** of the European Union, annexed to TEU and TFEU, stipulates that Member States shall be regarded as constituting safe countries of origin in respect of each other. Only in special cases, stated in the single provision of the Protocol, an asylum application of a national of one Member State may be taken into consideration or declared admissible for processing in another Member State. The alternative requirements that have to be met in order to fall under one of the mentioned cases are the following: (a) if the Member State is derogating its obligations according to Article 15 ECHR (state of emergency); (b) if a procedure referred to in Article 7 TEU has been initiated in order to determine a material and ongoing violation of the principles stipulated in Article 6 TEU; or (c) if such a decision has been adopted already; eventually (d) if a Member State unilaterally takes such a decision. In this case, the application shall be dealt with on the basis of the presumption that it is manifestly unfounded, without affecting in any way the decision-making power of the Member State, whatever the case may be. The Council shall be informed immediately. Belgium declared that it would initiate these proceedings in any case of an asylum application.
- 7 Following up on the **Hague Programme**⁵, the innovations in the field of asylum policy, aimed to establish a European Asylum Authority which would have a stronger inter-governmental structure and which would have the task to support any forms of cooperation between the Member States in terms of a common European asylum policy. Regulation (EU) 439/2010 set up the **European Asylum Support Office (EASO)**, an agency of the EU, seated in Malta. The EASO acts as a centre of expertise on asylum. It plays a key role in the development of the Common European Asylum System. Its main goal is the enhancement of practical cooperation on asylum matters. It is also aimed at helping the Member States to fulfil their European and international obligations in this context. It provides special support to Member States whose asylum and reception systems are under particular pressure. It also publishes reports and collects general information on asylum matters. Since it became operational on 1 February 2011, the EASO already has had some specialised tasks: It gave practical support to Greece, due to an agreement signed on 1 April 2011. In the subsequent years, several other countries requested and obtained the support of EASO, e.g. Luxembourg, Sweden, Bulgaria and Italy. There is a strong and newly structured cooperation between the EASO and the United Nations High Commissioner on Refugees (UNCHR), due to a working agreement signed on 13 December 2013.

8 **III. Measures for a Common European Asylum System (para. 2)**

Article 78 para. 2 TFEU specifies a catalogue of measures aiming to create a **common European asylum policy regarding non-EU citizens and stateless persons**. The substantial changes of lit. a are giving the direction to the future setup ('a uniform status of asylum for nationals of third countries, valid throughout the Union'): The Union is not any more limited to the creation of minimal standards but creates a **common standard of protection**⁶. The common asylum status (lit. a) is granted to a refugee as defined according to Article 1 of the Geneva Refugee Convention. In areas, in which asylum status cannot be granted because the asylum seeker does not qualify as a refugee in the sense of

⁵ See Article 68 TFEU mn. 2.

⁶ See Schwarze/*Grafhof*, Article 78 AEUV mn. 18.

the Geneva Refugee Convention, lit. b is applicable: a uniform status of subsidiary protection shall be established for nationals of third countries who, without obtaining European asylum, are in need of international protection because they may suffer serious harm in their home country where they expect death penalty, torture, or the serious and individual threat of indiscriminate violence in situations of armed conflict.⁷ The specific rules based on lit. a and lit. b are provided for by Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive), which is a recast of Directive 2004/83.

According to Article 3 Directive 2011/95, Member States may introduce or retain 9 more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, but only in so far as those standards are compatible with this Directive (**'national subsidiary protection'**).

Thus, Member States may grant a right of asylum under their national law to a person who is excluded from European refugee status because of former terrorist activities, but only so far as the national kind of protection does not entail a risk of confusion with refugee status within the meaning of the European asylum system. A clear distinction must be drawn between national protection and protection under the directive.⁸

Lit. c expands the normative programme on a common system of temporary protec- 10 tion for displaced persons in the event of a massive inflow⁹; in this regard, there is a corresponding relationship to Article 78 para. 3 TFEU.

The crucial **procedural** innovation, in respect to lit. a and lit. b, is determined by lit. d. 11 It requires a common procedure for the granting and withdrawing of the uniform asylum or subsidiary protection status. Thus, Directive 2005/85 on minimum standards on procedures found a recast through Directive 2013/32 on common procedures for granting and withdrawing international protection; the modifications induced by this directive must be transposed into national law until 20 July 2015.

The provisions of the Member States that are responsible for the examination of an ap- 12 plication for asylum or subsidiary protection, requires a procedural specification, which has to be in line with the system of Dublin III, as described above (see mn. 4). Moreover, provisions concerning the standards of the living conditions for the applicants for asylum (lit. f) have to be determined. This is accomplished by Directive 2003/9/EC, recast by Directive 2013/33/EU laying down standards for the reception of applicants for international protection¹⁰. It is crucial for this task to foster a **balanced distribution** of the burden on the Member States, caused by the reception of asylum seekers, refugees and displaced persons. This aim, however, has so far become realized only by distributing financial aid to assist particularly affected Member States, not by creating a corresponding system of distributing the persons seeking protection.

Lit. g covers the **cooperation with third countries**. The purpose of the cooperation is 13 the assistance of third countries in order to prevent refugee migration into the Union and to safeguard conditions for the refugees that are in line with the principles of human dignity. The responsibility in terms of the asylum and refugee policy faced by the Union in accordance with Article 78 para. 1 TFEU cannot be fulfilled by delegating the problem to weaker third countries and giving mere financial aid.

⁷ Article 15 Council Directive 2011/95.

⁸ ECJ Case C-101/09 *Germany v B, D* [2010] ECR I-10979.

⁹ Cf. Directive 2001/55.

¹⁰ Directive 2013/33/EU is to be implemented until 20 July 2015.

14 **IV. The emergency situation according to para. 3 – ordre public and solidarity clause**

Article 78 para. 3 TFEU stipulates a specific clause of **ordre public** and **solidarity**. It deals with the special case of a threat to public safety. If a sudden inflow of nationals from third countries led to an emergency situation in one or more Member States, the Council may, upon recommendation of the Commission, decide on preliminary measures in favour of the affected Member States. The regulatory aim of the provision is to equalise the burdens for the Member States. The European Parliament has to be heard in advance. In this regard, Article 78 para. 3 TFEU corresponds with Article 78 para. 2 lit.c TFEU.

Article 79 [Immigration policy] (ex Article 63, points 3 and 4, TEC)

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- (d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Bibliography: *Hansen*, More Barbwire or More Immigration, or Both – EU Migration Policy in the Nexus of Border Security Management and Neoliberal Economic Growth, 11 *Whitehead Journal of Diplomacy and International Relations* 2010, 89; *Schmidbauer*, Menschenhandel und polizeiliche Bekämpfungsansätze, *Kriminalistik* 2005, 548; *Weber*, Migration im Vertrag von Lissabon, *ZAR* 2008, 55; *Wolf*, Efforts toward An Even Closer European Union Confront Immigration Barriers, *Indiana Journal of Global Legal Studies* 1996–1997, 223; in addition, see literature to Article 78 TFEU.

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I. General remarks, historical development

1

Article 79 TFEU is designed in parallel to Article 78 TFEU. The former regulates temporary stay of nationals of third countries seeking asylum, subsidiary or any other form of protection within the area of the Union; the latter contains provisions on permanent immigration. Both Article 79 TFEU and Article 78 TFEU are based on Article 63 TEC. Article 63 TEC dealt with asylum and refugee policy in its No 1 and 2 and with immigration policy in No 3 and 4. Both became necessary due to the abolition of the internal border controls. As both groups, asylum seekers and refugees as well as immigrants, benefit accordingly from a factual freedom of movement within the entire territory of the Union, the question of admission to a Member States is a question of common interest to all Member States. Already the draft TECE separated the two scopes, asylum and immigration, and inserted them into two different provisions: Draft-Article III-266 TECE concerning the common asylum policy and draft-Article III-267 TECE concerning the common immigration policy. Apart from some editorial changes, Article 79 TFEU adopts the wording of draft-Article III-267 TECE (as well as Article 78 TFEU does with draft-Article III-266 TECE, see mn. 1 there). This eliminated the extremely intransparent procedure of Article 67 TEC. According to Article 79 para. 2 TFEU, all measures in respect to the **common European immigration policy** will be enacted in the ordinary legislative procedure in a consolidated and democratic manner.¹ The time limits of Article 63 para. 3 TEC were abandoned.

The **dynamics of integration policy** of Article 79 TFEU are easy to grasp and reflect a **new 'common European understanding'** in the field of immigration policy, parallel to Article 78 TFEU (see mn. 2 there)². To effectively route the migration flows in all their phases and to adopt coherent measures for the immigration policy is – corresponding to the internal freedom of movement – the rationale of integration for the Union. An exclusively national immigration policy could not live up to the challenges that it faces in the light of the migration flows in the globalised world of the 21st century.

II. The common immigration policy (para. 1)

3

Article 79 para. 1 TFEU enumerates the objectives of the **common immigration policy**. While Article 63 No 3 TEC merely spoke of 'measures on immigration policy', now in Article 79 TFEU the Union identifies as its task the development of a common immigration policy that expresses a profound understanding in terms of integration. According to the stipulation in Article 79 para. 1 TFEU, the Union intends to ensure to effectively **control all migration flows in all phases**, to treat all third-country national who reside legally in the territory appropriately and to prevent and combat illegal immigra-

¹ See VHVH/*Rosenau/Petrus*, Article 79 AEUV mn. 3.

² See *Häberle*, *Gemeineuropäisches Verfassungsrecht*, EuGRZ 1991, 261 et seq.

tion as well as human trafficking. Article 79 para. 4 TFEU shows that migration policy always needs an accompanying **integration policy**.

- 4 Role model and prerequisites of the existing immigration measures remain in place, namely measures regarding the **conditions governing the entry residence and the procedure** for a long-term residence (Article 63 No 3 lit. a TEC). The family reunion was mentioned as special residence title; for the secondary law, see Regulation 1091/2001 on freedom of movement with a long-stay visa, replaced by Regulation 810/2009 establishing a Community Code on Visas (Visa Code). Regarding questions of long-term stay of third-country nationals, Declaration No 18 of the Closing Conference of Amsterdam already declared that Member States are entitled to conclude treaties with other States in this respect, as long as these are in conformity with former Community, now Union law. On questions regarding the repatriation, Directive 2001/40 on the mutual recognition of decisions on the expulsion of third-country nationals as well as Directive 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement should be mentioned from secondary law.
- 5 Not least because of the aging of society, **legal migration** plays a significant role. The competitiveness of the Union can only be maintained if such migration is allowed to take place. Irrespective of whether the Union wants to prevent illegal migration or coordinate legal migration, a practical and adequate **infrastructure** is necessary in any event. Reference shall be made to the network of immigration liaison officers and to the European Migration Network³ composed of National Contact Points, designated by Member States, and the Commission.

6 **III. Measures on immigration policy (para. 2)**

Article 79 para. 2 TFEU specifies necessary **measures on immigration policy** which are to be adopted according to the ordinary legislative procedure, thereby safeguarding the necessary **democratic level of legitimisation**. Lit. a specifies the necessary entry and residence requirements as well as all provisions that are relevant for issuing visa and residence permits for a long-term stay, including such for a family reunion. Thereby, the Union adopts the task and the responsibility to regulate the conditions for long-term stay visa and resident permits, explicitly expanded on family reunion⁴. This opens up the opportunity for a **comprehensive migration policy**⁵. The term 'residence permit' is understood as every document or administrative decision issued by the authorities of a Member States, entitling an individual to stay on the territory of a Member State. Family members of Union citizens are allowed to enter and stay within the Union irrespective of their nationality.⁶ For secondary law, see Regulation 810/2009 establishing a Community Code on Visas (Visa Code).

- 7 Lit. b grants the Union the (further) competence to determine the respective conditions governing the freedom of movement and residence of **third-country nationals residing legally** in a Member State. Concerning the status of third-country nationals entitled to a long-term stay in a Member State, the respective Directive 2003/109 was adopted in 2003.
- 8 Measures to be taken in respect to **illegal immigration** and **unauthorised residence** are described in lit. c. The **removal** and **repatriation** of persons are explicit part of

³ Cf. Council Decision 2008/381/EC establishing a European Migration Network.

⁴ See *VHvH/Rosenau/Petrus*, Article 79 AEUV mn. 5, showing a difference between Union citizens and their family members on the one hand and other foreigners on the other hand.

⁵ See *CR/Rossi*, Article 79 AEUV mn. 3.

⁶ See *CR/Rossi*, Article 79 AEUV mn. 12.

it.⁷ Regarding repatriation, there are Directive 2001/40 on the mutual recognition of decisions on the expulsion of third country nationals, Directive 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement (see already mn. 4 above) as well as Directive 2003/110 on assistance in cases of transit for the purposes of removal by air. Measures in this field have to observe the limitations of the ECHR (especially Article 3 and Article 8 ECHR) for the treatment and expulsion of illegal immigrants;⁸ in this context, the common immigration policy is displayed through the mutual recognition of decisions on repatriation.⁹ **Conformity with the human rights law** should be a matter of course for the Union that is bound to fundamental human rights in a threefold way (general principles of law, ECHR and the European Charter of Fundamental Rights).

Lit. d has a human rights implication, too, and creates responsibility for the Union in 9 the light of international law. It deals with measures **combating human trafficking**, especially **trade with women and children**. The legislative competences in this field are new in wording. In its content, however, it is nothing more than the accentuation of a policy area that has been growing recently in its importance but has always been respected by the Union. Examples of Union measures are: **Directive 2011/36** on preventing and combating trafficking in human beings and protecting its victims, and **Directive 2004/81** on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

At the level of the Council of Europe, the Convention against human trafficking needs to be considered in this context (Council of Europe Convention on Action against Trafficking in Human Beings dated 16 May 2005)¹⁰.

IV. Agreements with third countries (para. 3)

10

According to Article 79 para. 3 TFEU, the Union may conclude readmission treaties with third countries. Such treaties deal with the relationship towards third-country nationals who do not or who do no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States. Its parallel character to Article 78 para. 2 lit. g TFEU (see mn. 2 there) is apparent. The parallel responsibility in immigration policy is also apparent. The Union would not comply with such a responsibility if it transferred the problem to weaker Member States. Financial support definitely is a major support measure but certainly not the decisive component. Reference shall be made to the European Return Fund, as well as to the possibility to mutually recognise decisions on repatriation; a special reference shall be made again, however, to the human rights standard that applies to such decisions.

V. Integration policy (para. 4)

11

Successful integration of third-country nationals residing legally in the Union is essential for a successful immigration policy. Article 79 para. 4 TFEU relates to this context of integration, although not allowing any legal harmonisation and therefore safeguarding

⁷ See CR/Rossi, Article 79 AEUV mn. 22.

⁸ See CR/Rossi, Article 79 AEUV mn. 22.

⁹ See VHVH/Rosenau/Petrus, Article 79 AEUV mn. 8.

¹⁰ CETS 197. See Schmidbauer, Kriminalistik 2005, 548 et seq.

diversity. A coherent framework for integration shall be adopted for the integration of third-country nationals. In this respect, the Union intends to provide extensive assistance by means of a separate European Integration Fund (EIF) created by the Council.¹¹

12 VI. Reservation in favour of the Member States (para. 5)

According to Article 79 para. 5 TFEU, the Member States maintain the right to lay down special rules in order to deny a residence permit of third-country nationals due to job market considerations or due to a lack of sufficient resources. It could be understood as an ordre public for the labour market. The core area of legal immigration is left within the competence of the Member States. This puts the common immigration policy, which is emphatically stressed by para. 1, in a different perspective. As the Member States, however, regard the permanent migration as central element of their sovereignty, a more comprehensive regime was not possible.

Article 80 [Principle of solidarity]

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Bibliography: *Epaminondas*, Solidarity as an Objective of the European Union and the European Community, Legal Issues of European Integration 1994, 85; *Malcom*, Promoting Solidarity: From Public Services to a European Model of Competition?, 44 CMLRev 2007, 1057; *Ottmann*, The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model, Vienna Online Journal on International Constitutional Law 2008, 36; *Sangiovanni*, Solidarity in the European Union, 33 Oxford Journal of Legal Studies, 2013, 213; *Wolfram/Kojima* (eds), Solitarity: A Standard Principle of International Law, 2009.

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1 I. General remarks, historical development

The principle of **solidarity** occurs frequently in the Treaties, very prominently in Article 3 para. 3 TEU, Article 67 and Article 222 para. 1 TFEU, conjuring the ‘spirit of solidarity’. The principle of solidarity has the same effect for the relationship between the Member States as the principle of loyalty regarding the relationship between the Member States and the Union: it wants to facilitate cooperation by mutual consideration, especially by an **equal and fair distribution of burdens** within the Union. The Union is to be qualified as ‘solidarity group’ committed to the spirit of ‘sincere cooperation’ (as in Article 4 para. 3 s. 1 TEU).¹ Article 80 TFEU connects the principle of solidarity with the core area of Police and Judicial Cooperation, the common policies in the fields of border checks, asylum and immigration. These areas are characterised by a very high necessity

¹¹ Council Decision 2007/435.
¹ See *Häberle*, Europäische Verfassungslehre, 7th ed. 707.

of cooperation and a high risk of an unfair distribution of burdens. Article 80 TFEU is identical to its role model draft-Article III-268 TECE. The demanded solidarity presents a **constitutional building block** concerning the European integration structure in both articles. The abstract **obligation** for mutual solidarity of the Member States finds its way into written primary law via Article 80 TFEU. Even if there may be doubts about the legislative effectiveness because of the relative openness, it has, in any way, the **character of an appeal**².

II. Regulatory content

2

The rule, however, was not just made to appeal. The solidarity clause also includes concrete **obligations to act**.

In the field of finances, especially financial compensation measures have to be considered. Hereto, different funds were established at Union level: the **External Borders Fund** for 2007–2013³; the **European Return Fund**⁴; and the **European Integration Fund**⁵. The European Refugee Fund (ERF), which was already established for the period from 2000–2004, was continued for the period from 2005 until 2010 (ERF II). During the period from 2008 until 2013, the ERF spent about € 630 million to support the efforts of the Member States in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures. In addition to the financial compensation mechanisms, there are other measures that have to be considered, such as exchanging information, technical help, infrastructure support or common training and retraining measures. The whole range of **corporate** respectively **open to corporate constitutionalism** comes into play.⁶ In addition to an area of freedom, security and justice, European solidarity has a very important role concerning the help for Greece within the Economic and Monetary Union. Article 80 TFEU, however, does not create a concrete standard for solidarity.

CHAPTER 3 JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81 [Judicial cooperation in civil matters] (ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, par-

² See VHVH/Rosenau/Petrus, Article 80 mn. 1; concerning the solidarity in international law, see Wolf-ram/Kojima (eds), *Solidarity: A Standard Principle of International Law*, 2009.

³ OJ 2007 L 144/22.

⁴ OJ 2007 L 144/45.

⁵ OJ 2007 L 168/18.

⁶ Cf. Häberle, *Der kooperative Verfassungsstaat* (1978), in: *id.*, *Verfassung als öffentlicher Prozess*, 3rd ed. 1998, 407 et seq.; Hobe, *Der kooperationsoffene Verfassungsstaat*, 37 *Der Staat* 1998, 1 et seq.

ticularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments.

If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

Bibliography: *Haibach*, The Mutual Recognition of Decisions in Civil and Commercial Matters in the European Union in the Light of the Full Faith and Credit Clause of the U.S. Constitution, *Maastricht Journal of European and Comparative Law* 2003, 291; *Horng*, The Principle of Mutual Recognition – The European Union's Practice and Development, *World Competition* 1999, 135; *Knotzl/Zach*, Taking the Best from Mediation Regulations – The EC Mediation Directive and the Austrian Mediation Act, 23 *Arbitration International* 2007, 663; *Kohler/Pintens*, Entwicklungen im europäischen Familien- und Erbrecht 2008–2009, *FamRZ* 2009, 1529; *Rauscher/Pabst*, Entwicklungen im europäischen und völkervertraglichen Kollisionsrecht 2007–2008, *GPR* 2008, 302; *Wagner*, Zur Kompetenz der Europäischen Gemeinschaft in der justiziellen Zusammenarbeit in Zivilsachen, *IPrax* 2007, 290.

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1

I. General remarks, historical development

Article 81 TFEU deals with the cooperation of the administrations of justice and courts of the Member States in **transnational civil matters**. Its predecessor is Article 65 TEC. Article 65 TEC already required, as a condition for the Council to act, a **cross-border implication**; furthermore, the regulation had to be necessary for the **proper functioning of the internal market**. Article 81 TFEU includes several procedural ar-

rangements. Basically, the ordinary legislative procedure applies (para. 2). In family law, however, the Council decides unanimously after consulting the European Parliament (para. 3). Article 81 TFEU, as a special rule, overrides Articles 114, 115 TFEU.¹

The **direct role model** of Article 81 TFEU is draft-Article III-269 TECE, which is almost identical in wording. However, a substantial novelty was added in para. 3 subpara. 3 by the Intergovernmental Conference 2007. The national Parliaments received an unlimited right of veto in the cases mentioned, meaning that the objection of one single Parliament is sufficient. The legal protection was also extended by eliminating Article 35 TEU (old version) and Article 68 TEC without any replacement (see Article 67 TFEU mn. 11). The restriction for measures to be necessary for a 'proper functioning of the internal market' was abolished, too. Concerning the competence in family affairs, the restriction was somewhat artificial anyway and made the market relevance appear rather arbitrary. Today, para. 2 is rather succinct: 'particularly when necessary for the proper functioning of the internal market'. This formulation also allows other focuses.

Ireland and the **United Kingdom** may participate in the legal act of Article 81 TFEU by 'opting-in'; **Denmark** can participate only by an independently established agreement.²

II. The judicial cooperation in civil matters (para. 1)

Whereas, in the past, the Member States needed to establish **international treaties** to facilitate the cross-border legal relations, Article 65 TEC improved the situation by establishing more effective and more consistent rules by the (former) Community. At that time, and still today, the term 'civil matters' refers to civil procedure law in a broad sense. Due to the principle of conferral of powers, the competence concerning the substantive civil law remains with the Member States. Article 81 TFEU accords '**development responsibility**' to the Union, referring to a gradual and dynamic process.

The **principle of mutual recognition** of judgments and of decisions in extrajudicial cases is the essential element of the judicial cooperation. It is generally stated in para. 1 and finds its arrangement in para. 2 lit. a, as one of the most important measures. According to para. 1 s. 2, the **approximation of laws and regulations** is also an effective way to realise the cooperation objective. Compared to mutual recognition, it is the far more intensive measure. If only for reasons of practical efficiency, priority should be given to the simpler and faster recognition; the aspect of '**unity** (by endorsement) in **diversity** (of the culturally different regulations of the Member States)' has to be added to these considerations. Neither for the implementation of legal proceedings nor for the enforcement of such decisions, shall the internal frontiers be an obstacle. The Member States' restrictions, which are necessary and provided by fundamental rights, have to be respected in the implementation of the principle of mutual recognition.³

III. The catalogue of measures from para. 2

The wording of para. 2 implies that the catalogue is meant to be **exhaustive** (in contrast to the former Article 65 TEC, which used the formulation 'include'; however, its list of measures was far less comprehensive). An implicit use of competences concerning the substantive civil law is excluded. According to the **Hague Programme**⁴, the Council is in

¹ This is in dispute, see Streinz/*Leible*, Article 81 AEUV mns 52 et seq.

² See Article 67 TFEU mn. 6, concerning the respective reservations of the three Member States.

³ For further reference, see VHVH/*Rosenau/Petrus*, Article 81 AEUV mn. 9.

⁴ See Article 68 TFEU mn. 2.

charge to control the quality and coherence of measures; the Council and the Commission are supposed to ensure the coherence and the close links in accordance with international law (see Council Decision 2006/719 on the accession of the Community to the Hague Conference on Private International law)⁵. To ensure the efficient implementation of the measures, para. 2 gives the legislative power to the Union; concerning family law, the legislative power is conferred by para. 2 in conjunction with para. 3.

- 7 The principle of **mutual recognition** under **lit. a** has a prominent function, which applies for all measures. It can be qualified as a **cornerstone of judicial cooperation**, being a solution from full harmonisation.⁶ For this reason, para. 1 places the principle, as a general rule, 'before the brackets'. Free circulation of civil judgments and abolition of the exequatur procedure is a necessary condition for mutual recognition; for this, however, the legal system of each Member State has to be of high quality and the Member States must be able to trust in this quality.⁷ Otherwise, it is not only the much-criticized 'forum shopping', which leads to a loss of trust. A **trust-building** measure can be, for example, the discussions between the Member States' courts on legal issues (to be organised not only at the highest judicial level), exchange programmes, common European measures on education and training etc.
- 8 **Lit. b** relates to the cross-border **service of judicial and extrajudicial documents** (see already **Council Regulation 1348/2000** on the service of judicial and extrajudicial documents in civil and commercial matters in the Member States), the cross-border **taking of evidence** (see **Council Regulation 1206/2001** on the cooperation between the courts of the Member States in the field of taking evidence in civil and commercial matters) and the **recognition and enforcement** of judicial and extrajudicial decisions in civil and commercial matters (see **Council Regulation 1206/2001** on the judicial service and the recognition and enforcement of judgments in civil and commercial matters (**Brussels I**), which has taken the place of the Brussels Convention of 27 September 1968; **Council Regulation 1346/2000** on insolvency proceedings in its consolidated version of 8 July 2011; **Council Regulation 2201/2003**, as amended by Regulation 2116/2004, on the service and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation 1347/2000. The cross-border service of judicial and extrajudicial documents is facilitated also by the **European Service Regulation** (Council Regulation 1348/2000). Within its scope of application, it replaces the **Hague Service Convention** of 15 November 1965.⁸ It is now possible to use the direct cross-border service by mail, see Article 14 European Service Regulation.
- 9 **Lit. c** deals with the compatibility of **International Private Law** and the **International Civil Procedure Law** in the Member States. The explicit intention of the provision is avoiding conflicts of jurisdiction. Again, **Brussels I Regulation** is seen as the cornerstone (see mn. 8 above). Concerning the cross-border insolvency law, reference should be made to the **European Insolvency Regulation** (Council Regulation 1346/2000 on the insolvency proceedings). Moreover, the projects Rome I (Regulation 593/2008) and Rome II (Regulation 864/2007), concerning the conflict of law for provisions regarding contractual and non-contractual obligations, will be developed further.
- 10 **Lit. d** deals with the **cooperation in the taking of evidence**. Therefore, the **European Evidence Regulation** has to be mentioned (Regulation 1206/2001 on the cooperation between the courts of the Member States concerning the taking of evidence regulation),

⁵ OJ 2006 L 297/1.

⁶ See VHVH/Rosenau/Petrus, Article 81 AEUV mn. 2.

⁷ See VHVH/Rosenau/Petrus, Article 81 AEUV mn. 3.

⁸ BGBl. 1977 II, 1453.

which provides two ways of taking of evidence. Either it is done by a directly requested court under its laws (Article 10 TFEU) or the trial court is allowed to implement the taking of evidence on the foreign territory according to its own laws (Article 17 TFEU).

According to **lit. e**, the **effective access to justice** which constitutes the basic requirement of the rule of law has to be guaranteed. The **EC Legal Aid Directive** will guarantee that financial barriers will not preclude the access (Directive 2003/8 to improve the access to justice in cross-border disputes by establishing common minimum requirements relating to legal aid for such disputes). 11

Lit. f demands the **elimination of obstacles** to the proper functioning of civil proceedings, if necessary by adjusting rules concerning civil procedural law. The main goal is equal access to justice and effective legal protection; also see the respective secondary legislation (**Council Directive 2002/8** to improve the access to justice in cross-border disputes by establishing common minimum requirements relating to legal aid for such disputes). Furthermore, Member States shall appoint liaison judges or **other competent authorities for their own country**. Finally, the **Commission** issued a **Green Book** on minimum procedural standards in 2009 (4 April 2009).⁹ 12

Alternative dispute resolution mechanisms are becoming more and more important in civil procedure practice. Especially the mediation process has to be highlighted in this context. **Lit. g** takes account of this. This is the reason why the European Parliament and the Council adopted the so-called **Mediation Directive** (Directive 2008/52 on certain aspects of mediation in civil and commercial matters). 13

Concerning the implementation of **lit. h**, one may think of the **EU-workshops**. These workshops are intended to provide practical experience with regard to the application of EU law and to improve the cooperation between legal practitioners. Other examples are common **databases** and all other forms of **effective information exchange**. The competence has remained unused.¹⁰ 14

IV. Special rules for family law (para. 3)

15

Family law is a particularly sensitive matter of cooperation. The special legal cultures, the grown traditions, the Member States' interest in sovereignty and the citizens' interest concerning their fundamental rights have to be taken into account in a very distinct way. Therefore it is not the ordinary legislative procedure, but a **special sovereignty-protecting legislative procedure** that has been established. The Council has to decide unanimously after consulting the European Parliament.

For reasons of democratic legitimacy, it appears problematic that the EP will only be consulted, without having a real codecision power. Therefore, a so called '**rendez-vous clause**' was added to paragraph 3 subpara. 2. Through this clause, certain matters can be **reintroduced** to the ordinary legislative procedure after a unanimous Council decision. 16

The Intergovernmental Conference 2007 imposed a further restriction in paragraph 3 subpara. 3. Any proposal under paragraph 3 subpara. 2 will be forwarded to the Member States' Parliaments. They must check the proposal within six months, having the possibility of an **absolute veto**. If only one single Member State's Parliament objects, the decision will not be adopted. Thus, the **national Parliaments** act as **real European co-legislators** in this context – which does not correspond to the traditional institutional balance at Union level. 17

⁹ COM (2009) 175 final.

¹⁰ See VHVH/Rosenau/Petrus, Article 81 AEUV mn. 16.

- 18 Currently, the judicial cooperation in family law cases is characterised by the so-called **Brussels II Regulation** (Regulation 2201/2003 concerning the jurisdiction, the recognition and the enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Council Regulation 1347/2000, amended by Regulation 2116/2004 with regard to treaties with the Holy See). Moreover, the conflicts of laws in divorce and separation matters will be harmonised. The discussion concerning **Rome III and Rome IV**, however, is currently deadlocked:¹¹ Regulation 4/2009 was enacted concerning procedural and conflict of laws issues **in maintenance cases**. In this context, Council Decision 2011/220/EU of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance is to be mentioned as well.

CHAPTER 4 JUDICIAL COOPERATION IN CRIMINAL MATTERS

Article 82 [Principle of mutual recognition; minimum rules] (ex Article 31 TEU)

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

¹¹ See *Kohler/Pintens*, FamRZ 2009, 1529 et seq.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Bibliography: *Alegre/Leaf*, Mutual Recognition in European Judicial Cooperation: A Step too Far too Soon? Case Study – The European Arrest Warrant, 10 ELJ 2004, 200; *Mitsilegas*, EU Criminal Law, 2009; *Vogel/Spencer*, Proportionality and the European Arrest Warrant, 6 Criminal Law Review 2010, 474; *Panait*, The Issue of the Police and Judicial Cooperation in the European Union, Contemporary Readings in Law and Social Justice 2012, 537; *Schünemann*, Europäischer Haftbefehl und gegenseitige Anerkennung in Strafsachen, ZRP 2003, 472; *Spronken/Vermeulen/de Vrocht/van Puyenbroeck*, EU Procedural Rights in Criminal Proceedings, Directorate General, Justice and Home Affairs, 2008; *Weyembergh*, Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme, 42 CMLRev 2005, 1567; for further references, also see literature to Article 67 TFEU.

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I. General remarks, historical development

1

The Lisbon Treaty **extends** and **clarifies** the existing rules of judicial cooperation, both in general (when e.g. the principle of mutual recognition got anchored in primary law for the first time) and in individual details. The **reform** or even **reconstruction** became necessary by the transfer of the PJCC into the uniform and supranational EU law;¹ the PJCC is – factually – constitutionally incorporated into the Treaties. Draft-Article III-270 TECE provides the role model for this **constitutional integration**, which is identical apart from only editorial changes caused by the Lisbon mandate.

In 1992, police and judicial cooperation was incorporated into EU primary law by the Treaty of Maastricht. In 1997, the Treaty of Amsterdam incorporated the civil law provisions of the police and judicial cooperation into the supranational TEC. The criminal law part remained in the intergovernmental third pillar due to the Member States' claims of sovereignty. This ensemble of rules presented the role model for the constitutional update by the draft TECE. It began as a purely intergovernmental cooperation but, through the Treaty of Lisbon and the integration of the criminal law part of the PJCC into the TFEU, it became completely supranational. The ECJ anticipated this in its much criticized **Pupino decision**² and brought the 'framework decision' in line with the legal regu-

¹ See Schwarze/Böse, Article 31 TEU mns 1 et seq.

² ECJ Case C-105/03 *Pupino* [2005] ECR I-5385, especially mn. 34 and mn. 36.

latory instruments of the (then) Community. As a result, the exclusive preservation of Member State sovereignty became ever smaller – also in the sensitive field of judicial cooperation. This in turn led to multiple scepticism. Consequently, Article 82 TFEU includes procedural safeguarding rules in form of restrictions (para. 3) to take into account the Member States' doubts. The rule considers the dialectic of 'unionalisation' and 'protection of sovereignty'; it also expatiates on the specific cooperation mechanisms. Furthermore, the rule takes into account the high relevance of fundamental rights. Due to all of those issues, Article 82 TFEU has become extraordinarily complex and difficult to read. The ideal of a constitutional focus on the essentials could not be fully achieved, especially regarding language and content.

- 3 In the context of Article 82 TFEU, exceptions apply for **Ireland**, the **United Kingdom** and **Denmark**.³

4 **II. The provision of para. 1: mutual recognition**

Para. 1 has become extremely complex. The **principle of mutual recognition** of judgments and judicial decisions is the guiding principle and the basis of para. 1 ('shall be based on'). In relation to para. 2 and Article 83 TFEU, it includes the more intensive and more far-reaching but tedious approximation of laws ('shall include'). In primary law, the principle of recognition was initially limited to the less sensitive area of cooperation in civil matters. With the Tampere Programme⁴, the Union started a **spill-over** from civil to criminal law, which has been continued consistently since then. Combined with this process, there has been a drastic shift of paradigm for criminal justice: So far, the judgments and judicial decisions of other Member States had to be examined critically (for example regarding the conformity with the *ordre public*-standard). Now the correctness (and especially the compliance with the rule of law) is assumed. This **trust** must not lead to erosions of the rule of law or fundamental rights. It is about nothing less than the 'principle of practical concordance' (as established by *Konrad Hesse*) between the interests in effective law enforcement and the protection of individual rights of the parties. The establishment of **comparable high legal standards** in all Member States that are subjected to constant control and that are made mandatory as criteria for membership are essential.

- 5 Para. 1 subpara. 2 determines the form of action for the catalogue of measures in lit. a to d. The European Parliament and the Council have to act in accordance with the **ordinary legislative procedure**. The catalogue has to be considered as exhaustive.
- 6 Lit. a requests to establish rules and procedures for ensuring the **recognition** of all forms of judgments and other judicial decisions throughout the Union, taking up the **basis and guiding principle** of the cooperation. One of the existing and particularly controversial measures of mutual recognition is the establishment of the **European arrest warrant (EAW)**; see Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States; for its European law conformity, see case C-303/05⁵). Here, the recognition principle has been implemented by secondary legislation. The abandonment of the examination of the dual criminality of the 32 groups of offences, enumerated in Article 2 para. 2 Council Framework Decision on the EAW, provoked particular criticism⁶. The Bundesverfas-

³ For the reservations of the three aforementioned Member States see Article 67 TFEU mn. 6.

⁴ See Article 68 TFEU mn. 1.

⁵ ECJ Case C-303/05 *Advocaten voor de Wereld* [2007] ECJ I-3633.

⁶ See *Schünemann*, ZRP 2003, 472 et seq.

sungsgericht (German Federal Constitutional Court), however, did not object to the European legal basis.⁷ Further **exemplary instruments of mutual recognition** in secondary legislation are, for example, the Framework Decision on recognition of freezing orders (Council Framework Decision 2003/577/JHA of 22 June 2003 on the enforcement of decisions on the freezing of assets or evidence in the European Union), the Council Framework Decision on mutual recognition to fines (Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties) and the Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters, imposing custodial sentences or measures for the purpose of their enforcement in the European Union; Framework Decision 2009/299/JHA of 26 February 2009 amending the Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition of decisions following a trial at which the person was not present. **Other fields of mutual recognition** are: measures of legal extradition (already in Tampere, the European Council expressed its opinion that formal extradition procedures for persons who are fleeing from justice after having been finally sentenced should be replaced by a simple transfer of the person, and furthermore that summary proceedings should be considered), measures of evidence warrant, the recognition of fines or the recognition of occupational bans. In 2005, the Council submitted a proposal for a European enforcement order; subsequently, the Council issued Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The Commission has also proposed a European supervision order⁸; the subsequent Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention had to be implemented into national law until 2012.

Lit. b is focused on the **avoidance of conflicts of jurisdiction** and their solution. In this context, attention must be drawn to Article 54 Schengen Implementation Convention concerning double jeopardy, meaning the *ne bis in idem*-principle, also found in national laws throughout the Union, such as Article 103 para. 2 Grundgesetz (German Constitution).

Lit. c demands – by analogy to Article 81 lit. h TFEU (see mn. 14 there) – the training of the judiciary and judicial staff. **EU workshops** provide practical experience concerning the application of EU law and thus promote the cooperation between these groups. Common **databases** or other forms of **effective information exchange** pursue the objective of knowledge transfer, too.

Lit. d eventually relates to the cooperation between judicial or equivalent authorities of the Member States. The cooperation aims at facilitating the proceedings in criminal matters and the enforcement of decisions. The most important institutional arrangement is **Eurojust**⁹. The Council Joint Action 98/428/JHA established a **European Judicial Network (EJN)**¹⁰ as a system of judicial contact points between the Member States, involving the Commission. The judicial cooperation in criminal matters is based on the traditional normative instruments of international legal assistance. However, the applica-

⁷ See BVerfGE 113, 273 – Europäischer Haftbefehl.

⁸ COM (2006) 468, 29 August 2006.

⁹ Cf. Article 85 TFEU.

¹⁰ Decision 2008/976, OJ L 348/130.

ble standard in this context is Council of Europe Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and the Additional Protocol of 17 March 1978. Further documents are (partly outdated) the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991 and the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000¹¹ as well as Articles 48 et seq. Schengen Convention. The Convention on mutual assistance and cooperation between customs administrations (Naples II) of 18 December 1997 contains special rules concerning customs matters. A deepened cooperation in criminal matters in the sense of a European avant-garde was finally opened by the Prüm Treaty of 27 May 2005 between the BENELUX countries, Germany, France, Spain and Austria.

10 **III. The provision of para. 2: the approximation of laws**

Besides the mutual recognition of criminal decisions and the intergovernmental transnational cooperation in criminal matters, there is another complementary possibility: the **approximation of laws**. The harmonisation, however, is focused **instrumentally** on the **facilitation of the mutual cooperation** as defined in para. 1. It is limited to minimum rules, which shall take care of sovereignty and diversity. The Union is expressly in charge to consider the (cultural) differences between the legal systems and legal traditions. In the sense of subsidiarity, this includes the respect for national identities. The European Parliament and the Council have to use the ordinary legislative procedure and the directive as instrument (see Article 289 TFEU).

- 11 Like para. 1 for the mutual recognition, para. 2 lays down an exhaustive list concerning the approximation of laws. Lit. a concerns the mutual admissibility of **evidence** between Member States and, therefore, allows necessary measures of harmonisation. In the past, the role model in secondary law was a Council Framework Decision on the European Evidence Warrant (Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for obtaining objects).
- 12 Lit. b allows rules concerning the **rights of individuals in criminal procedures**. Firstly, an equal standard in criminal procedures in all Member States has to be created. Secondly, the validity of protection standards concerning fundamental rights has to be secured. This is why harmonisation **cannot** mean **levelling** at a low level of protection. A Framework Decision on certain procedural rights in criminal proceedings (proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union¹²) was already designed under the old law. The common rules, adopted by the Framework Decision, set uniform standards concerning the level of protection.
- 13 Lit. c affects the legislation concerning the harmonisation of the **rights of victims of crime**, again at a high level of protection. It is necessary to reach a high and **effective standard in the protection of victims** throughout the European Union. Therefore, the Council enacted a directive relating to compensation to crime victims (Council Directive 2004/80 on compensation to victims of crime, after a previous Green Paper: Compensation for victims of crime¹³), and a framework decision on the standing of victims in criminal procedures (Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal procedures; see also case C-105/03¹⁴).

¹¹ OJ 2000 C 197/3.

¹² COM (2004) 328, 28 April 2004.

¹³ COM (2001) 536, 28 September 2001.

¹⁴ ECJ Case C-105/03 *Pupino* [2005] ECR I-5285.

Incidentally, other **unnamed aspects of the criminal procedure** can also be determined (lit. d), which requires that the Council determines these issues by resolution and that the Council adopts the decision unanimously after approval by the European Parliament. The principle of unanimity contributes to the concerns of the Member States; otherwise criminal (procedural) legal rules could be imposed on the Member States by a simple majority vote. Finally, the adoption of minimum rules does not prevent the Member States to maintain or introduce a higher level of protection for individuals. This clause clarifies that **levelling is not intended**. 14

IV. The specific safeguard clause in favour of Member States, para. 3 15

Para. 3 summarises in two subparagraphs the content of draft-Article III-270 paras 3 and 4 TECE without substantial change. Because criminal law and criminal procedure law belong to the **core competences of the Member States' sovereignty**, the Member States pushed for specific security mechanisms. This is what the complex rule of para. 3 presents. It provides that a Member State, which holds its national rules of procedure to be fundamentally affected by a directive based on para. 2, has the possibility to stop the legislative process by suspension of the procedure and to request that the European Council is to be involved. Subsequently, the Heads of Government within the European Council have to decide on the further procedure: In case of a consensus, the Council refers the draft back and the legislative procedure is resumed (see para. 3 subpara. 3). Because the European Council has to decide consensually (see Articles 235, 238 TFEU), new provisions can certainly be blocked by just one Member State which considers the law as incompatible with its own legal system. After the end of the periods mentioned in para. 3 subpara. 2, the authorisation to enhanced cooperation is deemed to be given if there are at least nine Member States that wish to do so. The **fragile balance between the national sovereignty and the 'unionalisation'** may require such exceptions and then again exceptions from the exceptions. However, the opportunity of a **citizen-oriented** area of freedom, security and justice had been missed again by adopting this hardly accessible rule.

Article 83 [Criminal offences with a cross-border dimension] (ex Article 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area

which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Literature: *Calderoni*, A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime, 16 *European Journal of Crime, Criminal Law and Criminal Justice* 2008, 265; *Mitsilegas*, The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?, 34 *ELR* 2009, 523; also see the literature to Article 82 TFEU.

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1 I. Overview and development of the provision

The **harmonisation** of criminal law, especially of substantive criminal law, affects the Member States' sovereignty in its core. Article 83 TFEU regulates the essential competences of the Union concerning the approximation of laws, differentiated accordingly to the **harmonisation in the areas of particularly serious crime** (para. 1) and the **additional harmonisation** (para. 2). By restricting the legislative process and by exception clauses (para. 3), the article wants to reflect the reservations of the Member States regarding their sovereignty. It resembles Article 82 TFEU in its structure. Especially para. 3 was created in parallel to Article 82 TFEU and is therefore redundant. Article 83 TFEU is, similar to Article 81 TFEU, an example of widely unsuccessful legislative technique.

2 The aforementioned **deficiencies** and **redundancies** can already be found in draft-Article III-271 TECE, which Article 83 TFEU – apart from editorial changes caused by the Lisbon mandate – adopted to a great extent. Draft-Article III-271 TECE has also been the opposite of constitutional brevity and precision. The reasons why this was not corrected during the reform process of Lisbon might have been political necessities and time pressure. This way, the ideal of a people-orientated Union is failing. The compro-

mise between 'unionalisation' and sovereignty protection requires a much higher level of linguistic transparency.

Exceptions of Article 83 TFEU apply for **Ireland**, the **UK** and **Denmark**.¹

3

II. Harmonisation of particularly serious crime (para. 1)

4

The national criminal law systems can be harmonised in accordance with para. 1 in the areas of particularly serious crime only. Due to sovereignty issues and diversity, harmonisation, however, is limited to minimum requirements. The same applies to the harmonisation of procedures (see Article 82 TFEU). Another restriction is the cross-border dimension. It may arise from the nature and impact of the specific crime or from the need for a common legal basis. Either way, even if the wording might be general, there is a **perspective of subsidiarity** within both. The procedural framework for acts of the Union is the ordinary legislative procedure; legislative instrument is the directive, which is less intense in its effects concerning the core area of national sovereignty than a regulation because it is just the objective of the directive which is binding.

Subpara. 2 specifies the areas of particularly serious crime in form of an exhaustive list **(enumerative principle)**. It is based on Article 31 para. 1 lit. e TEU (old version) but goes even beyond. In the opinion of the **European Council of Tampere**², an agreement on common definitions, requirements and sanctions should focus on particularly relevant areas of serious and typically cross-border crime: Financial crime, drugs trafficking, trafficking in human beings, sexual exploitation of children, high tech crime and environmental crime. Since then, the Council has adopted several legal acts, such as the instruments to combat terrorism, money laundering, smuggling and human trafficking, environmental crime, the Framework Decisions on combating the sexual exploitation of children and child pornography, on combating corruption in the private sector and the decision concerning the investigation and prosecution of genocide, crimes against humanity and war crimes.

5

Subpara. 3 breaks up the strictly enumerative system of subpara. 2 but it also formulates a **reservation** regarding decision-making. This again is a concession to national sovereignty reservations, which were opposing the termination of the pillar model for a long time. The qualified majority by which the Council can decide does not apply in cases in which the Union's competence is supposed to be expanded beyond the elements of the list. If it may be necessary to expand the list of crimes, the Council has to decide **unanimously**. Further, in the context of para. 3, the fundamental transition to a qualified majority decision appears largely as a relative matter.³

6

First element of the catalogue is the **fight against terrorism**. The Union has devoted **7** itself to this fight not only from 11 September 2001 onwards but even before. The concept of terrorism is discussed controversially. There is no binding definition under public international law. The Council of Europe has felt compelled in regard to the **regional community of responsibility**, see the European Convention on the Suppression of Terrorism of 27 January 1977⁴; see as well the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005⁵; in the area of the European Union see Directive 2005/60 of the European Parliament and the Council of 26 October 2005 on the preven-

¹ Corresponding to the reservations of the three aforementioned Member States, see Article 67 TFEU mn. 6.

² Cf. Article 67 TFEU mn. 1.

³ See *Sieber*, Grenzen des Strafrechts, 119 ZStW 2007, 1 et seq.

⁴ CETS No 90; in force since 4 August 1978.

⁵ CETS No 196.

tion of the use of the financial system for the purpose of money laundering and terrorist financing. In the field of criminal law, the Counter Terrorism Strategy was eventually strengthened by the Council Framework Decision 2008/919/JHA; the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law is also relevant.

- 8 The next element of the catalogue refers to **human trafficking** and especially the **sexual exploitation of women and children**. The regulation corresponds to **international agreements** (such as the UN Palermo Convention, together with the additional protocols)⁶ and it once again demonstrates the openness of the Union to international law. Moreover, there already is important secondary legislation, such as Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings and the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.
- 9 The containment of **illicit drug trafficking** has been an important issue at the Union's agenda for a long time now. Thereby, again, the Union considers comprehensive international agreements. It adopts secondary legislation and develops long-term anti-drug strategies: see the Drug Strategy (2005–2012) the related EU Drugs Action Plan (2005–2008), as well as and the new Drug Strategy (2013–2020) which wants to contribute to a reduction in drug demand and drug supply within the EU, as well as a reduction as regards the health and social risks and harms caused by drugs; also the Communication of the Commission 45 of 14 February 2005 in the version adopted by the Council⁷, and the Green Paper: The Role of Civil Society in Drugs Policy in the European Union⁸. **Illegal arms trafficking** is combated with the same intensity.
- 10 **Money laundering** is dealt with, for example, by the Council Directive 91/308/EEC of 10 June 1991 (in the version of Directive 2001/97/EC) on prevention of the use of the financial system for the purpose of money laundering⁹. Other measures cover the **combating of corruption, the counterfeiting of means of payment and computer crime** (Council of Europe Convention of 23 November 2001 on Cybercrime¹⁰; not ratified by Germany, the UK, Poland and Austria) and **organised crime**.

11 **III. Additional harmonisation (para. 2)**

Para. 2 is infelicitously worded. According to this provision, the establishment of minimum requirements is also possible in **policy areas that are already harmonised**.¹¹ These minimum requirements may be set by directives. The procedure is ancillary to the proceedings in which the harmonisation measure was carried out; consequently, both the ordinary and the special legislative procedure are possible. The element '**essential**' is problematic, too. In comparison to the normally required element of 'necessity', this is an explicit plus. In this context, it will probably not be enough that there is no less restrictive measure which is equally effective. It remains to be seen how, in practice, politics will handle the scale of the element 'essential' and how the ECJ will interpret this term.

⁶ UN Documents A/RES/55/25.

⁷ OJ 2005 C 168/1.

⁸ COM (2006) 316, 26 June 2006.

⁹ OJ 1991 L 166/77.

¹⁰ CETS No. 185.

¹¹ See VHVH/*Rosenau/Petrus*, Article 83 AEUV mns 15, 19.

IV. The specific safeguard clause in favour of the Member States (para. 3) 12

Para. 3 combines draft-Article III-271 paras 3 and 4 TECE in two subparagraphs without substantial change. Especially because criminal law and criminal procedure law are part of the **core areas of the Member States' sovereignty**, there are specific security mechanisms concerning the procedural standards and the mutual recognition (parallel to Article 83 TFEU, see draft-Article III-270 TECE). The complicated rule of para. 3 – in parallel to Article 82 para. 3 TFEU and, to this extent, redundant – takes this into account. It renders a Member State the possibility to stop the legislative procedure and to request that the draft directive is to be referred to the European Council if the Member State holds a draft directive (as provided for in para. 1 or para. 2) as fundamentally incompatible with its own legal system. Then, the Heads of Government of the European Council have to decide about the further procedure: in case of a consensus, the Council refers the draft back, which shall terminate the suspension of the ordinary legislative procedure (para. 3 s. 3). Due to the consensual decision of the Council (see Articles 235, 238 TFEU), one single Member State can easily block the legislation. Subsequently, after the expiry of the deadlines stated in paragraph 3 subpara. 2 and in case of the wish of at least nine Member States, the authorisation to establish an enhanced cooperation is deemed to be given. It would have been much more systematically convincing to unify Article 82 para. 3 TFEU and Article 83 para. 3 TFEU.

Article 84 [Crime prevention]

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

Bibliography: *Albrecht/Kilchling*, Crime Risk Assessment, Legislation, and the Prevention of Serious Crime – Comparative Perspectives, 10 *European Journal of Crime, Criminal Law and Criminal Justice* 2002, 23; *Herlin-Kamell*, The development of EU Precautionary Criminalisation, 1 *European Criminal Law Review* 2011, 149; for further literature, see Article 67 TFEU.

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I. General remarks, historical development 1

Effective crime prevention is essential for the area of freedom, security and justice. Therefore, and for the first time at the level of primary law, draft-Article III-272 TECE had supplemented the competences from draft-Articles III-270 and III-271 TECE with a preventive element. Article 84 TFEU follows this pattern and complements the repressive competences from Articles 82 and 83 TFEU. The procedural framework is given by the ordinary legislative procedure. To secure diversity in legal culture, national sovereignty and identity, any form of **harmonisation is excluded**.¹

¹ See also *VHvH/Rosenau/Petrus*, Article 84 AEUV mn. 1.

II. Crime prevention

Crime prevention is a partly descriptive and partly normative **overall heading**. It includes all measures aimed at the quantitative and qualitative minimisation of crime and the feeling of insecurity of the citizens. Prevention may refer to the perpetrators, the victims or specific situations. Furthermore, it can have a general direction of impact or be arranged as special prevention. Even after the implementation of Article 84 TFEU, the arrangement of the prevention remains in the responsibility of the Member States. The Union is only able to act complementarily, assisting and supporting the Member States. For this assistance and support, institutional infrastructure and professional working methods have to be established. Especially the **European Crime Prevention Network (EUCPN)** serves this need.² Its headquarter is in Brussels. Each Member State has a maximum of three contact points. In Germany for example, those contact points are the Federal Ministry of the Interior, Ministry of Justice and the German Forum for Crime Prevention. Preventive measures are especially necessary in the fields of particularly serious crime: prevention of terrorism, prevention of corruption, preventive measures against organised crime and serious crime as well as drug abuse. Increasing importance has to be given to the sector of cybercrime.

Article 85 [Eurojust] (ex Article 31 TEU)

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

- (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- (b) the coordination of investigations and prosecutions referred to in point (a);
- (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

2. In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials.

Bibliography: *Coninx/da Mota*, The International Role of Eurojust in Fighting Organized Crime and Terrorism, 14 *European Foreign Affairs Review* 2009, 165; *Souminen*, The Past, Present and the Future of Eurojust, 15 *Maastricht Journal of European and Comparative Law* 2008, 217; *Xanthaki*, Eurojust: Fulfilled or Empty Promises in EU Criminal Law, 8 *European Journal of Law Reform* 2006, 175; see also the literature to Article 67 TFEU.

² See Decision 2001/427/JHA setting up a European Crime Prevention Network, OJ 2001 L 153/1.

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I. General remarks and development of the provision

1

Police and judicial cooperation require institutional safeguards and need to be enabled infrastructurally. By establishing Eurojust, meaning the **European Judicial Cooperation Unit**, an important step towards further institutionalisation has been made. This 'European Judicial Authority', seated in The Hague, has its own legal personality and coordinates the cross-border criminal procedures at Union level. It was established by Council Decision 2002/187/JHA of 28 February 2002, amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA on the strengthening of Eurojust. In the Treaty of Nice, Eurojust was mentioned in the framework of the primary law for the first time (Article 29 para. 2, Article 31 para. 1 lit. a, para. 2 TEU old version). Draft-Article III-273 TECE eventually implemented Eurojust. It was taken over by Article 85 TFEU.

In the context of Article 85 TFEU, Declaration No 27 on Article 85 para. 1 subpara. 2 TFEU is of particular relevance. It states that regulations referred to in Article 85 para. 1 subpara. 2 TFEU should take into account national rules and practices relating to the initiation of criminal investigations.

II. Profile, institutional involvement and control of Eurojust, para. 1

3

Eurojust is the criminal law counterpart to Europol and was established in order to combat serious crime. It is an institution of the European Union with its own legal personality and it is ought to facilitate an ideal coordination of cross-border investigations and law enforcement measures of the Member States when combating serious crimes.

Eurojust is composed of representatives of the Member States (public prosecutor, 4 judge or police official with similar powers). The representatives jointly form the college, which is responsible for the organisation and functioning of Eurojust. The college elects a president for a term of three years from among its members. The college is supported by a secretariat. Eurojust acts through its members or by the college. It maintains a close relationship to Europol and to the European Judicial Network, whose secretariat is located in the secretariat of Eurojust.

In the fulfilment of its tasks, Eurojust processes personal data, either in an automated 5 manner or in structured manual files. Besides the work files, Eurojust maintains an automated index with references to the work files. Only national members and the support staff, as well as authorised employees of Eurojust are entitled to **access** the personal data. The required protection provisions are stated in Articles 14 et seq. Council Decision 2002/187/JHA. An independent **data protection supervisory** is responsible for the compliance with these provisions.

The Council Decision 2002/187/JHA also regulates the right of an individual to have 6 **access** to the data concerning him or her as well as their correction and deletion. The **Joint Supervisory Body**, consisting of judges appointed by the Member States, decides on complaints about Eurojust in this respect.

Eurojust is **liable** for any damages caused by an unauthorised or incorrect processing of 7 data in accordance with the national law of the country in which the head office is located. The proceedings have to be instituted before a court of the country in which its head office

is located. Each Member State is – in accordance with its own national law – liable for damages arising from unauthorised or incorrect data that were communicated to Eurojust.

- 8 The **working assignments** of Eurojust are laid down in para. 1 subpara. 1 s. 1: National authorities are to be supported in their endeavours to combat transnational serious crimes. The support is directed to increase the efficiency of such cooperation.
- 9 The European Parliament and the Council determine Eurojust's structure, operation, field of action and tasks by means of regulations adopted in accordance with the **ordinary legislative procedure** (subpara. 2). The working profile is formulated by means of an open catalogue of tasks ('these tasks may include'). Many of these tasks are covered by the **Hague Programme**¹. According to lit. a, the initiation of criminal investigations belongs to these tasks, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly – but not exclusively – with regard to offences detrimental to the financial interests of the Union. In addition, lit. b demands co-ordination in respect to the before mentioned tasks. A special mode of cooperation is described by lit. c: on the one hand resolution of conflicts of jurisdiction and on the other hand (in close relation to it) a close cooperation with the **European Judicial Network**².
- 10 Finally, subpara. 2 demands that the previously mentioned regulations determine the specifications for the participation of the European Parliament and of the national Parliaments in the evaluation of the activities of Eurojust. This does not establish a traditional parliamentary control but a **twofold democratic accountability** at the Member States' and at the Union's level. The **parliamentary control function** of the European Parliament becomes all the more apparent.

11 **III. Formal acts of judicial procedure, para. 2**

Formal acts of judicial procedure may not be exercised by Eurojust. Only the responsible officials of the Member States are allowed to do so. This describes a traditional **sovereignty reservation**. Eurojust can only support the national actors but not replace them.

Article 86 [European Public Prosecutor's Office]

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced coopera-

¹ See Article 68 TFEU mn. 2.

² See Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network, OJ 1998 L 191/4, also see Article 74 TFEU mn. 3.

tion referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Literature: *Hamran/Szabova*, European Public Prosecutor's Office – Cui Bono, 5 New Journal of European Criminal Law 2013, 40; *Nürnberg*, Die zukünftige Europäische Staatsanwaltschaft – Eine Einführung, ZJS 2009, 494; *Sommer*, Die Europäische Staatsanwaltschaft, StV 2003, 126; Editorial, The European Public Prosecutor: The View from Transparency International, 2 New Journal of European Criminal Law 2010, 132; *Zimmermann*, Die Auslegung künftiger EU-Strafrechtskompetenzen nach dem Lissabon-Urteil des Bundesverfassungsgerichts, Jura 2009, 844; for further literature, see Article 67 TFEU.

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I. General remarks and development of the provision

1

Draft-Article III-274 TECE had the constitutional perspective to establish a **European Public Prosecutor's Office** based on Eurojust in the area of freedom, security and justice. It was highly disputed, both politically and scientifically, how and if at all such an institution would have to be created, especially in regard to the tremendous sovereignty impact of such a measure. The controversy also had consequences for the Lisbon reform process. Article 86 TFEU tries to come up with a **compromise** that is likely to last for the future. The establishment of a European Public Prosecutor's Office might find a basis in primary law; however, it remains **optional** ('may establish'). At least, it enables the creation of such an institution by means of ordinary law if and as soon as such a consensus has been reached. Eurojust serves as a model for the implementation of the European Public Prosecutor's Office. Eurojust had shaped the institutional character of the judicial cooperation in criminal matters; the European Public Prosecutor's Office would be another step towards further institutionalisation. Subparas 2 and 3 of para. 1, which find

their origin in the Governmental Conference of 2007, introduce a mechanism to facilitate a strengthened cooperation, which was unknown to the draft TECE until then.

- 2 The concept of the European Public Prosecutor's Office in Article 86 TFEU dates back to a proposal that was already made at the forefront of the Treaty of Nice in 2000.¹ The Commission specified its ideas in a Green Paper² in 2001 and a follow-up report³ in 2003. For the Commission, the integration and control of Europol that was constantly demanded by legal scholars was not as decisive as **the effective combat of fraud against the financial interests of the European Union**.⁴ The Commission's communication on the protection of the EU's financial interests by criminal law and by administrative investigations of May 2011 has been (until now) the last step towards a European Public Prosecutor's Office. Just like its constitutional model, Article 86 TFEU became rather awkward in its structure and wording.

3 II. The establishment of a European Public Prosecutor's Office, para. 1

The **functions** of the European Public Prosecutor's Office are **limited**. Different from the intention of the Constitutional Convent, the institute's task is restricted to the combat of crimes against the financial interests of the Union. The extension to serious cross-border crimes is possible with further steps (see para. 4). Para. 1 stipulates a special legislative procedure (and not the usual ordinary legislative procedure) in order to preserve the Member States' sovereignty. This is oriented on the concept of Eurojust, which only has the regulation as legislative instrument. In addition, a unanimous Council decision after the consent of the European Parliament is necessary. Upon initiative of the Governmental Conference in 2007, subpara. 2 takes into account that it became quite hard to achieve unanimity in a Union with presently 28 Member States. A procedure is being introduced to facilitate enhanced cooperation, in case unanimity is not possible to achieve. The mechanism, however, is rather complicated.

- 4 As far as unanimity cannot be established, a group of at least nine Member States can demand that the European Council has to consider a draft regulation. In such a case, the proceedings within the Council will be suspended, followed by a discussion in the European Council. In case of the achievement of a consensus, the draft shall be referred back to the Council for adoption within four months after the suspension. The Council procedure will then be taken up again. But even if a consensus cannot be established, the draft regulation has not ultimately failed. If at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly within the same four month period. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20 para. 2 TEU and Article 329 para. 1 TFEU is deemed to be granted and the provisions on enhanced cooperation shall apply.

5 III. The responsibility of the European Public Prosecutor's Office, para. 2

Para. 2 deals with the **competences of the European Public Prosecutor's Office**, whenever the institution comes into operation. In this case, Eurojust would merge into

¹ COM (2000) 608 final.

² See the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor of 11 December 2001 (COM (2001) 715 final).

³ COM (2003) 128 final.

⁴ See COM (2004) 544 final with the announcement of a White Paper for the European Prosecutor.

the European Public Prosecutor's Office as far as its competences are tackled. The present liaison between Europol and Eurojust ought to change into a cooperation between the European Public Prosecutor's Office and Europol. The European Public Prosecutor's Office shall obtain powers usually associated with public prosecutors and be entitled to exercise those functions before the courts of the Member States: investigation, prosecution and bringing of charges.

In detail: The European Public Prosecutor's Office will be responsible – partly in liaison with Europol – for **investigating, prosecuting and bringing of charges in the criminal proceedings**, however limited to the perpetrators of and accomplices in offences against the financial interests of the Union. The precise criminal offences are determined by para. 1, in order to comply with the principal of legal certainty. In relation to such offences, the European Public Prosecutor's Office will exercise the inherent functions of the national prosecutor in the competent courts of the Member States. Here, the European prosecutors will replace their national colleagues. This entails **far-reaching sovereignty restrictions** for the Member States.

IV. The legal basis for the creation of a European Public Prosecutor's Office, para. 3

Para. 3 states that the European Public Prosecutor's Office will be created by a regulation, determining at the same time its details such as the rules of procedure, the general rules applicable for the performance of its tasks, as well as the rules governing the admissibility of evidence, and the rules on the judicial review of procedural measures taken by the European Public Prosecutor's Office in the performance of its functions. This is a **mixture of organisational and procedural aspects**, ranging from the founding act to details of the admissibility of evidence. In order to comply with all this, the regulation has to establish a legal basis in accordance with the principle of legal certainty, not only when describing organisational rules but especially in regard to the definition of its functions. This, however, might lead to conflicts with national procedural regulations as there could be different procedural standards depending on whether the European Public Prosecutor's Office or a Member State's public prosecutor brings the charge. Such a criminal procedure, European only for certain incidents, causes an alarming '**new complexity**' under criteria of rule of law; this is not very convincing under integration policy aspects.⁵

V. A possible extension of powers, para. 4

The limitation to combat crimes against the financial interests was highly disputed from the outset (see mn. 3 above) and the necessity for a 'special criminal law' both from a legal and political point of view was questionable. The need to common Union actions is even more evident in an area without internal borders, especially in respect to the combat of crimes with cross-border dimension. Therefore, according to para. 4, the European Council may, at the same time or subsequently, adopt a decision amending para. 1 in order to **extend the powers of the European Public Prosecutor's Office**. This refers to the goal of combating **serious crimes having a cross-border dimension** as well as regards perpetrators of, and accomplices in, **serious crimes affecting more than one Member State**. It is obvious that this leads to further sovereignty limitations than those

⁵ See Zimmermann, Jura 2009, 844.

provided for in para. 1. Because of this, the consent of the European Parliament (democratic legitimacy) and consultation of the Commission are compulsory before the **Council can unanimously adopt a decision**. The political chances for realisation are low.

CHAPTER 5 POLICE COOPERATION

Article 87 [Police cooperation] (ex Article 30 TEU)

1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

- (a) the collection, storage, processing, analysis and exchange of relevant information;
- (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection;
- (c) common investigative techniques in relation to the detection of serious forms of organised crime.

3. The Council, acting in accordance with a special legislative procedure, may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.

In case of the absence of unanimity in the Council, a group of at least nine Member States may request that the draft measures be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft measures concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The specific procedure provided for in the second and third subparagraphs shall not apply to acts which constitute a development of the Schengen acquis.

Bibliography: *v. Arnould*, Die Europäisierung des Rechts der inneren Sicherheit, JA 2008, 327; *v. Danwitz*, Rechtsschutz im Bereich polizeilicher und justizieller Zusammenarbeit der Europäischen Union, 2008; *Hecker*, Europäisches Verwaltungskooperationsrecht am Beispiel der grenzüberschreitenden polizeilichen Zusammenarbeit, EuR 2001, 826; *Lavenex*, Justice and Home Affairs: Communitarization with Hesitation, in: Wallace/Pollack/Young (eds), Policy-Making in the European Union, 6th ed., 2010, 457 et seq.; *Papayannis*, Die Polizeiliche Zusammenarbeit und der Vertrag von Prüm, ZEuS 2008, 219; *Peers*, EU Justice and Home Affairs Law, 3rd ed., 2011; also see literature to Article 67 TFEU.

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I. General remarks and development of the provision

1

Just like judicial cooperation, police cooperation finds its anchor in primary law in the Treaty of Maastricht, as an essential element of the then third pillar of the Union. The programmatic Article 87 para. 1 TFEU is designed similarly to its predecessor of Article 29 paras 1 and 2 TEU (old version). However, the draft Constitutional Treaty already foresaw the amalgamation of the pillars and the incorporation of the police cooperation into the Community (now: Union). The troika consisting of draft-Article III-275 to draft-Article III-277 TECE was structured like this: The first provision built the basis, whereas the third and last provision described the framework for cross-border actions by the authorities. Between those two norms, draft-Article III-276 TECE was placed as an independent provision for Europol. The TFEU adopts this constitutional continuation. Article 87 TFEU and draft-Article III-275 TECE are, regarding their wording, almost identical. However, the provision also contains substantial innovations in addition to editorial changes caused by the Lisbon mandate. Subparas 2 and 3 of para. 3 go back to the Intergovernmental Conference of 2007. They institute a facilitated mechanism for a stronger cooperation, unknown to the draft TECE at that point. This (enhanced) mode of cooperation finds its limits in subpara. 4. It may not apply to those legal acts constituting an extension of the Schengen acquis. Once more, the dialectic of the incorporation into the 'Community' and the intergovernmental approach becomes apparent. The draft TECE consequently pushed the incorporation of certain matters into the Community (now: Union); the TFEU leaves it there and rather facilitates an improved cooperation and takes sovereignty considerations of the Members States into account by 'intergovernmental reminiscences'.

For **Ireland** as well as the **United Kingdom** and **Denmark** exceptions to Article 86 TFEU apply.¹

II. The evolution of police cooperation, para. 1

3

The state of integration achieved so far and described in Article 87 TFEU in terms of police cooperation does not represent the climax but describes a **dynamic process** which requires further developments in the future. This is determined by the expression 'shall establish'. The Union bears a far reaching '**responsibility to develop**', which encompasses the cooperation among Member States' law enforcement authorities. Police and customs are especially mentioned, due to their particular relevance. The intention is a **comprehensive security cooperation** to prevent (preventive) and reveal (repressive) crimes.²

¹ For the respective exceptions, see Article 67 TFEU mn. 6 and for issues regarding legal protection, see Article 67 TFEU mn. 11.

² Cf. *VHvH/Rosenau/Petrus* Article 87 AEUV mn. 4.

4 III. The different areas of police control, para. 2

1. The exchange of information and its instruments

Para. 2 describes **specific measures of police cooperation**, which can be adopted by the Council and the European Parliament in an ordinary legislative procedure with a qualified majority. Regarding its content, the provision picks up, as draft-Article III-275 TECE did before, Article 30 lit. b–d TEU (old version).

5 Lit. a deals with the collection, storage, processing, analysis and exchange of relevant information. It encompasses the **entire spectrum of exchange of information**, including the necessary measures, such as information of the law enforcement authorities on reports on suspicious financial transactions. In this context, the Schengen Information System and the Europol Information System deserve special mentioning, with the latter now being individually regulated in Article 88 TFEU.

6 In the area of search, specifics of the **Schengen Information System (SIS)** have to be highlighted. According to Article 92 Schengen Convention, the SIS is composed of a data base, maintained by each contracting party, and a joint ‘technical support function’ (CSIS; located in Strasbourg). The technical support function safeguards the harmonisation of the data set across the Member States by automatically updating their content.

7 Each Member State makes its report via a central authority only (Article 108 para. 2 Schengen Convention). The data retrieval is exclusively carried out by the designated national central authority. Only police, customs and certain immigration authorities are authorised to access the data (Article 101 Schengen Convention).

8 The SIS exclusively contains **categories of data** that are necessary for the admissible reporting purposes enumerated in Articles 95–100 Schengen Convention. Those categories of data result from Article 94 para. 2 Schengen Convention. In particular this includes persons searched for with an arrest warrant or persons who are subject to a refusal of entry. For the details of the requirements, see Articles 95 et seq. Schengen Convention.

9 Articles 102–118 Schengen Convention contain special provisions **on data protection and security of data** under the SIS. The respective national rules apply, too. A minimum standard for those rules is formulated in Articles 117 et seq. Schengen Convention. The Member State reporting the data is responsible for their correctness and storage (Article 105 Schengen Convention). The usage of the data is limited to the purposes determined in Article 102 Schengen Convention. Storage periods are limited by Articles 112 et seq. Schengen Convention. The national pool of data is supervised by a national supervisory body; a joint supervisory authority supervises the technical support function (Articles 114 et seq. Schengen Convention). Everyone has the **right to request** the national supervisory authority to check the data which concern them and to check the use which is made of such data (Article 114 para. 2 Schengen Convention). This right also results from national laws of the respective Member State. A national law may empower the national supervisory authority to decide on this subject (Article 109 Schengen Convention). An individual person is free to choose in which Member State he or she raises such a claim. Furthermore, the Schengen Convention entitles the individual to have illegally stored data **corrected** and **deleted** (Article 110 Schengen Convention). A **compensation of damages** is provided for by Article 116 Schengen Convention. Legal proceedings may be instituted against any Member State before the national courts. More far fetching regulations are not excluded by this stipulation. The exchange of information beyond the SIS is regulated by Articles 126–130 Schengen Convention.

The exchange of information shall be comprehensively governed by the **newest technologies**: database queries for DNA material and fingerprints, the creation of a European criminal prosecution network to combat terrorism, the Visa Information System (VIS) or the Customs Information System (CIS) as source of information. 10

2. Education and exchange 11

Lit. b deals with the support to education of personnel and with the cooperation in respect to the exchange of personnel, the equipment and the forensic research. It is about a comprehensive exchange of knowledge and infrastructure, enhanced by the education component. The **European Police Academy** was founded in 2001 for this reason. It is a network of national training institutions for high ranking managers in police service with a joint secretariat.³ All those measures serve on the one hand the **development and standardisation of modern methods** to combat crime and on the other hand the establishment of **mutual trust**.

3. Analysis 12

Lit. c relates to the **common development** – Article 30 lit. d TEU (old version) merely spoke of ‘assessment’. The Commission, taking up the Hague Programme⁴ intends to establish minimum standards for investigative techniques in the different legal orders, especially initiatives on the promotion of financial investigation techniques as law enforcement techniques. These methods include e.g. the surveillance of telecommunication (the respective Directive 2006/24/EC infringes the Charter of Fundamental Rights of the European Union⁵) and undercover investigation.

IV. Operational cooperation, para. 3 13

The **operational cooperation** of the police authorities was introduced to primary law by Article 30 lit. a TEU (old version) already. Its replacement to para. 3 (instead of keeping it in para. 2 like in the predecessor) has simple reasons: The ordinary legislative procedure was not meant to be applied to the operational cooperation; instead, a special legislative procedure including a consultation of the European Parliament and unanimous voting of the Council seemed to be more appropriate, due to sovereignty considerations of the Member States. The operational cooperation exceeds the conventional mutual assistance in criminal matters considerably. It comprises every form of **coordination** of measures in terms of police aversion of danger and criminal prosecution.⁶

Articles 39 et seq. **Schengen Implementation Convention**⁷ contain the respective 14 provisions. They deal primarily with cross-border observation and pursuit by officials of a contracting party. The Treaty of Prüm (27 May 2005) also deals extensively with the operational cooperation and explicitly identifies itself as pilot project on further integration within the framework of Union law.

Subpara. 2 takes into account, as well as the parallel provision in Article 86 para. 1 15 TFEU, that it is very difficult to obtain unanimity in a Union with 28 Member States. It introduces, despite sovereignty reservations, a **facilitated enhanced cooperation** for

³ Council Resolution of 22 December 2000, OJ 2000 L 336.

⁴ Cf. Article 68 TFEU mns 2.

⁵ ECJ Joint Cases C-293/12 *Digital Rights Ireland* and C-594/12 *Seitlinger and others*, judgment of 8 April 2014 not yet officially published.

⁶ See CR/*Suhr*, Article 87 AEUV mns 11 et seq.

⁷ Cf. Article 77 TFEU mn. 2.

cases in which unanimity is impossible to obtain. The mechanism is rather complicated: If unanimity cannot be established, a group of nine Member States can petition that the European Council will be concerned with a draft regulation. In such a case, the procedure will be interrupted and a debate in the European Parliament will follow. If a consensus can be reached within four months after the interruption of the proceedings, a draft has to be sent to the Council for adoption. The Council procedure will be continued. But even if no consensus has been reached, the draft has not ultimately failed. Should at least nine Member States wish for an enhanced cooperation on the basis of the draft and put this into a regulation, the Member States have to declare this within the same time frame to European Parliament, Council and Commission. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20 para. 2 TEU and Article 329 para. 1 TFEU will be deemed to be granted and the provisions on enhanced cooperation will apply.

- 16 Subpara. 3 makes an (re)exception to the possibility of enhanced cooperation. Legal acts which constitute a **development of the Schengen acquis** are **excluded**. In this context, the Member States' sovereignty considerations prevail.

Article 88 [Europol]
(ex Article 30 TEU)

1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

2. The European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

- (a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies;
- (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.

3. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities.

Bibliography: *Deflem*, Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective, 23 *Justice Quarterly*, 2006, 336; *De Lima*, Europol as the Director and Coordinator of the Joint Investigation Teams, 9 *Cambridge Yearbook of European Legal Studies* 2006–2007, 313–328; *de Moor/Vermeulen*, The Europol Council Decision: Transforming Europol into an Agency of the European Union, 47 *CMLRev* 2010, 1089; *Ellermann*, Vom Jäger zum Sammler – Europol auf dem Weg zu einem europäischen FBI?, *ZEuS* 2002, 561; *Komárek*, European Constitutionalism and the European arrest warrant: in search of the limits of 'contrapunctual principles', 8 *CMLRev* 2007, 9; *Lavranos*, Europol and the Fight against Terrorism, 43 *European Foreign Affairs Review* 2003, 259; *Mitsilegas*, The constitutional implications of mutual recognition in criminal matters in the EU, 43 *CMLRev* 2006, 1277; *Monaco*, Euro-

pol: The Culmination of the European Union's International Police Cooperation Efforts, 18 Fordham International Law Journal 1995, 247; *Ratzel*, Europol – das Europäische Polizeiamt: Teil 1: Geschichte, Organisation, Aufgaben, Zuständigkeiten und Rechtsgrundlage, Kriminalistik 2007, 284; *id.*, Europol – das Europäische Polizeiamt Teil 2: Die deutschsprachigen Verbindungsbüros Deutschland, Österreich, Schweiz, Kriminalistik 2007, 363; *Schalken/Pronk*, On Joint Investigation Teams, Europol and Supervision of Their Joint Actions, European Journal of Crime, 10 Criminal Law and Criminal Justice, 2002, 70; *Vennemann*, The European Arrest Warrant and its Human Rights Implications, ZaöRV 2003, 103.

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I. General remarks and development of the provision 1

Presently, the basis for Europol is found in the **independent provision** of Article 88 TFEU. This step was constitutionally mapped out by draft-Article III-267 TECE already. As regards their content, both TFEU and TECE are oriented on a role model that existed even before the merger of the pillars: Article 30 para. 2 TEU (old version). Besides certain changes in the matter of substance, the new provision abstains from sticking to the original time specifications.

As ‘**European Police Office**’ located in The Hague, Europol **institutionalises police cooperation** and provides an operative framework. Based on Europol Convention of 26 July 1995 and entering into force on 1 January 1998,¹ Europol became fully operational on 1 July 1999. The **organisation** is designed to promote **cooperation**. Each Member State delegates a liaison officer and maintains a national post that ought to function as a connection between Europol and the national authorities.² Europol is an **international organisation** with its own legal personality according to Article 26 para. 1 Europol Convention. If particular events require so, Europol is entitled to create its own **task forces** or **working groups**, recruited from specialists of the Member States – such as 11 September 2001.³

II. The working assignment of Europol, para. 1 3

Para. 1 states clearly that Europol’s mission is an **assistance assignment**, enriched by additional components to strengthen the cooperation. The task designated to Europol comprises preventive as well as repressive actions of national police and law enforcement authorities. The mission is limited to cross-border serious crimes, terrorism and crimes which affect a common interest covered by the Union.⁴ This limitation is necessary for two reasons: Because of subsidiarity, only those areas need common actions; another reason is that cooperation in all fields of criminality would neither be manageable nor carried out and financed effectively.

Already Article 30 para. 2 TEU (old version) contained a profound **work programme** 4 for the Council, which ought to be fulfilled within five years after the entering into force

¹ OJ 1995 C 316/1; for the location of Europol, see Protocol No. 6.
² See VHVH/Rosenau/Petrus, Article 88 AEUV mn. 9.
³ See Streinz/Dannecker, Article 17 AEUV mns 16 et seq.
⁴ See VHVH/Rosenau/Petrus Article 88 AEUV mn. 4.

of the Treaty of Amsterdam. Afterwards, it was the Council which was meant to create additional competences for Europol (see Article 2 para. 2 Europol Convention). Europol was not only created in order to administer a Union wide system for the exchange of information but also to take on a more active role in the preliminary proceedings. Executive powers were not provided for to be transferred to Europol, at least not in the beginning. The current para. 1 refrains from making over-ambitious time schedules and focuses on the assistance dimension of the mission. This is in line with the **dynamic typical for the integration process**.

5 **III. Specification of the mission, para. 2**

Para. 2 **specifies** the **structure, operation, field of actions and tasks** of Europol. This specification has to be developed on the basis of secondary law. There are not just procedural restraints (the ordinary legislative procedure); also the legislative instrument (the regulation) which Council and Parliament have to make use of is determined already. By transferring the mode for specification of Europol's mission into the ordinary legislative procedure and a codecision of the European Parliament, immense **democracy and legitimacy deficits** have been remedied.⁵ Until now, it was unclear whether and how Europol would obtain democratic legitimacy. The lack of direct democratic input was undisputed in any event. According to Article 34 Europol Convention, there is a duty for the Council Chairman to provide information for the European Parliament only.

6 The not exhaustive ('may') **catalogue** of possible tasks and competences of para. 2 starts with lit. a: It regulates the collection, storage, processing, analysis and exchange of information, in particular the information forwarded by the authorities of the Member States or third countries or bodies, in short: the entire '**intelligence work**'⁶.

7 In contrast to the **Schengen Information System**, Europol already has its **own data base**. This is the **Information System** (Articles 7 et seq. Europol Convention) and the **work files for purposes of analysis** as well as an **index system** (Articles 10 et seq. Europol Convention). Data are only entered into the Information System (a) by the Member States in compliance with their national procedures, and (b) by Europol itself regarding the data received by third countries and third bodies or data that are the result of analysis (Article 7 para. 1 Europol Convention). **Direct access** to the data is restricted solely to the national units, liaison officers, and – for Europol – the Director, Deputy Directors or duly empowered Europol officials (Article 9 Europol Convention).

8 Only such **categories of data** may be stored in the Information System that relate to: certain data on persons that are suspected of having committed or who have been convicted of a criminal offence; moreover, data on persons if and when there are serious grounds for believing that they will commit a crime (Article 8 Europol Convention). The crimes have to be falling under the jurisdiction of Europol according to para. 1. The work files for purposes of analysis may contain further categories of persons: e.g. persons who have been or might become witness or victim of crime, contacts and associates or other persons who can provide information (Article 10 Europol Convention).

9 Rules on **data protection** can be found in Articles 14–25 Europol Convention as well as in the Council Act adopting rules on the confidentiality of Europol-Information (at present: Council Decision 2009/968/JHA adopting the rules on the confidentiality of Europol information). The responsibility in terms of data protection legislation rests with the Member States that entered or conveyed the data, as well as with Europol in respect

⁵ See Streinz/*Satzger*, Article 171 AEUV mns 30 et seq.

⁶ See VHVH/*Rosenau/Petrus*, Article 88 AEUV mn. 6.

to data conveyed by third parties or data resulting from their own analysis (Article 15 Europol Convention). Incorrect or illegal data shall be deleted or corrected (Article 20 Europol Convention).

In order to safeguard an effective protection of fundamental rights of its citizens, each Member State is subject to the control of a **national supervisory body** in terms of data protection (Article 23 Europol Convention); an independent joint supervisory body, composed of representatives of the national supervisory bodies will supervise the activities of Europol (Article 24 Europol Convention). 10

The Europol Convention gives each individual the **right to information** (Article 19 Europol Convention), which can be invoked in any Member State. The application will be processed by Europol. The applicant has the opportunity to lodge a complaint with the joint supervisory body. An **application for correction or deletion** can be filed by the individual directly with Europol. In this respect, a complaint before the joint supervisory body is admissible, too (Article 20 para. 4 Europol Convention). Furthermore, the individual is entitled to receive the **compensation of damages** regardless of fault if the organisation caused damages as a result of legal or factual errors in data stored or processed at Europol. In addition, the Member State in which the event which gave rise to the damage occurred may be the subject of an action for compensation (Article 38 Europol Convention). The claim has to be filed before the courts of the respective Member State. Moreover, Europol will compensate those damages caused by the fault of its organs, its deputy directors and its employees in the performance of their duties; insofar it may be imputed to them. This claim also has to be filed before the courts of the Member States. The jurisdiction is determined by Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Article 39 Europol Convention). 11

The **Europol Interpretation Protocol**⁷ offers the possibility for the Member States to accept the jurisdiction of the ECJ to give a preliminary ruling on the interpretation of the Europol Convention. By now, however, Europol is **subject to judicial control of the ECJ** and important deficits of legal protection have been removed. 12

Lit. b regulates the ‘coordination, organisation and implementation of investigative and operational actions’. It is a **central coordination and assistance task in respect to the investigative activities** of the Member States’ competent authorities.⁸ Europol will be entitled to coordinate, organise and implement operational actions together with the competent authorities of Member States or in the framework of joint investigative activities in liaison with Eurojust, meaning emancipation from a mere assistant of national authorities to a responsibility assuming partner.⁹ 13

Further **important areas of competence** of Europol are the prevention of smuggle by cooperation with Eurojust and the Member States border protection agencies; the combat of cross-border crime and terrorism – the cooperation between police and customs authorities shall be strengthened. This, however, does not incorporate a right of Europol to act autonomously. Its competence is limited to assistance and enhancement. 14

Central elements of the present competence of Europol find its **basis in the previous law of the Union**. Also before, Europol was meant to obtain operational data from Member States and was authorised to ask the Member States in respect to certain offences for the establishment of joint investigative teams (see sections 43 et seq. of the Conclusions of the Chairman of the European Council in Tampere 15 and 16 October 1999), such as operative actions of joint teams and representatives of Europol. The representatives, however, 15

⁷ OJ 1996 C 299/2.

⁸ See VHVH/Rosenau/Petrus, Article 88 AEUV mn. 7.

⁹ See VHVH/Rosenau/Petrus, Article 88 AEUV mn. 7.

should only act as assistants. Executive powers should solely rest with the national authorities. The amending protocol to the Europol Convention of 30 November 2002, proposed by the Council to the Member States, already foresaw assisting participation of Europol in joint investigative teams. Eventually, the Council ought to establish an information network for research, documentation and statistics on cross-border crime.

16

IV. Control and legal protection

Para. 2 subpara. 2 states that details of the **control** of Europol will be dealt with in regulations. This fixed an important democratic and constitutional deficit which would have been unbearable after the extension of powers and the impact on fundamental rights caused by actions of Europol. The cooperative responsibility of control rests with the **European Parliament** and the **Member States' Parliaments**. This ensures democratic accountability and at the same time, it takes into account sovereignty considerations of the Member States.

17

Besides parliamentary control, which compensates democratic deficits, **judicial control** is inevitable – especially in the light of the fundamental rights impact of investigative activities. After its integration into the Union, Europol is subject to the judicial control of the ECJ under Article 263 para. 1 s. 2 TFEU. It states: '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.'¹⁰ Formerly, the following applied regarding the jurisdiction of the ECJ: By Declaration No 7 of the Amsterdam Closing Conference, it was clarified that measures in the area of police cooperation, including those of Europol, were (solely) subject to the jurisdiction of the respective national courts.

18

V. The restrictions regarding operative measures, para. 3.

Para. 3 postulates a **duty to consult** with the Member State authorities concerned and with regard to compulsory measures. It therefore confirms a **reservation for Member States' administrations**. The sovereignty preserving intention of this provision is obvious. Europol is no pre-federal European **FBI**¹¹; it serves a merely assisting purpose for the sovereign Member States. Therefore, the **immunity** of the Europol officials is criticised.¹² Europol's immunity is based on the Protocol of 19 July 1997 on the Privileges and Immunities of Europol, the members of its institutions, the deputy directors and the employees of Europol.¹³ Regarding the participation of the investigative teams and the waiver of immunity, there was a protocol dated 28 November 2002,¹⁴ replaced by Council Decision of 6 April 2009. It is in dispute whether this might be a similarity to the immunity of the United Nations in respect to its peacekeeping missions.

Article 89 [Cross-border operations of Member States authorities] (ex Article 32 TEU)

The Council, acting in accordance with a special legislative procedure, shall lay down the conditions and limitations under which the competent authorities of the

¹⁰ With a different view, see Schwarze/Böse, Article 88 AEUV mn. 13, assuming that the jurisdiction of the ECJ is caused by secondary law according to Article 263 para. 4 TFEU.

¹¹ See VHvH/Rosenau/Petrus, Article 88 AEUV mn. 8.

¹² See VHvH/Rosenau/Petrus, Article 88 AEUV mn. 15.

¹³ OJ 1997 C 221/2.

¹⁴ OJ 2002 C 312/1.

Member States referred to in Articles 82 and 87 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.

Bibliography: *Goldsmith*, The Internet and the Legitimacy of Remote Cross-Border Searches, University of Chicago Legal Forum 2001, 103; *Peers*, EU Justice and Home Affairs Law, 3rd ed. 2011; for further literature, see literature to Article 67 TFEU.

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I. General remarks and development of the provision

1

Article 89 TFEU finds its predecessor in Article 32 TEU (old version) and its ‘constitutional’ role model in draft-Article III-277 TECE. The provision mandates the Council to determine the conditions and limitations under which the competent authorities of the Member States may operate within the territory of another Member State. As a restricting condition, the cross-border activities have to be carried out in liaison and in agreement with the authorities of the respective other Member State. This mode of operation expresses the special **respect for traditional national sovereign rights – the territorial sovereignty**. In an area without internal borders, the limits for an outdated absolute understanding of territorial sovereignty are defined clearly.

II. Regulatory content

2

The provision creates the opportunity to put the **territorial sovereignty** of the Member States into perspective. The SIC, functioning as a role model, contains some comparable regulations in this respect: Article 40 SIC (cross-border continuation of the observation of people who are presumed to have committed a crime or who are fleeing) and Article 41 SIC (cross-border pursuit of persons who are caught in the act of committing a crime or persons who have escaped from prison). The procedure, however, is designed restrictively. The Council is bound to determine the conditions and limits of the disadvantages in a special legislative procedure. The choice between the legislative options is measured vaguely in accordance with Article 296 para. 1 TFEU. The **principle of unanimity** serves the **preservation of sovereignty**.

TITLE VI TRANSPORT

Bibliography: *Berndt/Lerche/Remmert*, Die Unabhängigkeit des Eisenbahninfrastrukturbetreibers gemäß der aktuellen Rechtsprechung des EuGH, 24 EuZW 2013, 647; *Bovis*, Public Service Obligations in the Transport Sector: The demarcation between State Aids and Services of General Economic Interest under EU Law, 16 European Business Law Review 2005, 1329; *id.*, State Aid and European Union Transport: Reflection on Law, Policy and Practice, 39 Journal of World Trade 2005, 587; *Brandenberg*, Entwicklungen in der Eisenbahnregulierung aus europäischer Sicht, 20 EuZW 2009, 359; *D’Acunto*, Union européenne et droit des passagers, Revue du droit de l’Union européenne 2012, 31; *Enchelmaier*, Alpine transport restrictions reconsidered, 50 CMLRev 2013, 183; *European Commission*, White Paper: Roadmap

to a Single European Transport Area – Towards a competitive and resource efficient transport system COM (2011) 144 final *Frenz*, Verkehrspolitik, in: *Frenz*, Handbuch Europarecht, vol. 6, 2011, 867; *Gänser*, Politique des transports de l’Union européenne et environnement, *Revue du droit de l’Union européenne* 2012, 275; *Greaves*, EC Transport Law, 2000; *Humphreys*, Sustainability in European Transport Policy, 2012; *Kocijan*, Revisiting the Formative Years of European Transport Policy, 59 *Zbornik PFZ* 2009, 529; *Kuyper*, Re-reading external relations cases in the field of transport, in: *Bulterman* (ed), *Views of European law from the mountain*, *Lieber Amicorium Piet Jan Slot*, 2009, 291; *Loič*, Droit européen des transports, 48 *Revue trimestrielle de droit européen* 2012, 531; *Maiani/Bieber*, Droit européen des transports, 2nd edn 2013; *Ogorelc*, European Union Common Transport Policy, 50 *Naše more: Journal of marine sciences* 2003, 197; *Petrova*, Cabotage and the European Community common maritime policy : moving towards free provision of services in maritime transport, 21 *Fordham International Law Journal* 1998, 1019; *Rauh/Schneider*, There is no such thing as a free open sky, 51 *Journal of common market studies* 2013, 1124; *Schubert*, The regulation of air navigation services in the Single European Sky, 37 *Annals of air and space law* 2012, 125; *Schubert*, Legal aspects of cross-border service provision in the Single European Sky, 35 *Air and space law* 2010, 113; *Simoncini*, Governing air traffic management in the Single European Sky, 38 *ELR* 2013, 209; *Viegas*, Passengers with reduced mobility in the European Union, 38 *Air and space law* 2013, 47; *Weber*, Grundstrukturen des europäischen Verkehrsrechts, in: *Rüssli et al*, *Staats- und Verwaltungsrecht auf vier Ebenen: Festschrift für Tobias Jaag*, 2012, 757; *von Zebinsky*, European Union external competence and external relations in air transport, 1996.

Article 90 [Common transport policy]
(ex Article 70 TEC)

The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy.

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1 I. Significance and overview

Transport, covering more than 10 million employees and a percentage of GDP of almost 5 % (2011¹), represents one of the major economic sectors of the Union. Although aggravated by divergent national concepts and interests in its practical realization, the common transport policy has always formed an integral and **indispensable component of the concept of the internal market** (comp. Article 26 para. 2 TFEU) and is one of the few policies already envisaged in 1957. Since the last enlargement of the Union, European transport policy has to cover about 500 million citizens and almost the whole European continent.

2 Comparable to the sector of agriculture, the nature and extent of the common transport market depend on the legislative activities according to the specific legal system established by Articles 91 et seq. The legislative competences are divided between the Union and the Member States (Article 4 para.2 lit. g TFEU), which means that if the Union adopts a measure (particularly according to Articles 91 and 100 para. 2 TFEU), the Member States’ activities are blocked even in their international treaty relations with third States.² However, Articles 91 et seq. lack direct applicability in the Member

¹ For details see the Commission Staff Working Paper Accompanying the White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system of 28 March 2011, SEC (2011) 391 final.

² ECJ Cases C-466/98–469/98, 472/98, 475/98, 476/98 *Open Skies Treaty* [2002] ECR I-9855.

States.³ As far as they do not provide for any special rules, the general provisions of the Union Treaties remain applicable.⁴ An exception is established by the rules on the freedom of services, comp. Article 58 para. 1 TFEU; consequently the transport sector falls outside of the scope of the EU Services Directive.⁵

A small but **significant amendment in the wording** of Article 90 TFEU ('shall ... be pursued within the framework ...' instead of the former wording 'shall ... be pursued by Member States') now clearly expresses the (already under the previous wording de facto accepted) possibility of a common transport policy of the Union independent and separate from policies of the Member States.

Overview: Article 90 TFEU defines the task of a common transport policy, whereas Article 91 provides for the legislative powers necessary for its realization. The stand-still obligation of the Member States in Article 92 TFEU is meant to ensure a minimum standard of liberalization. The further Articles take account of the fact that different national approaches in the transport sector may be justified in particular cases due to the overall political importance of this economic branch in the Member States. A justification therefore could apply in view of further 'distinctive features of transport' (see Article 91 para. 1 TFEU) – for example in cases in which the upholding of unprofitable routes is necessary. Article 100 para. 2 TFEU provides for a special rule for sea and air transport which has become outdated.

II. Transport policy

According to Article 100 para. 1 TFEU, the object of Articles 90 et seq. TFEU is the transport of persons and goods by rail, road and inland waterway (including combined transports). A special status is given to the transport by sea and air (Article 100 para. 2 TFEU). Not included is transport by pipeline or by telecommunication; these branches are covered by the general internal market rules. Where trans-European networks are established within the field of transport infrastructure, the special provisions of Articles 170 et seq. TFEU are applicable.

Article 90 et seq. are also applicable in the case of **traffic-oriented activities** immediately and inseparably connected with the transport field (like port services, logistics, and agencies).

The common transport policy is particularly directed at the realization of the objectives specified in Article 3 TEU. The enlargement and the qualitative change of the listed catalogue have consequently led to an essential expansion of the policy approach in the field of transport. The effective exertion of fundamental freedoms as well as the implementation of the internal market require the existence of an efficient infrastructure and developed concepts of transportation.⁶

Alongside the primary aim of **establishing a common transport market** (by liberalizing and harmonizing rules including social and environmental policy measures) a new approach, focusing on promoting **sustainable mobility**, has become increasingly visible.⁷ The **2011 White Paper** of the Commission therefore stresses the need for a resource effi-

³ See ECJ Case 13/83 *Parliament v Council* [1985] ECR 1603.

⁴ ECJ Cases 167/73 *Commission v France* [1974] ECR 359; 209 – 213/84 *Nouvelles Frontières* [1986] ECR 1425.

⁵ Service Directive 2006/123 of 12 December 2006, OJ L 376/36; see Article 2 para. 3 lit.d.

⁶ *Epinay*, Artikel 90 AEUV, in: Vedder/Heintschel von Heinegg (eds), *Europäisches Unionsrecht*, 2012, mn. 4.

⁷ For details see the Commission's White Paper of 28 March 2011: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 0144 final.

cient transport system and a reduction of emissions⁸. The adopted roadmap until 2050 consists of 40 initiatives aiming at the establishment of a competitive transport system while reducing Europe's dependence on oil and cutting carbon emissions. This approach is also owed to **Article 11 TFEU** which requests environmental protection requirements to be integrated into the implementation of Union policies.

- 9 Already in 1971, the ECJ declared the existence of an exclusive **competence of the Union to conclude international treaties with third states** in cases in which the Union had already taken internal measures within the relevant subject matter.⁹ In view of the density of legislative measures to be applied within the Union, the Member States are practically excluded from creating international treaty relations with third states in the field of transport policy.¹⁰ This is particularly true for the area of sea and air transportation.¹¹ Within **international transport organizations** concerned with transport policy (like IMO, ICAO), the EU formally enjoys only observer status. However, it is the Union that increasingly formulates and represents European interests.
- 10 Apart from listing the means of traffic (comp. Article 100 TFEU) as well as the obligation arising from the general Treaty objectives, Article 90 TFEU does not provide substantial requirements concerning the common transport policy. Therefore the institutions of the Union enjoy a **wide margin of discretion** to determine the content of the policy within the framework of the competences accorded to them (particularly by Articles 91 and 100 para. 2 TFEU). The principle of subsidiarity as laid down in Art 5 para. 3 TEU is generally applicable – with the exception of measures governed by Article 91 para. 1 lit. a and b TFEU which fall within the exclusive competence of the Union.
- 11 The disagreement of the Member States concerning the common transport policy which had prevented a more concrete definition of objectives at the time of the conclusion of the Treaty continued after its entering into force. It was only the spectacular and – as far as the obligation to take action according to Article 91 lit a and b TFEU is concerned – widely successful proceedings for failure to act against the Council brought before the ECJ by the European Parliament¹², which led to some stimulation of the so far only punctual and dragging legislative activities. Since then, substantial progress in relation to marked integration has been made in regard to all types of transportation as well as to creating sustainable mobility.¹³

Article 91 [Adoption of necessary measures] (ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

- (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;**

⁸ The White Paper speaks of a minimum reduction of 60 % of GHG emissions from transport needed by 2050. Ibid. mn. 67.

⁹ ECJ Case 22/70 *AETR* [1971] ECR 263; now codified in Article 3 para. 2 TFEU.

¹⁰ E.g. ECJ Cases C-466–469, 471, 472, 475, 476/98 *Open-Skies-Agreement* [2002] ECR I-9855.

¹¹ See the Commission's Communication, The EU's External Aviation Policy – Addressing Future Challenges, COM (2012) 556, welcomed by the Council conclusions of 20 December 2012.

¹² ECJ Case 13/83 *Parliament v Council* [1985] ECR 1513.

¹³ On these two core elements of EU transport policy see *Epiney*, Handbuch EUWirtR, Chapter L, mn. 26.

- (b) the conditions under which non-resident carriers may operate transport services within a Member State;
- (c) measures to improve transport safety;
- (d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

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I. General remarks 1

Article 91 TFEU provides the central legal basis for secondary legislative acts of the Union in the field of the common transport policy (Article 90 TFEU). Additionally, a specific legal basis to combat discrimination in the case of transport is laid down in Article 95. As stated in Article 100 para. 1 TFEU, Article 91 TFEU applies to acts governing transport by rail, road and inland waterway. The legal basis for legislative acts in the field of air and sea transport can be found in Article 100 para. 2 TFEU. However, the legislative procedure provided for in Article 91 TFEU also applies for activities within the sea and air transport policy.

II. Scope of competence 2

1. Competence to regulate

Article 91 para. 1 lit. a–d TFEU aim at the development of a common transport policy as laid down in Article 90 TFEU. Even though the European Union only holds shared competences with the Member States, the competence of the Union is very broad. According to Article 91 para. 1 TFEU, the institutions mentioned in para. 1 are empowered to lay down ‘any appropriate provisions’. Therefore the EU legislature is granted a wide margin of discretion to adopt rules governing a common transport system.

2. Limitations on rules and measures 3

However, the distinctive features of transport (Article 91 para. 1 TFEU) constitute a restriction applicable to every legislative act on basis of Article 91 TFEU. The obligation to take into account these features emphasizes the special status of the transport sector compared to other economic branches subject to the general rules of the internal market – especially those pertaining to the general freedom of services. This special position of the transport branch is due to the importance of transport for the general economy, particularly the public interest regarding comprehensive geographic transport services, the dependence of these services on the public transport routes and the necessary inclusion

of transport into the network rules for the development of larger geographic areas. However, there is no obligation on the EU to preserve traditional structures such as state monopolies or strictly regulated national policies.

- 4 The adoption of measures referred to in para. 1 may lead to conflicts arising between the principles of freedom of transport services (open market, free competition) on one hand and the economic well-being of the population (standard of living, level of employment) as well as the proper operation of transport facilities in the affected regions on the other hand. According to para. 2, if the latter interests might seriously be affected, account must be taken of this situation. However, the broad definition of the used concepts provides the Union legislators with a very broad margin of discretion.

5

III. Object of the rule

1. Authorizations

Since the 1990s, the Union has developed a largely complete and consistent regulatory system on basis of Article 91 **para. 1 lit. a and b** TFEU for the **implementation of the freedom of services** concerning transport between the Member States (lit. a) and cabotage transport within a Member State (lit. b). According to para. 1 lit. a, the EU Parliament and the Council are authorized to adopt common rules for trans-border transport between the Member States and between Member States and third states as well as for the transit through the Member States territory. Article 91 para. 1 lit. b TFEU is concerned with purely national transport within the territory of one Member State (cabotage).¹ In so far the European Parliament together with the Council are authorized to lay down the conditions under which transport enterprises having their seat in another Member State may operate cabotage transports. The rules laid down in para. 1 lit. a and b constitute justiciable obligations of the EU to take appropriate and necessary measures.² This was decided by the ECJ in an action for failure to act initiated by the Parliament in 1985 after the Council had failed to adopt legislative measures for 15 years after the end of the transition period.³

- 6 The extension of the Union competence to measures improving transport safety (**para. 1 lit. c**) was introduced by the Maastricht Treaty. Measures adopted on basis of lit. c cover safety issues of the construction of vehicles⁴ and transport routes⁵ as well as the behaviour of users. The broad range of already adopted directives cover inter alia the laws of the Member States relating to roadworthiness tests for motor vehicles⁶, technical

¹ See ECJ Cases C-1/90 *Pinaud Wiegner* [1991] ECR I-5253; 13/83 *Parliament v Council* [1985] ECR 1513.

² ECJ Case 13/83 *Parliament v Council* [1985] ECR 1513; *Epiney*, Artikel 91 AEUV, in: Vedder/Heintschel von Heinegg (eds), *Europäisches Unionsrecht*, 2012, mn. 6.

³ ECJ Case 13/83 *Parliament v Council* [1985] ECR 1513. End of the transition period on 31 December 1969, see Article 75 para. 3 TEC (old version until 1999).

⁴ See for example Framework Directive 2007/46/EC of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, last amended (as for February 2014) by Commission Regulation (EU) 195/2013 of 7 March 2013, OJ L 65/1.

⁵ See for example Directive 2008/96/EC of 19 November 2008 on road infrastructure safety management, OJ 319/59; Directive 2004/54/EC of 29 April 2004 on minimum safety requirements for tunnels in the Trans-European Road Network, OJ L 167/39, amended by Regulation (EC) No 596/2009 of 18 June 2009; OJ L 188/14.

⁶ Directive 2009/40/EC of 6 May 2009 on roadworthiness tests for motor vehicles and their trailers (Recast), OJ L 141/12; repealing inter alia Directive 96/96/EC of 20 December 1996; amended by Commission Directive 2010/48/EU of 5 July 2010, OJ L 173/74.

requirements for inland waterway vessels⁷ and the compulsory use of safety belts⁸. A speed limitation for all road vehicles (other than heavy vehicles and commercial vehicles⁹) failed due to German opposition.

Para. 1 lit. d contains a fall-back rule ('other appropriate provisions') on which all other measures connected with transport in the wide sense can be based. Inter alia, directives laying down conditions for the mutual recognition of driving licenses¹⁰ or on taxes regarding certain vehicles as well as tolls and charges¹¹ were based on para. 1 lit. d. Standards for emission reductions for new passenger cars were based on Article 175 para. 1 TFEU¹²

2. Types of legal acts and procedure

8

Measures on basis of Article 91 TFEU may be introduced by all forms of actions laid down in Article 288 TFEU. Acts may therefore be drafted as regulations, directives, decisions, recommendations or opinions. An autonomous act of legislation by the EU is also possible for situations relating to third states. As far as the EU has made use of its regulatory competence under Article 91 TFEU, it also holds corresponding treaty-making authorities.¹³

The ordinary legislative procedure (Articles 289, 294 TFEU) is applicable to all legislative measures in the field of transport. According to Article 91 para. 1 TFEU the Council and the Parliament are obliged to enter into consultation with the Economic and Social Committee and the Committee of the Regions. The former veto-power of single Member States and the restricted participation of the EP under Article 71 para. 2 TEC (old version) have been removed by the Lisbon Treaty.

IV. Status of legislation

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Measures adopted on basis of Article 91 TFEU are drafted separately for each mode of transport. In the field of road transport, measures are divided between those governing carriage of goods and those applicable to transport of passengers.¹⁴ The freedom to provide services in all fields of transport governed by Article 91 TFEU has been largely achieved.¹⁵

⁷ Directive 2006/87/EC of the EP and the Council of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, OJ L 389/1; amended by Directive 2009/46/EC of 30 April 2009, OJ L 109/14.

⁸ Directive 2003/20/EC of 8 April 2003 amending Council Directive 91/671/EEC of 16 December 1991 on the approximation of the laws of the Member States relating to the compulsory use of safety belts in vehicles of less than 3.5 tonnes, OJ L 115/63.

⁹ Council Directive 92/6/EEC of 10 February 1992 on the installation and use of speed limitation devices for certain categories of motor vehicles in the Community, amended by Directive 2002/85/EC of 4 December 2002, OJ L 327/8.

¹⁰ Directive 2006/126, amended by Directives 2009/113/EC, 2011/94/EU, 2012/36/EU and Council Directive 2013/22/EU of May 2013, OJ L 158/356.

¹¹ Council Directive 93/89 of 12 November 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, OJ L 279/32.

¹² Regulation (EC) No 443/2009 of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO₂ emissions from light-duty vehicles, OJ L 140/1, amended by Regulation 397/2013 of 30 April 2013 OJ L 120/4. Directive 2009/33/EC of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120/5.

¹³ See Article 216 TFEU; ECJ Case 22/70 *Commission v Council – European Agreement on Road Transport*, [1971] ECR 263.

¹⁴ *Epiney* (n. 2), mn. 9.

¹⁵ *Ibid.*

- 11 The market for **commercial road transport** has been liberalized for a long time. The common rules for access to the international road **haulage market** have been regrouped in the Regulation (EC) 1072/2009 (amended by Regulation 612/2012)¹⁶; correspondingly Regulation 1073/2009¹⁷ deals with common rules for the international carriage of **passengers** by coach and bus. Specific rules are provided for **cabotage operations** – transport of goods or passengers by non-resident carriers within a Member State. The above mentioned Regulation (EC) No 1072/2009 allows for carrying out cabotage operations concerning the road transport of goods. Regulation (EC) 1073/2009 also lays down the conditions under which non-resident carriers can operate national road passenger transport services within a Member State. Any carrier who operates road passenger transport services and who holds a Community licence can operate cabotage operations. However, urban and suburban services are excluded by Regulation 1073/2009 para. 12.
- 12 With more than 37000 kilometers of waterways in Europe, commercial **waterway transport** is a competitive alternative to other forms of transport governed by Article 91 TFEU. Liberalization of the market governing waterway transport has been achieved earlier than in other fields of transport. Council Regulation (EC) No 1356/96¹⁸ lays down common rules applicable to the transport of **goods or passengers by inland waterway** between Member States with a view to establishing freedom to provide such transport services. **Cabotage** operations are governed by Council Regulation (EEC) 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State. Technical requirements for inland waterway vessels are governed by Directive 2006/87/EC¹⁹, the capacity policy in Regulation (EC) 718/1999²⁰. According to Council Directive 96/75/EC²¹, contracts and pricing may be negotiated freely in the field of national and international inland waterway transport. Special provisions concerning the rights of operators from third countries exist under the Revised Convention for the Navigation of the Rhine²² (Convention of Mannheim) and the Convention on Navigation on the Danube (Belgrade Convention)²³.
- 13 The European rail industry generates turnover of 73 Billion Euro, 800000 employees work in the system. As a result of the liberalisation of the **railway sector** in the EU, equitable and non-discriminatory access to the rail network had to be provided for undertak-

¹⁶ Council Regulation (EU) 612/2012 of 10 July 2012, OJ L 178/5 amending Regulation (EC) 1072/2009 of 21 October 2009 on common rules for access to the international road haulage market, OJ L 300/72.

¹⁷ Regulation (EC) 1073/2009 of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) 561/2006, OJ L 300/88; amended by Reg. 611/2012 of 10 July 2012, OJ L 178/4; amended by Reg. (EU) 517/2013 of 13 May 2013 by reason of the accession of the Republic of Croatia OJ L 158/1.

¹⁸ Council Regulation (EC) 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services, OJ L175/7.

¹⁹ 2006/87/EC Directive of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, OJ L 389/1; amended by Directive 2013/49/EU of 11 October 2013, OJ L 272/41.

²⁰ Council Regulation (EC) 718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport, OJ L 90/1.

²¹ Council Directive 96/75/EC of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community, OJ L 304/12.

²² Revised Convention on the Navigation of the Rhine, signed in Mannheim on 17 October 1868 by the Grand Duchy of Baden, Bavaria, France, the Grand Duchy of Hesse, the Netherlands and Prussia in the version of 11 March 1969, BGBl. II S. 597.

²³ Convention concerning the Regime of Navigation on the Danube of 18 August 1948, 32 UNTS 181, 33 UNTS 201.

ings operating in that sector. Free access to the market has been realised only in the last years. The market for railway freight transport has been completely opened since 2007.²⁴ For international passenger transport, almost free access to cabotage operations exists since 2010.²⁵ Three **railway packages** have been adopted so far – aiming at the development of a single European railway market. The first package consisting of three Directives²⁶ was recast in 2012.²⁷ In 2004, a European Railway Agency was established by Regulation (EC) 881/2004²⁸ as part of the second railway package. Its objective is to contribute, on technical matters, to an enhanced level of interoperability of railway systems and to develop a common approach to safety on the European railway system. However, the railway sector still suffers a low level of competition as well as insufficient public and private investment.²⁹ The 2011 White Paper therefore proposed strategies to revitalise the railway sector by creating a sound financial basis, ensuring freedom of access to all services and promoting the integration social aspects.³⁰ Thus, a **fourth railway package** was proposed in 2013.³¹ It aims at an amendment of the already existing Directives and Regulations in order to allow more competition to create a more efficient and customer-responsive industry.³²

Article 92 [Standstill obligation] (ex Article 72 TEC)

Until the provisions referred to in Article 91(1) have been laid down, no Member State may, unless the Council has unanimously adopted a measure granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.

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²⁴ Directive 2004/51/EC of 29 April 2004, OJ L 164/164; repealed by Directive 2012/34/EU of 21 November 2012 establishing a single European railway area, OJ L 343/32.

²⁵ See Article 1 para. 8 of Directive 2007/58/EC of 23 October 2007, OJ L 315/44; amended by Directive 2012/34/EU of 21 November 2012 establishing a single European railway area, OJ L 343/32. For an overview of the numerous regulations and directives see e.g. Streinz/Schäfer, Artikel 91, mn. 13 et seq.

²⁶ Directive 2001/12/EC of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 75/1; Directive 2001/13/EC of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertaking, OJ L 75/26; Directive 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ 75/29.

²⁷ Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (recast), OJ L 343/32.

²⁸ Regulation (EC) No 881/2004 of 29 April 2004 establishing a European Railway Agency, OJ L220/3.

²⁹ See Commission MEMO/12/520 of 3 July 2012.

³⁰ Commission's White Paper of 28 March 2011: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 0144 final.

³¹ See Commission Communication of 30 January 2013 on the Fourth Railway Package – Completing The Single European Railway Area To Foster European Competitiveness And Growth, COM (2013) 25 final.

³² Ibid., at 10.

1

I. Purpose of the provision

As a specific form of the general duty to loyalty in Article 4 para. 3, Article 92 TFEU establishes a **standstill obligation** for the Member States until the legal measures prescribed by Article 91 para. 1 TFEU have been adopted. Article 92 TFEU precludes the introduction of any new discriminatory measures which are unfavorable to carriers of other Member States in comparison to the carriers who are a Member States own nationals. A change in an administrative practice may also constitute a measure of that kind.¹ However, this provision does not abolish existing discriminations. It is solely directed against a change of the *status quo* by new impositions of restrains of any kind.

2 Article 92 TFEU applies to all cases, in which no secondary legislative measure under Article 91 para. 1 exists. Even though the Member States are in this case free to adopt their own national legislative measures, primary law of the Union, such as Article 92 TFEU, nevertheless needs to be respected.² The standstill provision of Article 92 TFEU enjoys **direct applicability**. Individuals affected by restraining national measures can therefore invoke Article 92 TFEU directly. As consequence, conflicting national measures remain unapplied. The Council may, however, unanimously grant an exception to the standstill obligation.

3

II. Beneficiaries and addressees

Beneficiaries are either nationals or legal persons having their registered office, central administration or principal place of business in another Member State (argument Article 54 TFEU). As the transport policy constitutes a special form of the freedom of services, Article 54 TFEU may be applied to transport rules as well. Article 92 TFEU is **addressed to the Member States** and covers all national measures within the *ratione materiae* scope of Article 91 TFEU.

4

III. Prohibition of further deterioration

The standstill principle prohibits national measures deteriorating the position of carriers of other Member States. Article 92 TFEU does not prohibit measures discriminating against national carriers of a Member State. Measures deteriorating the position of both nationals and non-nationals are also not subject to Article 92. However, it is still unclear what exactly the scope of the standstill obligation is. According to one opinion, deterioration is deemed to occur if the new national measure moves the position of non-national carriers further away from national treatment (**relative prohibition of deterioration**). Thus, the removing of privileges for non-national carriers in order to achieve equal treatment among all carriers in a Member State would not be considered a violation of the standstill obligation.³ According to the ECJ⁴, however, Article 92 TFEU constitutes an **absolute prohibition of deterioration** as the relationship between national and non-

¹ ECJ Joined Cases C-184/91 and C-221/91 *Christof Oorburg and Serge van Messem v Wasser- und Schifffahrtsdirektion Nordwest* [1993] ECR I-1633.

² *Epiney*, Artikel 92 AEUV, in: Vedder/Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (2012) mn. 1.

³ *Schäfer/Streinz*, Artikel 92, mn. 7.

⁴ ECJ Case C-195/90 *Heavy vehicle fee* [1992] ECR I-3175 –; See also Case C-184/91 *Oorburg* [1993] ECR I-1633.

national carriers may not be changed to the disadvantage of the non-national carriers. Therefore Article 92 TFEU applies in cases in which further deterioration for non-national carriers are created by national measures, as well as in cases in which advantages for carriers from other Member States are removed. But this argumentation fails to take into account that the establishment of a non-discriminatory single transport market cannot require more than national treatment (including the prohibition of covert discrimination). Therefore the removal of advantages for any carrier supports the rational of a common transport policy.

Article 93 [Exception from the ban on State aid] (ex Article 73 TEC)

Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

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I. General remarks

1

Article 93 TFEU constitutes an **exception** to the ban on state aid within the meaning of Article 107 para. 1 TFEU ('Save as otherwise provided in the Treaties ...').¹ According to Article 107 para. 1 TFEU any aid² granted by a Member State or through state resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, is, insofar as it affects trade between the Member states, incompatible with the internal market. In addition to the cases listed in Article 107 para. 2 and 3 TFEU, Article 93 TFEU allows for two exceptions from the ban on state aid in the field of road, rail and inland waterway transport ('coordination of transport' and 'reimbursement for public services obligations'). Therefore, Article 93 TFEU only **applies to aid within the meaning of Article 107 TFEU**³ that in principle is inconsistent with the internal market.⁴ According to the ECJ, this applies for aid meeting the following conditions: There must be an intervention by the State or through state resources which must confer an advantage on the recipient and must be liable to affect trade between Member States. Fourth, it must distort or threaten to distort competition.⁵

The aid control **procedure** under Article 108 TFEU et seq. also applies to Article 93 TFEU. However, certain rules of secondary legislation apply as *lex specialis*. For example, according to Article 9 para. 1 of Regulation 1370/2007, the prior notification require-

¹ ECJ Case 156/77 *Commission of the European Communities v Kingdom of Belgium* [1978] ECR 1881, mn. 10 et seq.

² For the definition of this concept see the commentary on Article 107.

³ GHN/*Boeing/Maxian Rusche*, Artikel 93, mn. 1.

⁴ ECJ Cases C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* [2003] ECR I-7747, mn. 74 et seq.; 156/77 *Commission of the European Communities v Kingdom of Belgium* [1978] ECR 1881, mn. 9 et seq; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, mn. 20; Case C-482/99 *France v Commission* [2002] ECR I-4397, mn. 68.

⁵ ECJ C-280/00 *Altmark Trans v Regierungspräsidium Magdeburg* [2003] ECR I-7747, mn. 75.

ment laid down in Article 107 para. 3 TFEU does not apply to compensations as defined in the Regulation.⁶ According to the ECJ in its landmark decision *Altmark trans*, Article 3 of Regulation 1107/1970 barred the Member States from invoking Article 93 TFEU directly in order to justify aid in cases not foreseen by secondary legislation.⁷ However, the repealing of Regulation 1107/1970 by Regulation 1370/2007 led to the direct invocation Article 93 TFEU being possible again.⁸ Taking into account the problem of secondary legislation limiting the scope of primary legislation, this development was indeed necessary.

3 II. Justification of aids in the transport sector

Article 93 TFEU allows state aid in two cases:

- (1) The aid meets the needs of coordination of transport. The concept of 'coordination' is taken from the French legal terminology – meaning the creation of a regulatory framework concerning transport infrastructure. This concept comprises e.g. remedies for competition distortion, the reduction of structural overcapacities and the promotion of combined transport by investments in infrastructure and transport facilities.
- 4 (2) The granting of aid which constitutes reimbursement for the discharge of certain obligations inherent in the concept of a public service is also compatible with the Treaty. The concept of a 'public service' has also been taken from the French legal terminology (*'service public'*). It refers to services of general interest relating to the transport industry, the performance of which causes economic disadvantages (e.g. the obligation to operate and to carry, and the tariff obligation).⁹ Article 2 lit. e of Regulation 1370/2007 defines a 'public service obligation' as follows: A requirement set by a competent authority in the general interest that a carrier would not assume without reward if considering his or her own commercial interest.

5 III. Secondary legislation

Due to the unclear definition of the categories of aid in Article 93 TFEU, secondary legislation became necessary in order to avoid a weakening of the competition rules. Introduced as part of the third railway package, **Regulation 1370/2007** on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70¹⁰ defines certain compensations by authorities to public service operators as compatible with Article 93 TFEU. This Regulation does not apply to transport of goods by rail and road and to inland waterway transport of passengers and goods.

Article 94 [Economic circumstances of carriers] (ex Article 74 TEC)

Any measures taken within the framework of the Treaties in respect of transport rates and conditions shall take account of the economic circumstances of carriers.

⁶ Regulation 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70 of 23 October 2007, OJ L 315/1.

⁷ ECJ Case C-280/00 *Altmark* [2003] ECR I-7747, mn. 108.

⁸ See recital 35 of Regulation 1370/2007, OJ L 315/1.

⁹ See Regulation 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulation (EEC) Nos 1191/69 and 1107/70; ECJ Case C-280/00 *Altmark* [2003] ECR I-7747.

¹⁰ of 23 October 2007, OJ L 315/1.

The 'distinctive features of transport' (Article 91 para. 1 TFEU) characterize the transport sector as committed especially to the public interest. Due to this commitment, the economic interests of the carriers, which face tougher competition conditions in a liberalized public transport market, might run the risk not receiving appropriate attention in respect of the determination of tariffs and transport conditions. Therefore Article 94 TFEU establishes an obligation to take into account the economic circumstances of all carriers applicable to all measures within the framework of the Treaty in respect of transport of goods and passengers. However, the Article is limited to rates and conditions of transport. Other fields of transport regulations are not covered.¹ A certain margin of profit for a certain carrier is not ensured by the provision. This obligation only applies to the Union institutions, not to the Member States. Even though Article 94 TFEU is not directly applicable and grants the Union a wide margin of discretion, the obligation has at least a guideline character.

Article 95 [Abolition of discrimination] (ex Article 75 TEC)

1. In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited.

2. Paragraph 1 shall not prevent the European Parliament and the Council from adopting other measures pursuant to Article 91(1).

3. The Council shall, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the provisions of paragraph 1.

The Council may in particular lay down the provisions needed to enable the institutions of the Union to secure compliance with the rule laid down in paragraph 1 and to ensure that users benefit from it to the full.

4. The Commission shall, acting on its own initiative or on application by a Member State, investigate any cases of discrimination falling within paragraph 1 and, after consulting any Member State concerned, shall take the necessary decisions within the framework of the rules laid down in accordance with the provisions of paragraph 3.

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I. Non-discrimination

1

As a contribution to the internal market and in the interest of the final consumers and the shippers, Article 95 TFEU complements the general prohibition of discrimination in Article 18 TFEU by a provision taking into account the special situation of transport: The Article addresses the problem of discriminating rates and conditions for the carriage on the same routes and for the same goods, depending on the country of origin or on the destination. It is applicable to the transport within the Union, even if the carriage origi-

¹ *Epiney*, Artikel 94 AEUV, in: Vedder/Heintschel von Heinegg (eds), *Europäisches Unionsrecht*, 2012 mn. 3.

nates in or is destined to third states. The nationality or the seat of the carrier is irrelevant. Article 95 TFEU is addressed to the Member States as well as to private carriers.

- 2 Goods constitute **'same goods'** within the meaning of Article 95 TFEU if their transport causes the same costs in an economic view. Classifications of goods e.g. in the Combined Nomenclature may serve as first indications, but are not decisive. The **'same transport links'** are only given if the same means of transport and identical transport routes are used. Due to the wording of the provision, Article 95 para. 1 only applies to the transport of goods, not of passengers. As a consequence of this very **limited scope** of Article 95 para. 1 TFEU, the prohibition has hardly any practical significance.
- 3 Article 95 TFEU does not cover discrimination in the case of **transport on different routes**, even if these routes are comparable in all regards (length of the route) and lead to advantages for transport within one Member State compared to transport across Member State borders. These cases are solely covered by the competition regulations of Article 101 et seq. TFEU. Sanctions on basis of secondary legislation based on Article 91 para. 1 TFEU are also not excluded (Article 95 para. 2).
- 4 After the Treaty of Lisbon, Article 95 para. 1 TFEU now constitutes a **direct applicable prohibition** of discrimination and no longer only a legal basis for secondary legislation. According to the new wording of the Article, discrimination shall be prohibited. However, Article 95 TFEU still and additionally constitutes a legal basis for measures laid down in para. 3 of the Article.

5 II. Legislative powers

According to para. 2, Article 95 para. 1 TFEU does not constitute an exhaustive regulation of any discrimination in the field of transport. Therefore this prohibition does not have limiting effect on other measures fighting protectionism on basis of Article 91 para. 1 TFEU. The rules for implementing the provisions of para. 1 set out in para. 3 were already set in 1960 in Regulation 11/60¹ (last amended by Regulation 569/2008²). Para. 3 declares these rules to be laid down by the **Council**, acting on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Commission (para. 3). Even though para. 3 still does not grant the EP equal participation rights, at least it now has to be consulted.

Article 96 [General prohibition of support measures] (ex Article 76 TEC)

1. The imposition by a Member State, in respect of transport operations carried out within the Union, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited, unless authorised by the Commission.

2. The Commission shall, acting on its own initiative or on application by a Member State, examine the rates and conditions referred to in paragraph 1, taking account in particular of the requirements of an appropriate regional economic policy, the needs of underdeveloped areas and the problems of areas seriously affected by politi-

¹ of 16 August 1960, OJ 52/1121.

² Regulation 569/2008 of 12 June 2008 amending Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community, OJ L 161/1.

cal circumstances on the one hand, and of the effects of such rates and conditions on competition between the different modes of transport on the other.

After consulting each Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition provided for in paragraph 1 shall not apply to tariffs fixed to meet competition.

Complementing the prohibition of discrimination in Article 95 TFEU and *lex specialis* 1 to the general prohibition of aid in Article 107 TFEU, Article 96 TFEU **prohibits the imposition by a Member State** of rates and conditions in respect of transport operations in favour of particular undertakings or industries. Rates covered by Article 96 TFEU are mostly support tariffs below the marked level for national carriers of a Member State.¹ These tariffs and conditions therefore have the same effect as direct financial support by a Member State. Whether such measures involve any element of **support or protection** in the interest of particular undertakings or industries must be assessed objectively; it does not depend on the purpose of the action. The prohibition in Article 96 TFEU is **directly applicable**.

Article 96 TFEU does not aim at a protection of competition. The prohibition rather 2 protects industries and undistorted competition from state influence on tariff fixing. Therefore the prohibition **does not concern** – as it is made clear by para. 3 – the **tariffs fixed to meet competition**. These tariffs and conditions are not imposed by the State but rather chosen by the respective industry itself in its own economic interest in order to meet competition. Such tariffs are initiated by industries in order to prevail against competitors. Competition-oriented rates within the meaning of para. 3 may also constitute price discounts meant to prevent the creation of a competitive situation in relation to another carrier.²

The **Commission** may authorize the **derogation from the prohibition** (para. 1) on 3 the Commission's own initiative or on application by a Member State after consultation of the Member State concerned (para. 2). In the assessment of the relevant aspects, the Commission has a broad and only partly justiciable margin of discretion.³ The criteria to be considered are mainly requirements of regional structural and location policy and the effects on competition between the different modes of transport.

Article 97 [Charges in respect of crossing of frontiers] (ex Article 77 TEC)

Charges or duties in respect of the crossing of frontiers which are charged by a carrier in addition to the transport rates shall not exceed a reasonable level after taking the costs actually incurred thereby into account.

Member States shall endeavour to reduce these costs progressively.

The Commission may make recommendations to Member States for the application of this Article.

As a specific contribution to the removal of trade barriers and flanking the free 1 movement of goods within the European Union (Article 28 TEU), Article 97 TFEU lim-

¹ Commission Decision 91/523/EEC of 18 September 1991 abolishing the support tariffs applied by the Italian railways to the carriage of bulk ores and products produced and processed in Sicily and Sardinia, OJ L 283/20; CR/Jung, Artikel 96, mn. 2.

² CR/Jung, Artikel 96, mn. 8; Streinz/Schäfer, Article 96 mn. 6.

³ ECJ Case 1/69 *Italy v Commission* [1969] ECR 277.

its the amount of charges or dues in respect of the crossing of frontiers to a reasonable level. The provision therefore also protects the transport of goods across the external borders of the EU. Addressees of Article 97 TFEU are the carriers (para. 1) as well as the Member States (para. 2). However, only financial burdens that are subject to public law are covered by Article 97 TFEU (wording, legislative background of the provision). The provision itself does not define what exactly constitutes a reasonable level of dues and charges. Due to the vagueness of the prohibition, it is unclear whether Article 97 TFEU is directly applicable.¹

- 2 The lifting of border controls between Member States in the course of the development of the internal market and the liberalization of the transport market – also intended by para. 2 – has led to the provision losing practical significance for transport of goods within the EU. It is still relevant for transport to and from third States.²
- 3 So far the Commission has not issued any recommendations (Article 292 s. 4 TFEU) as foreseen in para. 3.

Article 98 [Exceptions due to the division of Germany] (ex Article 78 TEC)

The provisions of this Title shall not form an obstacle to the application of measures taken in the Federal Republic of Germany to the extent that such measures are required in order to compensate for the economic disadvantages caused by the division of Germany to the economy of certain areas of the Federal Republic affected by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this Article.

- 1 Article 98 TFEU constitutes a narrowly to be interpreted special rule for measures of economic support of German regions adjacent to the former inner-German border and Berlin taken in the Federal Republic of Germany aiming at a compensation for economic disadvantages caused by the division of Germany. The provision forms a *lex specialis* to Articles 93 and 96 TFEU and may justify measures otherwise prohibited by these articles.
- 2 According to the ECJ^{1*}, such exceptions must be interpreted in a restricted way. The Court explained, that since the phrase 'division of Germany' refers historically to the establishment of the dividing line between the two occupied zones in 1948, the economic disadvantages caused by that division can only mean the economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links or the loss of markets as a result of the breaking off of commercial relations between the two parts of the German territory.^{2*} According to the Court, the disadvantages suffered by the new *Länder* as a whole are explained by causes other than the geographical rift caused by inner-German frontier.³
- 3 Thus, in the course of time, Article 98 TFEU has become **obsolete**. Although a decision **repealing the Article** may be taken by the Council by a qualified majority on a proposal by the Commission with effect from 1 December 2014 (see also the similar provi-

¹ GHN/Boeing/Kotthaus/Maxian Rusche, Artikel 97, mn. 4.

² Streinz/Schäfer, Artikel 97, mn. 3.

^{1*} ECJ Cases C-57/00 P VW-Sachsen [2003] ECR I-9975; Case C-334/99 *Commission v Germany* [2003] ECR I-1139, mn. 120.

^{2*} ECJ Case C-334/99 *Germany v Commission* [2003] ECR I-1139, mn. 52.

³ ECJ Case C-334/99 *Germany v Commission* [2003] ECR I-1139, mn. 54.

sion concerning State aid in Article 107 para. 2 lit.c TFEU); such a rather exceptional ‘autonomous’ change to the treaty is not likely to occur in the near future.

**Article 99 [Advisory Committee]
(ex Article 79 TEC)**

An Advisory Committee consisting of experts designated by the governments of Member States shall be attached to the Commission. The Commission, whenever it considers it desirable, shall consult the Committee on transport matters.

The Advisory Committee is today of no relevance. In fact, even though the Committee 1 was initialised already in 1958¹, it has not been active since the 1980s.² The Committee, whose position is defined in rules laid down by the Council on basis of Article 242 TFEU³, was designed to advise the Council on transport matters. The still existing Committee could in theory be convened at any time. However, it is very unlikely that the Commission would revitalize this instrument in the near future.

Outside the regime of Article 99 TFEU, several special consulting committees acting 2 on the basis of secondary EU law have been initiated. The Commission is also advised by *ad hoc* experts. In 2011, the Commission set up – without any reference to Article 99 TFEU – a consultative committee, named ‘European Energy and Transport Forum’.⁴ According to Article 1 of the Decision, establishing the ‘Forum’, it is made up of 34 qualified representatives of operators, manufacturers and managers of networks and infrastructures, transport users and energy consumers, trade unions, environmental protection and safety associations and the academic world. The Members of the Forum, which are to be appointed every two years, were appointed most recently in 2004.⁵

**Article 100 [Modes of transport]
(ex Article 80 TEC)**

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

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¹ OJ 1958, 509, as amended in OJ 1964, 1602.

² CR/Jung, Artikel 99 AEUV, mn. 3.

³ OJ 1958, 509, as amended in OJ 1964, 1602.

⁴ Commission Decision 2001/546/EC of 11 July 2001 setting up a consultative committee, to be known as the ‘European Energy and Transport Forum’, OJ L 195/58.

⁵ OJ 2004/C 312/07.

1 I. Material scope of the transport policy (para. 1)

Article 100 para. 1 TFEU confines the material scope of application of the provisions on the EU transport policy (Articles 90 – 99 TFEU) to three modes of transport. For historical reasons, the scope is limited to the inland transport modes road, rail and inland waterways. The historical division between the covert modes of transport and the originally not included sea and air transport was due to the limited importance of the latter. The geographical size and location of the six founding Members of the Community did not make it necessary to entrust the Community with competences in relation to the global transport systems for air and sea transport. The transport policy has been focused on removing borders between Member States and thus contributing to the free movement of individuals and goods. As sea and air transport was originally of limited importance as mode of transport between the Member States, no pressing need for harmonization and liberalization existed. However, with currently 28 Member States and technological progress especially but not only in the field of air transport, this situation has changed fundamentally. The separation of provisions governing the original three modes of transport (Articles 90–99 TFEU) and the authorization for measures in the field of air and sea transport (Article 100 para. 2 TFEU) now remain a vestige of the earlier times. It would be desirable to overcome this separation in the Articles on transport policy in the future – especially with the EU now holding the same competence concerning air and sea transport as concerning the original three modes of transport on basis of Article 100 para. 2 TFEU.

- 2 Transports by cableway installations¹ and lifts² are excluded. Transport by pipelines is also not covered. The Articles on the establishment and development of trans-European networks (Article 170 et seq. TFEU) constitute *leges speciales*. However, the general laws of the Union (free movement of persons and goods, state aid, competition policy) are applicable to all modes of transport – including sea and air transport.³
- 3 The common transport policy covers the whole process of transport and therefore all framework conditions for the transport by carriers, including all governmental regulatory measures. These include infrastructure, common rules for the protection of the environment, research and development in the field of transport and the financing of projects.⁴

4 II. Sea and air transport (para. 2)

The strong interconnection of air and sea transport with third states and the integration in world-wide transport and normative frameworks as well as organisational structures (ICAO, IATA, IMO) constitute specific characteristics of these modes of transport.

¹ Directive 2000/9/EC of 20 March 2000 relating to cableway installations designed to carry persons, OJ L 106/21.

OJ L 106, 3.5.2000, p. 21–48 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

² Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts, OJ L 213/1, last amendment by Regulation (EU) 1025/2012 of 25 October 2012 on European standardisation, OJ L 216/12.

³ ECJ Cases 167/73 *Commission v France* [1974] ECR 359; 209–213/84 *Nouvelles Frontières* [1986] ECR 1425; 66/86 *Air tariffs* [1989] ECR 803.

⁴ CR/Jung, Artikel 100, mn. 2; see e.g. Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), OJ L 164/44, amended by Directive 2009/149/EC of 27 November 2009, OJ L 313/65.

In the original 'Europe of the six' these carriers were economically almost without significance for the internal transport. A common policy was therefore not urgent to be accomplished. However, in a Europe of over two dozen Member States this finding is no longer valid. The successful representation of European interests in a worldwide framework is increasingly dependent on formulating a common Union policy.

Para. 2 puts an end to the exceptional position of sea and air transport; the legislative discretion of the Union is even broader than in the authorization concerning the other modes of transport ('appropriate provisions').

40% of the EU internal trade is operated via **sea transport**; 90% of the external freight trade of the Union is seaborne. More than 400 million passengers per year arrive at and depart from European ports. Since the 1980s, the EU has followed a strict policy of market liberalisation⁵ including social⁶, security⁷ (e.g. by founding the European Maritime Safety Agency (EMSA)⁸) and environment standards⁹. In 2009 the Commission issued a **Communication** presenting the main strategic objectives for the European maritime transport system up to 2018. Under the impact of the financial crisis starting in 2008, the purpose of the Communication is to identify and present main strategic goals for the EU maritime transport system up to 2018 in order to strengthen competitiveness while enhancing environmental performance of the sector.¹⁰

Air transport, covering about 8 % of the total transport of persons in the EU and supporting 7.8 million jobs¹¹, has become one of the economically important means of transport in the Union. Despite the recent economic crisis, global air transport is ex-

⁵ See e.g. Council Regulation (EEC) 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries OJ L 378/1; Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage); OJ L 364/7; Council Regulation (EEC) 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, repealed by Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269/1; Council Regulation (EEC) 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, OJ L 378/14; Directive 2002/6/EC of 18 February 2002 on reporting formalities for ships arriving in and/or departing from ports of the Member States of the Community, OJ L 67/31; Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community, OJ L 188/35, amended by Regulation 1137/2008 of 22 October 2008, OJ L 311/1, amended by Directive 2013/53/EU, OJ L 354/90; Regulation (EC) 789/2004 of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) No 613/91, OJ L 138/19, amended by Regulation (EC) 219/2009 of 11 March 2009, OJ L 87/109, amended by Regulation (EU) No 530/2012 of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ L 172/3.

⁶ See Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission of 9 June 2011. The task force was set up in 2010 following the proposal of the Commission in its Communication COM (2009) 0008. Directive 2012/35/EU of 14 December 2012 amending Directive 2008/106/EC on the minimum level of training of seafarers, OJ L 343/78.

⁷ Directive 2005/65/EC of 26 October 2005 on enhancing port security, OJ L 310/28; also see *Commission*, Second report assessing the implementation of the Directive on enhancing port security, COM (2013) 0792 final.

⁸ See Regulation (EC) of 27 June 2002 establishing a European Maritime safety Agenda, OJ L 208/1, amended by Regulation (EU) 100/2013 of 15 January 2013, OJ L 39/30.

⁹ E.g. Regulation (EU) No 530/2012 of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ L 172/3; Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52.

¹⁰ Communication of 21 January 2009, Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM (2009) 0008 final.

¹¹ Estimated number in 2013. See *ERA*, A Blueprint for the Single European Sky, 2013, 2.

pected to grow significantly in the next decades. The exploitation of this economic potential as well as increasing safety concerns have led the Commission to adopt several measures especially in the last years. While initially only punctual measures of the EU were brought forward, since the 1990s an overall air policy of the Union was developed (e.g. complete liberalization of market access¹²; uniform tariffs and conditions of carriage; passenger rights¹³; harmonization of technical norms, security and environmental standards.) The air transport sector was gradually liberalised through three packages of EU measures which covered air carrier licensing, market access and fares. Regulation 1008/2008/EC¹⁴ now unifies the measures of the third package¹⁵. In 2002, **the European Aviation Safety Agency (ESA)** was established in order to establish and maintain a high uniform level of safety for civil aviation in Europe.¹⁶

- 8 The EU seeks to meet the danger of heavy congestion of the airspace and the strain on the capacity of airports in the Union. Therefore the EU launched in 2004 an initiative for the **Single European Sky (SES)**.¹⁷ A second package of measures concentrating on cost efficiency, safety and the environment including decarbonisation (SES II) was adopted in 2009.¹⁸ The core of the first SES legislative package consists of four Regulations¹⁹ on the provision of air navigation services (ANS), the organisation and use of airspace and the interoperability of the European Air Traffic Management Network (EATMN). The second package on the Single European Sky (**SES II**) aims at an improvement of economic, financial and environmental performance of the provisions. A performance scheme²⁰, the establishment of Functional Airspace Blocks²¹, network manage-

¹² Regulation 2408/92 of 23 July 1992 on access of Community air carriers to intra-Community air routes, OJ L 240/8, repealed by Regulation (EC) 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293/3.

¹³ Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ L 46/1; see also ECJ Cases C-22/11 *Finnair Oyi v Lassooy* (Not yet published) Judgment of 04 October 2012; C-321/11 *Cachafeiro v Iberia* (Not yet published) Judgment of 04 October 2012; C-581/10 *Nelson v Lufthansa* (Not yet published) Judgment of 23 October 2012; C-12/11 *Denise McDonagh v Ryanair* (Not yet published) Judgment of 31 January 2013; C-11/11 *Air France v Folkerts* (Not yet published) Judgment of 26 January 2013.

¹⁴ Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293/3.

¹⁵ Council Regulation 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240/1; Council Regulation 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240/8; Council Regulation 2409/92 of 23 July 1992 on fares and rates for air services, OJ L 240/15.

¹⁶ See Regulation 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79/1.

¹⁷ Already planned in 1999. See Commission Communication of 1 December, The creation of the single European sky, COM (1999) 614 final [Not published in the Official Journal].

¹⁸ Commission Communication of 25 June 2008, Single European Sky II: towards more sustainable and better performing aviation, COM (2008) 389 final.

¹⁹ Regulation 549/2004 of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation), OJ L 96/1; Regulation 550/2004 of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation); OJ 96/10; Regulation 551/2004 of 10 March 2004 on the organisation and use of the airspace in the single European sky (the airspace Regulation), OJ L 96/20; Regulation 552/2004 of the European Parliament and of the Council of 10 March 2004 on the interoperability of the European Air Traffic Management network (the interoperability Regulation). All these Regulations were amended by Regulation 1070/2009 of 14 November 2009, OJ L 300/34.

²⁰ Commission Regulation 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005, OJ L 201/1, amended by Commission Implementation Regulation 1216/2011 of 24 November 2011, OJ L 310/3.

²¹ Commission Regulation 176/2011 of 24 February 2011 on the information to be provided before the establishment and modification of a functional airspace block, OJ L 51/2.

ment²² as well as a framework of reporting of charges and costs²³ are part of the package. However, the implementation and establishment of the Single European Sky initiative is facing difficulties. Therefore the Commission decided in 2013 to update and amend the rules governing SES and SES II. The proposal called **SES2+**²⁴ includes several new Regulations focusing on performance and safety.²⁵

On 5 November 2002, the ECJ²⁶ confirmed the exclusive competence of the Union to enter into international agreements concerning the largely harmonised fields of air transport policy. This opens up broad possibilities for the EU's own external air transport policy. The **EU-US Air Transport ('Open Skies') Agreement** of 30 April 2007 (provisionally applied since 30 March 2008, as amended by the protocol provisionally applied from 21 June 2011)²⁷ is considered to be a first important step towards creating an open transatlantic air space. In February 2014, the EU-ASEAN Aviation Summit proposed an 'Open Sky' agreement between EU and ASEAN.²⁸

TITLE VII COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1 RULES ON COMPETITION

SECTION 1 RULES APPLYING TO UNDERTAKINGS

Bibliography: *Adam*, Beurteilungsspielraum und Legal Ausnahme im Europäischen Kartellrecht (2007); *Aigner*, Kollektive Marktbeherrschung im EG-Vertrag (2001); *Amato*, Antitrust and the Bounds of Power (1997); *Andrelang/Maganaris*, Damages for the infringement of Article 81 EC by cartel agreements in German Courts, ERPL 2008, 755; *Basedow*, Die Europäische Union zwischen Marktfreiheit und Überregulierung, in: Stürner (ed) Privatautonomie in der transnationalen Marktwirtschaft (2009); *Bechtold/Bosch/Brinker/Hirsbrunner* (eds), EG-Kartellrecht. Kommentar (2nd edn 2009); *Berg*, Die Rechtsprechung des EuGH und des EuG auf dem Gebiet des Kartellrechts 2006–2008, EWS 2009, 105; *Boeger*, Solidarity and EC Competition Law, EL Rev 2007, 319; *Botta*, Testing the decentralisation of competition law enforcement, EL Rev 2013, 107; *Dethmers/Posthuma de Boer*, Ten Years on: Vertical Agreements under Article 81, ECLR 2009, 424; *Drake*, Scope of courage and the principle of individual liability for da-

²² Commission Regulation 677/2011 of 7 July 2011 laying down detailed rules for the implementation of air traffic management (ATM) network functions and amending Regulation (EU) No 691/2010, OJ L 185/1.

²³ Commission Regulation (EU) No 1191/2010 of 16 December 2010 amending Regulation (EC) No 1794/2006 laying down a common charging scheme for air navigation services, OJ L 333/6.

²⁴ See Commission Press release of 11 June 2013, Single Sky: Commission acts to unblock congestion in Europe's airspace, IP/13/523.

²⁵ Commission Communication of 11 June 2013, Accelerating the implementation of the Single European Sky, COM (2013) 408 final; Proposal for a Regulation of 11 June 2013 amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services, COM (2013) 409 final; Proposal for a Regulation of 11 June 2013 on the implementation of the Single European Sky (recast), COM (2013) 410 final.

²⁶ ECJ Case C-466/98–469/98 *Open Skies* [2002] ECR I-9855.

²⁷ Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand of 30 April 2007, OJ L 134/4; Protocol to amend the Agreement of 24 June 2010, OJ L 223/3.

²⁸ Commission Press Release of 12 February 2014, IP/14/133.

mages: further development of the principle of effective judicial protection by the Court of Justice, EL Rev 2006, 841; *Drauz/Schroeder*, Praxis der europäischen Fusionskontrolle (3rd edn 1995); *Fesenmair*, Öffentliche Dienstleistungsmonopole im europäischen Recht (1996); *Forrester/MacLennan/Komninos*, 'EC Competition Law 2005–2006, YbEL 2009, 521; *Geradin/Layne-Farrar/Petit*, EU Competition Law and Economics (2012); *Gildehaus*, The rating agency oligopoly and its consequences for European competition law, EL Rev 2012, 269; *Glöckner*, Missbrauchskontrolle im EG-Kartellrecht nach den 'Erläuterungen' der Kommission und der europäischen Rechtsprechung, EWS 2009, 401; *Grabitz*, Dienstleistungsmonopole im Binnenmarkt, EWS 1990, 4; *Hamer*, Die Rolle des nationalen Richters im Rahmen der Kartell-Durchführungsverordnung 1/2003/EG, EWS 2003, 415; *Heidenreich*, Anhörungsrechte im EG-Kartell- und Fusionskontrollverfahren (2004); *Heinemann*, Grenzen staatlicher Monopole im EG-Vertrag (1996); *Heinemann*, Immaterialgüterschutz in der Wettbewerbsordnung – Eine grundlagenorientierte Untersuchung zum Kartellrecht des geistigen Eigentums (2002); *Heinemann*, Europäisches Kartellrecht – Einführung und aktuelle Entwicklungen, JURA 2003, 649 and 721; *Hellich*, Die Mißbrauchsaufsicht über marktbeherrschende Unternehmen und das Scheitern der klassischen Eingriffsverwaltung bei beurteilungskomplexen Tatbeständen (2001); *Hodges*, Competition Enforcement, Regulation and Civil Justice: What is the Case?, CML Rev 2006, 1381; *Jones/Sufrin*, EU Competition Law (4th edn 2011); *Kyolbye*, The New Commission Guidelines on the Application of Article 81 para. 3: An Economic Approach to Article 81, ECLR 2004, 566; *Lerch*, Strombezugsverpflichtungen und EG-Kartellverbot (2008); *Liakopoulos/Marsilia*, The regulation of transnational mergers in International and European law, 2010; *Montag*, Gewerbliche Schutzrechte, wesentliche Einrichtungen und Normung im Spannungsfeld zu Article 86 EGV, EuZW 1997, 71; *Möschel*, Der Missbrauch marktbeherrschender Stellungen nach Article 82 EG-Vertrag und der 'More Economic Approach', JZ 2009, 1040; *Nebbia*, Damages actions for the infringement of EC competition law: compensation or deterrence?, EL Rev 2008, 23; *Reich*, Horizontal liability in EC law: Hybridization of remedies for compensation in case of breaches of EC rights, CML Rev 2007, 705; *Riley/Peysner*, Damages in EC antitrust actions: who pays the piper?, EL Rev 2006, 748; *Rose/Bailey* (eds.), Bellamy & Child's European Union Law of Competition (7th edn 2013); *Rumpff*, Das Ende der öffentlichen Dienstleistungen in der Europäischen Union? Artikel 86 Abs. 2 (ex-Art. 90 Abs. 2) EGV im System des EGV (2000); *Schwarze*, Rechtsstaatliche Defizite des europäischen Kartellbußgeldverfahrens, WuW 2009, 6; *Schwarze*, Rechtsschutz und Wettbewerb in der neueren europäischen Rechtsentwicklung (2010); *Szysczak*, Public Service Provision in Competitive Markets, YbEL 2001, 35; *Terhechte*, Applying European competition law to international organizations, EYIEL 2010, 179; *Tzakas*, Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?, CML Rev 2011, 1125; *Whish/Bailey*, Competition Law (7th edn 2012); *Willms*, Das Europäische Gemeinschaftsrecht und die öffentlichen Unternehmen (1996); *Wu*, EU-China competition dialogue, ELJ 2012, 461; *Zäch*, Wettbewerbsrecht der Europäischen Union (1994).

Article 101 [Cartel Prohibition] (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;**
- (b) limit or control production, markets, technical development, or investment;**
- (c) share markets or sources of supply;**
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;**
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.**

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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I. General remarks

1

1. Overview

Rules enshrined in Articles 101–109 TFEU constitute the **principle element securing a system of undistorted competition** within the internal market. With the entry into force of the Treaty of Lisbon and the deletion of Article 3 para. 1 lit. g TEU, this treaty objective has lost its prominent normative foundation in primary EU law. However, its normative binding force remains untouched.¹ The term ‘internal market’, referred to in ex-Article 3 TEU, is indeed substantiated in Protocol No 27 (i. e. still on a treaty level: cf.

¹ See *Jones/Sufrin*, EU Competition Law (4th edn, 2011) 42 et seq.

Article 52 TFEU), as explicitly comprising a system 'ensuring that competition is not distorted.' Free competition is key to the overall regulatory concept ('Leitbild') of the open market economy of the European integration. This is also confirmed explicitly in other treaty provisions (cf. Articles 119, 120 TFEU). In the European context, the role of competition law is not limited to its classical **economic** (performance-related income, consumer sovereignty, efficient factor allocation, adaptation flexibility and economic progress) and **socio-political** (separation of powers in the economic domain) **functions**. EU competition law is rather of a **supportive nature for the realisation of fundamental freedoms**. In view of the different traditions of economic policy among Member States as well as changes of social, societal, ecological and economic realities through comprehensive globalisation of our (living) environment, the content and limitations of regulatory interventions should not be thought to be static. On the contrary, the regulatory framework is in need of a constant and strict scrutiny and, if necessary, adjustments. Insofar, we are dealing with a highly **dynamic legal matter**. The gradual softening of strict ordoliberal concepts (Freiburg School) towards an increased consumer orientation and an 'upgrading' of Article 106 para. 2 TFEU bears witness of this dynamism.

In an economic system dominated by private actors, normative directives addressed only to Member States are not by far not enough to effectively implement this **binding treaty objective of fundamental importance**.²

- 2 Whereas Articles 101 et seq. TFEU deal with **practices by undertakings** that are likely to distort competition, Articles 107 et seq. TFEU (aids granted by States) and Articles 110 et seq. TFEU (tax provisions) – the latter set of rules not falling in the realm of competition law *strictu sensu* – stipulates rules for public interventions to avoid distortion of competition.
- 3 **Article 101 TFEU concerns agreements between undertakings** and concerted practices (antitrust), **Article 102 TFEU prohibits the abuse of a dominant position** of market power control by an undertaking and finally **Article 106 TFEU foresees exemptions** of the strict rules of European competition law under certain conditions. These exemptions only apply with respect to **public undertakings, to undertakings granted special or exclusive rights and to undertakings entrusted with services of general economic interest**. This provision confirms that the objective of European competition rules is **not an end in itself to market liberalisation**, but one of its principal aims is the well-being of the Union's peoples, an objective that is well embedded in comprehensive regional integration and concretised in Article 3 TEU. The enabling clause in Article 103 TFEU for the Commission to legislate is of enormous practical relevance. For implementation to be effective as well as according to the rule of law, norms need to be precise to a degree that means they have to be regarded as secondary norms.
- 4 Besides the public authorities and courts of the Member States, it is the role of the **Commission** to act as the '**European Competition Authority**' and to enforce the rules of competition law (cf. also Article 105 TFEU). The enforcement regime of Articles 101 and 102 was reformed and the new regime was implemented by **Regulation 1/2003**³ and entered into force on 1 May 2003 replacing Regulation 17/62.⁴
- 5 The **prohibition of anti-competitive agreements** and the **prohibition of abuse of a dominant position** form the **first and second pillar** of every developed competition law and have found their equivalents in European Union Law in Articles 101 and 102 TFEU. However, this cannot be said to the same extent of a typical **third pillar** – preventive con-

² ECJ Case 6/72 *Euroemballage and Continental Can* [1973] 215.

³ Council Regulation 1/2003/EC of 16 Dec 2002 on the implementation of the rules on competition (OJ L 1/1).

⁴ Regulation 17/62 of 13 March 1962 (OJ 1962 13/204).

trol of concentrations of undertakings (merger control). As this is only explicitly mentioned in Article 66 TEEC (which ceased to be valid law on 23 July 2002), practically speaking merger control has frequently been exercised at the European level by means of Articles 101 and 102 TFEU (then Arts 85 and 85 TEC). This changed in 1989 with **Regulation 139/2004 (Regulation on merger control)**, a secondary source of law which has regulated the matter comprehensively; so since that date control of concentrations has been an integral part of Union competition law.

2. Scope of application

6

Generally, the competition rules apply in the entire **field of application** of Union Law. Application to **agriculture** and agricultural products are exceptional, as stipulated in Regulation 26/62⁵ which provides detailed regulation of Article 42 TFEU. Article 2 of this regulation excludes this economic sector from the scope of application of Article 101 TFEU; not so for Article 102 TFEU.

For a long time large **sectors of transportation** used to fall under a **special regime** although there has not been any exceptional provision in competition law (such as Article 42 TFEU). Only secondary legislation in the form of regulations such as Regulation 2056/86 (for maritime transport) and Regulation 3975/87 (for air transport) existed, but **has been entirely abolished** together with Article 32 Regulation 1/2003 by enacting Regulation 411/2004 (air)⁶ and Regulation 1419/2006 (maritime).⁷ These were the last sectoral exemptions of application of general competition rules.

Article 106 para. 2 TFEU most likely needs to be seen as a restriction on the scope of application of Articles 101 and 102 TFEU. Further economic sectors lack any legal basis **for further exemption** in the field of application and can therefore be neither considered nor recognised. This is particularly true for the insurance sector.⁸

The **territorial scope of application** of EU competition law generally corresponds to Article 52 TEU and Article 355 TFEU with all its modifications; thus it consists of the sovereign territory of all EU Member States. In cases where anti-competitive practices occur at least partly on the territory of the EU, the enforcement regime of EU competition law is applicable following the **general principle of territoriality** in public international law. Furthermore, in certain cases the regime is applied beyond the EU territory, based on practically identical provisions concluded in treaties with non-EU States (cf. Articles 53 et seq. TEEC or equivalent provisions in treaties of association). Even actions arising outside the Union but distorting competition in terms of Articles 101 and 102 TFEU can be brought within the ambit of EU competition law (particularly in cases of agreements, decisions or simple practices incompatible with Article 102 TFEU). This is definitely the case when the conduct has an appreciable effect on the practice of competition and the practice of the market within the EU such as to undermine attainment of the objectives of the internal market (**principle of effect**).⁹ The same applies to agreements between undertakings with their seats (only) outside the Union. This ECJ sanctioned extra-territorial application of EU competition law is compatible with the principle of non-intervention¹⁰ as the Commission abstains from so-called enforcement-jurisdiction (e.g. service of process or measures of constraint) in such cases. However, to minimise

⁵ Frequently amended; codified Version: Regulation 1184/2006 of 24 July 2006 (OJ 2006 L 214/7).

⁶ Regulation 411/2004 of 26 February 2004 OJ 2004 L 68/1.

⁷ Regulation 1419/2006 of 25 September 2006 OJ 2006 L 269/1.

⁸ ECJ Case 45/87 *Verband der Sachversicherer* [1987] 405, mn. 12.

⁹ ECJ Case C-306/96 *Javico International/YSLP* [1998] ECR I-1983, mn. 25; fundamentally already in ECJ Joined Cases 89, 104, 114, 116, 117, 125–129/85 *Wood Pulp* [1988] 5193.

¹⁰ *Eilmansberger*, Vor Art 101 AEUV, in: Streinz (ed), *EUV/AEUV*, (2nd edn, 2012) mn. 22.

any conflicts regarding jurisdiction, a series of **bilateral agreements** on the application of positive comity principles in the enforcement of competition laws have been concluded with the United States of America,¹¹ Canada,¹² Japan¹³ and the Republic of Korea.¹⁴ ‘Memoranda of Understanding’ in preparation for similar agreements have been concluded with Brazil (2009), the Russian Federation (2011), China (2012) and India (2013).¹⁵

- 10 Regarding the **relation** of Union Law to **domestic legislation**, see Article 103 TFEU mn. 15 et seq.

11

II. Addressees

1. The cartel-ban addressing undertakings

The term ‘undertaking’ is to be interpreted in a **functional** manner. It comprises ‘every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.¹⁶ The ECJ in its jurisprudence has consistently regarded as ‘**economic**’ ‘any activity consisting in offering goods and services on a given market’;¹⁷ **inquiries made for the purpose of procuring goods or services** can hardly be regarded sufficient to qualify as an undertaking.¹⁸ The term undertaking includes natural persons (liberal professions and tradespersons) in particular. **Legal status** is unimportant in this regard as is the question whether the entity is **profit-making**. The cartel-ban is therefore just as applicable to public undertakings;¹⁹ equally an ‘organization which manages an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalization’;²⁰ also ‘a pension fund managing a supplementary pension scheme set up by a profession’s representative body and membership of which has been made compulsory for all members of that profession’;²¹ in contrast an ‘organisation involved in the management of the public social security system, which fulfils an exclusively social function and performs an activity based on the principle of national solidarity’²² is not regarded as an undertaking in terms of Articles 101 and 102 TFEU; neither is a ‘body which is entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases’.²³ International organisations performing public functions are not covered by the concept of an undertaking either.²⁴ In this context the view of the ECJ regarding **sickness funds in the German statutory health insurance scheme is disputable**.²⁵ The court held that the activities of such funds are not economic in na-

¹¹ OJ 1995 L 269/1; OJ 1998 L 173/26.

¹² OJ 1999 L 175/49.

¹³ OJ 2003 L 183/12.

¹⁴ OJ 2009 L 202/36.

¹⁵ Cf. <<http://ec.europa.eu/competition/international/bilateral/>>, accessed 14 March 2014.

¹⁶ ECJ Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-55, mn. 18.

¹⁷ ECJ Case C-82/01P *Aéroports de Paris* [2002] ECR I-9297, mn. 79.

¹⁸ *Prev Op*, but cont; cf. ECJ Cases C-205/03P *FENIN* [2006] ECR I-6295, mn. 26; C-113/07P *SELEX Sistemi* [2009] ECR I-2207, mn. 69; other opinion: e.g. *Müller-Graff*, Art 101, in: Vedder and von Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (2012) mn. 6 with further references.

¹⁹ Argument: Article 106 para. 1 TFEU and Article 54 para. 2 TFEU.

²⁰ ECJ Case C-244/94 *FFSA* [1995] ECR I-4022, mn. 22.

²¹ ECJ Joined Cases C-180–184/98 *Pavlov* [2000] ECR I-6497.

²² ECJ Joined Cases C-159, 160/91 *Poucet and Pistre* [1993] ECR I-637.

²³ ECJ Case C-218/00 *INAIL* [2002] ECR I-717.

²⁴ ECJ (n 1444).

²⁵ ECJ Joined Cases C-264, 306, 354, 355/01 *AOK-Bundesverband* [2004] ECR I-2493.

ture as they ‘pursue an exclusively social objective’ ‘based on the principle of national solidarity, [are] entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions’. This finding is factually inadequate as these entities are at least in a partial competitive situation with private sickness funds, providing practically the same benefits in the health care market. A more case-related and thus more flexible application of EU competition law would have been not only possible but appropriate by applying Article 106 para. 2 TFEU. If this holding is to be upheld then it should be treated with caution, as more recent political developments suggest the establishment of (real) competition among sickness funds. For the **differentiation of activities involving exercise of powers of public authorities** excluding economic character and its difficulties.²⁶

The functional understanding of the term undertaking is noteworthy in that it regards 12 companies in which **one entity belongs to the same group of entities or one dominates the other** (parent-/subsidiary company) as a single economic entity; the subsidiary company being directly or indirectly controlled by the parent company and thus not able to determine freely its conduct does not fall within the scope of Art 101 TFEU.²⁷ Such a unit is treated equally as one single unit in relation to other third party undertakings.

To prevent a circumvention of the cartel-ban, Article 101 TFEU explicitly mentions **as-** 13 **sociations of undertakings** which do not necessarily have to be economically operational themselves. Their legal status, whether as a private or as a public entity, is insignificant (e.g. trade associations, professional associations, etc.).²⁸

2. Member States

14

Member States are **not directly addressed** by the cartel-ban; however, they are **bound** **by Article 4 para. 3** TEU not to legislate or regulate to reinforce the effects of agreements, decisions or concerted practices of undertakings contrary to Article 101 TFEU;²⁹ Member States are also required not to adopt or maintain in force a law which, in granting the relevant decision-making power, requires a professional association to compile a compulsory, uniform tariff for the services of customs agents, expressly prohibiting registered customs agents from derogating from the tariff.³⁰ **In contrast**, fixing tariffs for the long distance transport of goods by road by tariff boards consisting of independent experts deciding on the basis of considerations of public interest is **admissible**.³¹ The same applies to price-fixing by freight commissions governed by the Law on Inland Waterways Traffic (‘BinnSchVG’)³² or if members of a professional association represent not only the interests of association members but act like independent experts in the public interest. It is also permissible to approve a draft tariff produced by a professional organisation³³ or to prohibit insurance intermediaries from transferring to their clients all or part of the commission paid by insurance companies³⁴ or the requirement of a municipal licence for

²⁶ Compare *Khan/Suh*, Article 106 TFEU mn. 4, with further references.

²⁷ ECJ Case C-73/95 P *VIHO* [1996] ECR I-5482; further discussions in *Schröter*, Art 85, in: von der Groeben and others (eds), *Kommentar zum EU/EG Vertrag* (5th edn 1997/98) mn. 96 et seq.

²⁸ For further details see *Hirsbrunner*, Art. 81, in: Bechtold and others (eds), *Kommentar zum EG-Kartellrecht* (2nd edn 2009) mn. 25 et seq.

²⁹ ECJ Cases 311/85 *Travel Agents* [1987] 3801; 66/86 *Flight Tariffs* [1989] 838.

³⁰ ECJ Case C-35/96 *Commission v Italy* [1998] ECR I-3886.

³¹ ECJ Case C-185/91 *Reiff* [1993] ECR I-5841.

³² ECJ Case C-153/193 *Delta* [1994] ECR I-2525; see also ECJ C-96/94 *Spedizioni Marittima* [1995] ECR I-2900.

³³ ECJ Case C-35/99 *Arduino* [2002] ECR I-1561.

³⁴ ECJ Case C-2/91 *Meng* [1993] ECR I-5791.

the opening of new shops according to a commercial development plan corresponding to the public interest.³⁵

15 **III. Conduct restricting competition**

The prohibition of Article 101 para. 1 TFEU requires a **coordination of conduct** having as its object or effect the restriction of competition as formulated in the provision and illustrated with rule examples.³⁶

16 **1. Agreements, decisions and concerted practices**

The prohibition of Article 101 para. 1 TFEU is relevant for agreements between undertakings and concerted practices of undertakings. A **free decision-making power in the undertaking is required**. Conduct that is governed by national statute cannot be regarded as the autonomous conduct of an undertaking.³⁷

17 The term **'agreement'** is to be interpreted as widely as possible and includes any form of understanding between the parties. A meeting of the minds of the parties can also be tacit. It is unimportant whether there has been intent to be legally bound;³⁸ equally unimportant is the question of validity of the contract according to either domestic public or private law.³⁹ The term covers both horizontal and vertical agreements.

18 **Decisions of associations of undertakings** with restricting effects on competition are also prohibited. Such decisions are considered **special forms of agreements between undertakings**; even undertakings that have abstained or even voted against such a decision are regarded as being involved as long as the association is constituted in such form as to be empowered to regulate the conduct of its members on the market.⁴⁰ In this context intent to be legally bound is also insignificant.

19 Article 101 para. 1 TFEU covers **concerted practices** as a fall-back element, too. Such practices can be seen in any coordination that has not led to a meeting of the minds (which would constitute an agreement) but in which competition linked with economic risks has been replaced by a practical co-operation. This includes any direct or indirect contact between undertakings of which the intent is to influence the conduct on the market of competitors or to disclose the course of conduct which they will or may take on the market.⁴¹ An example of such a conduct is the establishment of an information exchange system.⁴²

20 In contrast, a **parallel behaviour on the market** is not considered a concerted practice as long as several or all market players react independently, but in the same way, to certain market signals. (e.g. an alignment reaction to a price leader based upon an independent and market typical decision by an undertaking or parallel and uniform reactions to changes on the crude oil market). Parallel behaviour however is the first **evidence that there is concerted practice** on hand when such reaction cannot be seen as common under normal circumstances of competition.⁴³ Determining whether there is permitted

³⁵ ECJ Joined Cases C-140, 141, 142/94 *DIP SpA* [1995] ECR I-3287.

³⁶ Cf. wording of Article 101 para. 1 TFEU: '... in particular those which.'

³⁷ ECJ (n 32).

³⁸ Even gentlemen's agreements are covered by the so-called competition law approach of the term 'contract'.

³⁹ ECJ Case 136/86 *Aubert* [1987] 4808.

⁴⁰ ECJ Joined Cases 209–215, 218/78 *FEDETAB* [1980] 3125.

⁴¹ ECJ Case 243/83 *Binon* [1985] 2015.

⁴² ECJ Case C-7/95 P *John Deere* [1998] ECR I-3138.

⁴³ ECJ Case 395/87 *Tournier* [1989] 2565; regarding particularities on oligopolistic markets ECJ Joined Cases 48, 49, 51–57/69 *ICI* [1972] 619; *Weatherill*, Cases and Materials on EU-Law (10th edn 2012) 457.

parallel behaviour or a prohibited collusive conduct in the form of informal 'coordination' – and collecting the evidence thereof – may prove very difficult in certain cases.⁴⁴

2. Restriction of competition

21

Article 101 TFEU protects competition by allowing undertakings to exercise their **freedom of business** on the market.⁴⁵ Crucial for the question whether there is distortion or restriction of competition is the comparison between the conditions of competition with and without the conduct in question.⁴⁶

Competition on **every trade level** is protected. Horizontal (agreement on the same trade level) and vertical agreements (on different trade levels) are treated alike.⁴⁷ 22

Lawful competition is protected. Statutory regulations influencing competition (e.g. a fair trade or industrial property law) are required to be compatible with Union Law, in particular provisions on the free movement of goods (cf. Articles 34 et seq. TFEU) and the free movement of services (cf. Articles 56 et seq. TFEU). 23

Article 101 TFEU concerns only competition in trade between Member States (i.e. it is an **interstate clause**). Conduct of undertakings that affects only the interior competition of a Member State does not trigger the scope of application of EU competition law.⁴⁸ In this manner this clause also acts as a conflict rule between domestic competition regimes. A single act may not be regarded as isolated, but has always to be seen in the context of a possible overall system.⁴⁹ For conduct in relation to third countries Article 101 TFEU does not apply unless such action has effect on the internal market.⁵⁰ Practices that only affect relations with third countries fall under the regime of the Common Commercial Policy (Article 207 TFEU). 24

Trade between Member States is **affected** as soon as an 'agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market ...'⁵¹ The degree of probability, on the basis of all the objective factors of law or of fact, is relevant.⁵² Capability to affect competition is most likely to be found if market shares held by the undertaking are not insignificant (14–17%).⁵³ In the practice of the Commission, this wide application of the concept of 'capability' has practically led to the assumption of trade between Member States and thus to a decreasing importance of national competition law.⁵⁴ The Commission with its '**Guidelines on the effect on trade concept**' contained in Articles 81 and 82 of the Treaty'⁵⁵ has provided objective criteria on effects on trade between Member States. According to this document, the Commission takes an agreement as applicable for national competition law only if the aggregate market share of the parties on any relevant market within the Union affected 25

⁴⁴ See for details *Eilmansberger*, Art. 101, in: Streinz (ed), EUV/AEUV (2edn, 2012) mn. 22 et seq.; *Jones/Sufrin*, (n 1) 165 et seq.

⁴⁵ ECJ (n 40).

⁴⁶ ECJ Case 99/79 *Lancôme* [1980] 2511.

⁴⁷ ECJ Case 56/65 *Maschinenbau Ulm* [1966] 281.

⁴⁸ ECJ Joined Cases 56, 58/64 *Consten-Grundig* [1966] 389.

⁴⁹ 'Bundle of agreements'-theory, ECJ Cases C-234/89 *Beer Supply Agreements* [1991] ECR I-977; ECJ C-214/99 *Neste (Service Station Agreements)* [2000] ECR I-11140.

⁵⁰ ECJ (n 9).

⁵¹ ECJ (n 48).

⁵² ECJ Cases 1/71 *Cadillon* [1971] 351; C-250/92 *Klim* [1994] ECR I-5671; C-219/95 *P Ferriere Nord* [1997] ECR I-4430.

⁵³ ECJ Joined Cases C-89, 104, 114, 116, 117, 125–129/85 *Ahlström (Wood Pulp)* [1993] ECR I-1575.

⁵⁴ For further references see *Stockenhuber*, Art 101, in: Grabitz, Hilf and Nettesheim (eds), *Das Recht der EU* (50th edn 2013) mn. 206 et seq.

⁵⁵ OJ 2004 C 101/81.

does not exceed 5 % and in the case of horizontal agreements if the annual Union turnover of the actors does not exceed Euro 40 million.⁵⁶

- 26 The restriction of competition needs to be **appreciable**. Trivial cases are not covered by the cartel-ban in Article 101 para. 1 TFEU.⁵⁷ According to the ‘**Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition**’ (**De Minimis** Notice)⁵⁸, appreciability is not given in agreements if the aggregate market share does not exceed 10 % on any of the relevant markets affected by the agreement between competitors (horizontal) or 15 % on any of the relevant markets affected by the agreement between non-competitors (vertical).⁵⁹ Furthermore, the revised Notice provides that agreements constituting restrictions by “object” or which are listed as “hard core” restrictions within any current or future block exemptions do not fall in the scope of application of the *de minimis* rule as such restrictions are to be automatically assumed to have an appreciable restriction on competition. This revised rule reflects the judgment of the ECJ in *Expedia*.⁶⁰ A reduced threshold of 5 % applies in sectors in which competition is restricted or such networks of agreements already exist, as the threat of restriction of competition is accordingly higher. Regarding **small and medium sized enterprises (SME)**, the Commission in its Recommendation of 6 May 2003⁶¹ defined as medium-sized an undertaking with less than 250 employees and an annual turnover of less or equal of Euro 50 million. A threshold for SMEs is not set, as such undertakings are rarely able to appreciably restrict competition between Member States. Certain **hardcore restrictions** (e.g. fixing prices, limitation of output or sales, allocation of markets or customers) as enumerated in the Commission Notice⁶² are not covered by the SME definition and **remain inadmissible** also in trivial cases.

27

3. Object and effect

The conduct of an undertaking also needs to have as its **object or effect** a restriction of competition. The alternatively formulated clause ascertains a comprehensive protection of competition, as it covers any interference either with or without intent.

- 28 If the conduct has as its object a restriction of competition, the prohibition is applicable regardless of the actual result of the conduct. As intent already threatens competition, it suffices to determine on an **objective basis** the **capability** of the practice to restrict competition.⁶³
- 29 In contrast, even where conduct does not carry **any intention to restrict** competition, the prohibition applies, as the effect amounts to a restriction.⁶⁴ It is sufficient that there is a **causal context (causation)** between the agreement, the decision or voting procedure on the one hand and the restriction of competition on the other. Restriction of competition is effected as soon as players see themselves restricted in their freedom of decision on the market and have changed the standing of third parties on the market.⁶⁵

⁵⁶ (n 55), para. 52.

⁵⁷ *de minimis* rule; cf. ECJ (n 52); most recently ECJ Case C-226/11 *Expedia* of 13 December 2012, not yet reported, ruling that agreements by ‘object’ restricting competition will be regarded as appreciable regardless whether or not the undertakings affected do not reach the threshold of minimis.

⁵⁸ Commission Notice C (2014) 4136 final of 25 June 2014 replacing the *De Minimis* Notice of 2001 (OJ 2001 C 368/13).

⁵⁹ (n 58), para. 8.

⁶⁰ ECJ Case C-226/11 *Expedia* of 13 December 2012, not yet reported.

⁶¹ OJ 2003 L 124/36.

⁶² (n 58), para. 13.

⁶³ ECJ Cases C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529 mn. 28, 30; C 32/11 *Allianz Hungária and Others* [2013] of 14 March 2013 mn. 34, 37 et seq.

⁶⁴ ECJ (n 47); ECJ (n 63) *Allianz Hungária* mn. 34.

⁶⁵ See *Stockenhuber* (n 54) mn. 145.

4. Rule examples (Article 101 para. 1 lit a–e)

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Article 101 para. 1 TFEU enumerates five, **non-exhaustive** examples of anti-competitive conduct of particular practical relevance. These examples are certainly not randomly enumerated but are set out in order of the severity of offense.⁶⁶ The practices described are not per se prohibited. For every single case the general requirements have to be determined additionally; co-ordinated practice of certain undertakings, which disadvantages the freedom of decision of other undertakings, will invariably need to be demonstrated by reference to a certain market, factually, territorially and temporally. The term ‘market’ is congruent to the one in Article 102 TFEU.⁶⁷

a) Direct or indirect fixing of purchase or selling prices or any other trading conditions (lit. a)

Such agreements are obviously able to influence market conditions. Co-ordination 31 which leads to price-fixing (including the pricing of components, e.g. rebates) as well as trading conditions (e.g. term of payment) between competitors (horizontal)⁶⁸ as well as in vertical agreements, is prohibited. The exclusion of fixed interest rates for agreed bank overdrafts in uniform banking conditions does not have restrictive effects on competition.⁶⁹

b) Limiting or controlling production, markets, technical development, or investment (lit. b)

The prohibition is relevant for the restriction of competition, e.g. by prohibition of 32 production, agreement of specialisation, coordination of market shares⁷⁰ and coordination of sales.⁷¹

c) Sharing market or sources of supply (lit. c)

This prohibition is crucial for competition law and refers to distortion of competition 33 by market foreclosure for provider and consumer.⁷² The provision also governs situations where a distributor is instructed not to sell automobiles to independent leasing companies unless the company is based in the distribution area.⁷³ The same applies if the manufacturer imposes on all its dealers a requirement that they develop activities as agents for leasing transactions exclusively for the account of its own leasing company.⁷⁴

d) Application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (lit. d)

Only agreements and concerted practices that have as object and effect a discriminating 34 behaviour towards trade partners are considered. This rule example does not include the simple restriction of autonomous freedom of decision concerning constraint to conclude to equal conditions.⁷⁵

⁶⁶ So-called ‘hardcore’ restrictions, cf. mn. 24; comprehensively, see (n 54).

⁶⁷ See *Khan/Suh* Article 102 mn. 7.

⁶⁸ ECJ (n 40); ECJ (n 53).

⁶⁹ ECJ Joined Cases C-215, 216/96 *Bagnasco* [1999] ECR I-161.

⁷⁰ ECJ Case 45/69 *Boehringer* [1970] 769.

⁷¹ CFI Case T-66/89 *Publishers Association* [1992] II-1995.

⁷² ECJ Case C-393/92 *Almelo* [1994] ECR I-1508.

⁷³ ECJ Case C-70/93 *BMW* [1995] ECR I-3459.

⁷⁴ ECJ Case C-266/93 *Volkswagen* [1995] ECR I-3508.

⁷⁵ For details see *Stockenhuber* (n 54) mn. 194 et seq.

e) Prohibition of connection regarding supplementary obligations (lit. e)

35 Again here, only the restriction of the freedom of decision of the undertaking by agreement or concerted practices is relevant. This does not include the conclusion of connected agreements on the basis of autonomous decisions.⁷⁶

36 **IV. Legal consequences**

1. Nullity (para. 2)

Any agreements and decisions that are prohibited according to Article 101 para. 1 TFEU are void. This provision is, like the prohibition, **directly applicable**.⁷⁷ The consequence of nullity directly results from the primary provision (para. 2). A violation of Article 101 para. 1 TFEU is sufficient to annul an arbitration award where domestic rules of procedure require a failure to observe national rules of public policy.⁷⁸ Nullity does not arise in cases of exemptions.⁷⁹

37 An agreement is **only void to the extent** that it violates the prohibition. The legal consequence of the remaining parts is governed by the respective domestic law.⁸⁰

38 **2. Injunctions and damages actions**

Injunctions and claims for damages in cases of violation of competition law can arise according to national law. Article 101 TFEU is a protecting provision in terms of § 823 para. 2 BGB for the benefit of market actors.⁸¹ According to the latest jurisprudence of the ECJ the *effet utile* of Article 101 TFEU demands that **Union Law** provides for legal rights so that individuals can claim compensation for damages suffered. A chain of causation is required between the damage and a cartel or conduct prohibited by Article 101 TFEU.⁸² The same applies *mutatis mutandis* for violations of Article 102 TFEU. Even a party to a contract with competition restricting content can invoke remedies against the other party based on such a violation; and in such cases compensation claims can also be considered.⁸³

39 These rights to remedies exist on the merits; however, in practice there are barriers of material and procedural provisions in Member States which mean that until now remedies have been not often claimed and the victims of violations of antitrust rules have in practice rarely been compensated. The Commission attempted to correct this situation with its **White Paper on damages actions for breach of the EC antitrust rules**.⁸⁴ Proposed measures and legal policy options therein have met with harsh opposition from many economic actors. On 11 June 2013, the Commission has proposed a directive on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the EU.⁸⁵

⁷⁶ Cont; *ibid*, mn. 201 et seq.

⁷⁷ ECJ Case 127/73 *BRT/SABAM* [1974] 51.

⁷⁸ ECJ Case C-126/97 *Eco Swiss* [1999] ECR I-3079.

⁷⁹ Art 101 (3) TFEU in conjunction with Art 1 (2) Directive 1/2003; see mn. 38 et seq.

⁸⁰ In Germany: § 139 BGB.

⁸¹ ECJ Case 155/73 *Sacchi* [1974] 409; BGH NJW 1980, 1124; see *Eilmansberger* (n 44) mn. 129 et seq.

⁸² ECJ Case C-453/99 *Courage/Crehan* [2001] ECR I-6297; ECJ Joined Cases C-295–298 *Manfredi* [2006] ECR I-6619.

⁸³ ECJ Case *Courage/Crehan* (n 82) regarding a contract of exclusive purchase of beer.

⁸⁴ COM (2008) 165 final.

⁸⁵ COM (2013) 404 final.

3. Sanctions

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The **Commission** may impose on undertakings that have participated in violations of antitrust law **to terminate the infringement**⁸⁶ it has found and may impose **fin**es in case of non-compliance with its (declaratory) decisions and further infringements.⁸⁷ Furthermore, the Commission can impose **penalties**⁸⁸ for infringements that have already been intentionally or negligently committed. **Competition authorities of Member States** are authorised to use the same measures accordingly.⁸⁹

V. Exemptions (para. 3)

41

1. General remarks

As Regulation 1/2003 replaced Regulation 17/62 in antitrust law, a general change from a centralised registration system with exemption decisions by the Commission to a **legal exception system** has taken place. This way, the Commission is partly relieved of routine duties with very high demand of resources and at the same time it has the possibility to set new priorities in the enforcement of competition law.

According to **Regulation 17/62**, an **exemption** was granted by a decision of the Commission and had a **constitutive effect**. The decision of the Commission specified the date from which the decision took effect. From that date on competition restricting measures described in the decision were allowed.⁹⁰ Accordingly, paragraph 3 was not directly applicable. National courts were not authorised to find themselves whether requirements of exemptions were fulfilled as long as the Commission did not decide on individual or block exemptions.

In contrast, **Article 1 para. 2 Regulation 1/2003** stipulates that conduct under the terms of Article 101 para. 1 TFEU is not prohibited as soon as requirements stated in Article 101 para. 3 TFEU are fulfilled without any need of a prior decision by the Commission. Therefore, Article 101 para. 3 TFEU is regarded as directly applicable. This constitutes a **legal exception** equally assessable without any furtherance for each individual case also by national competition authorities and courts of Member States.

Undertakings that invoke Article 101 para. 3 TFEU do so in their **own risk**; Article 2 Regulation 1/2003 provides that in case of an investigation the undertaking carries the **burden of proof** of fulfilment of all requirements.

2. Requirements

45

Article 101 para. 3 TFEU states **two 'positive' and two 'negative' requirements** that have to be cumulatively fulfilled. The positive effects do not have to occur necessarily in the Member State in which the undertaking has its seat.⁹¹

– The intrinsically prohibited measures must contribute to **improving the production or distribution of goods or to promoting technical or economic progress**. The improvement of production can be e.g. the increase of cost-effectiveness or the improve-

⁸⁶ Council Regulation 1/2003/EC of 4 January 2003 on the implementation of the rules on competition (OJ L 1/1), Article 7.

⁸⁷ Ibid, Article 24.

⁸⁸ Ibid, Article 23.

⁸⁹ Ibid, Article 5.

⁹⁰ Council Regulation 17/62/EEC of 21 February 1962 on implementing Articles 85 and 86 of the Treaty (OJ L 13/204), Article 6 para. 1 s. 1.

⁹¹ ECJ Case C-360/92 P *Publishers Association* [1995] ECR I-54.

ment of quality. An improvement of distribution of goods can be reached by concentration of selling activities, such as e.g. the production for exclusive purchase agreements.⁹² A promotion of technical or economic progress can be seen e.g. in rationalisation of research and development activities by exchange of technology or by joint research and development.

- 47 – **Consumers** need to be allowed a **fair share of the resulting benefit**. Such advantages for consumers are the improvement of quality of life or in form of price reductions. These benefits need to be of adequate importance.
- 48 – The restriction of the freedom of competition by the exempted measures may **not be indispensable to the attainment of the objectives**. This requirement is not fulfilled if these objectives can be reached with less incisive measures.⁹³
- 49 – The restriction of competition may **not** afford the possibility of **eliminating competition** in respect of a substantial part of the products in question. Decisive for the assessment is the competition of all market players regarding the relevant goods including substituting products.⁹⁴
- 50 – The principle of legal exemption according to Article 1 para. 2 Regulation 1/2003 takes effect as soon as these requirements are given: Agreements, decisions and concerted practices under the terms of Article 101 para. 1 TFEU are to be treated as allowed without prior decision (by the Commission). For the purpose of a **consistent interpretation** of this provision, the Commission has issued a **‘Guideline for the application of Article 81 para. 3 TEC’**.⁹⁵

51 **3. Special exemption by legal acts**

Article 101 para. 3 TFEU determines between **individual and block exemptions**.

- 52 – The **individual exemption** under the terms of Articles 4 and 5 Regulation 17/62 concerned certain agreements, decisions and concerted practices that were registered with the Commission or – in cases of measures not subject to registration – an exemption was applied for. The Commission was competent⁹⁶ for an appropriate decision; this is practically obsolete under the regime today.
- 53 – As the system change to the legal exception with implementation of Regulation 1/2003 does not require any exemptions any longer, the new regime foresees a **declaratory decision** for **exceptional cases** only in Article 10.⁹⁷ Such a decision is only asked for to solve a legal situation and to ensure a uniform application of the law. The Commission decides *ex officio* in cases where it holds the view that the public interest of the Union imposes such decision. E.g. in cases of new forms of agreements and practices that have neither been economically nor legally reviewed yet or the assessment shows some difficulties.
- 54 – On the other hand, the paradigms change to an understanding of Article 101 para. 3 TFEU as a directly applicable legal exception does not bar the Commission from concretising at a future date rather generally formulated provisions regarding certain case groups (kinds of agreements, economic sectors, etc.) by utilising the Block Exemption Regulation. This might even regularly be in the interest of market players for the sake of **legal certainty**. This is the reason why none of the Block Exemption Regulations was suspended and **will continue to maintain great practical relevance**. Nevertheless one must not neglect the hierarchical system of legal norms as Article 101 para. 3 TFEU pre-

⁹² See details in *Koch*, Art 85, in: Grabitz and Hilf (eds), *Das Recht der EU* (2009), mn. 167 et seq.

⁹³ E.g. Case ECJ 61/80 *Stremmel* [1981] 851.

⁹⁴ For details see *Koch* (n 92) mn. 184.

⁹⁵ Commission Guidelines 2004/C 101/08 of 27 April 2004 (OJ C 101/97).

⁹⁶ (n 1511), Article 9 para. 1.

⁹⁷ (n 86).

vails over such regulations; therefore a regulation certainly does not have the last say and authorities and courts of Member States may contend the legal view of the Commission in certain individual cases in referring to Article 101 para. 3 TFEU. The final resort of such decisions is the European Court of Justice.

With a **block exemption** Article 101 para. 1 TFEU is declared not applicable for 55 agreements, decisions and concerted practices in certain blocks. Such a decision has – after the system change to a legal exception – only a declaratory character. As a general rule this decision is given as a regulation. The Council is in principle competent for this matter (Article 103 para. 2 lit. b TFEU); however, it has delegated this competence to the Commission by way of the so-called block exemptions and enabling regulations.⁹⁸ Its competence to concretise certain subject matters is explicitly recognised in Article 105 para. 3 TFEU. The Commission has made extensive use of this competence.⁹⁹

Article 102 [Abuse of a Dominant Market Position] (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;**
- (b) limiting production, markets or technical development to the prejudice of consumers;**
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;**
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.**

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I. General remarks

1

While Article 101 TFEU prohibits restriction of competition by coordination of practices (agreement or concerted practices) by economically independent undertakings, Article 102 TFEU targets unilateral measures. The economic freedom of action of so-

⁹⁸ For more references, cf. *Lusty*, Ch. 3, in: *Rose/Bailey* (eds.), *Bellamy & Child's European Union Law of Competition* (7th edn. 2013) mn. 3.079.

⁹⁹ See *Khan/Suh*, Art 103 TFEU mn. 10; for future relevance of this regulatory means, see *ibid* mn. 11.

called dominant undertakings¹ is restricted so that they may not abuse their monopolistic or oligopolistic position on the market. In situations where market mechanisms that are supposed to guide the behaviour of 'normal' undertakings to a certain degree either fail to work or have only limited effect, the **abuse control** mechanism of Article 102 TFEU comes into play. It is supposed to simulate a situation of actual competition. ('**as if concept**') This concept is to ensure a minimum standard of fairness even on markets where there is a certain concentration of economic power which in itself is not objectionable.

- 2 Article 101 and Article 102 TFEU are independent of each other. In extreme cases (coercion of an agreement in abuse of market power) **both requirements** can be **fulfilled**.² In a case of abuse there is *per se* hardly any positive assessment for the market behaviour. For this reason, in contrast to Article 101 TFEU, Article 102 TFEU does not foresee **any possibility for exemption**.³ Article 102 TFEU is **directly applicable**.
- 3 Regarding merger control see mn. 17 et seq. Regarding the relationship to national provisions see commentary to Article 103 TFEU mn. 14 et seq.

4 II. Elements of prohibition

1. Dominant position of undertakings

There is not a **statutory definition** of 'market-dominant position' in EU competition law.⁴ According to the consistent jurisprudence of the ECJ such a dominance relates 'to a position of economic strength enjoyed by an undertaking⁵ which enables it to prevent effective competition being maintained on the relevant market and giving it the power to behave to an appreciable extent **independently** of its competitors, customers and ultimately of its consumers'.⁶ Such a dominant position can also be fulfilled by several undertakings (**collective dominance**).

- 5 According to the decision by the Commission in **Continental Can**⁷ an undertaking holds a dominant position where, 'based on its market share or its market share notably in connection with the availability of technical knowhow, primary products and funds, the possibility to determine the prices or to control the production or the distribution for a significant part of the relevant products.'
- 6 A **dominant position** is regularly assumed if an undertaking has a high market share of over 75%.⁸ For this reason the dominant position of Microsoft with a market share of over 90% for client PCs went undisputed;⁹ a market share of over 50% is usually considered dominant without further discussion¹⁰ while a market share under 25% is regularly not seen as dominant. The quantitative criterion is however not the only one used to determine the dominance of an undertaking. Particularly, between a market share of 25% and 75%, a **bundle of further criteria** is used **to assess** whether there is a dominant posi-

¹ Regarding the terminology see mn. 4 et seq.

² ECJ Joined Cases 40–48, 50, 54–56, 111, 113, 114/73 *Suiker* [1975] 1663.

³ CFI Case T-51/89 *Tetra Pak Rausing* [1990] ECR II-347.

⁴ Statutory definition in German law: § 18 (1) GWB

⁵ Regarding the term 'undertaking' see *Khan/Suh*, Article 101 TFEU, mn. 9 et seq.

⁶ ECJ Case 27/76 *United Brands* [1978] 207 mn. 65; see also ECJ Cases 85/76 *Hoffmann-La Roche* [1979] 461; C-18/93 *Piloting Service Genova* [1994] ECR I-1812.

⁷ Commission Decision 72/21/EEC of 8 January 1972 (OJ L 7/25) official English version not available; translation by the author from the legally binding French version.

⁸ CFI Case T-83/91 *Tetra Pak II* [1994] ECR II-755 mn. 109, 121.

⁹ CFI Case T-201/04 *Microsoft* [2007] ECR II-3619

¹⁰ ECJ Case C-62/86 *AKZO* [1991] ECR I-3359 mn. 60; CFI Case T 228/97 *Irish Sugar* [1999] ECR II-2969 mn. 70.

tion or not. This is important; as some dominant positions can only be determined by a combination of factors which regarded on their own do not necessarily amount to a dominant position.¹¹ Those factors include for instance the gap to the next competitor,¹² the overall size of the enterprise, control of distribution, technological advance, access to selling markets as well as primary products and market power of other competitors.¹³ This bundle of factors amounts to an overall picture of the undertaking to assess whether it has a dominant position so that normal competition mechanisms do not sufficiently influence the behaviour of the concerned enterprise.

It is sufficient that this dominant position concerns a **partial market** that is separable 7 into three variables: the product market, the geographical market and the temporal factor. The dominance does not have to be exercised over the entire market. The assessment of the respectively relevant market has thus principal importance for the determination of the prohibition elements of Article 102 TFEU.

To determine the **relevant market** concerning the product market, all goods and services with characteristics (such as quality, price, including costs for transport, intended purpose) which may be regarded by consumers as alike (interchangeability test) need to be taken into account.¹⁴ To define the relevant market at the abstract level for individual cases can prove very difficult. Both the practice of the Commission and the Court have made economic concepts operable – in particular the concept of ‘**cross elasticity of demand**’; hypothetically, if product A is subject to a relatively minor price increase which makes a high number of consumers prefer product B over product A, this indicates that product A is in a strong relation of substitution with product B. Both products would be regarded as belonging to the same market.¹⁵ Light metal containers for meat and other products (such as fruits and condensed milk) have been seen as interchangeable;¹⁶ not so vitamins of different groups¹⁷ nor bananas and other fresh fruits.¹⁸

A **geographical market** is considered relevant where the conditions of competition are 9 homogenous in regard to the relevant products and these conditions are drastically different than in neighbouring areas.¹⁹ Product characteristics such as storage life and transportability are of particular importance. In individual cases, the relevant market can therefore be a local as well as a global one.²⁰

The dominant position has to be **(at least) on a significant part of the internal 10 market**. Markets of individual Member States as well as considerable parts of larger Member States amount to a significant part of the internal market.²¹ Equally, **important sea- and airports** because of their supra-regional significance can fulfil this requirement.²²

¹¹ In the same way Communication of the Commission 2009/C 45/02 of 24 February 2009 (OJ C 45/8).

¹² Cf. CFI (n 9), in the case of Microsoft this was considered for operating systems of working group server (amounting to 60 %).

¹³ For details see *Jung*, Art. 102, in: Grabitz/Hilf/Nettesheim (eds), *Das Recht der EU* (50th edn 2013) mn. 60 et seq.; 97 et seq.

¹⁴ ECJ Cases 31/80 *L'Oreal* [1980] 3775; C-53/92 P *Hilti* [1994] ECR I-693.

¹⁵ Cf. Commission Notice 97/C 372/03 of 9 December 1997 on the Definition of the Relevant Market for the Purposes of Community Competition Law (OJ C 372/5) para. 17.

¹⁶ ECJ Case 6/72 *Continental Can* [1973] 215.

¹⁷ ECJ Case *Hoffmann-La Roche* (n 6).

¹⁸ ECJ Case *United Brands* (n 6).

¹⁹ *Ibid.*

²⁰ Cf also Commission Notice (n 15).

²¹ E.g. Southern Germany, ECJ (n 2); Rheinland-Pfalz, ECJ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8137.

²² ECJ Case C-18/93 *Porto di Genova* [1994] ECR I-1812; Commission Decision 98/190/EC of 14 January 1998 *Flughafen Frankfurt* (OJ L 72/30) paras 57 et seq.

‘The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.’²³ Accordingly, neither a dominant position nor the striving for such is *per se* prohibited; what is prohibited is the utilisation of the resulting possibility of evading competition on the merits according to the principles of market economy in restricting other competitors with inappropriate means in their development (**abusive hindrance**, e.g. undercutting dumping prices). Equally abusive conduct which disadvantages competitors or market partners (suppliers, buyers) in a manner that would not be possible under conditions of properly functioning competition (**exploiting abuse**).²⁴ Another case group is finally the abusive change of market structure that can equally affect both the horizontal and the vertical relation (**market structure abuse**).

- 12 The term ‘abuse’ refers solely to an objectively **disapproving result** by the competition order. It does not contain any **subjective judgment of mischief**. In particular the question of fault in this context is absolutely irrelevant; however, fault is a further requirement to impose fines.²⁵
- 13 The assessment of certain practices as abusive poses great problems in practice, as a dominant undertaking usually has its special position on the market thanks to exceptionally successful operations. Furthermore dominant undertakings can generally claim their freedom of free competition. That the thin borderline has been crossed can mostly be determined only for individual cases on the basis of a **comprehensive balancing of interests**. There exists a comprehensive jurisprudence on this matter.²⁶ Nonetheless, efforts for modernisation of the prohibition elements have been initiated similarly to the transformation to a legal exception system of Article 101 TFEU²⁷ and a concretisation by the Commission of the provision elements. The Commission has issued a first guidance of interpretation in the form of a Communication.²⁸ A tendency towards an ‘economic-based approach’ is traceable and at least in the ‘abuse’ segment, a higher degree of legal clarity and legal certainty may be expected.
- 14 Article 102 para. 2 TFEU gives (not exhaustively) **examples** for abusive market behaviour; one of them is the **imposing of unfair prices** (excessively high selling prices; excessively low purchasing prices) and unfair trading conditions.²⁹ **The restriction of production, of sales or of technical development to the prejudice of consumers** is considered abuse e.g. in a cessation of production of automotive parts although many vehicles of this particular model remain on the market;³⁰ denial to deliver;³¹ per-

²³ Consistent jurisprudence since ECJ *Hoffmann-LaRoche* (n 6), para. 91.

²⁴ ECJ *AKZO* (n 10); CFI Case T-70/89 *Fernsehprogrammführer* [1991] ECR II-485, 535, 575.

²⁵ Cf. *Khan/Suh*, Article 101 TFEU, mn. 37.

²⁶ Further references *Müller-Graff*, Art 102, in: Vedder and von Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (2012) mn. 13 et seq.

²⁷ Cf. Article 101 TFEU, mn. 47.

²⁸ Commission Notice (n 11), Guidance on the Commission’s enforcement priorities in applying Art 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

²⁹ ECJ *United Brands* (n 6)

³⁰ ECJ Case 53/87 *Renault* [1988] 6067.

³¹ ECJ *United Brands* (n 6)

mission for ambulance services to provide preferentially and thus exclusively patient transport as long as there is not a case of emergency;³² denial to provide TV programme guides with basic information while the service is not offered by the broadcasting system itself;³³ the obligation to take delivery regarding a significant part of its need of electricity from a local energy supplier even if it happened by choice;³⁴ **discrimination of trade partners in equivalent transactions** thereby placing them at a competitive disadvantage; and the inappropriate **coupling of obligations**.³⁵ However, to deny a competing publisher access to the only nationwide system of newspaper home delivery **does not amount to an abuse**.³⁶

In two spectacular cases, Article 102 TFEU has impressively shown its normative significance: In the **Microsoft case**³⁷ the CFI on 17 September 2007 confirmed the imposition of a penalty by the Commission against Microsoft amounting to Euro 497.2 million together with its decision of 24 March 2004 that this undertaking had abused its dominant position. According to the Commission, Microsoft intentionally restricted compatibility between Windows Operating Systems for PCs and non-Microsoft workgroup servers. Furthermore, Microsoft delivered with each Windows Operating System the Windows Media Player so that similar software from other competitors was pushed out of the market. This continuous abusive practice by Microsoft slowed down the drive for innovation and was to the disadvantage of the competition and consumer, who had less choice and had to pay more. This decision by the Commission has led to clarification in the particularities of competition in the computer industry that result from the interplay between competition of innovations and network effects. The Commission has confirmed its 'new economic approach' in its application of competition rules.³⁸ With the decision of the Commission of 27 February 2008³⁹ Microsoft was given a penalty of Euro 899 million as it has not complied with the decision of 2004. Microsoft has appealed against this decision without much success. The EGC has once again confirmed the decision of the Commission and fixed the penalty amount to Euro 860 million.⁴⁰ In the **Intel case**, the commission has imposed its largest ever fine, amounting to Euro 1.06 billion.⁴¹ Intel with a market share of over 70% had tried with inappropriate practices to push competitors out of the market for CPUs (central processing unit) with x86-architecture. First, Intel granted entirely and partly hidden rebates to computer manufacturers who offered exclusively or almost exclusively Intel CPUs with x86-architecture. Further, Intel made direct payments to large retailers on condition that they stocked only computers with Intel-CPU's with x86-architecture. Customers – and ultimately consumers – were denied the full range of selection and were denied the possibility to select different computers as a result of these rebates and payments. Second, Intel made direct payments to computer manufacturers to prevent or to delay the introduction of certain computers with CPUs with x86-architecture made by other chip manufacturers than Intel and to restrict the channels of distribution for such computers. With these practices, Intel, according to the Commission, had frustrated its competing manufacturers to compete on

³² Article 102 para. 2 lit b TFEU; justification possible according to Article 106 para. 2 TFEU; ECJ (n 21).

³³ ECJ Joined Cases 241, 242/91 P *RTE* [1995] ECR I-808.

³⁴ ECJ Case C- 393/92 *Almelo* [1994] ECR I-1508.

³⁵ ECJ Cases 127/73 *BRT/SABAM* [1974] 51; C-333/94 P *Tetra Pak* [1996] ECR I-5987.

³⁶ ECJ Case C-7/97 *Bronner* [1998] ECR I-7817.

³⁷ CFI (n 9)

³⁸ See mn. 13.

³⁹ Commission Decision COMP/C-3/37.792 – *Microsoft* of 27 February 2008 (OJ 2009 C 166/20).

⁴⁰ GC Case T-167/08 *Microsoft* of 27 June 2012.

⁴¹ Commission Decision COMP/C-3/37.990 *Intel* of 13 May 2009.

the market on the basis of quality of their goods. Moreover, Intel had affected competition and innovation on this market. Intel has brought an action against this decision which has been dismissed by an expanded Chamber of the General Court on 12 June 2014.⁴²

16

3. Trade distortion between Member States

Abusive behaviour has to be capable of producing a distortion of trade between Member States.⁴³ It is sufficient that a hindrance of the objectives of a uniform market between Member States becomes a **possibility**. '[...] [I]t makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting patterns of trade and competition on the common market.'⁴⁴

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III. Legal consequences

Unlike the case of cartel prohibition (Article 101 para. 2 TFEU) legal transactions violating Article 102 TFEU are **not explicitly void**. The legal consequence may still result from the law of the Member States. As for German Law, the application of § 134 para. 1 BGB (nullity in case of violation of statutory prohibitions) is disputed, but to be answered in the affirmative.⁴⁵ In cases where market players are exploited § 138 para. 1 BGB may be applied. After the reform of the GWB, claims can also be based on § 33 GWB.

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It is once again a matter of domestic law of the Member States to determine if the concerned market actor has **claims for injunctions and damages**. According to German Law, § 823 para. 2 BGB may be invoked as Article 102 TFEU also protects individual interests.⁴⁶ Procedural matters, including the burden of proof, also follow domestic law.⁴⁷ Jurisprudence so far declaring that claims can also be based directly on EU Law only concern Article 101 TFEU, and thus explicit mention of Article 102 TFEU thus far is lacking. However, the jurisprudence is certainly transferable for violations against Article 102 TFEU.⁴⁸

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The **Commission is competent to control** the compliance with this prohibition. The decision by the Commission under the terms of Article 7 Regulation 1/2003⁴⁹ to bring an infringement to an end has insofar only declaratory effect. However, the decision can be enforced by imposing a fine⁵⁰ or in cases of fault the Commission may impose penalties.⁵¹

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The EGC and ECJ are **unrestricted** in their competence **to judicially review** the termination of fines and penalties.⁵²

⁴² GC Case T-286/09 Application of 22 July 2009 (OJ 2009 C 220/41), decided on 12 June 2014; not yet reported.

⁴³ Despite the different wording, this is identical in content with the interstate clause in Article 101 TFEU; see *Khan/Suh*, Article 101 TFEU, mn. 22.

⁴⁴ ECJ Case 322/81 *Michelin* [1983] 3523.

⁴⁵ See *Jung* (n 12) mn. 387.

⁴⁶ ECJ *BRT/SABAM* (n 35), consistent, but still cont.

⁴⁷ ECJ Case C-242/95 *GT-Link* [1997] ECR I-4453.

⁴⁸ The same applies for the White Paper of the Commission (COM (2008) 165 final), see *Khan/Suh*, Article 101 TFEU mn. 36.

⁴⁹ Regulation 1/2003/EC of 4 January 2003 (OJ L 1/1).

⁵⁰ *Ibid*, Article 23.

⁵¹ *Ibid*, Article 24.

⁵² *Ibid*, Article 31; Article 261 TFEU.

IV. Control of concentrations

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While Article 101 TFEU (antitrust) and Article 102 TFEU (prohibition of abuse) concern detrimental market behaviour for a free competition, the **primary law** of the EU⁵³ does not foresee an explicit protection of changes on the market structure such as a merger of undertakings resulting in a dominant undertaking.

The ECJ in its comprehensive mandate according to Article 3 para. 1 lit g TEC (today 22 in Protocol No 27) to establish a system for the safeguarding of the internal market free of any distortions, has tried – by way of judicial law-making – to extend the scope of application of Articles 101 and 102 TFEU to retroactively include the competence of merger control. According to the so-called **Continental Can-Docctrine**⁵⁴ an undertaking can violate the prohibition of abuse by increasing its market power to the point where the remaining competition would be completely eliminated,⁵⁵ a violation of Article 101 TFEU (antitrust) can be assumed if an acquisition of shares of a competitor enterprise has been performed to influence the business practices with the result that competition on the relevant market becomes restricted or distorted.⁵⁶

Introducing Regulation 4064/89⁵⁷ based on Articles 103 and 352 TFEU and providing 23 a regime of (preventive) merger control has pushed the significance of this jurisprudence aside. Regulation 4064/89 on the other has been replaced by Regulation 139/2004⁵⁸ on the control of concentrations between undertakings (**the EC Merger Control Regulation – MCRReg**) on 1 May 2004.⁵⁹ In its ‘guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’⁶⁰ the Commission explains how it assesses ‘horizontal mergers’ of undertakings that are presently or potentially competitors on the relevant market.

Following Article 21 para. 1 of the EC Merger Control Regulation⁶¹ the scope of appli- 24 cation of the Regulation excludes the applicability of Articles 101 and 102 TFEU. This will only happen if the ECJ’s jurisprudence⁶² is largely revoked.

The **scope of application** of Regulation 139/2004 is limited to mergers of undertak- 25 ings of union-wide significance.

The **Commission** decides on questions of admissibility. For mergers that are outside 26 the scope of application of the Regulation, Member States authorities are competent. The Regulation also contains provisions for the referral of mergers from the Commission to the Member States and *vice versa* accommodating the interest of legal certainty of the principle of a single contact point.

A **concentration** under the terms of the Merger Control Regulation is defined as a 27 merger of previously independent undertakings and the acquisition of control of other undertakings.⁶³ A concentration has a Union dimension where the overall turnover of all relevant undertakings exceeds the thresholds laid down in the regulation and where the

⁵³ Different in Article 66 ECSC Treaty.

⁵⁴ ECJ *Continental Can* (n 16).

⁵⁵ ECJ Case 142/84 *Philip Morris* [1987] 66.

⁵⁶ See *Schmidt*, BB 1990, 719 et seq.

⁵⁷ Regulation 4064/89 [1989] OJ L 395/1

⁵⁸ Council Regulation 139/2004 of 20 January 2004 [2004] OJ L24/1.

⁵⁹ See also in this regard (implementing) Commission Regulation 802/2004 of 7 April 2004 (OJ L 133/1); amended by Commission Regulation 1033/2008 of 20 October 2008 (OJ L 279/3).

⁶⁰ Commission Guidelines 2004/C 31/03 (OJ 2004 C 31/5).

⁶¹ (n 8).

⁶² Cf. mn. 22.

⁶³ (n 58), Art 3.

undertakings are extensively active in the Union regardless if the main business is done also within the Union. The Union dimension is assessed by **two alternative groups of turnover thresholds**. In the **one group** the following turnover figures are decisive: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than Euro 5 billion; (b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than Euro 250 million. In the **other group** the following turnover figures are important: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than Euro 2.5 billion; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than Euro 100 million; (c) in each of at least three Member States the aggregate turnover of each of at least two of the undertakings concerned is more than Euro 25 million; (d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than Euro 100 million. Excluded from consideration are cases in which each of the undertakings concerned achieves more than two-thirds of its aggregate union-wide turnover within one and the same Member State.⁶⁴

- 28 Concentrations concerned are to be appraised whether or not they are **compatible with the common market**.⁶⁵ Decisive in making this appraisal is whether the concentration would form an obstacle to competition, in particular by establishing or by strengthening a dominant position. For this reason concentrations need to be notified.⁶⁶ The concentration can be declared compatible or incompatible⁶⁷ with the internal market by the Commission.⁶⁸ In the latter case, the concentration is void.⁶⁹

**Article 103 [Adoption of Secondary Law]
(ex Article 83 TEC)**

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;
- (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

⁶⁴ Ibid, Article 1.

⁶⁵ Ibid, Article 2.

⁶⁶ Ibid, Article 4.

⁶⁷ Ibid, Article 8, Article 2 paras 2 and 3.

⁶⁸ Ibid, Article 21.

⁶⁹ Ibid, Article 7 para. 4.

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I. General remarks

1

To give effect to Articles 101 and 102 TFEU and its principles of competition law detailed clarifications are needed to determine the content of substantial as well as procedural provisions. Article 103 TFEU is the **legal basis for the adoption of secondary law of the Union**. Such legislation based on the primary principle norms of Articles 101, 102 TFEU gives effect as a **fully operable legal corpus of EU competition law**. For the sector of public and monopoly-like undertakings as well as services with general economic interest (Article 106 TFEU) there exists another special legal foundation (Article 106 para. 3 TFEU).

The **enforcement provisions** of Article 103 TFEU serve the effective implementation 2 of the substantial norms of Articles 101, 102 TFEU; neither the content nor the scope of application may be changed. Therefore the **admissible scope of regulation** is restricted to **procedural provisions** and **substantial norms clarifying principles**. Controversially disputed is e.g. whether the ‘interpretation’ of Article 101 para. 3 TFEU (‘...may [...] be declared inapplicable...’), done under the terms of Article 1 para. 2 of the (antitrust) regulation,¹ as ‘legal exception’ is still covered by its legal basis or not.

The implementation provisions of Article 103 TFEU do not contradict the sufficiently 3 concretised characters of the prohibitions of Articles 101 and 102 TFEU; thus the provisions are in that sense **directly applicable**, i.e. they may invoked by anyone – equally in national courts – without any furtherance.² This is the case without any restrictions for Article 102 TFEU (prohibition of abuse). Since the ‘new interpretation’ of Article 101 para. 3 TFEU as legal exception,³ the same applies for Article 101 TFEU (antitrust). The restricting jurisprudence so far for the sake of the principle of legal certainty (necessity of a preliminary unsuccessful procedure of exemption) is therefore obsolete.⁴

II. Procedure

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Article 103 TFEU contains a **binding mandate** for the Council to **legislate**. This obligation can be judicially enforced if necessary (Article 265 TFEU). The legal basis has a very comprehensive wording and includes the adoption of regulations or directives (Article 288 paras 2 and 3 TFEU); more details in content are laid down in paragraph 2 which are to be understood as examples (‘...in particular’).

Paragraph 1 prescribes a **special legislative procedure** (Article 289 para. 2 TFEU): 5 The Council shall act with a qualified majority (Article 16 para. 3 TEU) on the basis of a proposal by the Commission which can only be unanimously amended (Article 293 para. 1 TFEU); the European Parliament still needs to be consulted which has not been any different before so to conclude that its procedural rights has not experienced any

¹ Council Regulation 1/2003/EC of 16 Dec 2002 on the implementation of the rules on competition (OJ L 1/1).

² ECJ Case 37/79 *Estée Lauder* [1980] 2481 mn. 13, consistent jurisdiction since.

³ See mn. 2 and Article 101, mn. 50.

⁴ Further references *Jung*, Art 103, in: Calliess and Ruffert (eds), EUV/AEUV (4th edn, 2011), mn. 4.

amelioration. The implementation norms of the Commission are explicitly mentioned in primary legislation in Article 105 para. 3 TFEU.⁵

- 6 The demanded ‘**appropriateness**’ in paragraph 1 is not meant to be restrictively understood in the sense of a specific proportionality test, but rather as **objectively adequate** for the objective of Article 103 to implement the prohibition of cartels and abuses. As a matter of course, Article 5 TEU⁶ is applicable in this context, e.g. in deciding which legislative means to take.⁷

7

III. Scope of regulation and practice

Paragraph 2 refers to paragraph 1 which contains a very wide assignment of duties, regarding the admissible contents of regulation and enumerates in this context **five matters of regulation** of principal significance (lit a-e). Hence a certain legal act may contain one or more of the explicitly enumerated contents, but it can also cover other ‘appropriate’ elements for the effective implementation of the European prohibition of cartels and abuses stipulated in Articles 101 and 102 TFEU. So the **Antitrust Regulation**⁸ not only deals with several of the enumerated objectives, but it also contains rather a **comprehensive procedural regime** for the effective enforcement of undertaking-driven EU competition law (Articles 101 and 102 TFEU).

- 8 The **sanctions regime** contained in para. 2 **lit a**, consisting of fines and periodic penalty payments is regulated in Articles 23 and 24 Antitrust Regulation.⁹ **Fines** for infringements can be imposed up to an amount not exceeding 10% of the overall turnover of the undertaking;¹⁰ **periodic penalty payments** in contrast which are to ensure future compliance may not exceed 5% of the average daily turnover for each day the infringement has taken place.¹¹ The Commission has adopted ‘**Guidelines on the method of setting fines**’ imposed pursuant to Article 23 para. 2 lit a of Regulation No. 1/2003¹² to ensure an objective and transparent application of this not only potentially, but in the practice of the Commission¹³ quite sensible intrusion measure. This is particularly important as such measures have a specific relevance regarding fundamental rights and the rule of law. The principal witness policy of the Commission tries to provide an incentive for members of a cartel to report illegal practices and to benefit from an exemption or at least a reduction of fines that might otherwise have had to be paid.¹⁴ A new **settlement proceeding** provides a resource preserving simplification of administrative processes, offering in cases of an early confession a reduction of 10% of the fine.¹⁵
- 9 Under certain substantial requirements Article 101 para. 3 TFEU provides for the possibility of an **exemption of the prohibition of cartels**. The objective of Article 103

⁵ So far only in Article 211, 4th indent TEC in conjunction with a Council Regulation.

⁶ The principle of subsidiarity and proportionality.

⁷ i.e. regulation or directive.

⁸ (n 1).

⁹ Ibid.

¹⁰ Ibid, Article 23 para. 2.

¹¹ Ibid, Article 24 para. 1.

¹² Commission Guidelines 2006/C 210/02 (OJ C 210/2).

¹³ Cf. Commission Decision in the case Intel COMP/C-3/37.990 of 13.5.2009 (COM (2009) 3726 final) where the imposed fine amounted to Euro 1.06 billion.

¹⁴ See Commission Notice on Immunity from fines and reduction of fines in cartel cases 2006/C 298/11 (OJ C 298/17).

¹⁵ Cf. Regulation 622/2008 (OJ 2008 L 171/3); amending Regulation 773/2004 (OJ 2004 L 171/3) as well as Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art 7 and Art 23 of Council Regulation (EC) No 1/2003.

para. 2 lit b TFEU is the setting the procedural details of this highly important practical procedure. The provision clarifies the obligation to effectively control but at the same time to do so by the simplest possible administrative means. Until the entry into force of Regulation 1/2003 on 1 May 2004 used to be the existence of an individual or general legal act for an exemption constitutive not to apply the antitrust law of Article 101 para. 1 TFEU partly or entirely. The Council has made use of referral of its competence to the Commission in accordance with **lit b** to regulate on entire groups of agreements, decisions and concerted practices.¹⁶ According to the old Regulation 16/62 the Commission already had an exclusive competence to declare individual exemptions. The standardisation of types for certain economically relevant practices proved necessary for block exemptions and fulfilled in particular the obligation to simplify the administrative process.

The Commission for its part has made use of this referral in adopting numerous regulations of block exemptions. The **(umbrella) block exemptions regulation**¹⁷ to be read in conjunction with Commission Guidelines¹⁸ has consolidated vertical agreements or concerted practices; **the distribution of automobiles** was not included therein;¹⁹ however, since 1 June 2013 the distribution of motor vehicles is covered by the general block exemption for vertical restraints.²⁰ For horizontal restraints there also exist special regulations for agreements on **technology transfer**.²¹ Of highly practical importance are regulations on agreements for **research and development**²² which also include horizontal relations as well as on agreements that assign a production of a certain product exclusively to one single undertaking while another or the other involved undertakings commit themselves to exclusive purchase thereof.²³

After the regime change by way of Regulation 1/2003²⁴ from a notification proceeding to a legal exception these regulations have become **mere clarifications of Article 101 para. 3 TFEU elements** and legally speaking have no more than a declaratory significance; these regulations are, however, very **important orientation guides** for the correct understanding of the rather rudimentary provision of Article 101 para. 3 TFEU; they have a highly practical significance and serve the principle of legal certainty.²⁵ Hence, further adoptions of such regulations are not only admissible, but desirable.

Para. 2 lit c does not contain any referral of authority to completely exempt any economic sector by way of secondary legislation from the scope of application of Articles 101 and 102 TFEU; Regulation 1184/2006²⁶ and Part IV of Regulation 1234/2007²⁷ applying certain rules of competition to the production of, and trade in, **agricul-**

¹⁶ Regulation 19/65 concerning vertical agreements (OJ 1965 35/533); Regulation 2821/71 concerning horizontal agreements (OJ 1971 L 285/46); both amended by Regulation 1/2003 (n 1).

¹⁷ Regulation 330/2010 (OJ 2010 L 102/1) replaced Regulation 2790/1999 (OJ 1999 L 336/21), amended by Council Regulation 1/2003 (n 1) and effective in May 2010.

¹⁸ Guidelines on Vertical Restraints (OJ 2010 C 130/1).

¹⁹ (Special) Regulation 1400/2002 (OJ 2002 L 203/30), amended by Council Regulation 1/2003 (n 1) and Regulation 461/2010 (OJ 2010 L 129/52) effective on 31 May 2013.

²⁰ I.e. Regulation 330/2010 (n 17).

²¹ Regulation 316/2014 (OJ 2014 L 93/17) replacing Regulation 772/2004 (OJ 2004 L 123/11) effective on 30 April 2014; on this: *Gaster*, Art. 101 AEUV, in: Schröter et al. (eds), *Europäisches Wettbewerbsrecht* (3rd ed. 2014) mn. 1237.

²² Regulation 1217/2010 (OJ 2010 L 335/36) replaced Regulation 2659/2000 (OJ 2000 L 304/7), amended by Council Regulation 1/2003 (n 1) and effective in December 2010.

²³ Specialization Regulation 2658/2000 (OJ 2000 L 304/3; amended by Council Regulation 1/2003 (n 1).

²⁴ (n 1).

²⁵ *Brinker* (n 21) mn. 82.

²⁶ Council Regulation 1184/2006 of 24 July 2006 (OJ L 214/7), codified version of Regulation 26/62, amended several times.

²⁷ Council Regulation 1234/2007 (OJ 2007 L 299/1).

tural products restricts the applicability of Article 101 TFEU (not so for Article 102 TFEU) for the (associations of) undertakings of this economic sector factually to a remarkable extent. In contrast, **special regulations on land, maritime and air transport** which already had a decreasing significance have practically been abolished in the meantime.²⁸

- 13 The regulatory competence of **para. 2 lit d** ensures that neither the allocation of competences at the primary legislative level²⁹ between the Commission and the Court, nor the institutional balance or the entitlement to take recourse to effective legal remedies may be changed or affected in any relevant way.³⁰ Therefore **lit d is only relevant for the allocation of competences in the application of secondary law**; here in particular concerning proceedings on sanctions: In concordance with the unlimited jurisdiction allocated to the ECJ, Article 261 TFEU, Article 31 Regulation 1/2003³¹ assigns the ‘unlimited jurisdiction to review decisions’ to the Court and authorises it to ‘cancel, reduce or increase the fine...imposed.’ This authorisation includes the question of whether or not to fine so that a singular shifting of competences might be seen here to the disadvantage of the Commission; however, this is acceptable in light of the amelioration of effective legal remedies.
- 14 Finally, **para. 2 lit e** demands the Council to determine the **relationship between Union Law and national laws** in the domain of competition law. Such an explicit determination has not taken place in terms of the scope of Articles 101 and 102 TFEU until the adoption of Regulation 1/2003.³² Only the Merger Control Regulation³³ contains its own regulation.³⁴
- 15 Henceforth, it is **Regulation 1/2003**³⁵ which determines the relationship between Articles 101, 102 TFEU and the competition law of the Member States. According to Article 3 of the Regulation national courts and national competition authorities are obliged to apply Articles 101 and 102 TFEU in applying national competition law. The application of national competition law may only lead to prohibition of agreements where there is also a prohibition in Union competition law. However, Member States in their respective legal orders are free to provide for more restrictive norms against unilateral practices of undertakings. National statutes which do not have competition law as their objective are unaffected, e.g. norms against unfair trade practices.
- 16 Article 21 para. 3 subpara. 1 Merger Control Regulation³⁶ regarding **control of concentrations**³⁷ stipulates: ‘No Member State shall apply its national legislation on competition to any concentration that has a [Union] dimension’. Thus, Member States are no longer competent for (parallel) merger control unless the Commission assigns a concentration of undertakings to a national authority pursuant to Article 9 of the Regulation.

²⁸ (n 1), Article 43; *Brinker*, Art 103, in: Schwarze (ed), EU-Kommentar (3rd edn, 2012) mn. 8; see also *Khan/Suh*, Art 104 TFEU, mn. 2.

²⁹ Article 13 para. 2 TEU: ‘Each institution shall act within the limits of the powers conferred on it ...’

³⁰ ECJ Case C-70/88 *EP v Council* [1990] ECR I-2041.

³¹ (n 1).

³² *Ibid.*

³³ Council Regulation 139/2004 (OJ 2004 L24/1); cf. *Khan/Suh*, Article 102 TFEU mn. 23 et seq.

³⁴ *Khan/Suh*, Article 102 TFEU’ mn. 26.

³⁵ (n 1).

³⁶ (n 33).

³⁷ *Khan/Suh*, Article 102 TFEU, mn. 21 et seq.

IV. Law of antitrust proceedings

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The proceedings of **competition control** are regulated in the Regulation 1/2003³⁸ which has replaced Regulation 17/62, effective on 1 May 2004. The Commission has made use of its referral³⁹ to adopt further provisions on proceedings by adopting Regulation 773/2004.⁴⁰

Regulation 1/2003 governs the **general administrative procedure** of the Commission **18**
in competition law. The Commission decides upon receipt of a complaint or on its own initiative on the **finding and termination of infringements** of Articles 101 and 102 TFEU.⁴¹ In cases of infringements, the Commission can impose fines or penalties against undertakings that have committed the infringement.⁴² In the **procedure** for the findings, the Commission is also authorised to request information, to take statements and to conduct inspections.⁴³ The necessary procedure of consultations of advisory committees is ruled in Article 14 of the Regulation. Before taking (final) **decisions**, concerned undertakings need to be formally heard.⁴⁴ The decisions of the Commission are announced to the concerned undertakings and are furthermore published pursuant to Article 30 of the Regulation.

In terms of its **authority to conduct inspections** on the premises of the relevant un- **19**
 der takings, the Commission is required to apply for an authorisation at the competent court if the national legal order requires it. The national judicial authority may review the Commission decision on authenticity and if the coercive measures envisaged are neither arbitrary nor excessive; however, its power of review extends neither as far as assessing the necessity of inspection nor to the lawfulness of the Commission's decision.⁴⁵ According to the ECJ in the case *Roquette Frères*⁴⁶ the Commission has to supply the following information with their request for such an **assistance**: (a) description of the essential features of the suspected infringement (at the very least an indication of the market and of the nature of the suspected restrictions of competition); (b) explanations concerning the manner in which the undertaking is thought to be involved in the infringement in question; (c) detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement; (d) as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators; and (e) in the event assistance is requested by the Commission as a precautionary measure: explanations that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement. In contrast the national court cannot demand to be provided with the Commission's file.⁴⁷ In case of doubt, the court has to demand clarifications. Not until then can such a request for assistance be rejected.

The **national competition authorities** are competent in terms of the application of **20**
 Articles 101 and 102 TFEU to individual cases. They are entitled to act on complaint or

³⁸ (n 1).

³⁹ Ibid, Article 33.

⁴⁰ Regulation 773/2004 (OJ 2004 L 123/18); amended by Regulation 622/2008 (OJ L 171/3).

⁴¹ (n 6), Article 7.

⁴² Ibid, Articles 23 and 24 respectively.

⁴³ Ibid, Articles 18–20 respectively; regarding inspections on the premises: ECJ Cases 46/87 and 227/88 *Hoechst* [1989] 2859; C-94/00 *Roquette Frères* [2002] ECR I-9039; see also mn. 19.

⁴⁴ (n 1), Article 27.

⁴⁵ Ibid, Article 20 paras 6–8.

⁴⁶ (n 43).

⁴⁷ (n 1), Article 20 para. 8s 3.

on their own initiative and can require an infringement be brought to an end, order interim measures, accept commitments by the undertakings, and impose fines, periodic penalty payments or any other penalty provided for in their national law.⁴⁸ They also can decide that there are no grounds for action on their part.⁴⁹ A **close cooperation** between the national competition authorities and the Commission is imperative. Once the Commission embarks upon a relevant procedure, competences of national authorities are excluded. In cases where a national competition authority has to decide on a matter that has been subject to another decision by the Commission, the national authority cannot decide to contradict the previous decision of the Commission. Further details are regulated in Articles 11 et seq. Regulation 1/2003.

- 21 **National courts** are competent in terms of the application of Articles 101 and 102 TFEU. Cooperation with the Commission is governed by Article 15 of Regulation 1/2003. Once a case is pending with the Commission, national courts may not, anticipating a possible decision of the Commission, decide on the substance of the matter; judicial proceedings must be suspended in a given case. Once the Commission has rendered its decision, this decision prevails.⁵⁰ In case of doubt, either concerning lawfulness or correct interpretation, Article 267 TFEU comes into play (preliminary ruling by the ECJ).

**Article 104 [Transitory provision]
(ex Article 84 TEC)**

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

- 1 Contrary to its wording, which may lead to a misunderstanding, Article 104 TFEU is no longer to be understood as a **transitional rule** only, but also as a **fall-back rule**: this provision is to ensure that in cases where secondary legislation pursuant to Article 103 TFEU necessary for Union implementation is either not yet or is no longer in existence, EU competition law can be applied via decentralised means by Member State authorities. This also applies for decisions on exemptions or especially for those as the wording ‘in particular’ with reference to Article 101 para. 3 TFEU suggests.
- 2 Although these were the early days EU institutions have made use of their competence to legislate pursuant to Article 103 TFEU and covered almost all economic sectors by adopting Regulation 16/72¹ comprehensively. In recent times Article 104 TFEU has become **practically obsolete**.² Three exceptional sectors had been left since entry into force of Regulation 1/2003³ by virtue of Article 32: The provision that removed air transport between Union airports and third countries (lit c) from the scope of application of the regulation has been abolished with adoption of Regulation 411/2004 (air transport).⁴ Regulation 1419/2006 (sea transport)⁵ deleted international tramp vessel

⁴⁸ Ibid, Article 5 para. 1.

⁴⁹ Ibid, Article 5 para. 2.

⁵⁰ Ibid, Article 16 para. 1.

¹ Regulation 16/72 (OJ 1962 13/204).

² Regarding competences that rests with Article 104 TFEU see Art 84 EG in: *Loewenheim/Meesen/Riesenkampff* (eds), *Kartellrecht* (2nd edn 2009) mn. 5.

³ Council Regulation 1/2003/EC of 16 December 2002 (OJ L 1/1).

⁴ Regulation 411/2004 (OJ 2004 L 68/1).

⁵ Regulation 1419/2006 (OJ 2006 L 269/1).

services and maritime transport service (lit a and b from Article 32 Regulation 1/2003 so that Article 32 has been effectively deleted. However, Article 104 TFEU retains a **reserve function in case a regulatory vacuum occurs in future**; e.g. in a case where the ECJ declares an Article 103 TFEU regulation void. In this context the disputed question whether Article 101 para. 3 TFEU forms a legal exception⁶ or not⁷ might be of practical relevance.

The term ‘authorities’ in Article 104 TFEU is to be understood in a **functional manner**: Addressees are all competent entities in the Member States that are assigned to apply competition law administratively. This can be an administrative body – for instance the Bundeskartellamt in Germany or the Office of Fair Trading (OFT) and the Competition Commission in the UK,⁸ or the US Bureau of Competition, Federal Trade Commission (FTC) – or a judicial body – for instance the Austrian Kartellgericht.

The authorisation to **apply ‘the law of their country’** refers merely and in particular to competency and procedural norms; substantial competition law of the Member States can only be applied insofar as Articles 101 and 102 TFEU and their enforcing secondary legislation have left matters unregulated.

Article 105 [Antitrust supervision] (ex Article 85 TEC)

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

The significance of Article 105 TFEU may be regarded as **twofold**: **First**, the provision follows the scenario of Article 104 TFEU in which EU competition law is to be applied in a decentralised fashion because it lacks procedural implementation acts pursuant to Article 103 TFEU. **First**, the wording ‘without prejudice to Article 104’ allows Article 105 TFEU to authorise the Commission to supervise and to control to a certain extent from a centralised point of view (paragraphs 1 and 2). As Article 104 TFEU is practically obsolete¹ Article 105 TFEU effectively shares the same fate; the reserve function remains the same here.

Second, Article 105 TFEU also expresses in principle the central and exceptionally wide set of competences which have been assigned to the Commission.² The bundle of

⁶ To be answered in the affirmative pursuant to Regulation 1/2003 (n 3).

⁷ E.g. (German) Monopolies Commission, Special Report No. 28, 1999, 16 et seq.

⁸ Effective on 1 April 2014 OFT and CC combined will form the new Competition and Markets Authority (CMA) for competition law in the UK.

¹ Khan/Suh, Art 104 TFEU, mn. 2.

² ECJ Case C-119/97 P *Ufex* [1999] ECR I-1341 mn. 88.

competition control (paragraph 1), sanctions (paragraph 2) and original legislative authority (paragraph 3) makes this organ of the Union in this field of polity truly a ‘guardian’ of notable significance for the union-wide common rules. Nonetheless, the reason why Article 105 remains unimportant is quite easy to answer: The large amount of secondary legislation on the rudimentarily described power of paragraphs 1 and 2 leaves barely any scope of application (currently none) for Article 105 TFEU; of course a reserve function remains for cases of *lacunae* or other substantial deficiency.

3 The second significance of Article 105 TFEU has been confirmed by the Treaty of Lisbon. **Paragraph 3** has been introduced to Article 105 TFEU **authorising** the Commission for the first time **by way of a primary norm** to adopt regulations on **block exemptions** (Article 103 para. 2 lit. b TFEU). Regulations adopted pursuant to this authorisation are neither of a ‘delegated’ (Article 290 TFEU) nor of an ‘implementing’ (Article 291 TFEU) legal character. They are original ‘non-legislative acts’ in the meaning of Articles 288 para. 2, 297 para. 2 TFEU. This legislative addition shows that Article 105 TFEU is more significant than a mere transitional norm.

*Article 106 [Public undertakings, services of general economic interest]
(ex Article 86 TEC)*

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

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I. General remarks

This provision is concerned with obligations of Member States vis-à-vis public and monopolistic undertakings (**para. 1**) and allows for **limited exceptions** to certain under-

takings of services of general economic interest or having the character of revenue-producing monopoly (**para. 2**). **Para. 3** provides for special (legislative and administrative) competences of the Commission for both these sectors.

Article 106 TFEU (former Article 90 TEEC) had been one of the **most disputed provisions** in the 1950s negotiations on the drafting of the original EC treaty. The challenge was to find a **compromising solution** between States with a strong tradition of state-run economy (France, Italy) and those with a more private sector oriented tradition (Benelux). The former group of states was interested in a rather weak and rudimentary provision, whereas the latter group of states advocated for an as comprehensive as possible inclusion of public undertakings into the general framework of EU law. With a deliberately unclear wording, hence pleasantly open to interpretation, the provision attempts at a normative balancing between preventing distortion of competition by privileging the public sector to the disadvantage of the private economy¹ on the one hand and taking away from the Member States their flexibility in pursuing objectives of public welfare by employing privileged undertakings on the other hand (para. 2).

II. Public and monopolistic undertakings (para. 1)

1. Principle

Article 106 para. 1 TFEU reaffirms the general obligation of Member States, stipulated in Article 4 para. 3 subpara. 2 TEU, not to adversely affect the practical effect or usefulness of Treaty rules in general and EU competition rules in particular. The provision is thus essentially of a declaratory character only. However, if the respective prohibition norm is as such **directly applicable**, so is Article 106 para. 1 TFEU.² This provision is concerned with certain aspects of the exercise of control by Member States vis-à-vis public undertakings and undertakings with State granted special or exclusive rights.

2. Concerned undertakings

A **public undertaking** (para. 1 var. 1) is ‘any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.’³ The legal status of the unit exercising an economic activity (functional understanding of undertaking) is of no relevance, so that both, legal persons of public and private law, may qualify as ‘public undertakings’ within the meaning of this provision.⁴ Instead, essential is the **controlling influence of the Member State** or one of its (local or regional) territorial authorities.⁵ Such an influence is presumed where (a) public authorities directly or indirectly hold the majority of the undertaking’s subscribed capital or (b) control the majority of the votes attached to shares issued by the undertakings or (c) where public authorities can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body.⁶ **Examples:** Public broadcasting systems, ‘national’ airlines, railway companies, patient transport ambulance, airport ser-

¹ Para 1; see also Protocol No 27.

² ECJ Cases 155/3 *Sacchi* [1974] ECR 409; C-202/88 *Telecommunications Equipment* [1991] ECR I-1223.

³ Commission Directive 2006/111/EC of 16 November 2006 (O.J. L 318/17) [Transparency Directive] Article 2 lit. b.

⁴ ECJ Case C-69/91 *Decoster* [1993] ECR I-5373.

⁵ Wide understanding of ‘public authorities’, Transparency Directive (n 1658), Article 2 lit. a.

⁶ (n 3) Article 2 lit. b.

vices⁷ and public power corporations, active in the sectors of electricity and lignite.⁸ For the exercise of powers which are typically those of a public authority (traditional state prerogatives such as military, police, justice and probably elementary education), Article 106 is inapplicable as there is neither a market nor economic activity. The same applies to sovereign activities in a wider sense, such as air traffic control,⁹ regulatory authorities,¹⁰ administering functions for environmental protection.¹¹ An activity by a public authority consisting of storing data, permitting to search them and providing print-outs thereof on the basis of statutory obligations does not constitute an economic activity either.¹² Difficulties to precisely determine the meaning of 'public undertaking' persist, however, in particular with respect to economic activities on the social security sector. The ECJ has denied applicability of Article 106 TFEU where the economic activity at hand was exclusively social in character,¹³ even in case the same services may equally be offered by private undertakings.¹⁴ However, in case of a non-obligatory system that works with the principle of recapitalisation, the ECJ has taken the opposite view.¹⁵ In contrast, central associations of health insurance companies are not qualified as undertakings in the sense of Article 106 TFEU.¹⁶

- 5 **Undertakings with special or exclusive rights** (paragraph 1 var. 2) are undertakings that are granted privileges by the State up to a monopoly status as long as they are subject to special influence by public authorities. Such undertakings may or may not be public undertakings in the sense of para. 1 var.1. **'Exclusive rights'** means rights that are granted to one entity to exclusively engage in a particular economic activity; **'special rights'** are those 'rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area: (a) limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria; or (b) designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an activity; or (c) confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions'.¹⁷ **Examples:** private broadcasting systems,¹⁸ insurance companies with a monopoly in fire insurance for buildings, technical inspection authorities, employment agencies engaged in procurement of experts and management,¹⁹ general employment procurement,²⁰ artificial insemination centres,²¹ dock-work companies that supply tem-

⁷ See *Voet van Vormizeele/Bär-Bouysyère*, Article 106, in: J Schwarze (ed.) *EU-Kommentar* (3rd edn 2012) mn. 20.

⁸ GC Case T-169/08 *DEI v Commission* of 12 Sep 2012; on appeal C-553/12 P, not decided yet.

⁹ ECJ Case C-364/92 *SAT v Eurocontrol* [1994] ECR I-55.

¹⁰ ECJ Joined Cases C-46/90 and C-93/91 *Lagauche* [1993] ECR I-5267 mn. 46.

¹¹ ECJ Case C-343/95 *Diego Cali* [1997] ECR I-1549 mn. 22.

¹² ECJ Case C-138/11 *Compass-Datenbank* of 12 Jul 2012 mn. 51.

¹³ ECJ Joined Cases C-159, 160/91 *Poucet* [1993] ECR I-637.

¹⁴ *Kühling*, Art. 106, in: Streinz (ed), *AEUV/EUV* (2nd edn 2012) mn. 11.

¹⁵ ECJ Case C-244/94 *Fédération Française des Sociétés d'Assurances* [1995] ECR I-4013 mn. 17 et seq.

¹⁶ ECJ Joined Cases C-264, 306, 354–355/01 *AOK Bundesverband* [2004] ECR I-2493.

¹⁷ (n 3) Article 2 lit. g.

¹⁸ ECJ Case C-260/89 *ERT* [1991] ECR I-2925.

¹⁹ ECJ Case C-41/90 *Höffner und Elser* [1991] ECR I-1979; see *Eichenhofer*, *Das Arbeitsvermittlungsmonopol der Bundesanstalt für Arbeit und das EG-Recht*, 44 NJW 1991, 2857 et seq.

²⁰ ECJ Case C-55/96 *Job Centre* [1997] ECR I-7140.

²¹ ECJ Case C-323/93 *Crespelle* [1994] ECR I-5097.

porary labour to other undertakings operating in the port which itself is authorised to carry out dock work,²² patient transport ambulance performed by medical aid organisations entrusted with public emergency ambulance service,²³ and the management of a scheme for supplementary reimbursement of healthcare costs without any possibility within a certain occupational sector to be exempted from affiliation from that scheme;²⁴ Article 106 para. 1 TFEU enables justification for these cases.

3. Content of the prohibition

6

With respect to public undertakings and undertakings that benefit from State granted ‘special’ or ‘exclusive’ rights, Member States are barred from maintaining or enacting any measures in violation of EU treaty law. Obviously of particular practical relevance for the scenario at hand, special mention is made in para. 1 of the rules on competition, including both rules applying to undertakings (Articles 101 and 102 TFEU) as well as rules regarding state aid (Articles 107–109 TFEU), and, finally, the general non-discrimination rule (Article 18 TFEU). This listing, however, is by no way exhaustive. For infringement purposes, it makes no difference whether the incriminated activity is attributable to a Member State or rather to an undertaking (mutual attributability of the unlawful conduct). In particular, any State influence of a legal or factual character targeted at or at least favouring an advantageous position for a particular undertaking is likely to amount to a prohibited conduct.²⁵

Article 106 para. 1 TFEU is violated in cases where a Member State (actively) instructs 7 an undertaking to enter into cartel arrangements, facilitates such arrangements, aggravates the effects of such arrangements or favours infringements of the prohibition of abusive practices (Article 102 TFEU).²⁶ **Examples:** State approval to agreements on tariffs by airlines contrary to competition law;²⁷ fixing excessive tariffs in a contract of concession by a dominating funeral service provider;²⁸ or the charging of excessive port-duties resulting from state regulations;²⁹ monopoly of a public undertaking in the field of employment service, including the placement of executive staff, although the undertaking is apparently not able to accommodate the demand of this sector³⁰ and the activities of such undertaking extends to nationals and the territory of other Member States;³¹ authorisation for an undertaking to define specifications with general effects for the sector of telecommunications terminal equipment.³² An organisation with a dominant market position providing ambulance services has to effectively ensure not only its statutory obligations (i.e. ambulance service night and day) but also to efficiently accommodate the demand of (non-emergency) patient transport services.³³

²² ECJ Case C-163/96 *Raso* [1998] ECR I-570.

²³ ECJ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8137.

²⁴ ECJ Case C-437/09 *AG2R Prévoyance* [2011] ECR I-973 mn. 44 et seq.

²⁵ ECJ Case C-179/90 *Porto di Genova* [1991] ECR I-5889, fn. 17: even indirectly creating a condition favourable to violation.

²⁶ ECJ Case C-340/99 *TNT Traco* [2001] ECR I-4142.

²⁷ ECJ Case 66/86 *Air Tariffs* [1989] ECR 838.

²⁸ ECJ Case 30/87 *Pompes Funèbres* [1988] ECR 2507.

²⁹ ECJ Case C-242/95 *GT-Link* [1997] ECR I-4453.

³⁰ ECJ Case C-41/90 *Höffner and Elser* [1991] ECR I- 1979.

³¹ ECJ Case C 55/96 *Job Centre* [1997] ECR I-7140.

³² ECJ Case C-202/88 *France v Commission* [1991] ECR I-1223; Joined Cases C-46/90 and C-93/91 *La-gauche* [1993] ECR I-5320.

³³ ECJ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8137.

8 III. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly (para. 2)

1. Principle

In pursuance of certain (legitimate) objectives of an economic and socio-political character and the delegation of respective 'special tasks' to undertakings, Member States may find themselves in breach of EU law in general and EU competition law in particular. The prime function of Article 106 para. 2 TFEU is to find a **balance between these colliding interests** in exempting such undertakings from the full application of the rules of EU competition law – under certain conditions and within certain limits. However, in view of the wording 'in so far as ...' there can be no serious doubt that – as a matter of principle – EU law remains fully applicable, and exceptions from this general rule are thus always in need of justification.

9 This rule-exception-ratio bears witness of the provision's deep rooting in economic liberalism. Indeed, in case of doubt the provision gives precedence to the idea of an open and competitive common market rather than to the maintenance and development of high quality, but affordable public services, accessible for all. However, beginning in the 1990s this approach has become subject to increasing criticism, both in political practice and normative reality. The influence of globalisation in trade, the establishment of the internal market and fast technological advancements have led to policies to an ever faster and comprehensive market-opening. However, this consequent liberalisation approach has occasionally led to socially detrimental effects. In the meantime, the Commission has acknowledged that frictions do indeed exist and has explicitly recognised the role of services of general interest as 'a key element in the European model of society'.³⁴ Article 14 TFEU³⁵ and Protocol No 26 (2007), too, confirm that '[i]n the Union, services of general interest remain essential for ensuring social and territorial cohesion and for the competitiveness of the European economy. Citizens and businesses rightly expect to have access to affordable high-quality services of general interest throughout the European Union'.³⁶ The social and territorial cohesion is also mentioned in Article 3 para. 3 subpara. 3 TEU. Today, consideration of this paradigm shift is key for a correct interpretation of Article 106 para. 2 TFEU.

10 Based on considerations of public interest, the core object and purpose of paragraph 2 consists in providing certain market actors with an enlarged entrepreneurial scope of action. In order to achieve this end, one may either resort to a (selective) deviation from Articles 101 and 102 TFEU (antitrust rules) or allow for limited exceptions from state-directed prohibition rules, such as – in particular – the rules of State aid (Articles 107 et seq. TFEU). Although the wording of paragraph 2 is not entirely clear on this point, the provision does indeed, with certain limitations, allow for both these courses of action.³⁷

³⁴ Communication from the Commission, Services of general interest in Europe (2001), OJ 2001 C 17/4; confirmed in Communication 'A Quality Framework for Services of General Interest in Europe' COM (2011) 900 final of 20 December 2011.

³⁵ Formerly included as Article 16 TEC, Treaty of Amsterdam 1997.

³⁶ Communication from the Commission, White Paper on services of general interest of 24 May 2004, COM (2004) 374 final, 4; cf. also Communication 'Services of general interest, including social services of general interest: a new European commitment' COM (2007) 725 of 20 November 2007.

³⁷ Prevailing op., see *Kühling* (n 14) mn. 41; consistent jurisprudence and practice by the Commission; diss. op., e.g. *Heinemann*, Grenzen staatlicher Monopole im EG-Vertrag (1996) p. 62 et seq.; *Hochbaum/Klotz*, Article 86, in: von der Groeben/Schwarze (eds), Kommentar zum EUV und EGV (6th edn 2003) mn. 55 et seq.

Thus, although para. 2 makes explicit reference to undertakings only, States may also invoke this provision in order to justify the favourable treatment of certain private market actors, incompatible with the ordinary competition rules for fair competition on the internal market.

In departing from its earlier jurisprudence,³⁸ the ECJ has by now recognised – if not explicitly, at least implicitly – that Article 106 para. 2 TFEU creates individual rights and is directly applicable. Henceforth, it is incumbent on Member States' public authorities and courts to examine on their own whether or not the requirements of clause 1 are fulfilled.³⁹ In contrast, the question whether or not the same applies for the proportionality test in clause 2, is still in limbo.⁴⁰

2. Benefited undertakings

As in Article 101 TFEU⁴¹, **the term undertaking is to be understood in a functional way**; the legal form – private or public – is not decisive. Undertakings in the meaning of para. 2 will most likely be also an undertaking according to para. 1; however as this is not necessarily always the case it has to be examined for each case separately.⁴²

As '**services of general economic interest**' is an autonomous term of Union law, it has to be interpreted in a union-consistent way. A legal definition is neither found in primary nor in secondary law. Nevertheless there is agreement on the meaning of the term: it comprises all market-relevant activities in a wide sense which is offered in the **interest of the general public** (in contrast to private and particular interests) and thus is linked to **special welfare obligations** imposed by the Member States. In focus are certain activities of large network-bound industries such as transportation, energy supply and telecommunications services. The term yet includes in general all other economic activities which are linked with welfare obligations.⁴³ Undertakings of charitable, social, caring or cultural purposes only are excluded from the scope of application of paragraph 2 as it requires a market-related character; yet, these undertakings fall out of scope of application of any EU competition law rule as they lack economic relevance.⁴⁴

Although having declared the development of a uniform and comprehensive European definition of the contents of services of general interest to be an almost impossible endeavour,⁴⁵ the Commission in 2011 has published a Communication with a **definition of services of general economic interest**: '...economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO [public service obligations] is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission'.⁴⁶ However, this definition is rather aimed for a distinction of different

³⁸ ECJ Case 172/82 *Inter-Huiles* [1983] ECR 555 mn. 15.

³⁹ Consistent jurisprudence since ECJ Case C-30/91 *Corbeau* [1993] ECR I-2533.

⁴⁰ *Hochbaum/Klotz* (n 49) mn. 87; in favour: *Voet van Vormizeele/Bär-Bouyssièr* (n 19) mn. 59, with further references to ECJ jurisprudence 'open for interpretation'.

⁴¹ See *Khan/Suh*, Article 101 TFEU mn. 9.

⁴² Already in ECJ Case 52/76 *Benedetti* [1977] ECR 163, mn. 20/22.

⁴³ So far undisputed in its principles: Communication from the Commission (n 36) Annex 1.

⁴⁴ See *Khan/Suh*, Article 101 TFEU mn. 9.

⁴⁵ See Commission Green Paper on Services of General Interest COM (2003) 270 final, OJ C 76.

⁴⁶ Commission Communication 'A Quality Framework for Services of General Interest in Europe' COM (2011) 900 final of 20 December 2011, 3 et seq.

concepts to provide ‘clarity on terminology’ in the debate on services of general interest.⁴⁷ Practically speaking, **Member States** still enjoy a **wide range of discretion in defining** what they regard as services of general economic interest; this is due to the vast diversity of national traditions.⁴⁸ Common elements such as the continuity, quality and affordability of services and the protection of users and consumers can be found expressed as common values and aims of the Union, explicitly in Article 14 TFEU. As Member States enjoy such a **wide range of appreciation** in determining what they regard as services of general economic interest, the Commission may only challenge those determinations in cases of manifest errors.⁴⁹ In any case, Member States have to ensure that their service of general economic interest satisfies the absolute minimum criteria, notably, ‘the presence of an act of the public authority entrusting the operators in question with an service of general economic interest mission and the universal and compulsory nature of that mission.’⁵⁰

- 15 Services of general economic interest also need to be differentiated from ordinary offered services insofar, as – from the viewpoint of the state – they have to be provided also in situations in which the market does not generate sufficient incentives for such services.⁵¹ This way of distinguishing the terms offers **potentially a very wide scope of application** for Article 106 para. 2 TFEU.⁵² **Examples:** Postal services⁵³, telecommunications services⁵⁴, television and radio broadcasting systems⁵⁵, operating authorities for ports and airports⁵⁶, agricultural research institutes⁵⁷ and waste-disposal management.⁵⁸ Decisive in determining the applicability is always the specific mission being fulfilled. For this reason **every individual case needs to be carefully examined**. This **frequently leads to uncertainty**, particularly in cases involving services at ports and in the energy sector.
- 16 **Protocol No 29** ‘on the System of **Public Broadcasting** in the Member States’ provides an authentic interpretation that can be regarded as effectively equivalent to a primary law provision. The importance of missions serving general public interest for determining the threshold of EU competition rules is especially articulated. Declaration No 37 ‘on **public credit institutions** in Germany’ to the Final Act of the Treaty of Amsterdam has obviously a special meaning for Germany. This declaration emphasises on the one hand the general economic interest that these credit institutions serve but on the other hand it clarifies that competition rules call for certain restraints regarding state granted advantages.

⁴⁷ The Commission has defined the following concepts: ‘Service of general interest’, ‘service of general economic interest’, ‘social services of general interest’, ‘universal service obligation’ and ‘public service’; it has also declared that ‘... the concepts are dynamic and evolve.’ Communication (n 46) 3.

⁴⁸ Cf. e.g. the highly distinct exception of ‘service public’ in France; also mentioned in the Commission Staff Working Document SEC (2010) 1545 final of 7 December 2010.

⁴⁹ CFI Cases T-442/03 *Sociedade Independente de Comunicacao* [2008] ECR II-1161 mn. 195; T-289/03 *BUPA* [2008] ECR II-81.

⁵⁰ CFI Case T-289/03 *BUPA* [2008] ECR II-81, mn. 172.

⁵¹ Cf. Communication from the Commission 2001/C 17/04 of 19 January 2001 (OJ C 17/4).

⁵² For references see *Voet van Vormizele/B Bär-Bouyssièr* (n 7) mn. 66.

⁵³ ECJ Case C-340/99 *TNT Traco* [2001] ECR I-4109 mn. 53; differentiated regarding hybrid mail services, cf. Commission Decision C (2008) 5912 final of 7 October 2008; application for annulment, GC Case T-556/08 case pending.

⁵⁴ ECJ Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941 mn. 16.

⁵⁵ ECJ Case 155/73 *Sacchi* [1974] ECR 409; confirmed in CFI Case T-442/03 *Sociedade independente de Comunicacao* [2008] ECR II-1161 mn. 197.

⁵⁶ ECJ Case 10/71 *Port of Mertert* [1971] ECR 713.

⁵⁷ ECJ Case 258/78 *Nungesser* [1982] ECR 2015.

⁵⁸ ECJ Case C-209/98 *Sydhavens Sten & Grus* [2000] ECR I-3743 mn. 75 et seq.

The undertaking needs to be **entrusted** with such duties **by an act of state**;⁵⁹ insofar a legal act is not necessarily required.⁶⁰ A contract concluded with public authorities according to public law or a concession can also be regarded as sufficient.⁶¹ However, the substantial content of acts of entrustment has to meet more demanding requirements; the kind and the extent of duties of general economic interest have to be clearly defined⁶² before the state may grant privileges to the undertaking. The stricter rules in defining the duties are indispensable for reasons of legal certainty and of transparency aspects regarding citizens. Another reason is to facilitate the evaluation of proportionality conducted by the Commission.⁶³

Revenue-producing monopolies are undertakings with a monopoly position for the purpose of producing revenue for the public budget. A simple obligation to transfer profits does not suffice as in the end any public undertaking may claim to have this obligation. The German monopoly of spirits cannot any longer be seen as an example of such a revenue-producing monopoly in this sense. Already a long time ago, it has turned into a highly subsidised instrument for the protection of the German production of rectified alcohol⁶⁴ and has lost a significant characteristic of a monopoly with a market share of less than 10%. Revenue-producing monopolies are in the meantime regarded as a 'non-system remnant from the ages of corporate states' in most of the Member States and hence are under the impression to be abolished at some point according to their respective national constitutions. For these reasons, the practical importance of revenue-producing monopolies is to be estimated as being rather little.

3. Exceptional rules

The activities of the undertakings mentioned generally fall within the scope of application of Union Law, in particular of EU competition law.⁶⁵ **Selected exceptions** only apply if **two conditions** are fulfilled; (a) the application of Union Law hinders the performance of the entrusted duties; and (b) the privilege granted does not disproportionately interfere with the interests of the Union.⁶⁶ The original understanding of this provision as a strict prohibition rule with a certain rights of authorisation seems to have changed notwithstanding the supporting character of the textual interpretation of the rule. The understanding of the rule has developed from a strict prohibition to an important legal exception. In the French understanding the provision is nothing else than a general 'service public' reservation.⁶⁷ Reasons for this development may well be found in the shift of attitude of the European public, the shift of policies of Member States and in particular the latest developments of practices of the Commission and the case law of the Luxembourg courts.

Nevertheless, Article 106 para. 2 TFEU still is to be generally regarded as exception provision and thus has to be narrowly interpreted.⁶⁸ For justification under this rule, it has to be evaluated whether the particular measure has been actually **adequate, neces-**

⁵⁹ ECJ Case 66/86 *Flight tariffs* [1989] ECR 838.

⁶⁰ Statute, administrative acts or alike.

⁶¹ ECJ Case C-393/92 *Almelo* [1991] ECR I-1477 mn. 47.

⁶² ECJ Case C-280/00 *Altmark Trans* [2003] ECR I-7747 mn. 89; confirmed in CFI Case T-189/03 *ASM Brescia* [2009] ECR II-1931 mn. 123.

⁶³ Communication from the Commission (n 51) C 17/8.

⁶⁴ In favour: *Heinemann* (n 37) p. 181; against: *Kühling* (n 14) mn. 68.

⁶⁵ Article 106 para. 2 clause 1 TFEU: '...shall be subject to the rules ..., in so far as...'

⁶⁶ Article 106 para. 2 clause 2 TFEU.

⁶⁷ For more details see *Voet van Vormizeele/Bär-Bouyssière*, (n 7) mn. 54.

⁶⁸ Burden of proof with the Member State or the undertaking invoking the exception rule: ECJ Case C-340/99 *TNT Traco* [2001] ECR I-4109 mn. 59.

sary and proportionate in fulfilling the entrusted legitimate welfare duties. In this context, even a 'cross-subsidisation' in certain cases can be regarded as 'necessary' if it is the only way to ensure the fulfilment of typically loss-making welfare duties (in particular universal services) to economically acceptable conditions.⁶⁹ Whether the **standard of 'obstructing the performance'-requirement** are to be applied still as stringent as before⁷⁰ cannot be answered on an abstract level. It is a question of an evaluation on a case by case basis whether or not a mere risk of failure of performance may suffice.⁷¹ However, there is clear evidence of a normative shift of nuances that Union law privileges to a certain extent services of general interest with implementation of Article 14 TFEU. This may be taken as a reason to apply the exception rule of Article 106 para. 2 TFEU in a broader sense.

- 21 Once the requirements of para. 2 s. 1 have been fulfilled **disproportionate effects contrary to the interests of the Union (para. 2 s. 2)** constitute the **absolute limit** in granting exemptions from Treaty provisions. Determining these limits means to balance apparently concurring interests: The welfare interest to be served by the undertaking needs to be considered against the superior interests of the Unions, i.e. an internal market free of any infringement and a perfect competition order.

With the introduction of the new Article 14 TFEU in conjunction with the economic and social cohesion of the Union according to Article 3 para. 3 subpara. 3 TEU, the performance of services of general economic interest has reached the level of main objectives of the Union. As such, the meaning of para. 2 s. 2 as a controlling and corrective clause may have been even more diminished.

22 **IV. Supervisory and policing powers (paragraph 3)**

Para. 3 confers the **principal role for the enforcement** of the normative principles of paras 1 and 2 upon the **Commission**. For this purpose, it strengthens the general **supervisory function** of the Commission (Article 17 para. 1 TEU) by assigning two types of legislative measures, i.e. decisions and directives to it. This enlarges the range of actions of the Commission regarding Member States compared to only less restrictive measures such as recommendations or statements.⁷² Para. 3 does not in any way affect infringement procedures provided for in Article 259 TFEU; however, dealing with infringements by a quick and procedurally uncomplicated 'order' in form of a decision seems more effective than to rely on judicial infringement procedures. This is particularly true since paragraph 3 leads functionally to the same result. The Commission may also address public undertakings directly, but for such it has to rely on the requirements of the Anti-trust Regulation 1/2003.⁷³ In cases where the undertaking and a Member State have collusively acted contrary to the Treaties, the Commission is certainly not barred to act cumulatively against both.

- 23 Besides the repressive supervisory powers of the Commission, paragraph 3 also provides for a wide range of **competences for actions of preventive character**. Admissible are not only abstract norms with material substance, further defining the meaning of para. 1 and para. 2, but also to legislate on procedural norms that are adequate and necessary to ensure conduct of Member States in conformity with the Treaties.⁷⁴

⁶⁹ ECJ Case C-320/91 *Corbeau* [1993] ECR I-2533 mn. 17.

⁷⁰ In favour: *Kühling* (n 3) mn. 72.

⁷¹ A clear trend in the jurisprudence; for references see *Kühling* (n 3) mn. 72 fn. 290.

⁷² Article 288 para. 5 TFEU

⁷³ See *Khan/Suh*, Article 101 mn. 38.

⁷⁴ ECJ Case C-202/88 *France v Commission* [1991] ECR I-1223; ECJ Joined Cases C-271, 281, 289/90 *Telecommunication services* [1992] ECR I-5833.

The Commission enjoys a wide discretion on the ‘whether or not’ and ‘how’ to take 24 measures against a Member State acting in violation of the Treaties. Furthermore, the **discretionary power goes so far** as to regularly exclude an individual to successfully bring an action for wrongful failure to act or plea of illegality against legislation of a Member State.⁷⁵ Standing at the courts is, however, by no means generally excluded in cases where acts or omissions by the Commission involve direct and individual interests.⁷⁶ But such cases are expected to be very rare.

Regardless of the **potentially wide scope of application**, the Commission has made 25 use of its power only to a very limited extent. **Abstract and general rules** on the basis of paragraph 3 only exist regarding the **transparency** in the financial relationship between Member States and public undertakings as well as regarding the financial transparency within certain undertakings.⁷⁷ This Transparency Directive of the Commission serves primarily to identify **hidden state aid** granted to public undertakings and to prevent such conduct.⁷⁸ Another Commission directive was adopted under para. 3 in the **telecommunications sector**.⁷⁹ This sector in particular used to be monopolised and highly regulated by the States. The directive therefore is meant to **gradually liberalise the telecommunications markets**. A similar legislative approach would have been desirable for the **liberalisation of the quite comparable electricity and gas markets**. However, political resistance and resistance by the energy industry have prevented such an endeavour by the Commission.⁸⁰

Regarding **individual decisions**, from the mid-1980s onwards there has been a quite 26 rich, yet not excessive practice by the Commission, in particular regarding the opening-up to competition of the telecommunication sector, air and sea transportation (ports and airports) and postal and courier services.⁸¹

SECTION 2 AIDS GRANTED BY STATES

Bibliography: *Bartosch*, Materielle Selektivität und Europäische Beihilfenkontrolle, EuZW 2010, 12; *Becker*, EU-Beihilfenrecht und soziale Dienstleistungen, NZS 2007, 169; *Biondi*, State Aid is falling down, falling down: An analysis of the Case Law on the notion of aid, C.M.L.R. 2013, 1719; *Biondi/Eeckhout/Flynn*, The Law of State Aid in the European Union (Oxford 2004); *De Beys*, Aides d'État, Journal de Droit Européen 2009, 74; *de Cecco*, State Aid and the European Economic Constitution (Hart 2013); *Franzius*, Auf dem Weg zu mehr Wettbewerb im ÖPNV – Zum ‘Altmark Trans’ Urteil des EuGH, NJW 2003, 3029; *Hancher*, EU State Aids (Sweet & Maxwell 2011); *Heidenhain*, European State Aid Law (Beck) 2010; *Kefler/Dahlke*, Die Auswirkungen der Finanzkrise auf das Europäische Beihilfenrecht, EWS 2009, 79; *Plank/Walsh*, State Aid Modernisation – how to make better use of EU taxpayers’ money?, EuZW 2012, 613; *Rydelski*, Handbuch EG Beihilfenrecht, 2003; *Säcker/Montag*, European State Aid Law (C.H. Beck, Hart, Nomos 2015); *Schubert*, Beihilfen im Agrarsektor, EuZW 2010, 92; *Schwarze*, Die europäische Beihilfenkontrolle (Articles 87 ff. EG) in Zeiten der Finanz- und Wirtschaftskrise, DVBl. 2009, 1401; *Stefan*, Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law,

⁷⁵ ECJ Case C-107/95 P *Bilanzbuchhalter* [1997] ECR I-957 mn. 26 et seq.; GC Case T-567/10 *Vivendi* [2011] ECR II-317.

⁷⁶ ECJ Case C-141/02 P *T-Mobile Austria GmbH* [2005] ECR I-1283 mn. 70; also already in (n 75) mn. 24.

⁷⁷ (n 3).

⁷⁸ ECJ Joined Cases 188–190/80 *Transparency Directive* [1982] ECR 2545.

⁷⁹ Commission Dir 2002/77 of 16 September 2002 *on the competition in the markets for electronic communications networks and services* (O.J. 2002 L 249/21) consolidating and replacing a series of other directives.

⁸⁰ Instead Directive 2009/72 (Oil) OJ 2009 L211/55 and Directive 2009/73 (Gas) OJ 2009 L211/36 by the European Parliament and the Council.

⁸¹ For references see *Voet van Vormizeele/Bär-Bouyssièr* (n 7) mn. 90 as well as in the Report from the Commission on Competition Policy 2012 of 7 May 2013 COM (2013) 257 final.

**Article 107 [Prohibition of State aid; exceptions]
(ex Article 87 TEC)**

(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(2) The following shall be compatible with the internal market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

(3) The following may be considered to be compatible with the internal market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

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I. General

1

1. Purpose

State aids granted to certain undertakings or branches of production have the potential to distort competition in the European Union. They may entail state-generated competitive advantages of certain market players vis-à-vis others. The Treaty's provisions on state aid are aiming at **protecting competition within the internal market** from such distortions (see Article 3 para. 1 lit. b TFEU). Articles 107 et seq. TFEU contain rules for the coordination of the Member State's state aid practice, in order to avoid aids where they have a negative effect on the EU internal market.

Over the last years since the beginning of the financial crisis, the EU has seen a significant rise of crisis-related aid to more than 10 % of GDP.¹ At the same time, in a report issued in 2011, the European Court of Auditors criticised the current EU practice, which has lead to more than 40 separate instruments (Regulations, Communications, etc.) and regulatory confusion in the field. These developments have triggered an effort of the Commission to modernise the current regime, and to shift it from comprehensive *ex ante* review of most aids to more selective *ex officio*, *ex post* review of particularly critical aids². The aim is to alleviate procedural burden from small scale aid or 'good' aid that strengthens the EU internal market, contributes to growth, rectifies market failures and has a real proven incentive effect. The Commission is therefore in the course of revising the existing instruments (such as the Guidelines on environmental and regional aid, risk capital investments, and restructuring, and the *de-minimis* block exemption).

2. Overview

2

Article 107 TFEU contains a **general interdiction** of aids by the Member States under the conditions stipulated in paragraph 1. In turn, state aids may be permitted if the criteria of para. 1 are not met. Para. 2 lists three types of state aid which are, at the outset, considered permitted under Article 107 TFEU. Paragraph 3, in its litera a–d, lists scenarios and criteria under which the Commission may grant an exception from the general interdiction of state aids as stipulated in paragraph 1. In addition, the Council may approve further general exceptions under the conditions of paragraph 3 lit. e. Further, the Council may allow specific exemptions for certain undertakings or branches of production under the conditions of Article 108 para. 2, subpara. 3 TFEU.

Article 108 contains the procedural rules of the Union's state aid control. Based on Article 109, the Council may adopt Regulations on the application of EU state aid law, and

¹ See Commission's State Aid Scoreboard, COM 2011, 848.

² See Communication on State Aid Modernisation of 8 May 2012, COM 2012, 209.

may in particular enable the Commission to enact more specific Regulations on its behalf.

3 The rules on state aid which were contained in the old EU primary law in Articles 87 et seq. TEC have only been slightly modified by the Treaty of Lisbon. Apart from some minor terminological adaptations, Article 107 TFEU has only been amended in paragraph 2 lit. c and paragraph 3 lit. a. Thus, the ECJ's case law on the interpretation of the provisions remains relevant.

4 Decisive criterion for the control of the Member State's practice with regard to state aid remains the **protection of the internal market and of undistorted competition**. At the same time, Article 107 acknowledges that state aids may be justified in certain special situations (paras. 2 and 3). Such situations may be based on considerations of the Member State's industrial policies (see Article 157 para. 3 s.1 TFEU).

Regarding state aids of third countries which are distorting competition, such measures can be addressed with protective counter-measures, which are adopted in the framework of the EU's common trade policy.

5 **II. Scope of application**

1. Leges speciales; aids granted by the EU

Articles 107 et seq. TFEU are applicable to all types of state aids, as long as the Treaty does not provide otherwise (Article 107 para. 1 TFEU). They do not apply to aids granted by the EU herself (see, e.g., Articles 40 para. 2, 176, 177 TFEU). The Treaty contains special provisions for the agriculture sector (Article 42 TFEU), for aids for the establishment in certain areas (Article 50 para. 2 lit. h TFEU), transport (Article 93, TFEU), and public undertakings (Article 106 para. 2 TFEU).

6 **2. Direct effect**

Article 107 TFEU has direct effect³; it is exclusively upon the Commission to determine the illegality of the state aid in question, according to the procedure laid down in Article 108 TFEU. The direct effect only covers the interdiction to implement new state aids according to Article 108 para. 3 third sentence TFEU.⁴ In turn, an existing aid may be kept in place until the Commission has determined its illegality under Article 107 TFEU.⁵

7 **III. General interdiction of state aid (para. 1)**

1. State aid

The notion of state aids is a broad and comprehensive one ('in any form'); as a legal term, it has to be interpreted on the basis of objective criteria.⁶

8 State aid can be defined as any **voluntary benefit** for undertakings or branches of production, as far as it is not offset against an equivalent consideration for the beneficiary in line with market conditions.⁷ The definition does not only cover financial contribu-

³ ECJ Cases C-149/91 and C-150/91 *Sanders* [1992] ECR I-3918; C-44/93 *Namur* [1994] ECR I-3863.

⁴ ECJ Cases C-78/76 *Steinike* [1977] ECR 595; C-17/91 *Lornoy* [1992] ECR I-6523.

⁵ ECJ Case C-387/92 *Banco de Crédito Industrial* [1994] ECR I-902.

⁶ ECJ Case T-152/99 *Hijos de Andrés Molina, SA v Commission* [2002] ECR II-3049.

⁷ Fundamentally ECJ Case 30/59 *Bergmannsprämie* [1961] ECR 43 establishing the so-called 'private-investor-test'.

tions,⁸ but also any relief of financial burdens for an undertaking which it usually would have to bear,⁹ independently from the aims which are pursued by the relevant benefit,¹⁰ and irrespectively of the legal form of the measure. Therefore, the notion of state aid is **broadier than** that of **subsidy**,¹¹ which is not used in Article 107 TFEU. State measures which compensate certain undertakings for disadvantages they incur while fulfilling a **public service** usually to be performed by the state do not constitute a state aid (such as, for example, provision of public transport through a private undertaking¹²) However, this view of the ECJ remains debatable.

Allocations to **public undertakings** by the (public) shareholder are state aids if a private shareholder, in a comparable situation and only taking into consideration profitability of the allocation, would not have granted such benefit. When applying this test, any further considerations such as social or regional policy are irrelevant.¹³ The question whether the state has acted like a prudent capital provider under market conditions ('private-investor-test'), has to be assessed *ex ante*,¹⁴ and taking into account the effects of previously granted aid.¹⁵ The test is only applicable to measures taken by the state as a shareholder, and not to sovereign acts *de jure imperii*¹⁶ – however, this categorization depends on the nature of the measure, not only on its legalistic form.¹⁷ With regard to state aid in the forms of assumption of liability or of guarantees see the respective Commission Notice.¹⁸ The Commissions' possibilities to monitor the use of such instruments has been improved by Directive 111/2006¹⁹ on the transparency of financial relations between Member States and public undertakings.²⁰

The following benefits can be considered as state aid in the sense of Article 107 TFEU: investment grants, release from dues or obligatory contributions (e.g. tax deductibility of investments²¹); interest allowances;²² assumption of guarantees or bonds under favourable economic terms (most recently – addressing an 'implicit' guarantee – Case *Commission v. France*²³; and, with regard to the question whether the guarantee remains valid despite illegality under EU law Case *Residex*²⁴); assignment of land property free of charge or at a particularly low price;²⁵ delivery of goods or services at favorable terms; assumption of losses;²⁶ waiver of public receivables or their delayed enforcement;²⁷ waiver of fines or penalty payments; order to conduct a business under special administration in order to enable an undertaking in financial difficulties to pursue its

⁸ ECJ Case C-200/97 *Ecotrade* [1998] ECR I-7926.

⁹ ECJ Cases C-387/92 *Banco de Crédito Industrial* [1994] ECR I-902; C-243/99 *Adria-Wien-Pipeline* [2001] ECR I-8384.

¹⁰ ECJ Case C-288/11 P *Mitteldeutsche Flughafen v Commission* [not yet published].

¹¹ ECJ Case 30/59 *Bergmannsprämie* [1961] ECR 43, at para. 42.

¹² ECJ Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

¹³ ECJ Case C-42/93 *Spain v Commission* [1994] ECR I-4103.

¹⁴ ECJ Case C-482/99 *France v Commission* [2002] ECR I-4427.

¹⁵ ECJ Case T-29/10 and T-33/10 *ING v Commission* [not yet published].

¹⁶ ECJ Cases C-278/92 to C-280/97 *Spain v Commission* [1994] ECR I-4103; see also Case T-455/08 *Flughafen Leipzig v Halle* [2011] ECR II-1311.

¹⁷ ECJ Cases T-196/04 *Ryanair* [2008] ECR II-3643; C-124/10 *Commission v EDF* [not yet published].

¹⁸ OJ 2000, C 71/14.

¹⁹ OJ L 318/17.

²⁰ See Article 106 TFEU mn. 4, 25.

²¹ ECJ Case C-482/99 *France v Commission* [2002] ECR I-8267.

²² ECJ Case C-398/00 *Spain v Commission* [2002] ECR I-8069.

²³ ECJ Case T-154/10 *Commission v France* (Not yet published).

²⁴ ECJ Case C-275/10 *Residex* [2011] ECR I-13043.

²⁵ ECJ Case T-366/00 *Scott v Commission* [2007] ECR II-797.

²⁶ ECJ Case C-50/94 *Greece v Commission* [1996] ECR I-3356.

²⁷ ECJ Case T-36/99 *Lenzing* [2004] ECR II-3597.

activities;²⁸ abatements on interests for delay;²⁹ deferred payment terms for social security contributions;³⁰ preferential prices for natural gas, if they are not justified by economic considerations;³¹ tax exemptions for wholesale distributors of medicines which go beyond compensation for services rendered to the public;³² long-term purchase commitment in order to incentivise investments.³³ Furthermore, the granting of export credit,³⁴ export credit insurance,³⁵ or preferential treatment of an undertaking in public procurement.³⁶

- 11 Shareholding by the government** in private undertakings may constitute state aid if the undertaking could not have raised the share capital contributed by the Member State on the market;³⁷ the same applies to logistic support of a public undertaking for an affiliate without adequate financial compensation.³⁸ Privatisation of state shareholding needs to follow a formal and transparent tender process, which is not linked to unrelated conditions.³⁹ The Court recently confirmed that the sale of government-owned shares or the entire undertaking may constitute an aid if the Member State does not sell at the highest achievable price.⁴⁰

12 2. Through state resources

Aids are granted through state resources if they are directly or indirectly induced by representatives of the government, independent of the legal status of the body which is finally granting the aid.⁴¹ Thus, all direct (federal or regional authorities) or indirect (municipalities, corporations under public law, public foundations) governmental measures can be attributed to the state if these measures have a direct or indirect **impact on the public budget**. These criteria are also applicable to private bodies, if such body is controlled by the state and this control was causal for the granting of the aid.⁴² Also the indirect distribution of funds via compensation offices or relief funds can be attributed to the state⁴³ – even if these funds are only partly state-financed.⁴⁴

- 13** In turn, the following governmental measures do **not qualify as state aid**: Regulation of minimum price,⁴⁵ enabling of undertakings to worsen the conditions of employment contracts;⁴⁶ exemption of small enterprises from national legislation on dismissal protection of their employees.⁴⁷ The obligation to purchase ‘green’ electricity generated from

²⁸ ECJ Cases C-200/97 *Ecotrade* [1998] ECR I-7926; C-295/97 *Piaggio* [1999] ECR I-3751.

²⁹ ECJ Case C-342/96 *Spain v Commission* [1999] ECR I-2471.

³⁰ ECJ Case C-256/97 *DMT* [1999] ECR I-3926.

³¹ ECJ Case C-75/97 *Belgium v Commission* [1996] ECR I-3671.

³² ECJ Case C-53/00 *Ferring* [2001] ECR I-9098.

³³ ECJ Case T-80/06 of 13.2.2012 *Budapesti Erőmű Zrt. v Commission* ECLI:EU:T:2012:65.

³⁴ See *Heidenhain*, State Aid Law, § 17, paras 238 et seq.

³⁵ Communication OJ 2012 C 392/1.

³⁶ See *Heidenhain*, State Aid Law, § 46.

³⁷ ECJ Cases 323/82 *Intermills* [1984] ECR 1984, 3809; C-301/87 *France v Commission* [1990] ECR I-351; C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

³⁸ For the example of express courier services rendered see ECJ Case C-39/94 *SFEI* [1996] ECR I-3577.

³⁹ See Commission's Annual Competition Report 1993, pp. 403 et seq.

⁴⁰ ECJ Case T-268/08 and T-281/08 *Burgenland v Commission* ECLI:EU:T:2012:90.

⁴¹ ECJ Case C-379/98 *PreussenElektra* [2001] ECR I-2159.

⁴² ECJ Cases C-482/99 *Commission v France* [2002] ECR I-4397; CFI Case T-136/05 *Salvat père & fils* [2007] ECR II-4063.

⁴³ ECJ Case 78/76 *Steinike* [1977] ECR 595.

⁴⁴ ECJ Case T-139/09 of 27.9.2012 *France v Commission* (Not yet published).

⁴⁵ ECJ Case 82/77 *van Tiggele* [1978] ECR 40.

⁴⁶ ECJ Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887.

⁴⁷ ECJ Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6215.

renewable energy sources at a fixed price rate does not constitute a transfer of state resources to the energy-producing undertakings benefitting from such obligation.⁴⁸

3. Preferential treatment

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The aids have to be granted by **favouring certain undertakings or branches of production** (the latter notion also covering service and trade undertakings) over others. Thus, the following measures do not qualify as ‘preferential’ in the sense of Article 107 TFEU: social benefits granted to private households as part of social policy (unless such benefit is linked to an obligation to purchase certain goods or services); general promotion of economic development (e.g. infrastructure) or measures to stimulate the economy, as long as these measures do not give advantage to certain regions or industry sectors.

A state measure which is to the benefit of all undertakings in the relevant state, independently from their area of economic activity, does not constitute a state aid.⁴⁹ This may be different if such abstract and general measure is applied in practice in a way which advantages certain undertakings in comparison to others.⁵⁰ Such measure will be deemed selective if it differentiates between different market players without sufficient justification.⁵¹

4. Distortion of competition

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The notion of ‘distortion of competition’ has **to be interpreted autonomously** for Articles 107 et seq. TFEU.⁵² A measure distorts competition if it improves the competitiveness of an undertaking, potentially or factually, with regard to existing other undertakings, or if it impedes or hampers market access for new undertakings. The benefit usually implies a distortion of competition; however, in the event that the distortion is only potential, it has to be sufficiently concrete, and needs to be well-founded (by the Commission⁵³). It is not necessary that the distortion of the competition is appreciable if the relevant aid goes beyond the scope of the thresholds defined in Regulation 1998/2006⁵⁴ on *de minimis* state aids.⁵⁵ Furthermore, it is irrelevant whether the aid is aimed at balancing an aid of another Member State to a competing undertaking. It is upon the Commission to examine and – if necessary – do away with such competing aid.

5. Effect on trade between the Member States

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An aid affects the trade (in goods or services) between the Member States if the aid has an **impact beyond the borders** of the state granting it, and thereby has an effect on competition with undertakings in at least one other Member State.⁵⁶ This can also be the case if for example aids are granted to a public transport provider on a local level.⁵⁷ Given today’s level of integration of the EU’s internal market, aid with strictly local or national

⁴⁸ ECJ Case C-379/98 *PreussenElektra* [2001] ECR I-2159.

⁴⁹ ECJ Case C-143/99 *Adria-Wien-Pipeline* [2001] ECR I-8384.

⁵⁰ ECJ Cases T-152/99 *Hijos de Andrés Molina, SA v Commission* [2002] ECR II-3049; C-452/10 of 21.6.2012 *BNP Paribas v Commission* (Not yet published).

⁵¹ See ECJ Case C-279/08 P *NOX* [2011] ECR I-7671.

⁵² ECJ Case 730/79 *Philip Morris* [1980] ECR I-2671.

⁵³ See ECJ Case 248/84 *Borken-Bocholt* [1987] ECR I-4013.

⁵⁴ OJ 2006 L 379/5.

⁵⁵ See CFI Cases T-127/99 and T-148/99 *Territorio Histórico de Álava v Commission* [2002] ECR II-1275; however, this view is disputed.

⁵⁶ ECJ Case C-75/97 *Belgium v Commission* [1999] ECR I-3687.

⁵⁷ ECJ Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

effect seems to be the rare exception, e.g. in connection with promotion of small enterprises. This statement is backed by the fact that the mere suitability of an aid to distort competition⁵⁸ is sufficient under Article 107 TFEU.⁵⁹ Such potential distortion can also lie in a Member State's export support to undertakings for trade with third states.⁶⁰ The Commission, in Regulation 1407/2013 on **de-minimis** state aids, has fixed a threshold for state aid under which it considers the aid to have insufficient impact to distort competition. Therefore, it waived the obligation to notify such *de minimis* aids under this Directive. The threshold is particularly relevant for **small and medium enterprises** and amounts to € 200,000 over a period of three years. Whenever this threshold of the *de minimis*-Regulation is exceeded, it is irrelevant whether the distortion of competition is appreciable. This is, contrary to the parallel issue in the context of establishing a distortion as such, undisputed.⁶¹ The new *de-minimis* Regulation has replaced Regulation 1998/2006 as of 1 July 2014.⁶²

17

IV. Absolute exceptions (para. 2)

The aids listed in para. 2 are **excepted** from the interdiction of state aids in paragraph 1 **at the outset**. Despite the fact that aids falling under para. 2 do not have to be further justified, they are however subject to the Commission's control under Article 108 and the procedure described therein. The Commission must (only) examine whether the requirements of the exception are met. It has **no margin of appreciation**.

- 18 – **Welfare aids** to consumers according to **lit. a** are not forbidden under para. 1, if these aids are granted irrespectively of the origin of the goods. If this requirement is fulfilled, such aids do not constitute a hidden benefit to certain undertakings or branches of production. The practical implementation of these aids (e.g. through vouchers) is irrelevant.
- 19 – **Aids for disaster relief (lit. b)** are permitted as far as they are necessary to make good damages which are directly caused by the disaster. They have to be limited to large scale force majeure events. Normal risks, such as thunderstorms or strikes, are not covered.
- 20 – **Aids to certain areas affected by the division of Germany (lit. c)** need to be necessary in order to compensate disadvantages incurred directly by the division. Thus, the exception covers only economical disadvantages which are linked to the physical division of Germany as such, for example by interruption of traffic links or loss of delivery or business areas. It does not cover the general economical disadvantages resulting from the implementation of differing politico-economic systems.⁶³ The **Treaty of Lisbon** has facilitated the abolishment of this exception. It can now be abolished by simple Council decision. This might lead to omission of lit. c from 2014 on.
- 21 – On exceptions in the area of **aids in the transport sector**, see Articles 93 and 98 TFEU. With regard to state aid for railway companies, see the Commission's **Community Guidelines** on State aid for **railway undertakings**,⁶⁴ for aids to airlines and airports, a

⁵⁸ See above mn. 15.

⁵⁹ ECJ Case 730/79 *Philip Morris* [1980] ECR 2671.

⁶⁰ ECJ Case C-142/87 *Belgium v Commission* [1990] ECR I-1005.

⁶¹ See ECJ Cases C-142/87 *Belgium v Commission* [1990] ECR I-959; Case C-298/00 *Italy v Commission* [2004] ECR I-4087.

⁶² See Communication on State Aid Modernisation of 8 May 2012, COM 2012, 209, point 20 and OJ 2013 L 352/1.

⁶³ ECJ Cases C-57/00 and C-61/00 *Freistaat Sachsen, Volkswagen u.a. v Commission* [2003] ECR I-997.5

⁶⁴ OJ 2008 C 184/13.

new Guideline was adopted by the Commission in 2014⁶⁵ which will replace the existing ones of 1994 and 2005.⁶⁶

V. Discretionary exemptions (para. 3)

22

1. Scope and application

According to the procedure under Article 108 TFEU, the **Commission may** exempt individual aids from the interdiction laid down in paragraph 1 if the criteria of the respective exception of paragraph 3 are met. Thus, the applicability of the exception has to be assessed in two steps: first, the criteria of lit. a – e have to be established; then, the Commission has to exercise its **discretion** correctly.⁶⁷ On the first, factual level, the aids addressed in paragraph 3 have to be aimed at, suited and necessary for fostering the purpose of the exemptions.⁶⁸ When exercising its margin of discretion, the Commission has to duly take into account the EU's objective to protect the internal market from distortions, which now is laid down in Protocol No 27 of the TFEU.

The aid has to be **suited and necessary** for the goals listed in para. 3. When assessing the criteria under para. 3, the Commission disposes of a wide margin of appreciation. The discretion implies certain general economical and social judgments, which however have to be based on the objectives and policies of the EU. In any event the Commission's considerations have to be coherent,⁶⁹ also with regard to other EU policies beyond state aids.⁷⁰ It must be perceptible which exception of para. 3 the Commission applies.⁷¹

The Commission may substantiate the principles which it applies when exercising its discretionary power in guidance notes or communications. These **guidelines** are legally **non-binding** and published in part C of the EU's Official Journal.⁷² The non-binding guidelines help to ensure transparency, predictability and legal certainty. They may serve as useful evidence for the European Courts – without being authoritative.⁷³ However, such Communications or guidelines **can bind the Commission** when they are invoked together with the principles of legitimate expectation and/or equal treatment. The Commission is therefore obliged to apply their own guidelines coherently; it cannot deviate from the content without specific justification (but nevertheless has to assess each individual case on substance⁷⁴). If it wants to change its policy for the future, it has to modify its respective guidelines accordingly.

In course of the current reform effort with regard to the EU state aid policy, it can be expected that a number of horizontal and sectoral guidelines will be revised, aligned, or suppressed over the coming years.⁷⁵

2. Specific exemptions

24

The matters subject to the Commission's decision under paragraph 3 mainly concern aids in regional (lit. a, c), sectoral (lit. c, d), and horizontal (lit. b, c) contexts:

⁶⁵ OJ 2014 C 99/3.

⁶⁶ OJ 1994 C 350/5 and OJ 2005 C 312/1.

⁶⁷ Case ECJ C-169/95 *Spain v Commission* [1997] ECR I-148.

⁶⁸ ECJ Case 730/79 *Philip Morris* [1980] ECR 2690.

⁶⁹ ECJ Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103.

⁷⁰ With regard to the relation of state aid law and harmonisation of taxes see ECJ Case T-50/06 of 21.3.2012 *Ireland et al. v Commission* (Not yet published).

⁷¹ ECJ Case C-351/98 *Spain v Commission* [2002] ECR I-8069.

⁷² See below at mn. 21 et seq.

⁷³ ECJ Case C-310/99 *Italy v Commission* [2002] ECR I-2316.

⁷⁴ See GC Case T-/304/08 of 10.7.2012 *Smurfit Kappa v Commission*, (Not yet published).

⁷⁵ See Communication on State Aid Modernisation of 8 May 2012, COM 2012, 209.

a) Promotion of the economic development of disadvantaged areas (lit. a)

The disadvantage has to manifest itself in a gross domestic product of the area which is significantly lower than the average of the EU as a whole.⁷⁶ The exception concerns areas where the GDP per capita lies below 75 % of the Union's average; these areas are identical to those which are 'Objective-1'-areas of the EU Structural Fund (European Regional Development Fund – ERDF) established under Article 174 TFEU. In turn, differences of the economic situation within a Member State do not fall under lit. a, but under lit. c, which regulates admissible aids by the Member States for such differences. An extension of the scope to overseas territories in the last part of lit. a by the Treaty of Lisbon now also allows for aid to these regions on the basis of this exemption.

b) Promotion of important projects of common European interests (lit. b)

- 25 Usually, this exemption concerns cross-border projects,⁷⁷ in particular in the areas of R&D and environmental protection. See further the Commission's Communication on a Community Framework for State Aid for Research and Development and Innovation,⁷⁸ and the 'Guidelines on State aid for environmental protection and energy 2014–2020'.⁷⁹ In addition, state aids in order to remedy a **serious disturbance in a Member State's economy** may be justified under lit. b. This exception is evoked rather frequently, for regional and sectoral aid as well as horizontal measures. It is applied restrictively by the Commission. In order to be applicable, a significant part of a state's economy has to be affected. The disturbance has to be considerably stronger than a possible aggravation of the economical situation in the Union as a whole.⁸⁰ This possible exception has become in particular important with regard to aids to banks and other financial service providers during the financial crisis.⁸¹

c) Promotion of the development of certain economic activities or of certain economic areas (lit. c)

- 26 In practice, lit. c is the most important exemption to the general interdiction in para. 1. It covers sectoral (first alternative) as well as regional (second alternative) aids. In addition, the Commission has used lit. c. as a residual exception for horizontal aids which are not covered by another exemption. It has issued a number of guidelines and communications on the scope of lit. c for certain sectors in order to harmonize its practice with regard to the exemption: steel industry,⁸² automotive industry,⁸³ shipbuilding,⁸⁴ agriculture,⁸⁵ fisheries,⁸⁶ finance sector (with specific focus on the treatment of banks in the post-2007 financial crisis⁸⁷); maritime transport;⁸⁸ other guidelines apply across different sectors, such as the Communication on the Multisectoral Framework.⁸⁹

⁷⁶ ECJ Cases 730/79 *Philip Morris* [1980] ECR 2691; C-42/93 *Spain v Commission* [1994] ECR I-4175.

⁷⁷ ECJ Cases 62/87 and 72/87 *Exécutif régional wallon* [1988] ECR 1573.

⁷⁸ OJ 2006 C 323/1 – under revision.

⁷⁹ OJ 2014 C 200/1, replacing the old guidelines (OJ 2008 C 82/1) as of July 2014.

⁸⁰ ECJ Cases C-730/79 *Philip Morris* [1980] ECR 2691; C-57/00 and C-61/00 – *Freistaat Sachsen, Volkswagen et al. v Commission*, [2003] ECR I-9975.

⁸¹ See e.g. Communication OJ 2008 C 270/8.

⁸² Communication, OJ 2002 C 70/21.

⁸³ Framework, OJ 2001 C 368/10.

⁸⁴ Framework OJ 2011 C 364/9.

⁸⁵ Regulation 1857/2006, OJ 2006 L 358/1.

⁸⁶ Guidelines, OJ 2008 C 84/10 and Regulation 736/2008, OJ 2008 L 201/6.

⁸⁷ See, most recently Communication OJ 2013 C 216/1.

⁸⁸ Guidelines, OJ 2004 C 13/3 more specifically also OJ 2009 C132/6 on ship-management companies.

⁸⁹ OJ 2003 C 263/3.

The respective aid has to be **suited and necessary** in order to promote the develop- 27
ment of the targeted area. It is not sufficient to sustain uncompetitive industrial struc-
tures. The aid must not change the trade relations to the detriment of the common inter-
est in a functioning internal market; this might for example be the case if it would result
in overcapacities in a certain sector.⁹⁰

For **sectoral aids**, numerous specific Regulations and interpretative documents do ex- 28
ist, in areas such as postal services⁹¹ and shipbuilding.⁹² These aids have to be selective,
applying only to certain undertakings which require aid, temporary and declining over
time, and transparent. Thus, an aid is only permissible if the benefiting undertakings or a
certain economic sector are presumably enabled to prevail to competition on its own in
the future.

For **regional aid**, the Commission⁹³ applies the **Guidelines** on national regional aid 29
2014–2020.⁹⁴ The new regional aid policy as of 2014 exempts more categories of aid
from the obligation of prior notification, but imposes a stricter approach on aids for in-
vestments made by large enterprises in the eligible areas. From 1 July 2014 on, Member
States will also have to publish amounts and beneficiaries of the regional aid they
granted.

As regards rules for **horizontal aids** which are founded on lit. c, these comprise rules 30
for research and development aids (see mn. 22), aids for rescuing and restructuring firms
in difficulty⁹⁵ and aids to promote risk capital investments in small and medium-sized
enterprises.⁹⁶

On the basis of Regulation 994/98, the Commission is entitled to exempt *inter alia* 31
horizontal aids from their obligatory notice according to Article 108 para. 3 TFEU in
certain cases via **group exemption Regulations**. As of July 2014, the Commission has
consolidated its exemptions in Regulation 651/2014,⁹⁷ replacing *inter alia* previous spe-
cific Regulations on training aids, aids to small and medium sized enterprises, and aids to
employment. The Regulation 994/98 has been amended to include new possible subjects
of block exemption: innovation, culture, natural disasters, sport, broadband (and other)
infrastructure, and aid to transport to remote regions.⁹⁸

d) Aid to promote culture and heritage conservation (lit. d)

State aid for this purpose may be permitted as long as they do not affect the function- 32
ing of the internal market to an extent that is contrary to the common interest of the EU.
This common interest has to take the Union's aim to promote culture into due considera-
tion (Article 6 lit. c. and Article 167 TFEU). A Communication of the Commission spe-
cifically addresses the financing of public service broadcasting.⁹⁹ Regarding aids to na-
tional film industries see Communication on State Aid for films and other audiovisual
works.¹⁰⁰

⁹⁰ ECJ Cases 730/79 *Philip Morris* [1980] ECR 2692; C-42/93 *Spain v Commission* [1994] ECR I-4175.

⁹¹ OJ 1998 C 39/2.

⁹² OJ 2011 C 364/9.

⁹³ Communication COM (2014) 3282.

⁹⁴ COM (2013) 3769 final, applicable as of 1 July 2014.

⁹⁵ OJ 2004 C 244/2 – under revision.

⁹⁶ OJ 2014 C 19/4.

⁹⁷ O.J 2008 L 214/3.

⁹⁸ See also Communication on State Aid Modernisation of 8 May 2012, COM 2012, 209 and COM
Press Release of 5 December 2012.

⁹⁹ OJ 2009 C 257/27.

¹⁰⁰ OJ 2003 C 332/1.

3. Further categories for exception by the Council

Beyond the areas listed in paragraph 3 lit. a–d, the Council may, upon proposal of the Commission, define further scenarios in which an exemption from the interdiction of paragraph 1 may be granted (**lit. e**). The Council decides on a proposal of the Commission (Article 16 para. 3 TEU, Article 238 TFEU). In the event that the Council wants to deviate from the Commission's proposal, it needs to decide unanimously (Article 293 para. 1 TFEU). The definition of such additional areas is implemented via Directives or Regulations. The Council has adopted Regulations and Directives, e.g. concerning aids for shipbuilding.¹⁰¹ On the basis of these instruments, the Commission nevertheless has to assess whether the individual cases of state aids are compatible with EU internal market law.¹⁰²

Article 108 [State aid monitoring] (ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

¹⁰¹ OJ 2011 C 364/9.

¹⁰² ECJ Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5046.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Bibliography: see at Article 107.

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I. General

1

Article 108 TFEU sets out the framework for a control procedure in which the Commission monitors the practice of the Member States with regard to state aids. Based on this provision and as further detailed in its Regulation on the application of Article 108 TFEU,¹ the Commission decides on the permissibility of aids under Article 107 TFEU.

Thereby, one has to distinguish between control of **existing state aids** (para. 2), and **pre-emptive control** of intended new aids (para. 3). Existing aids are aids that already existed when the EEC Treaty entered into force, which have been approved under Article 108 para. 3, or which have been legally introduced otherwise (see Article 1 Regulation 659/99).

New aids are measures which aim at establishing entirely new aids or at modifying existing aids.² Further, two types of aids can be distinguished: abstract rules for aids which are of a general nature, and aids in individual cases where the aid is not based on such rules or where that aid granted on the basis of such rules has to be notified prior to its implementation.³

The Treaty of Lisbon has modified Article 108 TFEU in order to harmonise it with the Treaties' new terminology, and has introduced a new paragraph 4, which enables the Commission to substantiate (group) exception Regulations of the Council based on Article 109 TFEU by the means of Commission Regulations. These modifications do not

¹ Regulation 659/99, OJ 1999 L 83/1, amended by Regulation 734/2013, OJ 2013 L 204/15.

² ECJ Case C-44/93 *Namur* [1994] ECR I-3863.

³ See Article 1 lit. d, e of Regulation 659/99; ECJ Cases C-47/91 *Italy v Commission* [1994] ECR I-4647; C-278/95P *Siemens S. A.* [1997] ECR I-2527.

affect the functioning of the hitherto established state aid review procedure. Thus, both the case law established under the old Article 88 TEC, as well as Regulations on the application of the provision (most notably Regulation 659/99) remain relevant.

In course of the Commission's reform initiative outlined in its Communication on State Aid Modernisation of 8 May 2012,⁴ the application of Article 108 TFEU is currently under review, with the aim of allowing for prioritisation of the handling of certain critical aids over the great number of un-critical cases, and of introducing a mechanism under which notification requirements would in future lie directly with the undertakings applying for aid. Therefore, the Commission has amended Regulation 659/99 by Regulation 734/2013,⁵ in order to clarify and shorten the procedure for complaints of third parties against granted aids, and to introduce a formal mode of cooperation between the Commission and national courts deciding on state aids.

3 **II. Review of existing state aids (repressive control; para. 1)**

1. Constant review

State aids that already existed when the EEC Treaty entered into force (or when a new Member State joined the EU) or which have been approved under Article 108 para. 3 TFEU are constantly being monitored by the Commission with regard to their compatibility with the EU internal market, also with regard to their implementation in practice. Further, under Article 108 para. 1 TFEU, the Commission may review the application of an individual aid under a previous block exemption at any time.⁶ The procedure it has to use for this is detailed in Regulation 659/99.⁷

The Member States have to cooperate and provide the Commission with all relevant information. If the Commission, after consultation of the respective Member State, comes to the preliminary conclusion that existing state aids are (or have become) incompatible with the internal market, it proposes appropriate measures to the Member State in order to remedy the impairment. These measures may for example be a modification or abolishment of the aid scheme or the introduction of a certain procedure. If the Member State agrees, it implicitly agrees to a binding resolution of the matter⁸ and has to implement the agreement. In case it does not agree, the Commission may, if it deems this necessary, trigger the formal examination procedure under paragraph 2.

In any event, only the Commission has the competence to decide upon the compatibility of a state aid with EU law – this competence cannot be assumed by a national court.⁹

4 **2. Formal Review Procedure under para. 2**

a) Initial Commission decision

The formal review procedure is triggered by a Commission **decision**, which contains the essential facts and a legal assessment including its concerns with regard to the compatibility of the aid with the internal market. In its decision, the Commission fixes a time limit for the Member State to submit comments on its decision.

⁴ COM 2012, 209.

⁵ OJ 2013 L 204/15.

⁶ ECJ Case C-321/99 P *ARAP* [2002] ECR I-4350.

⁷ OJ 1999 L 83/1, amended by Regulation 734/2013, OJ 2013 L 204/15.

⁸ ECJ Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5046.

⁹ See ECJ Case C-39/94 *SFEI* [1996] ECR I-3577.

b) Third party participation

Undertakings (or their associations) which would **benefit** from the state aid may take part in the procedure, as well as undertakings whose interests would be **harm**ed by the measure. The latter may seize the Court according to Article 263 para. 4 TFEU. In order to facilitate such participation, the initial decision of the Commission is published in Section C of the EU's Official Journal, also stating a time limit for comments of these undertakings. All participants in the procedure, the concerned undertaking as well as the commenting third parties, are obliged to fully cooperate with the Commission for the aims of the procedure and have to provide all requested information.

c) Final decision

The Commission issues its final Decision (according to Article 288 para. 4 TFEU) on the matter after the time period it has set for comments has lapsed. In case it deems the state aid to be incompatible with the internal market, it obliges the Member State to take the necessary measures to remedy the breach of EU law. It may order to modify or completely abolish the measure, or to establish a procedure for its application. The Decision has to be sufficiently precise as to which measures have to be taken, and has to be reasoned in detail. The Decision becomes effective upon notification to the addressee (Article 297 para. 2, 3rd subparagraph TFEU). In its Decision, the Commission determines an adequate time limit for its implementation.

If the Commission deems the state aid compatible with the internal market, it closes the procedure (again in a Decision according to Article 288 para. 4 TFEU) and notifies the concerned Member State accordingly. In the event that the Commission does not take a decision at all, after having called upon it to act (Article 265 para. 2 TFEU), the Member States or the Council may bring an action for failure to act to the Court.

The existing measure granting an aid can be maintained until the Commission has finally decided on its compatibility with the internal market.¹⁰

III. Review of planned new aids (para. 3)

1. Notification procedure

In the event that a Member State plans to introduce a new state aid or to modify an existing one, it has to notify the Commission sufficiently in advance in order to allow it to submit comments on the intended measure (notification requirement, para. 3 s. 1). This notification requirement applies to all newly granted or modified aids, independently of their compatibility with the internal market. Thus, all aids which are not existing state aids according to paragraph 1 have to be notified according to para. 3. Furthermore, an aid under paragraph 1 qualifies for notification under para. 3 if the Member State plans to alter that aid.

Para. 4, in conjunction with Regulation 994/98, empowers the Commission to exempt certain groups of aids from the notification requirement. For details as to form and content of the notifications under para. 3 see Regulation 794/2004.¹¹

¹⁰ ECJ Case C-387/92 *Banco de Credito Industrial* [1994] ECR I-902.

¹¹ OJ 2004 L 140/1.

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2. First phase of review

Upon notification, the Commission preliminarily assesses the aid. This preliminary assessments leads to a decision (according to Article 288 para. 4 TFEU), in which the Commission states whether it will open a formal review procedure under para. 2. It can only abstain from such procedure if it deems the aid to be compatible with EU law.

11 Accordingly, the first review phase leads either to

- A decision of the Commission that it has no objections against the intended (new or modified) aid, or
- A decision to initiate a formal procedure according to para. 2.

If, within two months after notification of the Commission, it has not initiated a formal procedure, the relevant aid is deemed to be approved. The time limit can be derived from an analogy to Articles 263 subpara. 6, 265 subpara. 2 TFEU.¹² Upon completion of this period, the aid can only be rejected under the conditions for existing aids on the basis of para. 2. The Member State can implement these new aids once it has notified the Commission and if the Commission has not initiated a formal procedure (ex post) within fifteen days after the notification.¹³

According to the Court¹⁴ the decision in the first phase can be challenged by competitors, even though they are not directly affected by the decision according to the *Plaumann*-formula.¹⁵

12

3. Second phase: formal review

With regard to the commencement of the formal review procedure and the involved parties, see paras 4 and 5. Upon expiry of the time limit for comments of the parties, the procedure ends with a decision issued to the relevant Member State (Article 7 Regulation 659/99). Such decision can state that:

- The relevant measure does not constitute a state aid;
- The aid is compatible with the internal market; however, such positive decision may be conditional upon the respect of certain conditions and/or restrictions;
- The state aid is incompatible with the internal market and can therefore not be introduced.

13

IV. Illegal and abusive aids

1. Subject

While Article 107 TFEU addresses the legality of state aids in substance, an aid is (instead or in parallel) illegal under Article 108 TFEU if its introduction does not comply with the procedure set forth therein. Thus, for the assessment of illegality and abuse under Article 108 para. 3 TFEU, the substantive legality under Article 107 para. 1 is irrelevant. The only decisive factor is whether the Member States respect the formal requirements for the introduction of new or the modification of existing state aids.

14 Thus, **illegal** aids are aids which are granted without respecting the procedure laid out in Article 108 para. 3 TFEU (see Article 1 lit. f of Regulation 659/99), i.e. which infringe the notification requirement or the standstill requirement during the review procedure under paragraph 3. The Member State must not grant an intended aid if it

¹² ECJ Case C-120/79 *Lorenz* [1973] ECR 1482.

¹³ ECJ Case C-99/98 *Austria v Commission* [2001] ECR I-1142.

¹⁴ ECJ Case C-83/09 P *Commission v Kronoply and Kronotex* [2011] ECR I-04441.

¹⁵ ECJ Case 25/62 *Plaumann* [1963] ECR 211.

- has refrained from notification of the aid to the Commission altogether¹⁶;
- has notified the measure, but granted the aid before the Commission has taken a decision on the intended aid or has not taken a decision within the two month period referred to above in paragraph 13.
- If the Commission decides to commence a formal review of the intended aid, the Member State must not grant the aid until the review ends with a formal decision of the Commission.¹⁷ This legal barrier has direct effect in the Member State's national law; individuals may invoke it before a national court if the question of the legality of the aid becomes relevant in a procedure, such as, for example, a competitor's action against the granted aid.

State aids which are granted in violation of the standstill obligation under Article 108 para. 3 TFEU are legally void. They cannot become legal through a subsequent positive decision of the Commission.¹⁸ However, if the formal error under Article 108 TFEU has been rectified and the Commission then finds the aid to be (substantively) compatible with Article 107 TFEU, the aid does not have to be reclaimed¹⁹ (this is not the case for incurred interests during the period of formal illegality of the aid).

An **abusive use** of state aids may occur if an existing aid, which is legal as such, is being applied contrary to the initial purpose of the aid, or in violation of conditions under which the aid had been cleared by the Commission.

The **review procedure** with regard to potentially illegal or abusive state aids corresponds to the review procedure according to para. 2, with a preliminary and then a second formal review phase.

2. Legal consequences of illegally granted aids; reclaim

In the event of a negative decision of the Commission, it has to instruct the relevant Member State to reclaim the state aid (including interests incurred since its granting) from the beneficiary. Such request is aimed at reestablishing the previous (legal) status, and does not constitute a penalty.²⁰ Therefore, aids which are merely formally illegal due to a violation of the procedure laid out in Article 108 para. 3 TFEU cannot be reclaimed until their substantive illegality has been established.

The Commission may only request to reclaim the aid if the **general principles of EU law**, such as legitimate expectation, are respected.²¹

Further, the **time limit of 10 years** for reclaims has to be respected. Its run-time can be suspended by measures of the Commission or the Member State.

The Member State reclaims the illegal state aid from the beneficiary according to the relevant procedure of its national administrative law; however, this procedure has to be modified in order to reflect the 'effet utile'-principle established by the European courts. It has to ascertain the immediate and effective execution of the Commission's decision. Usually, the Commission imposes a time-limit of 4 months for the reclaim. This deadline is independent of ongoing discussions between the Member State and the Commission on how the aid is to be reclaimed.²²

¹⁶ See e.g. ECJ Case C-142/87 *Belgium v Commission* [1990] ECR I-1005.

¹⁷ ECJ Case C-312/90 *Spain v Commission* [1992] ECR I-4136.

¹⁸ ECJ Case C-354/90 *FNCEP* [1991] ECR I-5505.

¹⁹ ECJ Case C-199/06 *CELF* [2008] ECR I-469.

²⁰ ECJ Case C-99/02 *Italy v Commission* [2004] ECR I-3353.

²¹ ECJ Case C-5/89 *BUG Alutechnik* [1990] ECR I-3437; Case C-336/00 *Martin Huber* [2002] ECR I-7736.

²² ECJ Case C-485/10 of 28.6.2012 *Commission v Greece* (Not yet published).

If the granted aid has not been notified according to Article 108 para. 3, or if it was granted before a decision by the Commission according to Article 108 para. 3, the beneficiary may not invoke the defense of legitimate expectations. Potential safeguards to protect the reliance of the beneficiary on the Member State's decision in the national law are then inapplicable; possible discretion of the Member State's authorities in this regard is superseded by overruling community interests of the EU.²³

However, in exceptional cases a Member State may invoke that it would have been altogether impossible to enforce the reclaim under national law.²⁴ In such exceptional cases, the Member State has to cooperate with the Commission in order to overcome the obstacles in national law and to ensure respect of the TFEU provisions. According to the Court's case law, a reclaim is not impossible if the Member State only invokes obstacles in national law and does not at least try to obtain refund from the beneficiary.²⁵

21

V. Exceptions based on decision of the Council (para. 2 subparas. 3 and 4)

In individual cases, the Council may decide that an aid can be granted **notwithstanding Articles 107–109 TFEU**; upon application of a Member State, it may therefore decide that such aid is considered compatible with the internal market.

The council decides with unanimity. On substance, the individual case must be **exceptional**.

22

In the event that the Commission had already previously initiated a review procedure, the application of the Council to a Member State suspends this procedure until the Council has decided (para. 2 subpara. 3). The suspension terminates after the application, and the competence to decide on the individual case then shifts back to the Commission (para. 2 subpara. 4). The Commission itself may not grant an exception under paragraph 2 subparas. 3 and 4.

23

VI. Judicial review

1. Annulment procedure against the Commission

A **negative decision** of the Commission with regard to an aid to be granted by a Member State may be attacked by the relevant state through an **annulment procedure** according to Article 263 para. 1 TFEU. In addition, the undertaking or authority which would benefit from the aid may attack this decision.²⁶ The right also covers possible interest groupings, when its members would benefit from the aid. In the event that the concerned undertaking or authority misses the period for filing a complaint under Article 263 TFEU, this also has to be taken into account by the national court concerned with the matter. The detour via a request for a preliminary ruling according to Article 267 TFEU may not be used in order to remedy the failure to observe the time-limit.²⁷

²³ ECJ Case C-24/95 *Alcan* [1997] ECR I-1607.

²⁴ ECJ Cases C-349/93 *Commission v Italy* [1995] ECR I-353; C-209/00 *Commission v Germany* [2002] ECR I-11695.

²⁵ ECJ Case C-378/98 *Commission v Belgium* [2001] ECR I-5122.

²⁶ ECJ Cases 222/83 *Differdange* [1984] ECR 2889; 62/87 and 72/87 *Exécutif Régional Wallon* [1988] ECR 1573.

²⁷ ECJ Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-846.

A **positive decision** on an aid may be challenged by the Council and other Member States,²⁸ in line with Article 263 para. 1 TFEU. A disadvantaged competitor of the benefiting undertaking may request annulment of the decision of the Commission according to Article 263 para. 4 TFEU, if it is individually and directly affected. Usually this is the case if its market position is seriously affected by the granted state aid and if it has initiated the review of the aid or has at least significantly influenced the review procedure.²⁹ The competitor also has the right to claim that the Commission has wrongly abstained from initiating a review procedure according to Article 107 para. 2 TFEU.³⁰ Furthermore, such undertaking might consider a **claim for damages** against the Commission based on a breach of its official duties according to Article 340 TFEU.

A decision does not have to be designated as such in order to be subject of an annulment procedure; any final decision of the Commission on an aid qualifies under Article 263 para. 1 TFEU, irrespectively of its **denomination**.³¹

Interim measures against a Commission decision can be granted according to Articles 278, 279 TFEU.³²

2. Infringement procedure against a Member State

25

In the event that a Member State disregards the standstill period after notification of an aid or a negative decision of the Commission on an aid, the Commission or any other Member State may initiate an infringement procedure against it, without first having to go through the preliminary procedure according to Articles 258, 259 TFEU (again) – see para. 2 subpara. 2. According to Article 108 para. 2. subpara. 2 TFEU, in case the Commission is of the opinion that a Member State has not respected certain conditions under which the aid has been permitted, it has to initiate an infringement procedure directly at the Court. It may not, alternatively, decide that the Member State has to reimburse the aid which was not covered by its initial decision to clear the aid. If the Commission is of the opinion that, instead of the aid that was object of and cleared by the procedure under Article 108, the Member State has granted a new, different aid, it is obliged to initiate the procedure according to Article 108 para. 2 subpara. 1 TFEU.³³ The Member State can defend itself in this infringement procedure by claiming that it was entirely impossible for it to implement the Commission's decision correctly.³⁴

3. Procedures in national courts

26

In national court procedures (such as for example a competitor's action with regard to an aid granted to another company³⁵), the ECJ may come into play when the seized national court requests a preliminary ruling on a question of EU law interpretation according to Article 267 TFEU.

VII. Exceptive regulations of the Commission (para. 4)

27

The Treaty of Lisbon has introduced a **new para. 4** to Article 108 TFEU, which enables the Commission to enact Regulations (Article 288 para. 2) for the implementation of

²⁸ ECJ Case C-204/97 *Portugal v Commission* [2001] ECR I-3204.

²⁹ ECJ Cases C-169/84 *Cofaz* [1986] ECR 414; C-367/95 P *Sytraval* [1998] ECR I-1752.

³⁰ ECJ Cases C-198/91 *Cook* [1993] ECR I-2522; C-313/90 *CIRFS* [1993] ECR I-1177.

³¹ ECJ Cases C-322/09 *NDSHT* [2010] ECR I-11914; C-362/09 *Athinaiki* [2010] ECR I-13275.

³² Interim Decision in GC T-52/12 R of 19.9.2012 *Commission v Greece* (Not yet published).

³³ ECJ Case C-294/90 *British Aerospace* [1992] ECR I-518.

³⁴ ECJ Case C-209/00 *Commission v Germany* [2002] ECR I-11695.

³⁵ See ECJ Case C-27/91 *URSSAF* [1991] ECR I-5538.

Council Regulations according to Article 109 TFEU. Thereby, the hitherto competence under Article 1 of Council Regulation 994/98³⁶ is now stipulated in the Treaty itself. In these Regulations, the Commission can substantiate the general block exemptions of the Council (such as group exemptions or *de minimis* exemptions, see Article 109 TFEU).

Regulation 994/98³⁷ continues to set forth the areas in which the Commission is entitled to enact regulations under Article 108 para. 4 TFEU.

**Article 109 [Implementing regulations]
(ex Article 89 TEC)**

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

- 1 Article 109 TFEU authorizes the Council to pass appropriate implementation Regulations with regard to Articles 107, 108 TFEU. Such abstract Regulations shall ensure the uniform and effective implementation of EU state aid law in each individual case. The specific reference to the procedure under Article 108 para. 3 TFEU in the wording of the article is an example, and does not exclude Regulations on other issues.
The Council decides on the basis of a proposal from the Commission, (Article 16 para. 3 TEU, Article 238 TFEU). Based on the Regulations of the Council, the Commission, in turn, may enact further Regulations according to Article 108 para. 4 TFEU in order to determine its practice regarding specific exempted areas.
- 2 Most prominently, **Procedural Regulation 659/99**¹ on the application of Article 108 TFEU is based on Article 109 TFEU. Furthermore, with Regulation 994/98² and Regulation 1998/2006 passed under Article 109, the Council has provided the basis for the Commission's **group exemptions** and *de minimis* exceptions (regarding the latter see also Article 107 para. 16).
- 3 In **Regulation 651/2014**, the Commission has declared certain groups of state aid compatible with EU internal market law, *inter alia* training aid, regional aid, aid for research and development and innovation, as well as aid for environmental protection.

**CHAPTER 2
RULES ON TAXATION**

Bibliography: *Banks*, The application of the fundamental freedoms to Member State tax measures: Guarding against protectionism or second-guessing national policy choices?, *European Law Review* 2008, 482; *Barents*, Charges of Equivalent Effect to Custom Duties, *Common Market Law Review* 1978, 415; *Barents*, Recent Case Law on the Prohibition of Fiscal Discrimination under Article 95, *Common Market Law Review* 1986, 641; *Cordewener/Kofler/van Thiel*, The Clash between European Freedoms and National Direct Tax Law: Public Interest Defences available to the Member States, *Common Market Law Review* 2009, 1951; *Schwarze*, The Member States' discretionary powers under the tax provisions of the EEC Treaty, in: Schwarze (ed.), *Discretionary powers of the Member States in the field of economic poli-*

³⁶ OJ 1998 L 142/1.

³⁷ Most recently amended by Regulation 773/2013, OJ 2013 L 204/11.

¹ OJ 1999 L 83/1, amended by Regulation 734/2013, OJ 2013 L 204/15.

² Amended by Regulation 773/2013, OJ 2013 L 204/11.

cies and their limits under the EEC treaty, 1988; *Snell*, Non-discriminatory Tax Obstacles in Community Law, International and Comparative Law Quarterly 2007, 339.

**Article 110 [General principle of non-discrimination]
(ex Article 90 TEC)**

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.

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I. National tax sovereignty and internal market

1

Tax legislation does not only constitute parliamentary law par excellence; it is as such probably also the most important policy-making instrument in general. Furthermore, the nature and extent of the sovereignty in taxation matters are decisive factors for the independence and autonomy of a community. It is therefore not surprising that any attempt to give up or relativize this traditional core element of sovereign nationhood for the benefit of the European integration process encounters considerable opposition from the Member States.¹ Articles 110–113 TFEU serve to dissolve the latent tension between the preservation of national tax sovereignty to the greatest possible degree and the aim of ensuring that the European internal market continues to function with a minimum of disruption. However, it has to be taken into account that tax diversity and the resulting competition for locational advantages are not per se incompatible with the internal market objective. Countries like Switzerland that have a cantonally differentiated tax system demonstrate this very clearly. Until today, tax law harmonisation or even unification has still not become an autonomous objective of the Union but it is always functionally related to the internal market objective and factually limited by the scope of this objective ('supporting and supplementary function' in respect of the realization of the rest of the treaty policies).

However, because of the primacy of Union law, Member States must always exercise their generally enduring sovereignty in tax matters (including matters of direct taxation) 'consistently with Community [now: Union] law'.²

¹ See also Article 113 TFEU mn. 2.

² ECJ Case C-279/93 *Schumacker* [1995] ECR I-225 mn. 21.

- 3 Even the Commission considers that there is generally no need for a cross-border harmonisation of the tax systems of the Member States. Therefore, the Member States are free to opt for the tax system that they consider most appropriate, provided they do not thereby violate provisions of Union law.³ Factually, however, the European fundamental freedoms, the general prohibition of discrimination, the general freedom of movement, but also the general prohibition on State aid increasingly narrow down the discretion of the national tax legislators, also and especially in the field of direct taxation.

4 **II. Overview**

The chapter on taxation specifically contains rules prohibiting discrimination in tax matters in the context of cross-border movement of goods throughout the Union. In Article 113 TFEU, the prohibitory provisions are supplemented by an authorisation of the Council to harmonise taxation. Article 110 para. 1 TFEU prohibits discriminatory taxation imposed on products imported by other Member States or – as held by the ECJ in its broad interpretation (see below mn. 21) – discriminatory taxes imposed on goods exported to other Member States. Article 110 para. 2 TFEU complements this prohibition; even if there are no similar domestic products, it is prohibited to protect other domestic productions from substitution competition caused by imported goods. Inversely, Article 111 TFEU prohibits the discriminatory promotion of the export of national products. Article 112 TFEU regulates direct taxation; as a border adjustment (direct) taxes require the approval of the Council. Article 110 TFEU is not applicable to products imported directly from third countries.⁴ These are subject to the measures and contractual arrangements based on Article 207 TFEU.⁵

- 5 The purpose of the provisions is to prevent that internal taxation or charges of any kind might distort the free movement of goods within the Union. They are meant to ensure a complete competitive neutrality of internal taxation imposed on domestic and imported products. A fundamental question is whether the financial burden is likely to influence the relevant market by reducing the potential consumption of the imported products in favour of those domestic products competing with them. Internal taxation should not discourage imports from other Member States for the benefit of domestic production.⁶ Products originating in non-Member States which are in free circulation in the Member States are treated like products coming from another Member State.⁷

6 **III. The concept of taxation and demarcation**

Articles 110–112 TFEU intend to supplement the **Articles 28 et seq. TFEU** by trying to close the gaps that would otherwise exist when it came to approaches to eliminate obstacles to the realisation of the free movement of goods. Consequently, the central concept of taxation should therefore be interpreted broadly ('of any kind') and in any case goes beyond 'taxation' in a purely technical sense (see mn. 11 below).

- 7 With their complementary functions, Articles 28 et seq. TFEU and Articles 110 et seq. TFEU aim at averting any national form of levying of charges that is capable of discriminating against products from or for other Member States and thereby distorts their free

³ COM (2001) 260 final.

⁴ ECJ Case C-284/96 *Tabouillot* [1997] ECR I-7484.

⁵ ECJ Case C-130/92 *OTO* [1994] ECR I-3293.

⁶ ECJ Case C-252/86 *Bergandi* [1988] ECR 1343.

⁷ ECJ Case C-130/92 *OTO* [1994] ECR I-3293.

movement within the Union.⁸ The absolute prohibition of charges having equivalent effect to customs duties under Article 28 TFEU and the (mere) prohibition of discrimination in Article 110 TFEU are based on different factual requirements and can therefore not be applied simultaneously to the same case. Charges having equivalent effect to customs duties only cover imported goods as such, while internal taxation within the meaning of Article 110 TFEU is an element encompassed by general domestic levy schemes which apply to both imported and domestic goods⁹, even if the charges factually only concern imported products¹⁰ or if separate systems exist for imported and local goods¹¹. The same applies to the assessment of other fees, such as charges levied for the health inspection of goods.¹² A compulsory contribution (parafiscal charge), the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it wholly offset the burden borne by those products, constitutes a prohibited charge having an effect equivalent to customs duties. If those advantages only partly offset the burden borne by domestic products, such a charge constitutes discriminatory taxation within the meaning of Article 110 TFEU.¹³

Article 110 TFEU contains a *lex specialis* rule to the general prohibition of discrimination, meaning **Article 18 TFEU**, and the prohibition of measures having equivalent effect to quantitative restrictions, meaning **Article 34 TFEU**.¹⁴

In view of State monopolies of a commercial character, **Article 37 TFEU** contains a prohibition against discrimination which applies as a *lex specialis* if a taxation system is linked to the exercise of the specific function of the monopoly. Unless such a link has been established, tax provisions are subject to Article 90 TFEU.¹⁵

Article 110 and **Article 107 TFEU** on prohibition of State aid can be applied cumulatively.¹⁶

IV. The prohibition of discrimination against similar products (para. 1)

1. Scope of application

The concept of domestic taxation imposed on products has to be interpreted broadly. It covers indirect taxes on goods (turnover taxes, excise duties), contributions (e.g. for trade promotion purposes¹⁷, charges¹⁸; registration fee for used vehicles¹⁹) and special levies. Direct taxes are subject to the special provision of Article 112 TFEU.

Indirectly imposed duties are subject to the prohibition of discrimination, too. Examples for such indirect duties are charges imposed for the transportation of freight that are levied pursuant to the respective transport distance and weight of the transported

⁸ ECJ Case C-206/06 *Essent Netwerk Noord BV v Aluminium Delfzijl BV* [2008] ECR I-5497.

⁹ ECJ Case C-15/81 *Gaston Schul* [1982] ECR 1409.

¹⁰ ECJ Case C-343/90 *Dias* [1992] ECR I-4703; admission tax for new vehicles in Denmark in ECJ Case C-383/01 *DBI* [2003] ECR I-6065.

¹¹ ECJ Case C-45/94 *Cámara de Comercio* [1995] ECR I-4396.

¹² ECJ Case C-132/80 *United Foods* [1981] ECR 995.

¹³ ECJ Case C-17/91 *Lornoy* [1991] ECR I-6523.

¹⁴ ECJ Case C-252/86 *Bergandi* [1988] ECR 1343; Case C-266/91 *Celulose Beira* [1993] ECR I-4357; Caes C-101/00 *Tulliasiamies* [2002] ECR I-7517.

¹⁵ ECJ Case C-86/78 *Peureux* [1979] ECR 897.

¹⁶ Established case-law of the ECJ since Case C-47/69 *France v Commission* [1970] ECR 487 mn. 11, 14.

¹⁷ ECJ Case C-78/76 *Steinike* [1977] ECR 595.

¹⁸ ECJ Case C-46/76 *Bauhuis* [1977] ECR 6.

¹⁹ ECJ Case C-47/88 *Commission v Denmark* [1990] ECR I-4530.

goods²⁰, taxes which are levied for the use of goods²¹ or stricter sanctionative systems for infringements of the obligation to pay value-added tax in case of import.

- 13 The concept of products originating from other Member States refers to all products which were – in the sense of Article 28 para. 2 TFEU – in free circulation within the Member States. This is in accordance with the purpose of the provision to eliminate restrictions on the free movement of goods. The origin of the product within the terms of customs rules is insignificant.

14 **2. Discrimination against imported products**

Any kind of treatment of a discriminatory nature is prohibited. A treatment is discriminatory as soon as imported products are burdened with higher charges than domestic products, regardless of the frequency or the scale of the circumstances complained of.²² In any event, the structure of the tax system must ensure that imported goods are not charged with taxes that are higher than similar domestic products.²³ However, a tax measure that discriminates against domestic products with regard to imported products is generally permissible under European law (however, see mn. 21 below).

- 15 The financial burden imposed on imported products has to be compared with the burden imposed on similar domestic products.²⁴ However, similar is not tantamount to identical. According to the settled case-law of the ECJ, which has interpreted the concept of similarity broadly, in order to determine whether products are similar it is necessary to consider whether they have similar characteristics and meet the same needs from the point of view of consumers, the test being not whether they are strictly identical but whether their use is similar and comparable.²⁵ In this context, the term ‘comparable’ refers to products which, at the same stage of production or marketing, have similar characteristics and meet the same need from the point of view of consumers (e.g. table wines, irrespective of its characterization as fruit wine or grape wine, and beer²⁶; different taxation of light cigarettes (which are predominantly imported) and dark cigarettes (which are mainly domestically produced) to the disfavour of the light cigarettes²⁷; domestic and foreign waste are obviously similar products and can therefore not be charged with different fees for their deposition²⁸).
- 16 Distinctions made pursuant to the common customs tariff under Article 31 TFEU or national tax laws are not decisive.
- 17 The comparison of the respective financial burden covers taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which corresponds to the stage at which the product is imported from other Member States.
- 18 An unequal treatment may result from a higher rate of duty, from the possibility to grant tax benefits or from a different assessment base.²⁹ This is the case, for example, if

²⁰ ECJ Case C-20/76 *Schöttle* [1977] ECR 247.

²¹ ECJ Case C-252/86 *Bergandi* [1988] ECR 1343; setting up of games machines.

²² ECJ Case C-105/91 *Commission v Greece* [1992] ECR I-5871; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4142.

²³ ECJ Case C-228/98 *Charalampos Dounias* [2000] ECR I-599.

²⁴ ECJ Case C-168/78 *Commission v France* [1980] ECR 360.

²⁵ ECJ Case C-302/00 *Commission v France* [2002] ECR I-2055 mn. 23.

²⁶ ECJ Joined Cases C-367/93 to C-377/93 *Roders* [1995] ECR I-2248.

²⁷ ECJ Case C-302/00 *Commission v France* [2002] ECR I-055 mn. 35.

²⁸ ECJ Case C-221/06 *Stadtgemeinde Frohnleiten and Gemeindebetrieb Frohnleiten* [2007] ECR I-9643 mn. 59.

²⁹ ECJ Case C-327/90 *Commission v Greece* [1992] ECR I-3052; Case C-68/96 *Grundig* [1998] ECR I-3797.

flat-rate charges are imposed on imported products while domestic products are subject to a sliding scale for the increase or reduction of taxation, provided that the fixed charge may result in a higher burdening of imported products (electricity import).³⁰ However, the application of a progression coefficient is permissible in so far as it does not have the effect of favouring the sale of domestically manufactured vehicles.³¹

When comparing the respective financial burden, taxes already paid in the country of origin must be fully taken into account. Double taxation, which leads to a higher overall financial burden on imported goods, is prohibited (e.g. taxes on imported used vehicles in the amount of 90 % of the taxes imposed on new cars).³² If value-added tax (VAT) is levied on the import of second-hand products, the remaining value of the VAT which was levied on the occasion of a previous transaction is not to be included in the calculation of the tax base; in fact, the VAT-rest must be deducted from the VAT that is imposed on the import.³³

Indirect discrimination is prohibited, too. A levy scheme that does not distinguish between imported and domestic products nonetheless has an indirectly discriminatory nature if the majority of the domestic production is covered by the lower tax rate, while almost all of the imported products are subject to the highest tax rate.³⁴ In contrast, a differentiation of taxation that is based on objective criteria and does not distinguish by the origin of the respective product does not entail an indirect discrimination if the differentiation pursues legitimate economic or social purposes (e.g. if the distillation of a wine surplus is supported under the EU-agricultural policy)³⁵; if certain categories of games machines are subject to a favourable treatment, depending on the audience and installation site.³⁶

3. Discrimination relating to exports

The prohibition of discrimination in Article 110 para. 1 TFEU goes further than suggested by its wording. It also covers charges that are imposed in case of domestic products being exported to other Member States.³⁷ This financial burden also constitutes an obstacle to the free movement of goods. As demonstrated by a comparison of Articles 30 and 35 TFEU, it was necessary to close the legal loophole.

V. The prohibition of indirect protection for other productions (para. 2)

1. Purpose

The free movement of goods can be affected by State taxes on imported goods even if similar domestic products are not available. Therefore, Article 110 para. 2 TFEU supplements the prohibition of discrimination of Article 110 para. 1 TFEU which should be examined as a matter of priority. The provision intends to prevent that internal taxation

³⁰ ECJ Case C-213/96 *Outokumu* [1998] ECR I-1801.

³¹ ECJ Case C-113/94 *Casarin* [1995] ECR I-4214 and Case C-421/97 *Tarantik* [1999] ECR I-3633; for different modalities concerning taxes on vehicles also Case C-265/99 *Commission v France* [2001] ECR I-2320.

³² ECJ Case C-345/93 *Nunes Tadeu* [1995] ECR I-490; Case C-375/95 *Commission v Greece* [1997] ECR I-5990.

³³ ECJ Case C-299/86 *Drexel* [1988] ECR 1213; Case C-101/00 *Tulliasiamies* [2002] ECR I-7517.

³⁴ ECJ Case C-230/89 *Commission v Greece* [1991] ECR I-1909; Case C-302/00 *Commission v France* [2002] ECR I-2055.

³⁵ ECJ Case 46/80 *SpA Vinal v SpA Orbat* [1981] ECR 77.

³⁶ ECJ Case C-252/86 *Bergandi* [1988] ECR 1341.

³⁷ ECJ Case C-142/77 *Statens Kontrol* [1978] ECR 1543.

protects other domestic productions from substitution competition. However, this requires the existence of a domestic product that is capable of displacing the imported product that has been subjected to an internal duty (e.g. legal permissibility of the German coffee tax).

- 23 Examples: protection of the sale of domestic coal by imposing taxes on British crude oil; beer/wine in Great Britain³⁸; cheap consumer wine/beer in France³⁹; brandy/whiskey in Italy⁴⁰.

24 **2. Substitution competition**

In order to assess whether a substitution competition can take place, possible future developments need to be taken into account. According to the ECJ, such an assessment may not merely sustain existing consumer habits since the internal market is meant to provide all consumers with equal access to products originating in other Member States and the consumers' habits can therefore change accordingly.⁴¹

25 **3. Indirect protection**

Unlike in the case of the comparison of taxes imposed on similar products under Article 110 para. 1 TFEU, it is impossible to carry out an arithmetic comparison of the burdens referred to in Article 110 para. 2 TFEU. Therefore it has to be determined under consideration of all relevant economic circumstances whether the taxation concerned is capable of providing indirect protection to internal productions.

26 **VI. Direct effect**

Article 110 TFEU is addressed to the Member States. Due to the direct applicability of the provision in the legal system of the Member States, the article overrides potentially conflicting national provisions.⁴²

- 27 In principle, these are Member State is obliged to reimburse charges that were levied in breach of the law of the European Union.⁴³ Due to the absence of applicable Union law, the repayment of improperly levied charges is carried out under the laws of the respective Member State.⁴⁴ In this context, it has to be noticed that it was possible to pass on such charges to the purchasers⁴⁵; the burden of proof must lie with the Member State.⁴⁶

***Article 111 [Ban on fiscal privileges in case of repayment of taxes]
(ex Article 91 TEC)***

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

³⁸ ECJ Case C-170/78 *Commission v UK* [1980] ECR 417.

³⁹ ECJ Case C-166/98 *Socridis* [1999] ECR I-3791.

⁴⁰ ECJ Case C-216/81 *Cogis* [1982] ECR 2701.

⁴¹ ECJ Case C-319/81 *Commission v Italy* [1983] ECR 601.

⁴² ECJ Case C-28/67 *Molkerei Zentrale Westfalen v Lippe* [1968] ECR 232.

⁴³ ECJ Joined Cases C-114/95 and 115/95 *Texaco* [1997] ECR I-4263.

⁴⁴ ECJ Case C-90/94 *Haar Petroleum* [1997] ECR I-4142.

⁴⁵ ECJ Joined Cases C-142/80 and 143/80 *Essevi* [1981] ECR 1413.

⁴⁶ ECJ Case C-343/96 *Dilexport* [1999] ECR I-600.

I. General comments

1

While Article 110 TFEU is meant to prevent obstacles to the free movement of goods that result from a discriminatory tax burden, the accompanying Article 111 TFEU prohibits a distortion of competition by an excessive discharge of intra-Union exports of domestic goods under the border tax adjustment procedure. A systematic interpretation in view of Article 112 TFEU indicates clearly that Article 111 TFEU applies only to product-related indirect taxation.

Unlike the State aid rules of Articles 107 et seq. TFEU, the prohibition of excessive repayments as a border adjustment is absolute. Unlike the State aid rules of Articles 107 et seq. TFEU, it does not provide exceptions. Article 111 TFEU is directly applicable in the Member States.

II. Limitation of repayments

3

Pursuant to Article 111 TFEU, the repayment of internal taxation on export is (only) subject to an upper limit. Any repayment shall not exceed the national taxation imposed directly or indirectly on the respective exported products. In this regard, a consolidation into a lump sum is permissible; the burden of proof, that the mandatory upper limit of Article 112 TFEU was met, lies with the Member States. As under Article 110 para.1 TFEU, indirect taxes, contributions and fees imposed on the exported products are decisive criteria for the calculation, regardless of the stage of production or marketing at which they were incurred. In contrast, taxes that are not levied on the products themselves, especially direct taxation concerning the producers, are not capable of constituting a tax base. A repayment of those taxes is not permissible.¹

The provision does not exclude the possibility that the exported products are burdened with higher charges than similar domestic products in the country of destination. This is the case, for example, if it was admissible not to grant any or hardly any repayment within the meaning of Article 111 AEUV. This competitive disadvantage can only be avoided by a harmonisation, as foreseen in Article 113 TFEU, of the particular taxation law.

Article 112 [Ban on compensation of taxation without prior approval] (ex Article 92 TEC)

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.

Article 112 TFEU supplements the Articles 110, 111 TFEU by clarifying that these provisions generally only cover the (product-related) indirect taxes, but not those direct charges that concern the particular enterprise. As far as such direct taxation is concerned, compensatory levies on import (Article 110 TFEU) and discharges or repayments on export (Article 111 TFEU) are generally prohibited within the intra-Union

¹ ECJ Case C-45/64 *Commission v Italy* [1965] ECR 1138; see Article 112 TFEU.

trade. Exceptions must be approved by the Council, which in turn may grant an exception only for a limited period of time.

2 So far it seems that this opportunity has not yet been used in practice.

**Article 113 [Harmonisation of indirect taxation]
(ex Article 93 TEC)**

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

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1 I. General remarks

The Articles 110–112 TFEU contain certain prohibitions of discriminatory tax laws applicable to the movement of goods within the Union. Therefore they require the actual existence of ‘tax borders’ between the Member States. Yet the creation of a real and comprehensive ‘internal market without frontiers’ is impossible unless the Member States’ tax rules are harmonised to the extent that make any kind of border adjustment superfluous. Article 113 TFEU provides the legal basis for a harmonisation of (product-related) indirect taxes.

2 In many respects, the provision contains a compromise between national tax sovereignty and the internal market objective¹: Firstly, it only covers those (indirect) taxes that relate to the product itself and which therefore are more easily quantifiable within a transnational comparison of particular financial burdens; it does not, however, cover systems of direct taxation although those are generally capable of having similar adverse effects on the internal market objective. Secondly, the term ‘harmonisation’ must be interpreted as a synonym for the concept of ‘approximation’ within the meaning of Article 114 TFEU and thus constitutes a less comprehensive measure of the same kind (German technical term: ‘wesensgleiches Minus’) than a total harmonisation of the particular laws; as far as indirect taxes are concerned, it seems that such a harmonisation is still not permissible. Thirdly, the legislative procedure is still organized in a way that requires that all Member States give their approval to interferences in their tax sovereignty (see mn. 6 below). Fourthly, the functional restriction to the internal market objective constitutes quite a substantial and factual limitation of the legislative authorization.²

3 The Treaty of Lisbon deleted a reference in Article 113 TFEU to the now obsolete period expiring on ‘31 December 1992’ and linked the usage of the legislative authorization to the (additional) requirement of avoiding a ‘distortion of competition’. The latter seems

¹ See Article 110 TFEU mn. 1.
² For the parallel problem see Article 114 TFEU: ECJ Case C-376/98 *Directive on advertising and sponsorship of tobacco products* [2000] ECR I-8419 esp. mn. 84.

to constitute an adaptation of the relevant case law of the ECJ. However, considering the previous formulation, the added value of the adaption is not entirely obvious³.

II. Relationship with other provisions

4

Article 113 TFEU constitutes a *lex specialis* in view of the authorisation in Articles 114 et seq. TFEU to harmonise applicable laws. However, specific conferment of powers in certain policy areas may encompass regulatory powers for the harmonisation of indirect taxes. This is of special significance because the unanimity requirement stipulated in Article 113 TFEU can be omitted in those cases (see for example Article 192 para. 2 lit. a TFEU: environmental 'provisions primarily of a fiscal nature').

III. Indirect taxes

5

The provision only applies to indirect taxes. This term is narrower than the term 'internal taxation' used in Articles 110 and 111 TFEU. In any event, the terminology used in the different Treaty languages varies considerably. Therefore product-related non-tax charges (for example fees or special levies) are probably not generally excluded from the possibility of harmonisation as stipulated in Article 113 TFEU. In addition to VAT and consumption tax, further potential subjects of harmonisation are, for example, capital transfer taxes, transport taxes, insurance taxes etc. In contrast, the harmonisation of direct taxes has to be based on Articles 114, 116 TFEU.

IV. Procedure

6

Regardless of the position adopted in particular by the Commission according to which Council decisions on taxation matters should be adopted by qualified majority in order to guarantee the necessary tax coordination within Europe⁴– see also the final report of Working Group VI 'Economic Governance' of the Convention (Hänsch-report)⁵ and the following one, in which this opinion had the majority appeal although being controversial), also the latest Treaty amendment enforced the principle of unanimity within the Council. This again shows the importance that the (vast majority of) Member States still attach to the national tax sovereignty. Therefore, legislative acts of the Council have to be adopted in accordance with a special legislative procedure and after a compulsory consultation of the European Parliament and the ESC.

Usually, directives will be the appropriate form for the adoption of the provisions by the Council. Nonetheless, in individual cases, also all other individual forms of action referred to in Article 288 TFEU can constitute suitable measures.

V. Secondary legislation

8

Article 113 TFEU is the basis of the value-added tax system that has been introduced by the Member States since 1967. The VAT system contains the right to deduct input tax and harmonises the tax base, chargeable events, duties of taxable persons, potential tax exemptions and the range of permissible rates of taxation (central: Council Directive of

³ ECJ Case C-376/98 *Directive on advertising and sponsorship of tobacco products* [2000] ECR I-8419, esp. mn. 84.

⁴ COM (2003) 548 final.

⁵ CONV 357/02, 6.

28 November 2006 (2006/112/EC) on the common system of value added tax. Especially in the context of the transition to the Union's self-financing capacity and the resulting fact that the Member States have to share the collected value added tax with the Union, the establishment of a Union-wide common tax base was indispensable. Since 1987, there have been several attempts to harmonise the rates of taxation. However, since none of these attempts were successful, the country-of-destination principle continues to apply to commercial movement of goods. Due to the eliminated border controls, the fiscal supervisions are carried out domestically (at the companies). Because this system entails a high level of administrative efforts, it is extremely susceptible to fraud.

- 9 By now, a number of more or less extensive harmonisation measures (by means of harmonisation directives) have been adopted in view of other consumption taxes (especially with regard to alcohol, tobacco, fuels and heating fuels) and other indirect taxes (tax on capital gains, truck toll schemes).
- 10 In order to combat tax avoidance, tax evasion and tax fraud, different legislative acts of the Union regulate the mutual assistance between the tax authorities of the Member States (Council Regulation (EC) 1798/2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) 218/92 and Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC). Also, a new Commission Implementing Regulation (EU) 1156/2012 of 6 December 2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation is relevant in this context.

CHAPTER 3 APPROXIMATION OF LAWS

Bibliography: *Basedow/Wurmnest* (eds), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct*, 2011; *Craig/de Búrca*, *European Union Law*, 5th ed. 2012, 92-93; *Dawes/Lynskey*, The ever-longer arm of EC law: the extension of community competence into the field of criminal law, CMLR 2008, 131; *de Sadeleer*, Procedures for derogations from the principle of approximation of laws under article 95 EC, CMLR 40 (2003), 889; *Dougan*, Minimum Harmonization and the Internal Market, CMLR 37 (2000), 853; *Fahey*, Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority, *Modern Law Review* 74 (2011), 581; *Geber*, Rechtsangleichung nach Art. 114 AEUV im Spiegel der EuGH-Rechtsprechung, JuS 2014, 20; *Kieninger*, Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt, 2002; *Lang/Pistone/Schuch/Staringer*, Horizontal Tax Coordination, 2012; *Lessambo*, Fundamentals of European Union Direct Tax, 2010; *Maletic*, The Law and Policy of Harmonisation in Europe's Internal Market, 2013; *Mc Gee/Weatherill*, The Evolution of the Single Market – Harmonization or Liberalisation – MLR 53 (1990), 578; *Müller-Graff*, Die Rechtsangleichung zur Verwirklichung des Binnenmarktes, EuR 1989, 107; *Radaelli/de Francesco*, Regulatory Quality in Europe. Concepts, Measures and Policy Processes, 2007; *Schwartz*, Rechtsangleichung und Rechtswettbewerb im Binnenmarkt – zum europäischen Modell, EuR 2007, 194; *Silny*, Die binnenmarktbezogene Rechtsangleichungskompetenz des Artikel 95 EG, 2007; *Ullrich/Konrad*, Gewerblicher Rechtsschutz, in: *Dauses (ed.)*, Handbuch des EU-Wirtschaftsrechts (as of 2013), mn. 112 *et seq*; *von Danwitz*, Rechtsangleichung, in: *Dauses (ed.)*, Handbuch des EU-Wirtschaftsrechts (as of 2010), mn. 83 *et seq*; *Weatherill*, Preemption, Harmonization and the Distribution of Competences to Regulate the Internal Market, in: *Barnard/Scott (eds)*, The Law of the Single European Market, 2002, 2; *Weatherill*, The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a 'Drafting Guide', *German Law Journal* 12 (2001), 828.

Article 114 [Approximation of laws in the internal market]

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 proce-

and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

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

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

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

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

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

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

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

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

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

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

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

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1 I. Approximation of laws within the Internal Market

1. Overview

According to Article 3 para. 3 TEU, one of the aims of the Union is the creation of a **European internal market**. This aim often conflicts with **regulatory fragmentation** of diverging national product requirements such as for example different standards for labelling, construction, or composition of goods. These fragmentations are primarily addressed and remedied by the fundamental freedoms of the TFEU, in particular Article 34 TFEU. However, if the specific national requirements are justified under Article 36 TFEU or the Cassis-jurisdiction of the ECJ, the fragmentation may legally continue, and impede the free movement of the goods. This is where the additional instrument of Article 114 TFEU becomes crucial. Legally permitted factual impediments to a functioning internal market can be overcome by harmonisation of the respective national rules on EU level.

2 Therefore, the **harmonisation or approximation of national legal provisions** in order to achieve a functional internal market is amongst the **core tasks of the Union**, despite the omission of former Article 3 para. 1 lit. h TEC in the post-Lisbon Treaties, which contained an explicit assignment of tasks with regard to the approximation of laws. However, the competences under Article 114 TFEU do not pursue an end in themselves. They are aimed at supporting the objectives and policies of the Union defined elsewhere in the Treaty; this is also emphasized by the fact that the harmonisation or approximation of laws is not included in the catalogue of Union objectives of Article 3 TEU. Article 114 TFEU aims at continuously simplifying the approximation of laws with the aim to realise the internal market (Article 26 TFEU).

3 The opinion that unfair competition and obstacles to the exercise of fundamental freedoms caused by **diverging national legal provisions** have a **negative impact** on internal Market integration, is not only the prevailing one amongst legal scholars, but also strongly influences the concept of Articles 114 *et seq.* TFEU. Some economic scholars, however, take a different point of view: based on the notion of competing legal and regulatory systems they largely favour the idea of plurality of legal orders and are therefore sceptic vis-à-vis the ‘dogma’ of (absolute) harmonisation.¹

¹ Critically and with considerable arguments, Kieninger, 350; see also Schwartz, EuR 2007, 194.

Articles 114–118 TFEU share the common goal of fostering the EU internal market; 4 this aim constitutes a common and characteristic feature of the provisions. Because of its paramount importance in practice, Article 114 TFEU, which was incorporated into Union law by the SEA, has now also systematically developed into the **central provision** for the **harmonisation** or **approximation of legal provisions** within the Union by **inter-changing the position** with Article 115 TFEU, which initially headed the chapter.² The – certainly possible – deletion of the practically irrelevant Articles 116 and 117 TFEU has been omitted during the last reform. Article 118 TFEU, in turn, exceeds the traditional scope of approximation of laws, given its broad regulatory task to create uniform European legal titles. It therefore seems systematically somewhat misplaced in the context of Articles 114 TFEU *et seq.* In addition, for the approximation of laws in the area of intellectual property, Articles 114 and 115 TFEU remain applicable beside the (more specific) Article 118 TFEU.

The variety of concurring EU legal bases to harmonize or respectively approximate legal provisions causes significant difficulties in practice when **choosing the applicable legal basis**. According to general principles and under consideration of the *lex specialis* principle, the respective measures' objective regulatory focus has to be taken into account. For that reason, **special competence rules** that refer to the internal market take precedence over Articles 114, 115 TFEU; these rules include, for example, Article 43 TFEU (agriculture), Article 50 para. 2 lit. g TFEU (company law), Article 53 TFEU (professional regulations), Article 91 TFEU (transport), Article 113 TFEU (indirect taxation), Article 172 TFEU (network interoperability³), Article 192 read in conjunction with Article 193 TFEU (environmental protection⁴), and Article 207 TFEU (external trade policy).⁵ Pursuant to the prevailing opinion, Article 115 TFEU is applied **subsidiarily to Article 114 TFEU**.⁶ Essentially, its scope of application is limited to those matters that are not covered by Article 114 TFEU due to Article 114 para. 2 TFEU. Furthermore, its application is subject to a lack of *lex specialis* provisions.

Because of the abstract, all-encompassing wording of Articles 114, 115 TFEU in the style of sweeping clauses, the Articles have proved to be among the politically most important foundations of deeper legal integration in the EU internal market. In fact, they allow for Unionwide harmonisation in policy areas where no direct EU competences exist, as long as these measures can be founded on internal market requirements. However, for these reasons, these provisions have faced increasing criticism from a legal policy perspective.⁷

2. The notion of harmonisation

Approximation of laws means the harmonisation or **approximation** of legal provisions of the Member States **to a standard defined by the Union**. It does not solely (and not necessarily) concern the removal or reduction of differences of the respective national regulations. However, the objective of creating the internal market may also require a fundamental reorganisation of the respective national field of law in accordance with the principles required by Union law. Thus, irrespective of their denomination in the different legal bases (approximation, harmonisation, standardisation), approximation measures can comprise everything from measures merely ending individual outliers in na-

² von Danwitz, mn. 92.

³ See also ECJ Case C-271/94 *Parliament v Council* [1996] ECR I-1689.

⁴ Case ECJ Case C-300/89 *Titanium Dioxide* [1991] ECR I-286.

⁵ Comprehensive references provided in S/B/H/S/Herrnfeld Art. 114 AEUV mn. 5.

⁶ Case ECJ Case C-350/92 *Spain v Council* [1995] ECR I-1985.

⁷ For example Gareth, CMLR 2006, 63; Dawes/Lynskey, CMLR 2008, 131.

tional legislation(s) compared to the average member State's standard, to full blown harmonisation of the respective field of law.

8

3. Subject of harmonisation

Subject to harmonisation according to Article 114 TFEU as well as Article 115 TFEU are **laws, regulations and administrative provisions** of the Member States which concern the **establishment and functioning of the internal market**. The internal market is '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' (Article 26 para. 2 TFEU). Therefore the essential objective is the creation of **equal competitive conditions**. These equal conditions have to be assessed from a practical instead of a merely formalistic point of view. For example, prohibition to produce cigarettes that do not comply with EU law for the export to third countries does not directly aim at the improvement of the conditions for the functioning of the internal market; however, such prohibition may still be based on Article 114 TFEU if it aims at preventing the circumvention of a particular prohibition that was issued for that purpose.⁸

9

4. Techniques

The objective of approximation of laws may be pursued in a variety of ways: due to the increased number of Member States and the expansion of EU law into further fields of law, the original strategy to pursue an extensive harmonisation of the relevant substantive law (**complete harmonisation**) has reached factual limits. More recently this strategy has therefore been complemented or – especially in areas beyond mere technical standardisation – replaced by the setting of European minimum standards as well as the **obligation of mutual recognition** of normative or administrative national standards ('new strategy').⁹

10

In order to achieve the approximation of Member State's laws, Union law may oblige the Member States to adhere to certain **non-governmental standards** (such as technical norms of standardising bodies) or oblige Member States to accede to **international conventions** on the harmonisation of a certain subject area.

11

By now, the **practice** of approximation of laws has already outgrown the core area of **eliminating technical trade barriers**. Today it generally comprises all policy areas assigned to the Union for the purpose of legal regulation. Broad areas of **civil and commercial law** (such as labour and employment law, consumer protection law), **special administrative law** (such as higher education law, public procurement law, tax law, environmental law), and – within narrow boundaries – recently also **criminal law** and **criminal procedural law** are affected.¹⁰

12

II. Scope of application

1. Origination and dogmatic

Article 114 TFEU was introduced into Union law by the SEA. Through the Lisbon Treaty, it was placed at the beginning of Chapter 3 as the 'central norm' for the approximation of laws¹¹. Article 114 TFEU is applicable unless more specific provisions apply.

⁸ Case ECJ Case C-49/01 *British American Tobacco* [2002] ECR I-11550.

⁹ See Commission White Book COM [1985] 310 final.

¹⁰ *Dawes/Lynskey*, CMLR 2008, 131.

¹¹ *von Danwitz*, mn. 92.

Article 114 TFEU itself is **lex specialis** to Article 115 TFEU (see above mn. 4) insofar as norms affecting the competition within the internal market are subject of the approximation. In that regard, the main purpose of the respective measure is decisive for the applicability of Article 114.¹²

Firstly, the **characteristic of Article 114 TFEU compared to Article 115 TFEU** is that the ordinary legislative procedure – i.e. qualified majority within the Council – applies, while Article 115 TFEU requires unanimity. In turn, in order to compensate for the possibility to be overruled by the majority, Member States have the right under Article 114 paras. 4–6 TFEU to maintain national provisions establishing a higher standard of protection of certain interests, even in the event of harmonisation. Secondly, Article 114 TFEU provides for the possibility to take all appropriate measures, whilst, under Article 115 TFEU, the European legislator is bound to the adoption of a Directive. These two procedural facilitations have led to a marginalisation of Article 115 TFEU in practice.

2. Realisation of the objectives of Article 26 TFEU

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In general, the reference to the internal market objective opens an **extremely broad scope of application** for Article 114 TFEU. A functioning internal market does not only comprise the unconditional realisation of fundamental freedoms, but also the establishment of fair competition conditions between the market participants.¹³ The achievement of the goals set out in Article 26 TFEU may be determined to be at stake when different national provisions are *potentially* able to cause ‘significant distortions of competition’ and therefore a distortion of the internal market; it is in fact not necessary that such a distortion has actually occurred.¹⁴ Even if it has already harmonised a certain area of the internal market, the Commission is not prevented from **modifying** the respective **harmonisation measures** if it finds more effective means to achieve its aim, even though one could argue that once harmonisation has taken place and the distortion was thereby eliminated, the conditions of Article 114 TFEU are no longer fulfilled.¹⁵

However, Article 114 TFEU must not be misinterpreted with regard to its scope.¹⁶ It must, in particular, not undermine the **principle of conferred powers** enshrined in Article 5 para. 1 TEU. For that reason the utilisation of this competence norm is only permitted if the **internal market** objective in fact turns out **to be the central intention** of the Commission with regard to the regulation at issue.¹⁷ The respective intention can be determined, for example, by taking the particular regulatory deliberations into account. Furthermore, it must be ‘actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market’ (‘impact assessment’).¹⁸ The fulfilment of these prerequisites is subject to judicial review. Also, the mere divergence of national provisions in a certain field does not suffice in order to take measures under Article 114 TFEU. This divergence must in addition lead to market distortions. Otherwise, the Article would in fact constitute a sweeping clause for harmonisation in virtually all areas of law.¹⁹

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¹² ECJ Cases C-155/91 *Directive on Waste* [1993] ECR I-939; C-187/93 *Parliament v Council* [1994] ECR I-2857.

¹³ ECJ Case C-300/89 *Titanium Dioxide* [1991] ECR I-2867.

¹⁴ ECJ Case C-376/98 *Tobacco Advertising* [2000] ECR I-8419.

¹⁵ ECJ Case C-58/08 *Vodafone* [2010] ECR I-4999.

¹⁶ With a critical view *Weatherill*, GLJ 12 (2001), 828.

¹⁷ Most recently ECJ Case C-137/12 *Commission v Council* [2013] ECR I (not yet published).

¹⁸ See *Craig/de Búrca*, 93.

¹⁹ ECJ Case C-376/98 *Tobacco Advertising* [2000] ECR I-8498, at mn. 83 *et seq.*

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3. Derogation (para. 2)

Para. 2 is the result of the resistance of the Member States during the negotiations of the SEA to subject certain **politically particularly sensible matters** to majority decision-making. Today this original intent has, however, become more or less obsolete, as majority decisions have become the general rule in EU decision-making, for example with regard to the specific competences in Articles 46, 53, 56 TFEU, to which the ordinary legislative procedure applies. This should have resulted in a respective reduction of the material scope of para. 2 which has, however, not happened.

- 17 'Fiscal provisions' are explicitly exempted from the scope of application of Article 114 TFEU. The Court has stated that, 'by reason of their general character, those words cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules.'²⁰ Exempted are also provisions relating to the 'rights and interests of employed persons' (labour and employment law provisions, see Article 48, 153 para. 2 TFEU). As far as the freedom to provide services is concerned, Article 62 in conjunction with Article 53 para. 2 TFEU applies; Articles 63, 66, 75 TFEU apply to the movement of capital. As a result, remaining subject-matter of Article 114 TFEU is, essentially, the area of free movement of goods (Articles 34 *et seq.* TFEU). The competence under Article 114 TFEU is in particular relevant with regard to non-economic **standards of protection according to Article 36 TFEU**, which continue to fall under the competence of the Member States; furthermore, Article 114 TFEU applies to those rules which are maintained on the basis of the *Cassis*-doctrine of the Court.²¹ Such national measures must not lead to new divergence of national regulations.²² In order to prevent this, Article 114 TFEU allows for the approximation or harmonisation of national measures based on Article 36 TFEU or 'specific interests' according to *Cassis*, but only if significant distortions of competition are probable. Article 114 TFEU **does not constitute a general competence** to regulate all aspects of the internal market. The specific measure must be aimed at *improving* the internal market in a certain field. Mere differences between national provisions and an only abstractly existing threat to fundamental freedoms or only potentially resulting distortions of competition do not suffice. Also, the prohibition of harmonisation established by other provisions of the Treaties must not be circumvented. Nevertheless, harmonisation is not excluded if the aim and main focus of the respective measure is covered by Article 114 para. 1 TFEU, even if it also affects areas exempted from harmonisation.²³

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III. Harmonisation measures and procedure

1. Type of measures

In contrast to Article 115 TFEU, Article 114 TFEU does not limit the Union's legislative competence to passing Directives. 'Measures' of harmonisation may be **all legal acts** listed in Article 288 TFEU, especially Regulations. However, the **Declaration** of the Conference of Representatives of the Government of the Member States, which was included into the **SEA Final Act**, states that the instrument of a Directive shall be given precedence if harmonisation involves the amendment of legislative provisions in one or more

²⁰ ECJ Case C-533/03 *Commission v Council* [2003] ECR I-1025 on the free movement of persons.

²¹ S/B/H/S/Herrnfeld Art. 114 AEUV mn. 6 *et seq.*

²² ECJ Case C-350/92 *Spain v Council* [1995] ECR I-1985.

²³ ECJ Cases C-376/98 *Tobacco Advertising* [2000] ECR I-8498; C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7149.

Member States. **'Measures for the approximation'** include measures relating to a specific product or class of products as well as individual measures concerning these products.²⁴ Furthermore, the **prohibition** of trade in certain variants of a product may eliminate market distortions and thus be rightfully based on Article 114 TFEU.²⁵ Even the **establishment of EU agencies** can be founded on Article 114 TFEU if the agency is tasked with levelling the conditions of competition in the EU.²⁶

Irrespective of the respective act, special attention must be paid to the adherence to the **principles of subsidiarity and proportionality** according to Article 5 TEU. This task is now also assigned to the national parliaments.²⁷

2. Procedure

According to para. 1, the **ordinary legislative procedure** according to Articles 289 para. 1, Article 294 TFEU applies to the passing of acts under Article 114 TFEU. The ESC has to be consulted according to Article 304 TFEU.

As far as the content of the respective measure is concerned, **para. 3** states that the proposal of the Commission shall assume a **high level of protection** in the areas of health, (technical) safety and environmental protection, as well as consumer protection. When assessing this high level of protection, the Commission has to take into account new developments based on scientific facts. This obligation also applies to the Council and the Parliament. The requirement under para. 3 shall induce the adaptation of national protection to higher (EU) standards and prevent a regression towards the 'lowest common denominator'. However, the institutions exercise a **wide margin of discretion** when executing this obligation. Their assessment can permissibly be influenced by the different normative and technological stages of development as well as economic reasonableness. Harmonisation does not have to be based on the highest level of protection identifiable among the Member States; otherwise, the 'opting-up' possibility of paras. 4 and 5 would be redundant.

The Commission has to take into account the **different levels of development** of the Member States; insofar it may propose appropriate measures, including exceptions for certain Member States, in order to take these differences into account. These specific rules must be strictly limited in time and may not disrupt the functioning of the internal market beyond what is necessary (Article 26 TFEU).

3. Safeguard clause (para. 10)

A measure under Article 114 TFEU may contain safeguard clauses which authorise the Member States to take provisional measures for the protection of the legal interests listed in Article 36 TFEU. These **safeguard clauses** must be explicitly contained in the respective harmonisation measure (**para. 10**). An **analogous application** to other legal interests is **not permissible** due to the exceptional character of the provision²⁸. The existence of a safeguard clause according to para. 10 does not prevent further derogation of a Member State according to paras 4 or 5. The provisional measures are subject to **control by the Commission**, which monitors the correct application and potential abuse of such clause. In the event that the Commission is in disagreement with the respective Member State as

²⁴ ECJ Case C-359/92 *Germany v Council* [1994] ECR I-3681.

²⁵ ECJ Cases C-210/03 *Swedish Match* [2004] ECR I-11893; C-434/02 *André Arnold* [2004] ECR I-11825.

²⁶ ECJ Cases C-217/04 *ENISA* [2006] ECR I-3771 and C-270/12 *United Kingdom v European Parliament/Council*, judgment of 22 January 2014, not yet reported.

²⁷ See Protocol No 1 of the Treaty of Lisbon, OJ 2008 C 115/1.

²⁸ See for example AG Tesaura, ECJ Case C-359/92 *Germany v Council* [1994] ECR I-3681.

to the application of the clause, it may, as *ultima ratio*, initiate a simplified infringement procedure according to para. 9.

24 **IV. Deviating measures of the Member States (paras. 4–9)**

1. Objective

The possibility to maintain or introduce stricter national protective provisions for non-economic legal interests or goods despite European harmonization can be seen as a **counterbalance** to the introduction of the majority decision in para. 1. Article 114 TFEU distinguishes between **maintenance** (para. 4) and **introduction** (para. 5) of special national regulations.²⁹

25 **2. Prerequisites**

The maintenance or introduction of stricter national protective provisions by a Member State is limited to the scope of application of the respective EU measure taken under Article 114 para. 1 TFEU (and not according to Article 115 TFEU). Recourse to paras. 4 or 5 is not possible where the harmonisation measure does not regulate its subject matter comprehensively, but leaves a certain discretion to the Member States how to implement it.³⁰

26 Every Member State is empowered to refer to this possible exception. This empowerment is independent from whether the respective Member State has voted for or against the measure under Article 114 para. 1 TFEU in the Council. In turn, the harmonisation measure only sets a **minimum standard**, which the Member State is entitled to exceed under the prerequisites of paras 4 and 5 (**‘opting-up’**).

27 The **maintenance** of stricter national provisions (para. 4) requires that they are justified by major needs within the meaning of Article 36 TFEU or in relation to the protection of the working environment (see Article 153 para. 4 TFEU) or to environmental protection (see Article 193 TFEU). The principle of **proportionality of means and ends** is strictly to be adhered to. For example, a Member State may found its application of para. 4 on an assessment of a health risk that differs from the assessment of the health risk by the Union legislator when issuing the harmonisation measure; the Member State must then prove that the respective national regulations ensure a higher level of protection of public health and that they are not disproportionate.³¹

28 With regard to the policy areas of the **working environment** as well as the **environment**, stricter national provisions can not only be maintained, but also be **introduced** (para. 5) in order to enhance the protection in these fields, in accordance with Articles 153 para. 4 and 193 TFEU. Para. 5 takes into account that these legal interests cannot be based on the grounds set out by Article 36 TFEU.³² Further prerequisites are that the existence of the respective problem is specific to the relevant Member State, and that the related national provisions are based on new scientific evidence.

29 **3. Procedural provisions**

The national protective measure requires the **approval** of the Commission (para. 6 subpara. 1). If the Commission remains silent, such approval is deemed to have been

²⁹ ECJ Case C-3/00 *Denmark v Commission* [2003] ECR I-2690.

³⁰ As to the question whether the harmonization is intended to be comprehensive see ECJ Case 215/87 *Schumacher* [1989] 617.

³¹ ECJ Case C-3/00 *Denmark v Commission* [2003] ECR I-2690.

³² ECJ Case C-3/00 *Denmark v Commission* [2003] ECR I-2690.

obtained after six months from the notification by the Member State to the Commission (subpara. 2). This time limit may be extended according to subpara. 3 in particularly complex matters.

The Commission verifies whether or not the prerequisites of paras 4 or 5 are met, respectively. It has to check that the respective provisions of the Member States are **no means of arbitrary discrimination**, that they are no **disguised restrictions on trade** between the Member States (see Article 36 s. 2 TFEU) and that they do not constitute an **obstacle to the functioning of the internal market**. The approval by the Commission is a prerequisite for the legitimacy of national protective provisions.³³ The direct effect of a Directive after the end of the transposition period is not affected by an ongoing approval procedure.³⁴

In case it approves the introduction of national protective provision according to para. 5, the Commission is obliged to immediately **examine** whether its **harmonisation measure** needs to be adapted and shall propose such adoption if necessary (**para. 7**).

Para. 8 grants the Member States a right of initiative for law-making in case of **health issues** that are not caused by environmental hazards, which are caused by the Commission's harmonisation measure. The provision takes into account that this particular case is not covered by the possibilities of derogation provided by paras. 4 and 5. Thus, such health risks can only be countered on EU level. Nevertheless, the right of Member States to initiate EU legislation runs counter to the systematic position of the Commission as the initiator of EU law-making. However, this exception seems acceptable because of the importance of the concerned rights.

If other Member States disagree with the Commission regarding the approval of a deviating national procedure, they may bring an **action for annulment** to the ECJ (Article 263 para. 1 TFEU³⁵). In turn, the Commission's refusal to approve a provision may be challenged with the same action by the requesting Member State.³⁶

Also admissible are **infringement proceedings** by the Commission or by another Member State against the Member State that abuses the capacity to issue national protective measures. For reasons of procedural effectiveness and in deviation from Articles 258, 259 TFEU, a preliminary proceeding is not necessary; the matter may be brought directly before the ECJ (**para. 9**). The possibility of invoking the incompatibility of national protective measures with Union law before national courts remains unaffected.

Article 115 [National law with immediate effect on the internal market; approximation of laws]

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

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³³ ECJ Case C-41/93 *France v Commission* [1994] ECR I-1841.

³⁴ ECJ Case C-319/97 *Kortas* [1999] ECR I-3160.

³⁵ See for example ECJ Case C-41/93 *France v Commission* [1994] ECR I-1841.

³⁶ ECJ Case C-512/99 *Germany v Commission* [2003] ECR I-877.

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1 I. Scope of application

In practice, Article 115 TFEU has for a long time lost its initial function of a central norm of harmonization to Article 114 TFEU. The systematic change in the order of these provisions and the clarification within the wording of Article 115 TFEU (‘without prejudice to Article 114’) now reflects this shift in importance in the TFEU. Considering the almost identical legal prerequisites of both provisions, it seems unlikely that the new wording will establish a formal subsidiarity of Article 115 TFEU towards Article 114 TFEU. The provision can hardly be characterised as *lex specialis*.¹ Due to the aggravated procedural requirements of Article 115 TFEU, which still requires unanimity within the Council, the **recourse to this provision is not particularly attractive** in practice. In addition, the very marginal participation of the European Parliament, which has only to be consulted, makes the use of this Article hardly acceptable from a political point of view.

2 Also with regard to the policy areas for which Article 114 TFEU may not be used due to its para. 2, Article 115 TFEU will rarely be applicable. These fields are mostly covered by a comprehensive range of special enabling provisions.² Nonetheless, Article 115 TFEU continues to be important for the **harmonisation of direct taxes** (concerning indirect taxes see Article 113 TFEU). Here, because of the specific relevance for national sovereignty in this crucial policy area, and considering the current state of integration, the applicable principle of unanimity within the Council seems to be appropriate also for the foreseeable future.

3 II. Substantive prerequisites of Article 115 TFEU

1. Laws, regulations and administrative provisions

Subject of harmonisation are statutory as well as administrative provisions. Statutory and administrative provisions are held to be all **general regulations** issued by the state or otherwise **attributable to the State** or a **public authority**. This includes also unwritten legal rules. Technical norms issued by private entities constitute legal provisions if they are applied in a generally binding manner (e.g. as ‘generally recognised codes of practice’ or as ‘technical standards’).

It is not required that the respective subject is already regulated in every single Member State; if the current status disturbs the functioning of the internal market, the Commission may also act pre-emptively in order to channel the regulation of issues requiring regulation in a specific direction.

4 2. Effect on the internal market

Article 115 TFEU requires that the legal or administrative provisions which shall be harmonized directly affect the establishment or functioning of the internal market. It is submitted that this requirement has to be interpreted restrictively; the respective national

¹ Differently: ECJ Case C-350/92 *Spain v Council* [1995] ECR I-1985.
² See Article 114 TFEU, mn. 5.

provisions must have the potential to **negatively affect** either the functioning of the internal market and its basic principles, or the establishment of a competitive business environment within the EU. According to a **different, less restrictive view** it is said to suffice that the harmonisation fosters the functioning of the internal market.³ This view is supported by the fact that the Treaty provides for specific (additional) measures according to Articles 116, 117 TFEU for the most relevant case of impediments, namely the distortion of competition. Pursuant to this view it is decisive that the lacking harmonisation is ‘noticeable’ in its effect on the functioning of the internal market. Both approaches to the interpretation of Article 115 TFEU will usually lead to similar results as long as it is duly considered that in principle, Article 115 TFEU does **not** want to **eliminate** but rather **maintain** the respective legislative competence of the Member States. However, the **overly broad interpretation** of the prerequisites of Article 115 TFEU in practice, based on the assumption that the **harmonisation as such** constitutes a **progress in integration**, often leads to a disregard of the Member State’s said competence. In addition, the general competence of the Member States is often contradicted by the very high level of detail of the Commission’s harmonisation measure.

III. Procedure

5

Unlike Article 114 TFEU, Article 115 TFEU **only** allows for harmonisation through **directives**. The decision within the Council on the proposal of the Commission requires unanimity. This requirement takes account of the broad scope of application of the provision (‘sweeping clause’), and of the significance of the measures for the legal order of the Member States. The European Parliament as well as the Economic and Social Committee (only) have to be consulted.

In order to enable the Commission to adopt EU harmonisation measures to changes in 6 circumstances in the relevant field, for example due to new scientific findings or technological progress, the Commission is regularly empowered to issue **implementing measures** according to Article 290 TFEU. When it comes to ‘duly justified special cases’, the Council may also empower itself to issue modifying Directives, which have to be adopted with qualified majority (Article 291 para. 2 TFEU).

Article 116 [Provisions distorting competition]

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

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³ For an overview see S/B/H/S/Holz Müller, Art. 115 AEUV, mn. 5.

1 I. General remarks on Articles 116 and 117 TFEU

Divergent national legal provisions may cause significant distortions of competition, in particular by leading to different cost burdens on the respective market participants. This can be said for both the national economies in their entirety and, particularly, the market chances of single economic sectors. While Articles 114 and 115 TFEU address the first object of distortion (such as for example particularly low taxes in a Member State), Articles 116 and 117 TFEU provide the legal bases for action with regard to the second group of **specific distortions affecting certain economic areas or undertakings**. Article 116 TFEU shall serve to eliminate **existing** distortions of competition while Article 117 TFEU is meant to **pre-emptively** avoid future distortions.

- 2 Articles 116 and 117 TFEU were originally intended to take on a central role in eliminating the remaining **specific distortions of competition**.¹ In comparison to Articles 114 and 115 TFEU, they were drafted to be more flexible, more cooperative, and simpler.² **In practice** however, Articles 116 and 117 TFEU have remained **insignificant**. Not a single directive has yet been issued pursuant to Article 116 para. 2 TFEU. This may result from practical difficulties when attributing cost disadvantages to particular legal provisions, as well as from the increasing use of Articles 114, 115 TFEU within the scope of application of Articles 116 and 117 TFEU. On the occasion of the **Intergovernmental Conference of Lisbon in 2007**, Article 116 TFEU was (surprisingly) referred to in the context of possible distortions of competition when Great Britain opted out in the area of justice and home affairs (Title V TFEU).³ Articles 116, 117 TFEU might actually receive a **new scope of application** in the event of an increased use of the enhanced cooperation of certain Member States (Articles 326 *et seq.* TFEU). Article 326 para. 2 TFEU explicitly states with regard to enhanced cooperation, that such cooperation must not lead to a distortion of competition within the EU.
- 3 According to Article 116 para. 2 s. 2 TFEU, Articles 114, 115 TFEU as well as **all other provisions** of the Treaties remain **applicable** alongside Articles 116, 117 TFEU.

4 II. Prerequisites of Article 116 TFEU

The purpose of Article 116 TFEU is to **prevent** that Member States **perpetuate legal differences favourable** to specific (national) companies or economic sectors.

- 5 Union measures require **already existing differences** in laws, regulations or administrative provisions of the Member States in order to be permissible.⁴ These provisions must distort the conditions of competition in the internal market which need to be eliminated. **Influencing conditions of competition** to the advantage or disadvantage of certain economic sectors constitutes such a distortion of competition. In order to constitute a distortion in the sense of the Article, competition has to be affected **objectively** and **long-lasting**. The terms 'distortion' and 'need of elimination' both point to the required intensity of the effect on competition. The Commission has a wide scope of discretion when establishing the respective prerequisites (para. 1).

¹ See the so called *Spaak* Report of 21 April 1956, Doc. MAE 120d/56, p. 64.

² ECJ Case 6/64 *Costa v E.N.E.L* [1964] ECR 585.

³ Final Act, OJ 2007 C 306/231, Declaration 26 para. 2.

⁴ See Article 114 TFEU mn. 7.

III. Measures

6

If the prerequisites of Article 116 TFEU are fulfilled, the Commission takes up consultations with the respective Member State or Member States for the purpose of eliminating the respective distortions (para. 1). If this objective cannot be accomplished, the necessary **harmonisation Directives** will be issued according to the ordinary legislative procedure (para. 2 s. 1, in conjunction with Articles 289, 294 TFEU). In deviation of the previous, pre-Lisbon legal situation, such legislation is passed with full involvement of the **European Parliament**. The only procedural difference compared to passing legislation under Article 114 TFEU is the non-consultation of the ESC.

According to the wording of the provision, the failure of the consultations according to para. 1 automatically leads to the passing of a harmonisation Directive under para. 2. In the light of the systematic context of para. 2 s. 2, which further permits all **other appropriate measures**, it is submitted that the respective institutions are however equipped with discretion how to properly react to a deviation by the respective Member State. Therefore measures according to para. 2 s. 2 can be adopted not only cumulatively but also alternatively to a Directive according to para. 2 first sentence.

Article 117 [Distortion by planned provisions]

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 116 shall not apply.

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I. General remarks

1

Art. 116 TFEU wants to ‘prevent the differences between the legislation of the different nations with regard to the objectives of the treaty from becoming more pronounced’.¹ In addition to Article 116 TFEU, Article 117 TFEU therefore provides the possibility for a **preventive intervention by the Commission**, if the legislative agenda of a Member State ‘threaten[s], even potentially, to distort competition’.² The Member State concerned is

¹ ECJ Case 6/64 *Costa v E. N. E.L* [1964] ECR 585.
² With regard to Article 116 TFEU see ECJ Case 6/64 *Costa v E. N. E.L* [1964] ECR 585.

obliged to consult with the Commission about its respective desire (para. 1 s. 1). This consultation has to include other concerned Member States. If the Member State fails to consult the Commission, the Commission may initiate an infringement procedure according to Articles 258, 259 TFEU. Alternatively or in parallel, she may give a recommendation pursuant to Article 117 para. 1 s. 1 TFEU, or adopt further remedial measures according to para. 2 (in conjunction with Article 116 TFEU).

2 **II. Recommendation of the Commission (para. 1 s. 2)**

Irrespective of whether it has been consulted by the Member State or becomes aware of the respective desire otherwise, the Commission enters into **consultations** with the relevant Member State. There are no formal requirements for this procedure. The Court refers to an ‘appropriate procedure of consultation’³. After the consultation, the Commission may recommend to the Member State concerned such measures as it deems appropriate to avoid the distortion in question. The **recommendation** may aim at the omission or the modification of the proposed measure, or at a corresponding modification of provisions in other Member States. If in turn it came to the opinion that no distortion is imminent, it informs the Member State accordingly.

3 **III. Remedial measures (para. 2)**

If the respective Member State disregards the recommendation of the Commission according to para. 1 s. 2 and enacts the proposed measure nevertheless, and if this effectively causes a distortion of competition, this distortion can be remedied by harmonisation according to Article 116 para. 2 TFEU in conjunction with Articles 289, 294 TFEU. However, such measures shall only obligate the respective Member State, which essentially means that the Member State is compelled to **revoke the incriminated legal amendment**. The measures may not request from other Member States the amendment of legal provisions (para. 2 s. 1).

4 According to **para. 2 s. 2**, the procedure pursuant to Article 116 TFEU is **barred** if the distortion is detrimental only to the Member State that failed to comply with the recommendation of the Commission. Following the rationale of Articles 116, 117 TFEU, which aim at individual or area-specific distortions⁴ and given the meanwhile established rights of individuals under European law⁵, this **provision** appears to be highly **questionable**.

5 In the event that the Commission has wrongfully assessed the impact of an intended measure which ultimately lead to a distortion of competition, or if the recommendation it has given to the respective Member State has eventually not prevented a distortion, this existing distortion can be addressed on the basis of Article 116 TFEU.

Article 118 [Protection of intellectual property]

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual

³ ECJ Case 6/64 *Costa v E. N. E. L* [1964] ECR 585.

⁴ See Article 116 mn. 1.

⁵ Settled case law since ECJ Case 26/62 *Van Gend en Loos* [1963] ECR 3.

property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

Bibliography: *Eck*, Europäisches Einheitspatent und Einheitspatentgericht – Grund zum Feiern?, GRUR Int. 2014, 114; *Haedicke/Grosch*, European Patents and the Draft Agreement on a European Union Court, ZGE 2010, 196; *Hilty*, Intellectual Property and the European Community's Internal Market Legislation, IIC 2004, 760; *Luiginbühl*, Das europäische Patent mit einheitlicher Wirkung, GRUR Int. 2013, 305; *Ohly/Pila (eds.)*, The Europeanization of Intellectual Property Law: Towards a European Legal Methodology, 2013; *Pfeifer*, A Legal View of Selected Aspects and the Development of Digital Europe, GRUR Int. 2010, 671; *Schulze/Schulte-Nölke (eds)*, European Private Law – Current Status and Perspectives, 2011; *Walter/Lewinski (eds)*, European Copyright Law, 2010.

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I. Policy background

1

Art. 17 para. 2 CFREU states: 'Intellectual property shall be protected'. The explicit highlighting of intellectual property as a fundamental right in EU constitutional law takes into account the ever increasing practical relevance of non-tangible property rights. The accentuation furthermore emphasizes that intellectually property nowadays faces manifold threats and dangers. Because of its effect on innovation and investment, the protection of intellectual property constitutes an **essential element of the success of the internal market**. In order to avoid competitive distortions it is therefore necessary to create a **preferably uniform Union-wide level of protection** both in substantial and procedural regard.

The protection of intellectual property rights faces new challenges, which evolve simultaneously to the technical progress; they are especially caused by the ever growing possibilities of both lawful and unlawful distribution of intellectual property via the **internet**. Also, **product and service piracy**, which – not least as a consequence of the intensified trade with States that (still) have a limited sensibility for the worthiness of protecting intellectual property – is causing damages amounting to billions of Euros per year. In order to address these challenges on the European level, Article 118 TFEU is aimed at facilitating the enforcement of intellectual property rights by **creating uniform standards and titles** for patents, trademarks, designs, copyright, and other intellectual property rights.

II. Genesis of the legal bases

3

Article 118 TFEU, corresponding to the content of Article III-176 TCE, for the first time established an explicit legal basis for the **creation of relevant European legal ti-**

ties in the area of intellectual property law. It was the aim of the European Convention to limit the use of Article 308 TEC (Article 352 TFEU) and instead provide a more specific legal basis in this field.

- 4 Hitherto, merely Article 308 TEC established a legal basis for law-making in the field of intellectual property¹; this article was applied in the area of trademark, design and plant varieties protection.² Also initially on the basis of Article 308 TEC, efforts to establish a **Community (now: Unified) Patent** have been made since 1975.³

5 **III. Scope of application**

With an explicit reference to the internal market objective (Article 26 TFEU), Article 118 TFEU establishes a **comprehensive basis** for a uniform Union-wide protection in the field of intellectual property. It may serve as a legal basis not only **for substantial law**, but also with regard to **procedural issues**, and even **administrative bodies** (see para. 1: 'setting up Union-wide authorisation, coordination and supervision arrangements'). Article 118 TFEU, however, **does not** constitute a **conferral of competences** from the Member States to the Union; it merely clarifies that the former recourse to Article 308 TEC (Article 352 TFEU) is no longer required and is in fact also inadmissible in the future (*lex specialis*).

- 6 The **systematic position** within the chapter on approximation of laws may suggest that Article 118 is also *lex specialis* with regard to harmonisation measures in the field of intellectual property, thus excluding the recourse to Articles 114, 115 TFEU. However, it seems that the clear **wording** of the clause precludes this. It is submitted that beyond the creation of uniform European legal titles along with procedural provisions in this regard, it is still necessary to refer to the general rules on approximation of laws when issuing legislative measures for the purpose of harmonisation of national law in the field of intellectual property.⁴ Therefore, **harmonisation** measures for the **protection of intellectual property** according to the different national intellectual property rights of the Member States remain likely to be adopted **on the basis of Articles 114, 115 TFEU**⁵.
- 7 There is **no valid argument** for restricting the scope of application of Article 118 TFEU primarily to industrial property protection and practically exclude copyright.⁶
- 8 Finally, measures under Article 118 TFEU have **to be distinguished from the** European Patents issued by the **European Patent Office** in Munich. These are exclusively based on a treaty under international public law in the framework of the European Patent Organisation, and outside the EU framework. This organisation has (beyond the 27 EU Member States) additional members such as Switzerland, Turkey, or Iceland.

¹ See Opinion 1/94 [1994] ECR I-5267,

² See Regulation 40/94 on the Community trade mark, OJ 1994 L11/1, codified version: Regulation 207/2009 on the Community trade mark, OJ 2009 L78/1; Regulation 6/2002 on Community Design, OJ 2002 L3/1, amended by Regulation 1891/2006, OJ L386/14; Regulation 2100/94 on Community plant variety rights, OJ 1994 L227/1, amended by Regulation 15/2008, OJ 2008 L8/2.

³ See Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System (Harthoff Report) of 26 February 2009, as well as Recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of an Agreement creating a Unified Patent Litigation System, SEC (2009) 330 final.

⁴ For a different opinion see S/B/H/S/Holz Müller, Art. 118 AEUV mn. 18, with further references.

⁵ For the first time Directive 87/54 of 16 December 1986 on the legal protection of topographies of semiconductor products, OJ 1987 L24/36.

⁶ For a different opinion see V/HvH/Rossi, Art. 118 AEUV mn. 5.

IV. Measures and procedure

9

When issuing ‘**measures**’, comprising all legal acts according to Article 288 TFEU, the **ordinary legislative procedure** (Article 294 TFEU) applies according to para. 1. From the EU perspective, this entails a considerable progress when compared to the former procedure according to Article 352 TFEU. However, a universal regime for an intellectual property right ought to encompass (at least) two legal acts – one according to para. 1 and another one according to para. 2.

Majority voting according to Article 294 TFEU **does not apply to language arrangements**, i.e. especially the question in which languages the future European legal titles may be or have to be formulated; according to **para. 2**, a unanimous Council Regulation is necessary in this respect (only). The European Parliament merely needs to be consulted. Insofar, compared to Article 308 TEC, this entails a regression of the level of integration in this specific area.

Article 118 para. 2 TFEU emphasises the particular importance Member States still ascribe to language issues. This question is so sensitive politically that it decisively prevented an agreement of all twenty-seven Member States on a European Unified Patent. The success of establishing a common trademark regime (administered by the Office for Harmonisation in the Internal Market – Trade Marks and Designs) in Alicante, which privileges only five languages, will most likely not be repeated in the future.

Instead, for law-making in the field, the vast majority of Member States is likely to continue to resort to the instrument of **enhanced cooperation according to Article 20 TEU**. This instrument was chosen in 2011 for the adoption of an EU Unified Patent and patent litigation system, due to the fact that an unanimous decision according to para. 2 was unachievable.⁷ Italy and Spain refused to vote for the system proposed by the Commission, precisely because of the language issues described above. In the aftermath of the Council Decision to enable the willing Member States to pursue the Unified Patent and litigation system by the means of enhanced cooperation, these two States initiated an annulment procedure against the Decision. They claimed that Article 20 TEU was not applicable within the scope of Article 118 TFEU, because the latter norm established exclusive competence of the EU for the introduction of European intellectual property rights. The ECJ has **rejected the view of Spain and Italy** and confirmed that enhanced cooperation is possible also in the area of intellectual property rights.⁸ In particular, the Court rejected the argument that enhanced cooperation in the field would amount to a circumvention of the unanimity requirement for language issues under Article 118 para. 2 TFEU.⁹ Although a further annulment procedure initiated by Spain against the Regulations 1257/2012 and 1260/2012 themselves is still pending¹⁰, the general possibility of having recourse to enhanced cooperation within the scope of application of Article 118 TFEU is henceforth assured.

The language issue is **irrelevant for** intellectual property rights which do not require registration. These rights, such as **copyrights**, are automatically generated in the language in which they are drawn up.

⁷ Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU), resulting in Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012 L361/1 and Regulation 1260/2012, OJ 2012 L 361/89 regarding the respective language regime.

⁸ ECJ Joined Cases C-274/11, C-295/11 *Italy/Spain v Council* [2014] ECR, not yet reported.

⁹ *Ibid.*, at paras. 33 et seq.

¹⁰ Pending ECJ Cases C-146/13 and C-147/13, OJ 2013 C171/29 and C171/30.

V. Individual European intellectual property rights

The term **intellectual property** is to be interpreted widely. It encompasses 'at least the following intellectual property rights (...): copyright, rights related to copyright, *sui generis* rights of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned'.¹¹

- 15 Up to the revision of EU primary law by the Lisbon Treaty, **several rights** have been created on EU level under Article 308 TCE (Article 352 TFEU): The **European Trade Mark** Regulation 40/94 provides for a centralized European registration process for trade marks, (in parallel, Directive 89/104/EC has harmonized the national trade mark laws on the basis of Article 114 TFEU). Regulation 6/2002 has created a **European Design** – also with parallel harmonisation of the respective national laws through Directive 87/71/EC. Both rights are administered by the **Office for Harmonisation in the Internal Market – Trade Marks and Designs**. Furthermore, specific – *sui generis* – rights have been established, namely Plant Variety Rights¹² and the protection of geographical indications for agricultural products¹³. In other areas, the EU has restrained itself to the mere **harmonisation** of national laws on the basis of Articles 94 and 95 TEC (Articles 114 and 115 TFEU)¹⁴; in particular, in 2004 it has adopted measures under Article 114 TFEU for the enforcement of national intellectual property rights across Member States¹⁵.
- 16 The long-term efforts to create a **Unitary Patent** and **uniform patent litigation system** have finally reached a breakthrough in December 2012, when the European Parliament voted positively on the EU Council's compromise proposals for two draft **Regulations** implementing this right. These draft Regulations were adopted according the EU's legislative procedure of 'enhanced co-operation' by twenty-five Member States, without participation of Italy and Spain. Legal action of Italy and Spain in front of the ECJ against the Council decision to allow for recourse to enhanced cooperation for these two Regulations remained unsuccessful (see above mn. 12); however, a further recourse of Spain against the Regulations themselves is still pending.¹⁶ Nevertheless, they entered into force on 20 January 2013. They will only become applicable as of the date of entry into force of the Agreement on a Unified Patent Court.¹⁷ This Agreement, as an international treaty between twenty-five Member States, needs to be ratified by at least 13 of its

¹¹ Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, OJ 2005 L94/37.

¹² Regulation 2100/94 on Community Plant Variety Rights, OJ 1994 L227/1.

¹³ Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ 1992 L208/1.

¹⁴ Directive 87/54 on the legal protection of topographies of semiconductor products, OJ 1987 L 24/36; Directive 96/09 on the legal protection of databases, OJ 1996 L77/20; Directive 91/250/EEC on the legal protection of computer programs, OJ 1991 L 122/42; Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ 1992 L346/61; Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993 L248/15; Directive 93/98 on the harmonizing the term of protection of copyright and certain related rights, OJ 1993 L 290/9; Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L167/10; Directive 2001/84 on the resale right for the benefit of the author of an original work of art, OJ 2001 L 272/32.

¹⁵ Directive 2004/48 on the enforcement of intellectual property rights, OJ 2004 L 157/45.

¹⁶ Pending ECJ Cases C-146/13 and C-147/13, OJ 2013 C 171/29 and C 171/30.

¹⁷ Agreement on a Unified Patent Court of 19 February 2013, OJ C 175/1.

signatories, including France, Germany, and the United Kingdom, in order to become effective.¹⁸

Once the Regulations on the Unitary Patent and the Agreement on a Unified Patent Court will become effective, it will be possible to obtain a **unitary legal patent title**, ensuring uniform protection for an invention across the twenty-five participating Member States. Most of the provisions governing the Unified Patent will be implemented into the **national law** of the Member States from the Agreement on a Unified Patent Court. 17

TITLE VIII ECONOMIC AND MONETARY POLICY

Bibliography: *Bénassy-Quéré/Coeuré/Jacquet/Pisani-Ferry*, Economic Policy Theory and Practice, 2010; *Blanke*, The Economic Constitution of the European Union, in: *Blanke/Managiarneli* (eds), The European Union after Lisbon, 2012, 369; *Borger*, The ESM and the European Court's Predicament *Pringle*, *German L.J.* (14) 2013, 113; *Buti/Sapir*, EMU and Economic Policy in Europe, 2002; *Dawson*, Reforming EU Economic Governance: The Legislative Response to the Euro Crisis, *MJ* (4) 2011, 588; *De Grauwe*, Economics of Monetary Union, 9th ed. 2012; *Eichengreen*, European Monetary Unification, 1997; *Farina/Tamborini*, Macroeconomic Policy in the European Monetary Union: From the Old to the New Stability and Growth Pact, 2007; *Häde*, Die Europäische Währungsunion in der internationalen Finanzkrise – An den Grenzen europäischer Solidarität?, *Europarecht* (45) 2010, 854 *Häde*, The Treaty of Lisbon and the Economic and Monetary Union, in: *Blanke/Managiarneli* (eds), The European Union after Lisbon, 2012, 421; *Hatje*, Die Reform des Stabilitäts- und Wachstumspaktes: Sieg der Politik über das Recht?, *DÖV* 2006, 597; *Merino*, Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance, *CMLR* (49) 2012, 1613; *Mundell*, A Theory of Optimum Currency Areas, *American Economic Review* 51 (1961), 657; *Pipkorn*, Legal arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union, *CMLR* (31) 1994, 263; *Ruffert*, The European Debt Crisis and European Union Law, *CMLR* (48) 2011, 1777; *Ryvkin*, Saving the Euro: tensions with European treaty Law in the European Union's Efforts to Protect the Common Currency, *Cornell Int'l LJ* (45) 2012, 227.

Article 119 [European economic constitution; principles] (ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

¹⁸ Status of ratifications available at http://ec.europa.eu/internal_market/indprop/patent/ratification/index_en.htm. To date, only Austria has ratified the Agreement.

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1 I. Overview of Title VIII

In Title VIII of the TFEU, the economic and monetary policy of the Union are explained in further detail. According to **Article 3 para. 4 TEU**, the establishment of an economic and monetary union with the Euro as (common) currency is defined as one of the main tasks of the European Union. The conferral of competences in the fields of economic policy and monetary policy is imbalanced. While the **monetary policy** has become an exclusive competence of the Union (the responsibility for which is vested mainly in the ESCB), the **economic policy** is in many cases still in the domain of the Member States who have to treat it as an issue of common interest (Article 121 para. 1 TFEU) and only partly as a matter which is directly governed by the Union level.

Article 119 TFEU finds its predecessor norm in Article 4 TEC. The old wording has been taken over with only minor changes. The provision can be termed the basic norm of the EUs economic governance policy. Already the EEC Treaty contained rules on economic policy (Article 103 et seq. EEC, later Article 102a et seq. EEC), relating to cooperation in economic and monetary matters, conjunctural policy and the balance of payments. They, however, were much less detailed and strict than the post-Maastricht provisions.

3 II. Economic context

The monetary policy and the economic policy are two different policy fields which, however, are linked with each other. Article 119 TFEU has a function as overarching provision, making this interconnection clear.

4 Even before the introduction of the Euro as the common currency of the Euro area, economists highlighted the importance of macroeconomic convergence and coordination between the Member States. An **economic union without a minimum of economic coordination would lead to a highly unstable and unsustainable monetary union.**

5 From an economic perspective, the stability of a transnational single currency can be assessed by applying the ‘**theory on optimum currency areas**’ (OCA) developed predominantly by *Mundell*¹ and further elaborated later by various scholars. According to OCA theories, OCA have some major **preconditions**: (a) a high level of factual (not only legal) labour mobility, (b) free movement of capital in the currency area, (c) relatively convergent business cycles of the Member States, limiting the occurrence of asymmetric shocks – (d) as a stabilising momentum a system of insurances and transfers between

¹ See for instance *Mundell*, A Theory of Optimum Currency Areas, American Economic Review 51 (1961), 657 et seq.

strong⁴ and economically disadvantaged areas might be added.² In the **Euro area**, point (d) has always been problematic, while point (b) is fully realised in the internal market of the EU. The fulfilment of the requirements set out in points (a) and (c) varies in the EU with a significant non-convergent economic development between northern and southern Member States. It is subject to debate among economists to what extent the EU forms an optimum currency area. The monetary union of the EU has probably been correctly termed a **heterogeneous monetary union**. *Eichengreen* has highlighted already in 1991 that, in order to eliminate the negative effects of the regionally imbalanced development under point (c), significant transfer payments in the sense of a fiscal federalism may be necessary.³ Such transfers could, for example, be realised in the social insurance sector.⁴ It should be noted again that economic preconditions for a monetary union cannot be replaced by wishful political thinking, the requirements developed by OCA theorists describe economic processes that can be safeguarded but not created or abandoned by law.

The theory on OCA shows that there is an economic need for introducing a certain 6 form of common economic policy when introducing a single currency. The Treaty text makes this connection clear by stating in Article 119 para. 2 TFEU that the **monetary policy is introduced 'concurrently' with the economic policy**. Already the **Delors Report** (Report on economic and monetary union in the European Community of 17 April 1989) concluded: 'Economic union and monetary union form two integral parts of a single whole and would therefore have to be implemented in parallel.'⁵ Interestingly the Delors Report also emphasizes that the European structural policy as a means of **transfer payments** between European regions can serve as a stabilising instrument for the European monetary union used '[in] order to reduce adjustment burdens temporarily.'⁶ In particular such payments can lower the need for increased labour mobility which is in practice difficult to achieve.

The economic context given above explains why economic coordination is a necessary 7 part of the European monetary union. However, the common economic policy should not be limited to that **guardian function**. While the guardian function is important, additional (political) aims can be pursued by the Member States and the Union under Articles 119 et seq. besides it (see Article 120 TFEU).

III. Content of Article 119 TFEU

8

In its **first and second paragraph**, the present article describes the nature of the economic and monetary union. It does not contain a separate Union competence. Article 119 para. 3 TFEU contains a catalogue of guiding principles (stable prices, sound public finances and monetary conditions and a sustainable balance of payments).

With stable prices, sound public finances and monetary conditions and a sustainable 9 balance of payments, para. 3 names **preconditions for the sustainable functioning** of the economic union and in particular of the monetary union.

² Cf. *De Grauwe*, 23 et seq. The use of criteria differs among scholars.

³ See *Eichengreen*, Is Europe an Optimum Currency Area?, NBER Working Paper No 3579 – 1/1991, 25.

⁴ *De Grauwe*, 207 et seq.

⁵ Delors Report mn. 21.

⁶ Delors Report mn. 29.

IV. Economic policy

1. Definition

The term 'economic policy' is not explicitly defined in Article 119 TFEU. However, para. 1 contains a description of the elements on which it is based: a close coordination of Member States' economic policies, the internal market of the EU and the definition of common objectives (Article 121 para. 2 TFEU).

The term 'economic policy' is used in different ways and is understood in a broader or narrower manner, depending on the context of usage. In general, economic policy can be defined as political decisions concerning a) the allocation of resources, b) the macroeconomic stabilization and c) income redistribution between actors or regions.⁷

The term is used in a similarly broad meaning in Article 119 TFEU, although with a focus on macroeconomic stabilization. It excludes, however, the monetary policy which is dealt with separately in Articles 127 et seq. TFEU.⁸ This broad interpretation is not undisputed. A dissenting opinion however, understanding the term in a narrow sense (economic policy minus such policy fields which have been regulated separately), does not reflect the *telos* of Article 119 TFEU, that is the importance of a coherent (macro) economic policy for the stability of the monetary union. In practice, it is true that economic policy in the sense of Articles 119 et seq. TFEU is often fiscal policy; but although important, fiscal policy is only one part of a more comprehensive economic governance.

- 11 The term 'economic policy' in Article 119 TFEU could thus be translated as **(macro) economic governance**, including legislative measures, administrative measures and political decisions. The term is therefore not to be understood as a legislative competence but in a much broader and more overarching sense. Accordingly Article 119 TFEU calls for the economic policy of the Union and the Member States to be carried out in accordance with the (competence order of the) Treaties. The economic policy has **three foundational components**: the economic policy of the Member States, the internal market of the EU and the definition of broad (economic) objectives. As far as the internal market is concerned, in particular those rules that ensure factor mobility (free movement of capital and workers) are relevant for the stability of the monetary union.

2. Distribution of legislative competences

Article 119 TFEU does not introduce a separate legislative competence but only a duty to coordinate the economic policies of the individual Member States and of the Union as a matter of common interest. Therefore, Article 119 TFEU constitutes a common responsibility of the individual Member States and the Union level for a coherent economic policy irrespective of the distribution of legislative competences. Economic policy in terms of fiscal policy, taxation, regional economic policy or infrastructure etc. is still mainly a task of the Member States. Where legislative competences have been conferred to the Union, in particular in respect to the internal market, the Union can perform its own economic policy which has to be brought in line with the individual policies of the Member States and vice versa. In cases where the implementation of EU legislation by the Member States (Article 291 TFEU) has an impact on macroeconomic development (for example when Member States use EU structural funds), coordination with a view to

⁷ Bénassy-Quéré/Coeuré/Jacquet/Pisani-Ferry, 12, 20 et seq.

⁸ See also Schwarze/Hattenberger, Article 120 AEUV mn. 5 and GS/Wittelsberger, Article 98 EGV mn. 9.

a coherent economic policy may be necessary (see for instance Articles 174 and 175 TFEU).

3. Instruments of economic governance

13

The European Union today knows a number of economic governance mechanisms, some of which can be found in EU primary law while others are based on secondary legislation or an international agreement between the Member States; they can be roughly grouped together as follows:

- The Stability and Growth Pact (various legal instruments of primary law and secondary legislation)
- The Six Pack and the Two Pack Legislation (secondary legislation connected to the Stability and Growth Pact)
- The European Semester (a policy tool, partly integrated into secondary legislation)
- The Fiscal Compact (based on a public international law treaty) (mn. 17)
- The Euro+ Pact (based on the open method of coordination)
- Europe 2020 (a long-term political strategy framework)
- To a certain extent also the ESM (a public international law instrument based on Article 136 para. 3 TFEU) (see Art. 121 mn. 10).

V. Monetary policy

14

Concurrently (see mn. 6 above) with the economic policy, a common single currency – **the Euro** – is introduced (para. 2). The Treaty provisions on the Euro only relate to Member States who have introduced the single currency and are in most cases not applicable to such Member States who are not (yet) using the Euro currency (Article 139 TFEU). For historical reasons, the pre-Lisbon text still used the term ECU (European Currency Unit), in practice the single currency was always called Euro. The Euro was introduced in 1999 (from 2002 onwards also in the form of banknotes and coins). Introduction, issuance and policy decisions concerning the single currency are an exclusive competence of the EU (Article 3 para. 1 lit. c TFEU). When entering the final stage of the economic and monetary Union in 1999, the partaking Member States have conferred their **sovereign rights in monetary matters** to the Union. At the Union level, the respective competences are taken over in particular by the European System of Central Banks (ESCB) – which is independent from political decision makers (Article 130 TFEU). Some competences, however, are reserved to the Union's legislature (see Articles 133 and 138 TFEU for example). The exclusive competence encompasses both, the more **internal aspects of monetary policy**, for instance relating to monetary supply, including the issuance of banknotes, the definition of interest rates, or to the stable functioning of the payments system and the more **external aspects of monetary policy** such as measures relating to exchange rates or foreign currency reserves.

Article 119 TFEU functions only as a prologue for the more detailed provisions on monetary policy which can be found in Articles 127 et seq. TFEU.

VI. The objectives of para. 3

15

Article 119 para. 3 TFEU contains **objectives** that the Union and the individual Member States have to pursue when implementing the economic and monetary policy: **stable prices, sound public finances and monetary conditions and a sustainable balance of**

payments. Article 119 para. 3 TFEU contains a **binding provision** which addresses not only the Union but also the Member States. When applying the provisions of Articles 119 et seq. TFEU, the Union *and* the Member States have the obligation to make sure that all measures are taken in line with these principles. The principles named here are not replacing the more general aims and objectives defined in Articles 2, 3 TEU. In particular the Union is bound by the principles of Articles 2 and 3 TEU also in these policy fields; the principles named in Article 119 para. 3 TFEU therefore are of a **complementary nature**.

- 16 As the sovereign debt crises in several Member States have recently shown, sound public finances and the avoiding of macroeconomic imbalances are crucial for the stability of the monetary union and the whole project of European integration. The same is, to a lesser extent, true for price stability, meaning the avoiding of significant inflation or deflation in the internal market or portions thereof. The term ‘monetary conditions’ is concerned with a stable monetary supply which has to be ensured by the ECB.⁹
- 17 The importance of sound public finances for the stability of the single currency is shown again by the **Fiscal Compact** (Treaty on Stability, Coordination and Governance in the EMU of 2 March 2012), which contains inter alia an obligation of its partaking Member States to include in their national legal orders binding provisions which ensure a national budgetary policy that supports sound public finances (Article 3 Fiscal Compact).¹⁰ The Fiscal Compact is a treaty under public international law which is binding to most of the EU Member States but excludes the United Kingdom and the Czech Republic. Others are parties to the Treaty in general but not to the fiscal provisions of its Title III.
- 18 Article 119 para. 3 TFEU is further implemented by various provisions of the Treaty, important examples include Articles 121 para. 4, 126, 127 para. 1 TFEU.
- The objectives of Article 119 para. 3 TFEU are binding to the Union and the Member States. While the Member States are supervised relatively strictly and the ESCB is bound by relatively clear and strict rules laid down in its statute, rules on the soundness of Union finances exist to a lesser extent.

CHAPTER 1 ECONOMIC POLICY

Article 120 [Market-oriented policy environment] (ex Article 98 TEC)

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

- 1 Article 120 TFEU further elaborates the principles laid down in Article 119 TFEU. The article has been introduced by the Maastricht Treaty.

⁹ Streinz/*Kempen*, Article 119 AEUV mn. 30.

¹⁰ More general, see also COM (2010) 250, 4 et seq.

The article deals with the economic policies of the Member States and with the economic guidelines mentioned in Article 119 TFEU and regulated in detail in Article 121 para. 2 TFEU.

In its **first sentence**, Article 120 TFEU addresses the Member States and stresses that the common economic policy is finally serving the greater common interest of the Union as a whole, by referring to Article 3 TEU. However, a sole reference to Article 3 TEU leaves a broad discretion to the Member States of how these objectives can be best achieved and what measures are deemed necessary by the individual Member State. Therefore, the establishment of broad guidelines defining concrete economic policy goals are necessary in order to coordinate the macroeconomic development in the Union and to prevent (or reduce) imbalances of any kind. These instruments are further dealt with in Article 121 TFEU. Besides the guidelines in Article 121 para. 2 TFEU, legislation based on Article 121 para. 6 TFEU plays a practically significant role in this respect.

In its **second sentence**, the article tries to find a formula that is able to describe the character of the economy that the Union and the Member States are called for to implement. The provision speaks of 'an open market economy with free competition, favouring an efficient allocation of resources'. A comparison with other authentic language versions of the Treaty makes clear that the efficient allocation of resources is not an objective besides the creation of an open market economy but that the provision assumes that the efficiency of resources allocation is an (automatic) result of the openness of the market economy. The provision shows a favourable **attitude towards a more ordoliberal economic approach** and is therefore not politically neutral.

However, this is not the final word on the character of the EU's conception of economic policy. Article 120 TFEU explicitly calls for the **economic policy to serve the objectives laid down in Article 3 TEU**, which inter alia advocates: 'the creation of a social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'. One could add the ideas of solidarity, non-discrimination, territorial cohesion etc. Article 120 TFEU has to be interpreted in the light of these more general objectives.

Hence, Article 120 TFEU does not prevent the Union from implementing **interventionist measures** in accordance with the specific policy fields of the Treaties. Against this background, there is a broad political margin of appreciation for the EU and the Member States when interpreting and applying Article 120 TFEU. Traditionally, interventionist tendencies have been significant in particular in the agricultural market. The Union has always known markets that are more open than others. Only when the economic policy would systematically turn major economic sectors into command economies, the limit of appreciation would be reached.¹ In the EU, like in most nation states, it is in the final responsibility of the political decision makers to define the framework for macroeconomic development with a view to the *bonum commune*.

The provisions of the article are legally binding and can be interpreted and applied by the ECJ as any other norm of the TEU and TFEU. However, since the provisions are broad and leave room for legislative discretion, the article does not contain any enforceable individual rights.²

¹ See also Schwarze/Hatje, Article 119 AEUV mn. 10 with further reference.

² ECJ Case C-9/99 *Echirolles Distribution* [2000] ECR I-8207 mn. 25. The decision refers to Article 102a TEC, which was later replaced by Article 98 TEC.

**Article 121 [Coordination of the economic policies]
(ex Article 99 TEC)**

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

2. The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.

The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

5. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

6. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

Bibliography: *Artis/Buti*, Close-to-Balance or in Surplus: A Policy-Maker's Guide to the Implementation of the Stability and Growth Pact, 38 *Journ. of Common Market Studies* 2000, 563; *Baldwin/Gros/Laeven*, Completing the Eurozone Rescue: What More Needs to be Done?, London 2010; *Buti/Franco/Ongena*, Fiscal discipline and flexibility in EMU: the implementation of the Stability and Growth Pact, 14 *Oxford Rev. of Econ. Policy* 1998, 81; *Ederer*, La crise de l'union monétaire européenne, *Politique*

étrangère, 2012/1, 39; *Eger/Schäfer*, Research Handbook on the Economics of European Union Law, Cheltenham 2012; *Heipertz/Verdun*, Ruling Europe: The Politics of the Stability and Growth Pact, Cambridge 2010; *Hentschelmann*, Der Stabilitäts- und Wachstumspakt als Ordnungsrahmen in Krisenzeiten, Europa-Kolleg Hamburg, Institute for European Integration, Discussion Paper No. 1/10 (2010); *Hodson*, Governing the Euro Area in Good Times and Bad, Oxford 2011; *Tuori/Tuori*, The Eurozone Crisis: A Constitutional Analysis, Cambridge 2014; see Article 119 TFEU above for further literature.

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I. Overview

1

Article 121 TFEU finds its predecessor in Article 99 TEC. The wording of the article has not been changed significantly since the time of the Maastricht Treaty. However, secondary legislation based on Article 121 TFEU and other measures of economic policy relating to it have rapidly changed over the past years. Due to this, economic governance in the EU today looks very different from the one before the economic crisis starting in 2007/2008. Generally, economic governance in the EU today is defined much stricter with a tendency to a higher degree of supervision and enforceability.

According to Article 121 para. 1 TFEU, the Member States have the obligation to treat ² their economic policies as a matter of common concern; consequently, they have to coordinate them. Technically, this provision does not confer any legislative competence to the Union level¹. However, the Member States are obliged to coordinate measures of economic policy (also see Article 5 para.1 TFEU). The provision addresses all Member States while for those who have introduced the Euro currency, Article 136 TFEU or secondary legislation enacted thereof may contain further obligations.

II. Broad guidelines

3

Among the instruments of coordination, there are **broad guidelines of the economic policies** as set out in Articles 119 and 121 para. 2 TFEU. These guidelines are adopted in the form of recommendations (Article 288 TFEU). Although the coordination is a task of the Member States, the guidelines are based on a recommendation (i.e. an initiative) by the Commission. They are further prepared by the Council and reviewed again by the European Council, before being finally adopted by the Council. The participation of the European Council in the process of drafting the recommendations gives proof of their highly political nature. The recommendations address both the Union and the Member States. In the technical sense, they are not as binding as hard law (Article 288 subpara. 5 TFEU). The EP is excluded from the decision-making and only has to be informed in accordance with Article 121 para. 2 subpara. 3 TFEU. The broad guidelines are supplemented by **guidelines on employment policy** adopted in accordance with Article 148

¹ *Snyder*, in: Craig/de Búrca, The evolution of EU law, 2nd ed., 2011, 701.

para. 2 TFEU. This underlines that employment policy is a crucial part of comprehensive economic planning.

- 4 As to the content of the guidelines, Article 121 TFEU does not contain any specific requirements apart from the principles laid down in Articles 119 and 120 TFEU. The **guidelines refer to macroeconomic developments** and are often of a general nature. However, the article does not prevent the Union from making more **detailed and sector specific recommendations** or from encouraging the Member States to enact certain kinds of legislation². The large and improperly regulated banking sector in certain Member States (such as Cyprus and Ireland) have significantly contributed to the financial crisis and there is no reason why the guidelines mentioned in the present article should not contain recommendations also in that respect. Another sector, which is now under stricter review by the Commission, is the national housing market. However, the guidelines still have to be **'broad'**, i.e. they can formulate general objectives but have to leave the details to the Member States, in particular the concrete content of legislative measures.
- 5 The current **general recommendations** in place can be found in Council Recommendation 2010/410/EU of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union. It has been drafted against the background of the ongoing economic crisis in the EU. The recommendation contains the following six economic guidelines:
- (a) Guideline 1: Ensuring the quality and the sustainability of public finances;
 - (b) Guideline 2: Addressing macroeconomic imbalances;
 - (c) Guideline 3: Reducing imbalances within the Euro area;
 - (d) Guideline 4: Optimising support for R & D and innovation, strengthening the knowledge triangle and unleashing the potential of the digital economy;
 - (e) Guideline 5: Improving resource efficiency and reducing greenhouse gases;
 - (f) Guideline 6: Improving the business and consumer environment and modernising and developing the industrial base in order to ensure the full functioning of the internal market.
- 6 In addition, **country specific recommendations** – again with often very detailed provisions – are prepared within the framework of the European Semester (see mn. 11) on a regular basis. Generally, the mechanisms set up by secondary legislation pursuant to Article 121 para. 6 TFEU also refer to Article 121 para. 2 TFEU³ as legal basis for the recommendations. For an overview of present country specific recommendations, see <http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations>.

7

III. Compliance

Compliance with the guidelines is constantly monitored by the Commission and the Council in a **multilateral surveillance** according to Article 121 para. 3 TFEU. In order to ensure a close surveillance, the Member States have to provide relevant information. For further details, see Articles 5 and 6 of Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (see mn. 10).

² See e.g. Guideline 4 of Council Recommendation 2010/410/EU of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union.

³ See e.g. Article 6 para. 1 of Regulation 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

In the case of **non-compliance** with the guidelines or if they risk jeopardising the proper functioning of economic and monetary union, Article 121 para. 4 TFEU stipulates that a warning shall be directed towards the Member States concerned. In addition, specific recommendations to the individual Member States can be made which may suggest concrete steps to ensure compliance with the guidelines (again based on an initiative by the Commission, reflecting the general function of the Commission as a guardian of the Treaties). According to Article 121 para. 4 subpara. 1 TFEU, the Council may decide to make the country specific recommendations public, which can on the one hand cause political pressure to that Member State from the outside and on the other hand facilitate political decision-making towards reforms within the Member State concerned. Article 121 para. 4 TFEU therefore contains a political ‘enforcement’ system which corresponds with the non-binding character of the recommendations mentioned in Article 121 paras 1 and 2 TFEU.

Article 121 para. 2 TFEU and the present procedures, according to Prot. 15 of the TFEU, do not comprehensively apply to the **United Kingdom**.

IV. Secondary legislation

The provisions of Article 121 TFEU are relatively general. They are specified by secondary legislation based on Article 121 para. 6 TFEU, enacted in the ordinary legislative procedure (Article 294 TFEU). Today, Article 121 para. 6 TFEU has become an important basis for macroeconomic governance measures establishing the **Macroeconomic Imbalances Procedure (MIP)** besides the **Stability and Growth Pact** that had already been introduced in the 1990s:

1. Regulation 1466/97 as amended by Regulations 1055/2005 and 1175/2011

Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies was introduced in 1997 as part of the ‘**Stability and Growth Pact**’. It was amended by **Regulation 1055/2005** (EC) of 27 June 2005 and **Regulation 1175/2011** (EU) of 16 November 2011. This instrument consists of two major elements: (a) measures aiming at a better surveillance of the budget and of the economic coordination of the Member States, namely Regulation **1466/97** based on the present article, i.e. the preventive component of the Pact, and (b) Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure⁴, i.e. the corrective component of the Pact. The political background of the two instruments is provided by Resolution of the European Council on the Stability and Growth Pact⁵.

According to Regulation 1466/97, the Member States are obliged to define budgetary objectives ‘of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation’ (recital 1). In order to achieve these objectives, the Member States have to develop complex planning which is monitored and assessed by the EU. The Regulation calls for Member States that take part in the Euro currency to introduce respective **stability programmes** (‘participating Member States’ – Article 3 et seq. Regulation 1466/97) and for Member States with derogation (Article 139 TFEU) to introduce **convergence programmes** (‘non-participating Member States’ – Articles 7 et seq. Regulation 1466/97). The drafting

⁴ Regulation 1467/97 is based on Article 126 TFEU, see there for further details.

⁵ OJ 1997 C 236.

and the assessment of the programmes are incorporated into the timeframe of the **European Semester**⁶. The quality of data for assessing the programmes is ensured by independent statistical authorities⁷. Better planning and a greater involvement of the EP are also ensured by the introduction of an economic dialogue (Article 2-ab Regulation 1466/97). As to enforcement, the programmes are subject to measures under Article 121 para. 4 TFEU. The **reform programmes** which are set up by the Member States in order to implement the Europe 2020 strategy are not regulated by the present regulation but are consistent with the timeframe of the European Semester.

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2. Regulation 1176/2011

If the economic development of Member States in a monetary union is uneven, serious problems can emerge (see above Articles 119 and 120 TFEU). Macroeconomic imbalances cannot only be caused by high deficits and a negative balance of trade. Also a constant surplus in the current account balance (see for instance Germany) can be a challenge to the EU's integrated market, besides a number of other factors. Therefore a close monitoring (but not necessarily also a sanctioning) of all kinds of imbalances is necessary. Regulation 1176/2011(EU) of 16 November 2011 on the prevention and correction of macroeconomic imbalances allows for the respective measures. According to Article 3 Regulation 1176/2011, the Commission annually prepares a report containing a qualitative economic and financial assessment of the national economies based on a **scoreboard**. Details for the **indicators** used for the scoreboard are set out in Article 4 Regulation 1176/2011 and are made more concrete by the Commission. The scoreboard includes such important indicators as the moving average of the current account balance, change in nominal unit labour cost, annual changes in house prices, private and public debts in percent of GDP and the unemployment rate. As a result, an Alert Mechanism Report is published⁸. In a second step, Member States that need a more detailed review (**in-depth review procedure**) are identified. If a Member State is found to experience imbalances on this basis, Article 6 Regulation 1176/2011 holds that the Council, on a **recommendation** of the Commission, may address the necessary recommendations to the Member State concerned, in accordance with Article 121 para. 2 TFEU. If the Commission considers that there are **excessive imbalances**, a stricter procedure referring to Article 121 para. 4 TFEU is applied, calling for the Member State to respond to the Council's policy recommendations by submitting a **corrective action plan**⁹ within a pre-defined timeframe. The corrective action plan is assessed by the Commission and the Council and has to be made public. In order to generate better data for the measures described, the Commission can establish fact-finding missions.

13 The timeframe of the **European Semester** (Regulation 1175/2011 amending 1466/97) applies for the Macroeconomic Imbalances Procedure (see mn. 9).

14 In particular the corrective action plans and the attached review mechanism enhance the binding effect of these instruments in a manner which has been unusual for recommendations (Article 288 TFEU) until now; but in the end this does not change their legal character. It has always been the nature of a recommendation to place political pressure on a Member State to comply with the recommendation. In a technical sense, it is only the **quantity** of pressure that changes under the excessive imbalances procedure, **not the**

⁶ See Article 2-a Regulation 1466/97; however, the European Semester is not comprehensively regulated in Regulation 1466/97 but partly remains a political planning framework; it describes an annual economic and fiscal planning procedure lasting approx. 6 month.

⁷ See Article 10a Regulation 1466/97.

⁸ See e.g. COM (2012) 68 final of 14 February 2012.

⁹ See Article 8 of the Regulation.

quality¹⁰. However, it must be observed that the transfer of macroeconomic surveillance from the level of primary law to the level of secondary legislation cannot alter the **limits** Article 121 TFEU poses on the depth of macroeconomic governance (see mn. 4).

The Regulation is not applied if a Member State is under stricter supervision due to a special financial assistance programme, instead special **economic adjustment programmes** apply. This is currently the case for: Cyprus, Greece, Ireland and Portugal. 15

3. Regulations 1173/2011¹¹ and 1174/2011¹²

16

These two regulations establish a sanctions system which will be applied if a Member State does not comply with the recommendations of the Union described above. They are based on Articles 121 and 136 TFEU and only apply to **members of the Euro area**¹³.

4. Legislative context

17

Regulations 1173, 1174, 1175 and 1176/11 are **part of the so-called Six Pack** Instruments, a group of one directive and five regulations that aim at strengthening surveillance of the macroeconomic development and the fiscal policy of the Member States. The reform of the EU's economic and fiscal planning and surveillance is continued by the recently adopted **Two Pack** (Regulations (EU) 472/2013¹⁴ and 473/2013¹⁵).

Article 122 [Severe Difficulties] (ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. 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.

Bibliography: Kotzur, European Union Law on Disaster Preparedness and Response, 55 GYL 2012, 253; Louis, The No-Bailout Clause and Rescue Packages, 47 CMLR 2010, 971; see Article 119 above for further literature.

¹⁰ For a more critical perspective, see Schwarze/Hattenberger, Article 121 AEUV mns 49–52.

¹¹ Regulation (EU) No 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

¹² Regulation (EU) No 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

¹³ See Article 136 TFEU mn. 3–6 for further details.

¹⁴ Regulation (EU) No 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

¹⁵ Regulation (EU) No 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

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1

I. Overview

Article 122 TFEU is an expression of the wider principle of solidarity (Article 3 para. 3 TEU). It finds its predecessor in Article 100 TEC. The norm has been changing significantly over time. Originally, provisions similar to Article 122 para. 1 TFEU formed a part of the EEC's provisions on conjunctural policy. Generally, the Treaties assume that every Member State has to deal with difficulties in the economic and financial field independently. Traditionally, the Treaties know, however, exceptions from this principle, Article 122 TFEU represents one of these exceptions.

2 The present article applies to all Member States, meaning Member States which have introduced the Euro currency and Member states with a derogation (Article 139 TFEU). Measures under Article 122 TFEU are of a highly political nature, like measures concerning the balance of payments (Articles 143, 144 TFEU), which are historically closely linked to the present article; the EP has to be informed of measures taken but has no right to participation in the decision-making process. Both paragraphs of the article are designed as **emergency clauses**.

3

II. Economic measures under para. 1

Article 122 para. 1 TFEU allows for a **wide range of measures** in cases of economic difficulties in a Member State. In particular, the provision names severe difficulties in the supply of certain products with an emphasis on energy supplies. Financial assistance is excluded from the scope of Article 122 para. 1 TFEU since it is explicitly dealt with in Article 122 para. 2 TFEU. The norm should be interpreted in a **narrow** manner. Only if severe disturbances of the economic situation in one Member State become evident or are at least clearly identifiable, Article 122 para. 1 TFEU can be applied. The ECJ has added an additional element to Article 122 para. 1 TFEU. In its case *Balkan-Import-Export GmbH*¹, the court emphasised that Article 122 para. 1 TFEU usually only allows for **interim measures** (see mn. 15 there). In practice, also **precautionary instruments** can be based on Article 122 para. 1 TFEU as long as there is a clearly defined (hypothetical) emergency situation which underlies the precautionary measures. It is questionable whether such instruments as Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products and Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply are correctly referring to Article 122 TFEU as their legislative basis or if their relatively general scope is not covered by Article 122 TFEU anymore. It should be further noted that measures under Article 122 para. 1 TFEU can have significant impact on individual European citizens. In 1972, the ECJ decided that negative effects caused by exchange rate imbalances in the international monetary system can justify compensatory payments in cross-border trade among the Member States and with third countries. Thus, Article 122 TFEU has not only to be construed narrowly but also to be applied in a proportionate manner.

¹ ECJ Case 5/73 *Balkan-Import-Export GmbH* [1973] ECR 1091.

Conflicts may arise between Article 122 para. 1 TFEU and Article 194 TFEU in the field of energy supply. Article 194 TFEU has a much wider scope than Article 122 TFEU, dealing not only with energy supply but also with environmental aspects and the organisation of the energy market. Nonetheless, the instruments to ensure a sustainable energy supply mentioned above (see mn. 3) are still based on Article 122 TFEU. According to Article 194 para. 2 TFEU, the legislative measures under the new ‘energy policy’ of the Union are taken without prejudice to other provisions of the Treaties which means that Article 122 para. 2 TFEU is applicable parallel to Article 194 TFEU. In practice, this could lead to difficulties with the principle of conferral. Only an amendment of primary law or detailed jurisprudence by the ECJ could finally solve the related questions.

III. Financial measures under para. 2

In cases of **natural disasters and other exceptional occurrences**, the Union can grant financial aid to a Member State. The threshold for such assistance is high and is composed of **two requirements** that both have to be fulfilled: (a) there has to be a natural disaster (i.e. a severe natural catastrophe) or other occurrence beyond the control of the Member State (this may include man-made disasters as long as they are unforeseen or at least unavoidable) and (b) this incident must cause difficulties or at least threaten to cause severe difficulties. The financial assistance is (like in other cases of emergency aid – in Article 143 TFEU for example) subject to conditions that have to be defined by the Council based on a proposal of the Commission. Article 122 para. 2 TFEU does not cover all forms of bilateral assistance based on the initiative of one Member State or a group of Member States (as for example the bilateral assistance granted to Greece in May 2010²). The European Solidarity Fund, which was established in 2002 after several natural catastrophes in Europe, was not based on Article 122 TFEU but on Article 159 TEC (today Article 175 TFEU). This indicates again that Article 122 TFEU should be reserved to unexpected occurrences with a significant impact on a Member State.

It has been debated thoroughly whether also **economic downturn, financial crises or a sovereign debt crisis** can constitute an occurrence in the sense of Article 122 para. 2 TFEU. Generally economic downturn and financial crises of Member States are neither unforeseeable nor in other ways comparable to a natural disaster – which usually has one clearly identifiable cause, is limited locally and directly affects infrastructure etc. in a specific region. Economic and financial crises do hardly fulfil any of these requirements: they have various causes, they affect more or less the whole economy and they affect property, infrastructure etc. in a very indirect manner. Also Articles 143 and 144 TFEU which deal with balance of payments crises, would be almost superfluous if financial difficulties were already covered by Article 122 para. 2 TFEU. Finally, Article 125 TFEU seems to function as a *lex specialis* to Article 122 para. 2 TFEU since a bailout for indebted Member States would usually always take place in a situation of ‘exceptional occurrences’ and is certainly not part of day to day business. Therefore, Article 125 TFEU seems to contain a comprehensive prohibition of assistance for a very special type of ‘exceptional occurrences’: namely national debt crises. Thus, it is **highly questionable** whether Regulation (EU) 407/2010 of 11 May 2010 establishing a European Financial Stability Mechanism (EFSM) could be based on Article 122 para. 2 TFEU.³

² See ‘Statement by the Heads of State and Government of the Euro Area’ of 25 March 2010 and ‘Statement on the support to Greece by Euro area Members States’ of 11 April 2010.

³ See Article 125 TFEU below for further details.

*Article 123 [Prohibition of credit facilities in favour of any public body]
(ex Article 101 TEC)*

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as ‘national central banks’) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

See commentary on Article 123.

*Article 124 [Prohibition of privileged access to financial institutions
by any public body]
(ex Article 102 TEC)*

Any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

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1

I. Overview of Article 123 TFEU

According to Article 127 TFEU, it is one of the predominant objectives of the ECB and the ESCB to ensure the stability of prices and thus to limit **inflation**. In order to achieve this, the ESCB has the exclusive competence to control the monetary policy in the Euro area and in particular to control money supplies. This independent position could be weakened if under political influence the ECB or national central banks were forced to lend money to public authorities under favourable conditions, not reflecting the economic risks and thus creating a danger for price stability.

Against this background, Article 123 TFEU prohibits any form of **monetary financing of public budgets**. Neither the Union nor the Member States shall be financed directly by the **ECB or national central banks**. The public sector instead has to borrow capital directly at the financial markets at rates correlating with the economic risk of the transaction.

2 The article has been introduced into European primary law by the Treaty of Maastricht (then Art. 104 and 104b TEC).

II. Terminological details

3

The terms used in the article are further explained in **Regulation (EC) No 3603/93** of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty. The regulation is based on Article 125 para. 2 TFEU.

Overdraft facility means any provision of funds to the public sector resulting or likely to result in a debit balance.¹ **Other type of credit facility** is defined as any claim against the public sector existing at 1 January 1994, any financing of public debts and without prejudice to Article 123 para. 2 TFEU² any transaction with the public sector resulting or likely to result in a claim against that sector.

Since the prohibition of credit facilities could easily be avoided by **debt instruments, such as bonds** with a fixed and favourable interest rate for example, the direct purchase thereof is likewise prohibited. However, purchase of such instruments by open market operations is allowed. These indirect purchases take place after a fair price has been fixed by the market, and they are therefore subject to market conditions which eliminates (at least in theory) the risks explained above. However, recent developments put this concept into question to a certain extent. The ESCB has started buying large numbers of bonds from highly indebted Euro area members at the market. The volume of these programmes is so enormous that it influences the prices of these marketable debt instruments, indirectly enhancing the conditions for certain Member States to borrow fresh money at the markets. Due to this effect, the German central bank has rejected such programmes as an indirect form of monetary budget financing. It is still unclear to what extent the ESCB is allowed to continue these practices and detailed secondary legislation should be enacted soon.

There are **exemptions** from the strict prohibition. These include (a) claims against the public sector older than 1 January 1994, provided that they have a fixed maturity, (b) the British ways and means facility as long as the United Kingdom does not enter the third stage of the EMU, (c) intra-day credits to the public sector³, (d) certain payments on cheques⁴ e) transactions in connection with IMF grants or the facility on medium-term financial assistance under Article 143 TFEU (see there for further details), (f) other cases mentioned in Regulation 3603/93.

The following entities fall into the scope of Article 123 TFEU (see Articles 3 and 8 5 Regulation 3603/93):

- The EU, its organs, other bodies and institutions of the EU
- The central governments of the Member States, regional governments, municipalities, bodies governed by public law and public undertakings
- Public undertakings including any undertaking over which public authorities directly or indirectly exercise dominant influence by virtue of ownership, financial participation or a favourable legal position as to the organs of the undertaking.

Article 123 para. 2 TFEU excludes **publicly owned credit institutions** from the prohibitions of Article 123 para. 1 TFEU. Thus, in terms of money supply, they have to be treated under the same conditions as private banks.

¹ See Article 1 lit.a Regulation 3603/93.

² The wording of Article 123 para. 2 TFEU could be found in Article 104 para. 2 TEC at the time of entering into force of Regulation 3603/93.

³ See Article 4 Regulation 3603/93.

⁴ See Article 5 Regulation 3603/93.

III. Overview of Article 124 TFEU

Article 124 TFEU complements the prohibitions laid down in Article 123 TFEU by likewise prohibiting the public sector from influencing the financial sector in order to gain privileged access to financial institutions. In particular the Member States and the Union shall be prevented from indirectly seeking favourable conditions for financing sovereign debts by setting up (public) financial institutions as proxies or by influencing banks and other financial institutions. However, Article 124 does not prevent the competent authorities from performing their supervisory tasks. The terms used in Article 124 TFEU are often identical to Article 123 TFEU. They are further explained and defined by **Regulation (EC) No 3604/93** of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty.

IV. Terminological details

According to Regulation 3604/93 the term **financial institutions** has to be understood rather broadly, including: credit institutions, insurance and assurance undertakings, undertakings for collective investment in transferable securities (UNCITS), investment firms and other undertakings performing similar activities and/or the principal activity of which is to acquire holdings of financial assets or to transform financial claims.⁵

9 It is prohibited under Article 124 TFEU to seek **privileged access**, meaning any law, regulation or any other binding legal instrument which contains (a) an obligation for financial institutions to acquire or to hold liabilities of the public sector, (b) a conferral of tax advantages or other financial advantages to financial institutions in order to encourage the acquiring or the holding by those institutions of such liabilities.⁶

10 **Exemptions** include inter alia the funding of social housing and obligations to finance the repair of disaster damage.⁷ Exemptions can also include measures based on prudential considerations.

11 **Measures based on prudential considerations** are those measures which aim at ensuring the soundness of financial institutions so as to strengthen the stability of the financial system as a whole and the protection of the customers of those institutions.⁸ The need for clarification of terms used in primary law by secondary legislation becomes particularly clear in this case because the German text speaks of measures taken to ensure supervision ('aufsichtsrechtliche[...] Gründe[...]') instead of 'prudential considerations'; the German wording seems to be considerably narrower than the English (and also the French and Spanish) language version.

Article 125 [Exclusion of liability] (ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not

⁵ See Article 4 Regulation 3604/93.

⁶ See Article 1 para. 1 Regulation 3604/93.

⁷ See Regulation 3604/93 for details and further exemptions.

⁸ See Article 2 Regulation 3604/93.

be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Bibliography: *Frenz/Ehlenz*, Schuldenkrise und Grenzen der europäischen Wirtschaftspolitik, *Europäisches Wirtschafts- und Steuerrecht* (EWS) 2010, 68; *Louis*, The No-Bailout Clause and Rescue Packages, 47 CMLR 2010, 971; see Art. 119 above for further literature.

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I. Overview

Article 125 TFEU goes back to the Treaty of Maastricht and has been a cornerstone of 1 the monetary and economic union ever since. The article aims at preventing a Member State from transferring the burden of its sovereign debts to other Member States. Thus, the final objective of the article is twofold: it wants to make sure that each member is responsible for its own debts and at the same time guarantee that this liability for sovereign debts cannot be taken over by other Member States (i.e. **fiscal independence** of each Member State). It is the rationale of the article that such a non-liability (which could be called an exception from the principle of solidarity in Article 3 para. 3 subpara. 3 TEU) should increase the interest rates a Member State with a high public deficit and a high debt level has to pay, compared to the interest rates of less indebted States. This should, in theory, lead to an increase of self-discipline of the respective states.

According to its wording, Article 125 TFEU contains a **comprehensive bailout prohibition**. 2 Member States shall have no automatic (solidary) liability for the sovereign debts of another state, meaning the Member States of the Union (a) do **not form a group of jointly and severally liable debtors** and (b) are **barred from voluntarily taking over the debts** of other Member States. The prohibition of taking over debts covers the whole public sector, including public authorities of all levels, other bodies governed by public law (most notably including the **social security system** and the public pensions system) as well as public undertakings. The group of entities covered by Article 125 TFEU should be identical to the entities mentioned in Article 123 TFEU, irrespective of the slightly different wording. In the same way the Union and its institutions (with the notable exception of the ESCB and its open market operations, above Art. 124 TEU) are prohibited from taking on sovereign debts.

II. Explicit exceptions

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Article 125 TFEU explicitly allows one **exception**: For the execution of a **specific project**, Member States and also the Union can sign mutual financial guarantees, by which

they collectively become liable for debts arising from the execution of the project. Such projects include infrastructure undertakings like the Channel Tunnel between France and the United Kingdom¹ and similar activities.

Further, also Articles 143 et seq. TFEU can be understood as an exception from Article 125 TFEU – an exception which is, however, only applicable to Member States that are not part of the Euro currency area.

4

III. Implicit exceptions

1. The current sovereign debt crises in the EU

The recent Euro crisis which finds its roots in the sovereign debt crises of several Member States of the European Union, does significantly call into question the concept upon which Article 125 TFEU is based. According to an ECB report issued at the time of the beginning of the Greek crisis, the distrust in the Greek national balance at this time started to spread to the European banking sector leading to a situation comparable to the breakdown of Lehmann Brothers in the United States in 2007. The ECB concluded that there was a risk that within a very short period of time two or more major European banks would fall into bankruptcy.² Also the crises in Ireland and Spain cannot be decoupled from the national banking sector in these states and are therefore not limited to the problem of sovereign debts. Thus, a strict application of Article 125 TFEU would have turned the bailout prohibition into the opposite of its original aim – creating a risk, not a foothold, for the stability of the monetary union. The authors of the Maastricht Treaty were convinced that Article 125 TFEU would prevent Member States from defaulting by a mechanism of self-discipline but they did not develop a concept for a failure of this mechanism.

5

2. Re-reading Article 125 TFEU

Article 125 TFEU was re-read after the problem of sovereign debt crises emerged in 2008. Beginning with Greece, several Members of the European Union received financial assistance through several mechanisms, all backed by guarantees of the other Member States. These measures, which contravene the wording of Article 125 TFEU, can be justified by looking to the function of Article 125 TFEU. Originally, the bailout prohibition was designed as a foothold for a stable monetary system. Instead, past developments proved that a strict application of the bailout prohibition endangers the monetary union and could lead to its implosion. A strict application of the rule leads to a factual increase of instability, which means that Article 125 TFEU partly lost its function and a rebalancing of the principle of fiscal independence (mn. 1) vis-à-vis other constitutional principles becomes necessary – for example the principle of solidarity, the stability of the internal market or the protection of the Union's integrity as such. In the original concept Article 122 TFEU, an expression of the principle of solidarity, was blocked by Article 125 TFEU³, the same is true for bilateral or multilateral assistance. The re-reading of Art. 125 can lift this blockade. However, the prohibitions contained in Article 125 TFEU can only be abandoned as far as it is necessary to stabilise the monetary system. Hence, in practice,

¹ Cf. GS/Gnan, Article 103 EGV mn. 25

² Since it was an internal document concerning the government debt and government deficit paper, the ECB refused to give access. The GC confirmed the refusal: Case T-590/10 *Thesing and Bloomberg v ECB* of 29 November 2012 (not yet officially published).

³ See above Article 122 TFEU mn. 6.

financial assistance is only granted under strict conditionality, i.e. if the debtor countries are constantly monitored and detailed objectives of economic restructuring are defined by the Union. In addition no Member State can be forced to take part in such a bailout.

The ECJ meanwhile has justified the bailout measures taken in the course of the national debt crises with similar arguments.⁴ 6

Unfortunately, the brief reasoning of the Court does not fully reflect the sensitive nature of the issue at hand. In its conclusion, however, the ECJ's findings are correct and an application of a balancing of constitutional principles (as suggested above in mn. 5) becomes visible at least in parts in the decision.

IV. Outlook 7

With the amendment of Article 136 para. 3 TFEU, the bailout mechanisms received a formal basis in primary law. By doing so, the Member States largely abandoned the bailout prohibition in Article 125 TFEU. However, the strong conditionality of assistance measures under Article 136 para. 3 TFEU makes sure that important ideas underlying Article 125 TFEU, in particular the responsibility of Member States to keep sovereign debts **sustainable** and to undertake economic **reform** where necessary, guide the new bailout regimes. In the future, Article 125 TFEU will probably become relevant again when a stronger interconnection of the national social security systems will be discussed. Since an enhanced workforce mobility is crucial for overcoming the economic crisis in some Member States⁵, problems in the balance of payments of the local pension scheme and other social security instruments may have to be countered by limited financial transfers from economically strong social security institutions in northern and central European countries. Since such institutions are undertakings under public law, Article 125 TFEU may apply (see mn. 2) and thus, such transfer payments probably will need a clear legal basis in primary law.

Article 126 [Avoidance of excessive deficits; budgetary discipline] (ex Article 104 TEC)

1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:

- (a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:
 - either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,
 - or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;
- (b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.

⁴ ECJ Case C-370/12 *Pringle* of 27 November 2012 (not yet officially published).

⁵ See above Article 119 TFEU mn. 5.

3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.

The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.

6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,
- to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision un-

der paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.

When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

Bibliography: *Artis/Buti*, ‘Close-to-Balance or in Surplus’: A Policy-Maker’s Guide to the Implementation of the Stability and Growth Pact, 38 *Journ. of Common Market Studies* 2000, 563; *Baldwin/Gros/Laeven*, *Completing the Eurozone Rescue: What More Needs to be Done?*, London 2010; *Buti/Franco/Ongena*, *Fiscal discipline and flexibility in EMU: the implementation of the Stability and Growth Pact*, 14 *Oxford Rev. of Econ. Policy* 1998, 81; *Ederer*, *La crise de l’union monétaire européenne*, *Politique étrangère*, 2012/1, 39; *Eger/Schäfer*, *Research Handbook on the Economics of European Union Law*, Cheltenham 2012; *Heipertz/Verdun*, *Ruling Europe: The Politics of the Stability and Growth Pact*, Cambridge 2010; *Hentschelmann*, *Der Stabilitäts- und Wachstumspakt als Ordnungsrahmen in Krisenzeiten*, Europa-Kolleg Hamburg, Institute for European Integration, Discussion Paper No. 1/10 (2010); *Hodson*, *Governing the Euro Area in Good Times and Bad*, Oxford 2011; *Tuori/Tuori*, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge 2014; see Art. 119 TFEU above for further literature.

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I. Overview

1

Sound **public finances** are one of the prerequisites for a successful monetary union. Since in a monetary union exchange rates between the Member States are fixed and monetary policy has been transferred completely to the Union level, a Member State is no longer able to apply many of the instruments usually available to a sovereign state to deal with excessive sovereign debts. While an (uncontrolled) default of a Member State is still possible in a monetary union, the negative effects of such an event for the other members of the union are difficult to assess, in particular the high level of policy integration in the EU may cause difficult problems of transfer payments (see Article 125 TFEU). Consequently, both excessive public debts and a default of a Member State have to be avoided. To a lesser degree also for Member States without the Euro as their currency, keeping debts at a moderate level is important. In cases in which public debts are issued in the national currency, excessive debts may result in a decline of the value of the na-

tional currency; while in cases in which public debts are issued in a currency of which the issuing state is not in control, the effects are comparable to the effects caused by the default of a member of the monetary union.

- 2 The present article, dating back to the Maastricht Treaty, has to be read in conjunction with Protocol No 12 of the TFEU. Article 126 TFEU applies to **all Member States**, including those who are not yet members of the Euro area. An exception applies for the **United Kingdom**. According to Protocol 15 No 4, Article 126 paras 1, 9 and 11 TFEU are not applicable to the UK. Consequently in theory, only a very limited surveillance by the EU takes place concerning the public deficits of the UK¹.
- 3 **Article 126 para. 1** TFEU contains a general principle that Member States shall avoid excessive deficits. This legally binding principle is further elaborated in **para. 2**. For the identification of excessive deficits two criteria play a major role (mn. 5). Procedural rules to assess whether a Member State does meet the criteria are defined in paras 2–6. If a Member State does not or not fully meet the deficit criteria, a sanctions regime applies which is set up by **paras 7–13**. A legislative competence to enact secondary legislation relating to the implementation of the rules laid down in Article 126 TFEU can be found in **para. 14**. Article 126 has to be read together (see Article 51 TEU) with **Protocol 12** on the excessive deficit procedure. Important secondary legislation based on para. 14 comprises: **Regulation (EC) No 479/2009** of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (ESA 95), as amended by Council Regulation (EU) No 679/2010 of 26 July 2010; **Regulation (EC) No 1467/97 of 7 July 1997** on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EC) No 1056/2005 and Council Regulation (EU) No 1177/2011. Regulation 1467/1997 is part of the Stability and Growth Pact². In addition, **Regulation (EC) No 2223/96** of 25 June 1996 on the European system of national and regional accounts in the Community (ESA 95) plays an important role for the implementation of Article 126 TFEU.

4

II. The avoidance of excessive deficits

According to Article 126 para. 1 TFEU, the Member States are obliged to avoid excessive government deficits. A **deficit** is a net borrowing as defined in the European System of Integrated Economic Accounts. **Government** deficits are deficits of ‘central government’ (S. 1311), ‘state government’ (S. 1312), ‘local government’ (S. 1313) and ‘social security funds’ (S. 1314)³ (i.e. ‘general government’ in ESA 95 terminology). Commercial operations are excluded, meaning that only institutional units producing non-market services as their main activity are taken into account⁴.

¹ Nonetheless, the European Commission initiated **an excessive deficit procedure**, based on **Article 116 para. 4 TEC** in conjunction with Article 126 paras 2–8 TFEU (then Article 104 TEC), which developed into a full-fledged deficit procedure for a non-Euro Member State (see Council Decision 2008/713/EC of 8 July 2008 and subsequent Decisions). The construction is based on the idea that the UK has become a member of the second stage of the EMU and that in this stage all Member States have an obligation to avoid excessive deficits (Article 116 para. 4 TEC), irrespective of Article 126 para. 1 TFEU by which the UK is not bound. **Concerning the fiscal year of the United Kingdom** (which does not coincide with the calendar year and thus creates difficulties in assessing the British deficit), see the Annex to Regulation 1467/1997.

² See Article 121 mn. 10.

³ The numbers in parentheses are referring to the ESA 95. The state sector includes those non-profit institutions which are controlled and mainly financed by governments on the national, state and local level. Social security funds are units that provide social benefits and are state run with compulsory membership for certain groups of the population. They exclude private insurance and pension funds.

⁴ See Article 1 paras 1–2 Regulation 479/2009.

Mainly two criteria are used in order to identify **excessive** deficits: the *ratio* of the 5 planned or actual government **deficit** to gross domestic product or alternatively the ratio of government **debt** to gross domestic product (Article 126 para. 2 TFEU). The **reference values** of Article 126 para. 2 TFEU are defined in Article 1 of Protocol 12 at **3%** for the planned or actual deficit and **60%** for government debt. Government debt comprises the liabilities of general government (see mn. 4 above) in the categories: (a) currency and deposits, (b) securities other than shares, excluding financial derivatives and (c) loans as defined in ESA 95.⁵ The Treaties imply that debts exceeding the reference values affect **debt sustainability** and have, thus, to be avoided.

The failure to comply with the reference values does not automatically lead to the ini- 6 tiation of an excessive deficit procedure. Para. 2 lit. a and b contain **exceptions** ('unless'). In addition, Article 126 para. 3 TFEU leaves room for discretion since '**other relevant factors**' can influence the decision as to whether or not an excessive deficit exists. However, it would be a misunderstanding of Article 126 para. 3 TFEU to view the additional criterion of the relation between the government deficit and government investment expenditure as an automatism, precluding the existence of an excessive deficit – the fact that the national government invested in certain (e.g. infrastructure) projects does not (as such) contain an indication for the quality and sustainability of the investment made. The question of excessive deficits can only be answered after a comprehensive assessment of the economic situation of the Member State has been made, the two deficit criteria mentioned above (see mn. 5) serving as major guidelines for this assessment.

Further details on the application of the exceptions in Article 126 para. 2 TFEU and 7 the assessment under Article 126 para. 3 TFEU are provided for by Article 2 Regulation 1467/97. When preparing a report under Article 126 para. 3 TFEU, the Commission shall take into account inter alia (a) the developments in the medium-term economic position, (b) the developments in the medium-term budgetary positions, (c) the developments in the medium-term government debt position and other factors. Also a severe economic downturn in the Member State concerned can be taken into account for the assessment.

III. The excessive deficit procedure

8

The compliance of the Member States with the reference values and other criteria indicating excessive deficits is constantly monitored by the European Commission (Article 126 paras 6–7 TFEU). If a Member State does not fulfil the requirements of the criteria of Article 126 para. 2 TFEU, an excessive deficit procedure is to be initiated by the Commission. The **timeframe** for the various steps of the procedure is defined in Regulation 1467/97.

The procedure starts with the preparation of a **report** by the Commission, assessing 9 the situation in the Member State concerned (Article 126 para. 3 TFEU). The Commission can also prepare a report if the reference values are in line with Protocol No 12 but it is nonetheless of the opinion that there is a risk of an excessive deficit (Article 126 para. 3 subpara. 2 TFEU). The Member States have to report their relevant statistical data to the Commission (Eurostat⁶) regularly and promptly.⁷ To ensure that statistical data is sufficient, Articles 3 et seq. Regulation 479/2009 contain detailed provisions. These provisions include a regular evaluation of the quality of statistical data by the Commis-

⁵ See Article 1 No 5 Regulation 479/2009.

⁶ Eurostat is the statistical office of the European Union. It was founded in 1953 and forms a Directorate-General (DG) of the European Commission. See Commission Decision 2012/504/EU on Eurostat.

⁷ See Article 3 Protocol 12.

sion.⁸ If the Commission has reason to believe that the data provided is insufficient, it can express a reservation on the quality of the actual data reported by the Member State⁹ or can even amend actual data where there is evidence that actual data reported by a Member State does not comply with the requirements¹⁰.

- 10 If, after hearing the Economic and Financial Committee (Article 134 TFEU), the Commission considers that an excessive deficit exists or may occur, it has to address an **opinion** to the respective Member State and informs the Council (Article 126 para. 5 TFEU).
- 11 Based on this opinion and a recommendation (i.e. an initiative) by the Commission, the **Council** decides whether an excessive deficit exists (Article 126 para. 6 TFEU) and addresses recommendations to the Member State concerned with a view to correct the deficit within a given period of time (Article 126 para. 7 TFEU). Usually within six months after the decision of the Council, the Member State shall take effective action to correct the excessive deficit with the perspective to complete this task within the year following the identification of the excessive deficit.¹¹ The content of the Council recommendation is confidential (Article 126 para. 7 TFEU).
- 12 If a Member State fails to comply with the recommendations, further measures can be taken, increasing the pressure on the Member State concerned. A first sanction can be the **publication of the Council recommendations** (Article 126 para. 8 TFEU). For Member States whose currency is the Euro, further sanctions (Article 126 paras 9 et seq. TFEU) are possible, while for all other Member States no further enforcement measures are possible (see Article 139 para. 2 lit. b. TFEU).
- 13 Such further measures include an additional **warning pursuant to Article 126 para. 9 TFEU**. If the Member State still does not undertake sufficient endeavours to end the excessive deficit situation, the Council can decide to apply the **sanctions regime of Article 126 para. 11 TFEU**. The measures prescribed in the enumerative list of Article 126 para. 11 TFEU can be applied either alternatively or cumulative. Details are prescribed by Articles 11 and 12 Regulation 1467/97. For the concrete measures taken by the Council in the individual case, the principle of proportionality (Article 5 para. 4 TEU) has to be observed.
- 14 The right of **initiative** for measures taken during the excessive deficit procedure is vested in the Commission. However, this does not preclude the Council from **amending** the Commission's recommendations or even refusing to decide on whether excessive deficit exist or whether measures taken by the Member State concerned are insufficient. Decisions in the Council are taken by qualified majority vote, with the Member State concerned not voting. The Commission cannot force the Council to follow its recommendations.¹²
- 15 Article 126 para. 12 TFEU contains an obligation of the Council to abrogate decisions taken during the excessive deficit procedure either fully or in part – depending on the progress of a Member State in its efforts to reduce its deficit. In addition, the Member State concerned has a **right to public rehabilitation** by the Council. In cases, in which the Council decision has been published (Article 126 para. 8 TFEU), the Council has to declare that the excessive deficit no longer exists. This declaration does not only have the effect of a political rehabilitation but can also ease access of the Member State to the capital market, since an abrogation under Article 126 para. 12 TFEU may have a positive

⁸ See Articles 8 et seq. Regulation 479/2009.

⁹ See Article 15 para. 1 Regulation 479/2009.

¹⁰ See Article 15 para. 2 Regulation 479/2009.

¹¹ See Article 3 para. 4 Regulation 1467/97.

¹² See ECJ Case C-27/04, *Commission v Council* [2004] ECR I-6649.

influence e.g. on credit ratings or on decisions by institutional investors. As an example of such a decision, see Council Decision 2004/918/EC of 21 June 2013 on Hungary.

IV. Enhanced supervision for members of the Euro area

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For Member States whose currency is the Euro **stricter rules** for supervision may apply, based on Article 136 TFEU. **Regulation (EU) No 1173/2011** of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area plays a major role, establishing – in accordance with Article 126 para. 11 TFEU – fines of 0,2% of the national GDP as a standard sanction if a Member State has not taken effective action to correct its excessive deficit¹³. Regulation 1173/2011 has to be read in conjunction with Articles 11 and 12 of Regulation 1467/97.

CHAPTER 2 MONETARY POLICY

Article 127 [Objectives and tasks of the ESCB] (ex Article 105 TEC)

1. The primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCB’) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

¹³ See also Article 136 TFEU mns 3–6.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

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I. General

The **competence** for monetary policy lies within the **Union** since the final stage of the EMU on 1 January 1999 was started, while according to Article 139 para. 2 lit. c TFEU the provisions of Article 127 paras 1, 2, 3 and 5 TFEU are not applicable to those States which have not (yet) adopted the Euro; for the UK moreover, according to Protocol 15 No 4, Article 127 para. 4 TFEU is not applicable.

2 Article 127 TFEU reaffirms the **maintenance of price stability**, especially for the monetary sector, as the primary objective of economic and financial policy¹ and undertakes the system of the ESCB and its actors, with reference to the basic principles of Article 119 TFEU, to act in accordance with the fundamental principles of an open market economy with free competition; the additional explicit mention of the fundamental element is superfluous.

3 The cautious wording of Article 127 para. 1 s. 2 TFEU takes into account that, according to the stage of integration, the competence for the economic policy still remains with the Member States to a great extent, with the result that monetary measures to achieve the objectives of Article 3 TEU can only be supported by the ‘general’ economic policy in the Union (not only ‘of’ the Union) and only if it does not endanger the price stability. This, however, does not exclude monetary and financial measures by the ESCB to support a special economic policy of a Member State whose financial solvency is at stake.

II. Tasks of the ESCB

1. General tasks

Four basic tasks of the ESCB, which are substantiated in the statute, are set out in Article 127 para. 2 TFEU. In practice a sharp distinction between these criteria can be difficult².

5 **First indent: The definition and implementation of the monetary policy of the Union.** The ESCB is responsible for the fiscal and monetary policy, while disposing of every central bank instrument of a market economy, including minimum reserves³.

¹ Cf. Article 3 para. 3 TEU and Article 119 para. 2 TFEU as well as Article 282 para. 2 s. 2 TFEU.

² Cf. for example Guideline of the ECB of 26 September 2002 on minimum standards for the ECB and national central banks when conducting monetary policy operations, foreign exchange operations with the ECB's foreign reserves and managing the ECB's foreign reserve assets (ECB/2002/6).

³ See Instrument 17–2000 ECB-Statute and (basically) Guideline of the ECB of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem (ECB/2000/7), last amended by guideline of the

Second indent: The conduct foreign-exchange operations⁴. Referring to compliance with Article 219 TFEU ensures that other organs dispose of competence of foreign policy prerogatives of the monetary policy but also shall ensure coherent action of the Union on the surface. An integration of the ECB into the procedures for certain measures serves this objective (cf. Article 219 TFEU, especially para. 3 s. 2).

Third indent: Holding and managing the **official foreign reserves** of the Member States, including gold holdings, foreign currencies as well as claims against international institutions⁵. The States can only dispose to a limited extend⁶ the official foreign reserves⁷ that remain with the national central banks.

To preserve a certain autonomous financial scope within the international arena, **‘working balances’**, which are not precisely defined but are intended to be small foreign currency-reserves, remain with the Member States for independent holding and management (**Article 127 para. 3 TFEU**). Transactions exceeding a certain **threshold** require the **approval of the ECB**⁸.

Fourth indent: Promotion of the smooth operation of the **payment systems**. For this purpose, the ESCB can provide institutions for clearing and payment systems (Article 22 ECB-Statute), which it realizes with the Trans-European Automated Real-time Gross settlement Express Transfer system (**‘TARGET’**)⁹.

2. Special tasks and powers

According to **Article 127 para. 4 subpara. 1 TFEU**, the ECB has a consultation right on any proposed Union act in its fields of competence – within the limits and under the conditions set out by the Council (Article 129 para. 6 TFEU) – and on any proposals by national authorities regarding any draft legislative provision in its fields of competence. The ECB moreover may submit **opinions** to the appropriate Union institutions, bodies, offices or agencies or to national authorities¹⁰ on matters in its fields of competence (**Article 127 para. 4 subpara. 2 TFEU**). The ECB is entitled to submit opinions also to every Member State outside the Euro-Zone, except for the UK (cf. Article 127 para. 1 TFEU).

Since the distinct scope of participation of the ESCB-actors concerning **bank supervision** and the maintenance of **stability of the financial system** could not yet be clarified in a political consensus, it is not clear-cut in primary law¹¹ but, concerning the supervision of banks and other financial service providers, the transfer of tasks via secondary law as it was planned (Article 127 para. 6 TFEU), was realized with the adoption of three Regulations: Regulation (EU) No 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European

ECB of 7 May 2009 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem (ECB/2009/10).

⁴ Cf. Article 23 ECB-Statute.

⁵ Cf. GS/*Smits*, Article 105 EGV mn. 42; in particular: Article 30 ESCB-Statute as well as Guideline of the ECB of 20 June 2008 on the management of the foreign reserve assets of the European Central Bank by the national central banks and the legal documentation for operations involving such assets (ECB/2008/5).

⁶ See Article 31 ECB-Statute.

⁷ Cf. Articles 30, 31 para. 2 ECB-Statute.

⁸ See Article 31 para. 2 ECB-Statute and Guideline of ECB of 27 September 2001 for participating Member States’ transactions with their foreign exchange working balances pursuant to Article 31.3 of the Statute of the European system of central banks and of the European Central Bank (ECB/2001/9).

⁹ As to **‘TARGET 2’**, see Guideline of the ECB of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (**TARGET2**) (ECB/2007/2).

¹⁰ See Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions.

¹¹ See Article 127 para. 5 TFEU and Article 25 ECB-Statute.

Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority). The three new European Authorities for the supervision of financial activities started their work on 1 January 2011. The Regulations centralise key competences and resources for managing the failure of any bank in the Euro Area and in other Member States participating in the Banking Union.

- 12 The ECB-Statute sets out **further tasks** (especially Articles 5, 6 and 24 ECB-Statute).

**Article 128 [Issuing of banknotes and coins]
(ex Article 106 TEC)**

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

2. Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

- 1 A consistent and stability-orientated monetary policy (cf. Article 127 TFEU) requires a central management of cash in circulation – distinguishing between banknotes (Article 128 para. 1 TFEU; cf. also Article 16 ECB-Statute) and coins (Article 128 para. 2 TFEU) – within the Euro-Zone¹, which is incumbent upon the ECB. Article 128 TFEU does (naturally) not (yet) apply to non-participating Member States (Article 139 para. 2 lit. d TFEU).
- 2 **Monopoly on banknotes:** The reservation of approval of the ECB (Article 128 para. 1 s. 1 TFEU) covers ‘any action, which is relevant for the circulation of banknotes’², therefore includes the whole design, production, transport and delivery process as well as the modalities of exchange and collection³ and the protection of banknotes⁴. Notwithstanding the narrow wording (‘within the Union’), the reservation of approval also extends to third countries. Any other, especially more restrictive interpretation of the term ‘issue’ would endanger the objective of comprehensive monitoring of the ECB-Council (Article 16 ECB-Statute) concerning the circulation of banknotes in the Euro-Zone (*effet utile*). Therefore, the widely discussed introduction of 1 and 2 Euro banknotes would require the approval of the ECB-Council. The national central banks are – as well as the ECB – entitled and currently almost exclusively responsible⁵ to issue banknotes⁶, which has to be distinguished from introducing banknotes.

¹ Cf. Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.

² Cf. GS/Zilioli/Di Preso, Article 106 EGV mn. 9.

³ Cf. Decision of the ECB of 20 March 2003 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (ECB/2003/4).

⁴ Cf. for example Decision of the ECB of 15 May 2008 on security accreditation procedures for manufacturers of euro secure items for euro banknotes (ECB/2008/3).

⁵ Pursuant to the current key: ECB (8%), German central bank (almost 25 %), cf. ECB-decision 2001/15 of 6 December 2001 Decision of the ECB of 6 December 2001 on the issue of euro banknotes (ECB/2001/15).

⁶ See also Article 10 Regulation 974/98.

According to **Article 128 para. 1 s. 3 TFEU**, other banknotes than the ones issued by the ECB and the national central banks (be it of the Member States or third countries) do not have the status of legal tender within the Union; the same applies to coins according to Article 11 Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.

Since Euro coins are of an inferior meaning for the monetary policy, the **coinage prerogative** remains with the **Member States**, which also may determine the issuing authority (**first part of the second sentence of Article 128 para. 2 TFEU**). Therefore the **preservation of approval of the ECB** only determines the volume of the issued coins (**second part of the second sentence of Article 128 para. 2 TFEU**) annually divided by Member States⁷. According to **Article 128 para. 2 s. 2 TFEU**, the Council may adopt (by a qualified majority, cf. Article 16 para. 3 TEU) measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their **smooth circulation** within the Union, which was implemented with the Regulation 975/98 of 3 May 1998 on denominations and technical specifications of euro coins intended for circulation. The European Parliament only has a right to be heard, which deteriorates its previous legal position (Article 252 TFEU).

Article 129 [Structure of the ESCB; Statute] (ex Article 107 TEC)

1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.

2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as 'the Statute of the ESCB and of the ECB') is laid down in a Protocol annexed to the Treaties.

3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.

4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

According to Article 13 para. 1 TEU, the ECB is explicitly a 'general' institution of the Union now; the Articles 282 et seq. TFEU set out the fundamental institutional criteria of the two-staged currency constitution of the ESCB (tasks, legal personality, independence, body structure, reporting obligations). Besides the structure of the central bank system (Article 129 para. 1 TFEU) and the reference to the ECB/ESCB-Statute (Article 129 para. 2 TFEU), Article 129 para. 3 TFEU is the main content of Article 129. Article 129 para. 3 TFEU sets out the modalities of the amendment of the Statute and the applicable procedure for measures according to the Statute (Article 129 para. 4 TFEU).

The meaning of Article 129 TFEU may not be clear at first glance since it is nearly a complete normative duplication of provisions which are already set out – systematic

⁷ See for example Decision of the EBC of 6 December 2013 on the approval of the volume of coin issuance in 2014 (ECB/2013/46).

more logical – in primary law: Article 129 paras 3 and 4 TFEU have basically the same wording like Articles 40 and 41 ECB-Statute; Article 129 para. 2 TFEU is superfluous with regard to Article 51 TEU (protocols as an inherent part of the Treaties) as well as Article 129 para. 1 TFEU, since its legislative content can be interpreted by reading the Articles 282, 283 TFEU together with the Statute. Article 129 TFEU primarily has a political function: It shall clarify the narrow and inseparable unity between the political integration, laid down in the Treaties, and the margin of appreciation, laid down in the ECB-Statute, of the ESCB-institutions to stress (also normatively) and to antagonize the fear of independence of the monetary institutions.

- 3 According to Article 129 para. 1 TFEU, the decision-making bodies, meaning the Governing Council¹ and the Executive Board², fulfil the managing functions. Further details on both institutions can be found in Articles 10 et seq. of the Statute.
- 4 The Statute, referred to in Article 129 para. 2 TFEU, which was enacted 1992 and merely³ modified ever since, is a fundamental part of the primary law (cf. Article 51 TFEU) since it is attached to the Treaties as Protocol No 4. Efforts to regulate the monetary system only by secondary law were prevented, whereby the monetary system and its actors enjoy a certain – limited by Article 129 paras 3 and 4 TFEU – independence in contrast to the political process which is most likely determined by its own discretion.
- 5 The Statute, as part of the primary law (cf. Article 51 TEU), can basically only be changed according to the procedure set out in Article 48 TEU. Deviant to this, Article 129 para. 3 TFEU⁴ allows for certain, finally listed questions of organizational respectively procedural matters a simplified amendment procedure, which is independent⁵. A corresponding amendment of the primary law can be made within the ordinary legislative procedure but the Commission or the ECB itself have to initiate it (a ‘recommendation’ is required). The other institution has the right of hearing. In practice this simplified procedure was used to reduce the members with voting power of the Executive Board (see Article 10 para. 2 Statute)⁶.
- 6 Based on **Article 129 para. 4 TFEU** (and the identical Article 41 Statute), the Council⁷, which has a wide margin of appreciation in the individual case⁸, may substantiate the Statute by acts of secondary law, but only on matters which are mentioned in this paragraph. Either the Commission (proposal) or the ECB (recommendation) can initiate the procedure; the other institution, as well as the European Parliament, have the right of hearing.

***Article 130 [Independence of the ECB and national central banks]
(ex Article 108 TEC)***

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices

¹ For its composition, see Article 283 para. 1 TFEU.

² For its composition, see Article 283 para. 2 TFEU.

³ Last amended by the Lisbon Treaty, Prot. 1 No 11 mainly with respect to the accomplishment of the Monetary Union.

⁴ Cf. with identical wording: Article 40 Statute.

⁵ Meaning without the participation of the Member States: As distinct from the ‘simplified amendment procedure’ pursuant to Article 48 paras 6, 7 TFEU.

⁶ Decision 2003/223, OJ 2003 L 83/6.

⁷ Decision 2003/223, OJ 2003 L 83/6.

⁸ For practical examples, see Schwarze/*Potacs*, Article 129 AEUV mn. 21.

or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

A central bank might have different institutional positions and different relationships 1 to other carriers of State authority. The existing systems range from a strict subordination relationship (French model) to a **great extent of independence** (German model). The design of the ESCB and its institutions similar to the last mentioned model is anything but a natural economic decision but seems to be appropriate in light of the obligation of the European monetary policy to maintain **price stability** (Articles 127 para. 1 s. 1, 282 para. 2 s. 2 TFEU).

Article 130 TFEU guarantees the **freedom from instructions** and therefore ensures the 2 ECB itself as well as the national central banks independence from political influence¹ and safeguards a functional independence of these financial institutions. This independence is accompanied by provisions on the institutional and personal independence.

Article 130 TFEU grants the ECB (and the national central banks) only a '**limited 3 functional independence**' to exercise their financial tasks², with the result that investigations against fraud by OLAF are not excluded³.

Article 130 TFEU includes a **dual normative requirement**: On the one hand the ECB, 4 national central banks and their decision-making bodies are obliged not to seek or take instructions from any other body (Article 130 s. 1 TFEU). On the other hand any other body, that might give instructions (practically the whole public sector at the national and European level) is obliged to waive to any influence (first part of the second sentence of Article 130 TFEU) but especially is obliged not to interfere with regard to fail to effect the ESCB-institutions while they exercise their tasks (second part of the second sentence of Article 120 TFEU). Nevertheless, this does not exclude a pressure-free dialogue.

The independent position of the ESCB is additionally strengthened by the prohibition 5 of granting the state credit (Article 123 TFEU), the requirement to suit the national legislation to the Statute of the ESCB (Article 131 TFEU), the provisions on the external monetary policy (Article 219 TFEU) and the regulations on the institutional⁴ and personal ⁵ independence and the financial facilities of the ESCB⁶.

Article 131 [Harmonisation obligation of the Member States] (ex Article 109 TEC)

Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

Until the Treaty of Lisbon entered into force on 1 December 2009, Article 131 TFEU 1 was an useful modification, because of the priority of the application, to the general ad-

¹ In this meaning also Article 282 para. 3 TFEU, Article 7 ECB-Statute.

² See *Lavranos*, EuR 2003, 882.

³ ECJ Case C-11/00 *Commission v ECB* [2003] ECR I-7147 mn. 135.

⁴ Articles 13 para.1 and 282 para. 3 TFEU state that the ECB is an EU institution with legal personality.

⁵ See Article 283 TFEU, Article 11 ECB-Statute.

⁶ See Articles 28 to 33 ECB-Statute.

justment obligation of national law having to be compatible with the prior Union law, as it was suspended 'until the ESCB was established'. Now that this clause has ceased to exist, the provision is **practically superfluous**.

- 2 Besides the clear wording ('every Member State') and the absence of Article 131 TFEU in the listing of Article 139 para. 2 TFEU, the application of the provision to Member States, which are not (yet) members of the Euro-Zone, is everything but simple, especially concerning the independence of the national central banks and their institutions¹. The UK² is the only country with an exception to this rule in primary law.

**Article 132 [Legal acts]
(ex Article 110 TEC)**

1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:

- **make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),**
- **take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,**
- **make recommendations and deliver opinions.**

2. The European Central Bank may decide to publish its decisions, recommendations and opinions.

3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

- 1 The outstanding institutional role of the ECB as an institution (Article 13 para. 1 TEU) underlines its own legal personality. Article 282 para. 3 s. 1 and Article 132 TFEU contain an own list of rights¹. Apart from the lack of the instrument of a regulation, it corresponds the catalogue of Article 288 TFEU. The elimination of the former Article 110 para. 2 subpara. 1–4 TEC has only editorial reasons and does not imply the elimination of the application of the general provisions on the legislative process².
- 2 The provisions on the ECB are **legal acts without law-quality**³, which are signed by the ECB President according to Article 297 para. 2 TFEU⁴. Beyond the obligation of Article 297 para. 2 subpara. 2 TFEU, Article 132 para. 2 TFEU gives the ECB another option for the publication⁵. At least all legal acts are published by electronic means⁶.

¹ Cf. *Háde*, Unabhängigkeit für die ungarische Nationalbank? Zum Status der Zentralbanken von Mitgliedsstaaten mit Ausnahmeregelung, *EuZW* 2005, 679, with a critical discussion on the old regime.

² Cf. No 4 of TFEU, Protocol No 15.

^{1*} Cf. also Article 34 ECB-Statute.

^{2*} Reason: Article 296 para. 2 TFEU; signature, publication, entering into force: Article 297 TFEU; enforceable title: Article 299 TFEU [here the ECB is mentioned explicitly].

³ For the term, see Article 289 para. 3 TFEU.

⁴ Signature: ECB President, Article 297 para. 2 subpara. 1 TFEU.

⁵ Cf. Article 17.7 RoP ECB.

⁶ www.ecb.int/ecb/legal/html/index.de.html.

The rules of the ECB, as a **fundamental part of the law of the Union**, have the same quality and enjoy the same status as 'ordinary' legal acts of the Union of the same kind. The application is not limited to the euro zone; Article 139 para. 2 lit. e TFEU has only the effect that the legal acts of the ECB do not create normative commitment for Member States outside the euro zone. 3

Objectively, the scope of the law of the ECB is limited to the framework laid down in Article 127 TFEU and is substantiated by the final catalogue⁷ of the first indent of Article 3 para. 1 Protocol No 4 of the Statute, to enact regulations. As part of the principle of proportionality the distinguishing feature of 'necessity' is an additional limit. 4

Legal protection against actions of the ECB is determined by the general provisions⁸. 5

The Council of the ECB established a legal framework to exercise its sanction competence with the Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, which was completed by ECB Regulation (EC) No 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions (ECB/1999/4), as amended by ECB Regulation (EC) No 985/2001 of 10 May 2001 amending Regulation ECB/1999/4 on the powers of the European Central Bank to impose sanctions (ECB/2001/4). 6

Article 133 [Legal acts on the euro]

Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank.

Since the situation of the competences was unclear, Article 133 TFEU now establishes a **comprehensive legal basis** of competence for legal measures which are necessary 'for the use of the Euro as a single currency'. The ordinary legislative procedure is applicable (Articles 289 para. 1, 294 TFEU) but the voting right of Member States which do not belong to the euro zone is suspended according to Article 139 para. 4 TFEU. However, Article 133 TFEU does not intend the extension of competences to issue legislative acts; moreover, the competences of the ECB remain unaffected (cf. Article 132 TFEU). 1

Not only legal acts like Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro and Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, are subject to Article 133 TFEU but in the future also those regulations which relate to counterfeiting: Regulation (EU) No 1338/2011 of 28 June 2011 laying down measures necessary for the protection of the euro against counterfeiting as well as Regulation (EC) No 1339/2001 of 28 June 2001 extending the effects of Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency¹. Other fields of application, which are not subject to a special legal basis², are possible. But the wording 'necessity' needs to be understood as protection against over-regulation. 2

⁷ 'to define and implement the monetary policy of the Union; to conduct foreign-exchange operations consistent with the provisions of Article 219 of that Treaty; to hold and manage the official foreign reserves of the Member States; to promote the smooth operation of payment systems' and if Article 129 para. 4 TFEU gives an explicit competence for this.

⁸ Cf. also Articles 35, 36.2 ECB-Statute.

¹ OJ 2001 L 181/11: Formerly Article 123 para. 5 TFEU.

² Especially, Article 128 para. 2 or Article 149 para. 4 TFEU.

CHAPTER 3 INSTITUTIONAL PROVISIONS

Bibliography: *Bénassy-Quéré/Coeuré/Jacquet/Pisani-Ferry*, Economic Policy Theory and Practice, 2010; *Blanke*, The Economic Constitution of the European Union, in: *Blanke/Managiameli* (eds), The European Union after Lisbon, 2012, 369; *Borger*, The ESM and the European Court's Predicament *Pringle*, German L.J. (14) 2013, 113; *Buti/Sapir*, EMU and Economic Policy in Europe, 2002; *Dawson*, Reforming EU Economic Governance: The Legislative Response to the Euro Crisis, MJ (4) 2011, 588; *De Grauwe*, Economics of Monetary Union, 9th ed. 2012; *Eichengreen*, European Monetary Unification, 1997; *Farina/Tamborini*, Macroeconomic Policy in the European Monetary Union: From the Old to the New Stability and Growth Pact, 2007; *Häde*, Die Europäische Währungsunion in der internationalen Finanzkrise – An den Grenzen europäischer Solidarität?, *Europarecht* (45) 2010, 854 *Häde*, The Treaty of Lisbon and the Economic and Monetary Union, in: *Blanke/Managiameli* (eds), The European Union after Lisbon, 2012, 421; *Hatje*, Die Reform des Stabilitäts- und Wachstumspaktes: Sieg der Politik über das Recht?, *DÖV* 2006, 597; *Merino*, Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance, *CMLR* (49) 2012, 1613; *Mundell*, A Theory of Optimum Currency Areas, *American Economic Review* 51 (1961), 657; *Pipkorn*, Legal arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union, *CMLR* (31) 1994, 263; *Ruffert*, The European Debt Crisis and European Union Law, *CMLR* (48) 2011, 1777; *Ryvkin*, Saving the Euro: tensions with European treaty Law in the European Union's Efforts to Protect the Common Currency, *Cornell Int'l LJ* (45) 2012, 227.

Article 134 [Economic and Financial Committee] (ex Article 114 TEC)

1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, an Economic and Financial Committee is hereby set up.

2. The Economic and Financial Committee shall have the following tasks:

- to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions,
- to keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions,
- without prejudice to Article 240, to contribute to the preparation of the work of the Council referred to in Articles 66, 75, 121(2), (3), (4) and (6), 122, 124, 125, 126, 127(6), 128(2), 129(3) and (4), 138, 140(2) and (3), 143, 144(2) and (3), and in Article 219, and to carry out other advisory and preparatory tasks assigned to it by the Council,
- to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of the Treaties and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.

The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.

3. The Council shall, on a proposal from the Commission and after consulting the European Central Bank and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.

4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Article 139, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

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I. General remarks

1

Article 134 TFEU creates an advisory body in financial matters: the Economic and Financial Committee. The predecessor organ of the present Committee was the Monetary Committee (Article 114 para. 1 TEC) which had been introduced by the Maastricht Treaty. It was designed as an advisory body for the second stage of the EMU and was to be dissolved at the start of the third stage of the EMU (Article 114 para. 2 TEC). Accordingly, the Monetary Committee has been replaced by the present Economic and Financial Committee in 1999 (Council Decisions 98/743/EC and 1999/8/EC).

II. Tasks of the Economic and Financial Committee

2

Article 134 para. 2 TFEU assigns a number of tasks to the Committee; they all have to be read and interpreted in the light of Article 134 para. 1 TFEU which defines the scope of the Committee's work. There are three types of tasks that can be found in the article: (a) general advisory tasks (para. 2 indent 1 and indent 2) (b) specific advisory and preparatory tasks (para. 2 indent 3 and indent 4) relating to certain policy fields and decision-making procedures (c) other advisory for preparatory tasks explicitly assigned to it by the Council (para. 2 indent 3). The Committee is not limited to answering requests by the Council or the Commission; it can also act on its own initiative, in particular when providing general advisory opinions. The EP is not entitled to request the Committee to act. However, the EP can influence the Committee indirectly, in order to encourage it to give advice on its own initiative. Neither can the Committee make any binding decisions, nor can it veto the legislative procedure or any other decision-making process. Nonetheless, it is an infringement of primary law if the Committee is not heard where the Treaties explicitly provide for such a partaking. The involvement of the Committee does not replace the participation of other institutions required by the Treaties; this is explicitly made clear for the preparatory works according to Article 240 TFEU.

III. Composition, Statute of the Economic and Financial Committee

3

Article 134 para. 2 TFEU defines a maximum size and minimum requirements for the composition of the Committee. Detailed rules on the composition are reserved for a Council decision based on an initiative by the Commission. The EP is not involved in this decision and only has to be informed about the decision. Since the Committee has been designed, from the beginning, as an institution that gives advice exclusively to the Commission and to the Council and not (at least not directly) to other organs, this is conse-

quent. However, due to the strong relation of the Committee's work to the tasks assigned to and performed by the ECB and the ESBC, the ECB has to be heard. The Council has decided on the composition of the Committee by Council Decision 98/743/EC.

- 4 Presently the Committee is composed of two representatives of the ECB, two more named by each of the Member States and another two named by the Commission. The nomination of alternates is possible. The statute requires the members to be selected from among experts possessing outstanding competence in the economic and financial field.¹ In particular the term 'outstanding' is important, since it hinders the Member States, who still have a large margin of appreciation, to nominate politically adequate candidates with inadequate knowledge of economic contexts. Nonetheless, for the experts nominated by the Member States knowledge also of the functioning of the national state administrations is a necessary requirement, as Article 4 of the Decision clearly emphasizes, but this requirement is complementary to the first one and not to be understood as an alternative.

***Article 135 [Recommendation and proposals of the Commission]
(ex Article 115 TEC)***

For matters within the scope of Articles 121(4), 126 with the exception of paragraph 14, 138, 140(1), 140(2), first subparagraph, 140(3) and 219, the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

- 1 The Council or a single Member State can request the Commission to make recommendations or proposals. The provision of Article 135 TFEU does not question the right to initiative of the Commission in principle, which is a core principle of the EU legal order. Like Articles 241 and 225 TFEU, the present article only allows the organs named therein to call for the Commission to make use of its right to initiative in a concrete case. The article is only applicable in respect to the matters mentioned, i.e. certain matters of economic and monetary policy. The matters enumerated in Article 135 TFEU generally relate to the administration of the economic and monetary union and do not relate to cases where the TFEU allows for the creation of legislative acts.
- 2 Article 135 TFEU finds its predecessor in Article 115 TEC, which had been introduced by the Treaty of Maastricht. The provision has always existed in parallel to Articles 241 and 225 TFEU and the respective predecessor norms. Against this background, Article 135 TFEU has to be regarded as a *lex specialis* to the more general provisions of the other two articles. This gives rise to difficult dogmatic questions as to the relationship between them. Viewed from its function as *lex specialis*, the more general rules of Article 241 TFEU are blocked where Article 135 TFEU is applicable. The same should be true for Article 225 TFEU for two reasons: (a) Decision-making in the matters enumerated in Article 135 TFEU generally excludes the Parliament, therefore, a right to indirect initiative for the EP would be inconsequent and (b) if Article 225 was applicable, it would be difficult to explain why Article 241 should be blocked, creating dogmatic inconsistencies. Finally, Article 11 TEU on a citizens' initiative is also blocked by the present article. A broader interpretation, giving room for a parallel application of other forms of indirect initiative, would diminish the function as *lex specialis* and would reduce the scope of the present article to one single item: the creation of an additional right to indirect initiative

¹ See Article 3 Decision 98/743/EC.

of the Member States. Then, however, it could not be explained why the Article explicitly also mentions the Council.

It should be noted that Article 135 TFEU explicitly does not relate to the field of economic and monetary policy as a whole, for instance important provisions as Article 121 para. 6 TFEU – allowing for secondary legislation in accordance with the ordinary legislative procedure – are not included and hence, indirect initiatives by the EP and the citizens are possible. The role of Article 121 para. 14 TFEU in this context also needs to be clarified. Article 135 TFEU to the full extent excludes the paragraph from its special regime. It would be a misunderstanding to read this provision as if it led to even stricter limitations, prohibiting all forms of indirect initiative. Neither the wording nor a systematic perspective give support to such a narrow understanding. On the contrary, Article 121 para. 14 TFEU, like Article 121 para. 6 TFEU and unlike the matters enumerated in Article 135 TFEU, is a competence allowing legislation in a legislative procedure. Therefore, it is consequent that also in that case the general rules on indirect initiatives apply, including the EP and the citizens, but at the same time excluding individual Member States who only have a right to indirect initiative under the regime of Article 135 TFEU.²

Article 135 TFEU is concerned with **central aspects of the administration of the economic and monetary union**, namely:

- Multilateral supervision of the economic policy of the Member States (Article 121 para. 4 TFEU); note that the legislative competence of Article 121 para. 6 TFEU is not included, as far as secondary legislation enacted under Article 121 para. 6 TFEU refers to its para. 4, Article 135 TFEU is applicable.
- Multilateral supervision concerning excessive deficits (Article 126 TFEU); as to para. 14, see above mn. 3.
- Common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences, as well as measures ensuring unified representation therein (Article 138 TFEU).
- Measures concerning convergence reports and the admission of new members to the Euro area. (Article 140 para. 1, para. 2 sub-para. 1 and para. 3 TFEU).
- Agreements on an exchange-rate system for the Euro in relation to the currencies of third states (Article 219 TFEU).

CHAPTER 4 PROVISIONS SPECIFIC TO MEMBER STATES WHOSE CURRENCY IS THE EURO

Article 136 [Budgetary discipline; economic policy guidelines]

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

- (a) to strengthen the coordination and surveillance of their budgetary discipline;
- (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

² Similar Streinz/Kempen, Article 135 AEUV mn. 4, dissenting: CR/Häde, Article 135 AEUV, mn. 2.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

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1 I. Introduction to Articles 136 TFEU et seq.

A **common currency** calls for an **intensified coordination of economic and financial policies** among its members. This is true for both the **internal** policy coordination and the **external relations** to third countries and international organisations. This is reflected by the present chapter on specific provisions for Member States whose currency is the Euro.

2 II. Specific measures under Article 136 para. 1 and 2 TFEU

Article 136 paras 1 and 2 TFEU aim at strengthening the stability of the Euro currency area by allowing the Council to adopt legislative measures on economic policy coordination and fiscal discipline for the Euro area members in accordance with the procedures of Articles 121 TFEU and 126 TFEU.

Consequently, Article 136 TFEU allows for measures specially designed for the Euro area. Such measures can be much stricter than those rules generally applying for all Member States pursuant to Article 121 para. 6 TFEU. However, they cannot extend further than that which is allowed under Articles 121 and 126 TFEU. The Union is thus not free to adopt whatever legislation it deems necessary to reach the objectives set out in para. 1 lit. a and b of the present article.

3 As a part of the so called **Six Pack** instruments, **Regulations 1173/2011¹ and 1174/2011²** were passed under Article 136 TFEU, setting up a sanctions system. They are characterized by reverse majority voting in the Council, i.e. Commission recommendations shall be deemed adopted by the Council unless it decides, by qualified majority (Article 238 TFEU), to reject the recommendation.

4 Regulation **1174/2011** introduces a system of **sanctions** if recommendations made under Regulation 1176/2011³ are not complied with by the Member State addressed. These sanctions include an (interest-bearing) deposit of (up to) 0.1 % of the national GDP which can be converted into a fine of the same amount. Fines in accordance with this Regulation shall constitute other revenue in the sense of Article 311 TFEU and shall be assigned to the ESM⁴. Interestingly, this causes a situation where non-binding recommendations are enforced by financial sanctions. From a theoretical perspective, this con-

¹ 2011 OJ L 306/1.

² 2011 OJ L 306/8.

³ See Article 121 mn. 12.

⁴ See mns. 7 et seq.

ception is somewhat contradictory: non-binding rules are by definition not legally enforceable but (just like the mechanisms in Article 121 paras 3 and 4 TFEU) are enforced by political pressure. The sanctions mechanism is modelled after the mechanism of Article 126 para. 11 TFEU; but while this mechanism is based on primary law, the mechanism set out in Regulation 1174/2001 is based on secondary legislation. It is thus questionable whether Article 121 para. 6 or Article 136 TFEU provide a legislative basis for such sanctions. One way that might justify the mechanism of Regulation 1174/2011 is to understand the payments not primarily as enforcement tool but as a fine which has an enforcement effect on the one hand but also wants the Member State to make a contribution to the costs caused by macroeconomic imbalances on the other hand. Another interpretation would be that Article 136 TFEU refers to Articles 121 and 126 TFEU for the substantive content of the recommendations made but that, in addition, it implicitly allows for a sanctions system to be set up in order to enforce the recommendations.

Regulation **1173/2011** introduces a similar sanctions system for cases of non-compliance with either the preventive or the corrective arm of the **Stability and Growth Pact**⁵. For the preventive arm, an interest-bearing deposit amounting to 0.2 % of the Member State's GDP can be required, whereby the interest rate shall reflect the Commission's credit risk and the relevant investment period⁶. For the corrective arm, a non-interest-bearing deposit amounting to 0.2 % of the GDP can be requested⁷ and can finally be transformed into a fine⁸. In order to ensure that the EU has access to accurate financial and economic data, Article 8 Regulation 1173/2011 stipulates sanctions for the **manipulation of statistics**. In these cases, sanctions of up to 0.2 % of the GDP can be imposed as well, depending on the individual case.

The economic and financial stability in the Euro area is further strengthened by two additional regulations (**Two Pack**): Regulation 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

III. Financial assistance mechanisms (para. 3)

Article 136 para. 3 TFEU has been newly introduced in 2013. It is based on Council Decision 2011/199/EU and its implementation followed the procedure of Article 48 para. 6 TEU. Thus, it had to be ratified by all Member States. Due to a delay in the ratification process, the entering into force had to be postponed until May 2013. The provision allows for a financial assistance mechanism to be set up among the members of the euro area. Based on this **competence**, the **European Stability Mechanism (ESM)** has been set up. The ESM is going to replace the earlier EFSF and EFSM mechanisms which had, in principle, the same purpose but were designed as non-permanent mechanisms. The ESM technically is an **International Organization** in its own right, based on an independent international treaty which was concluded on 2 February 2012. The ESM is therefore not an EU organ. It is nonetheless strongly linked to the EU system; in particular the ECJ is responsible for deciding any dispute concerning the interpretation and application of the ESM Treaty. However, it is not fully integrated into the EU's institutional

⁵ See Article 121 mn. 10.

⁶ See Article 4 Regulation 1173/2011.

⁷ See Article 5 Regulation 1173/2011.

⁸ See Article 6 Regulation 1173/2011.

framework, e.g. financial audit is reserved to a Board of Auditors which is separate from the European Court of Auditors (an EU organ).

- 8 It is the **purpose** of the ESM to mobilise funding for Member States in need by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties⁹. It is the main task of the ESM to collect fresh capital for those Member States which are no longer able to finance themselves via issuing bonds and other financial instruments at the capital market. In addition, the ESM is authorised to **recapitalise banks** under certain conditions. Similar to the World Bank and other institutions, the ESM is initially capitalised by its Member States, the **authorised capital stock** is 700 billion Euro, represented by 7 million shares of a nominal value of 100,000 Euro each. These shares are distributed among the Member States according to a contribution key¹⁰. The liability of each Member State is limited to the portion of the authorised capital stock that it has taken over. The authorised capital can be raised (or lowered) by amending the ESM Treaty. In practice, the capital stock has not completely been paid in to the full extent by the Member States. The ESM Treaty requires only approximately 1/10 of the sum to be paid, while the rest remains as a guarantee which has to be paid if the ESM is in need of liquidity. The **maximum lending capital** of the ESM is independent from the capital actually paid in by the Member States. It is (in theory) not limited to the authorised capital but depends on the ability of the ESM to borrow capital at the capital markets and thus depends on the trust of the capital markets in the sustainability of the mechanism's finances. It can be significantly above or below 700 billion, e.g. if in the future the credit rating of major contributors to the ESM like France or Italy is called into question. Legally, according to Article 39 of the ESM Treaty, the ESM started with a maximum lending capital of 500 billion Euro, subject to change in accordance with Article 10 ESM Treaty.

Article 137 [Meetings of the Euro Group]

Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group.

Bibliography: *Christiansen/Piattoni*, Informal Governance in the European Union, 2003; *Puetter*, Governing informally: the role of the Eurogroup in EMU and the Stability and Growth Pact, 11 *Journal of European Public Policy* 2004, 854; see Article 134 TFEU above for further literature.

- 1 The Euro Group was set up in 1998 in order to coordinate economic policies for the third stage of the EMU – although initially as a purely informal group. It serves as a political forum. Protocol No 14 contains further details, e.g. on the participation of the ECB and the European Commission. The Member States are represented by their respective ministers. The Euro Group is chaired by a **president** who is elected for a period of two and a half years. Re-election is possible. This permanent position was introduced in 2005 with *J.-C. Juncker* being the first president. The Euro Group is now formally recognized by the Treaties; however, it has a largely informal role.
- 2 Though a political forum, the Euro Group is nonetheless of high practical relevance for decision-making on the Euro and on the coordination of economic policies in the Euro area. Members of the Group meet regularly one day before the ECOFIN Council which underlines its importance. Meetings are prepared by the **'Eurogroup Working Group'**, which is not explicitly mentioned in primary law. It is presided by a president in its own right who is not identical with the president of the Euro Group.

⁹ See Article 3 ESM Treaty.

¹⁰ See Article 8 ESM Treaty.

***Article 138 [Euro in the international monetary system]
(ex Article 111(4) TEC)***

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

Bibliography: *Puccio*, The EU and the IMF: The Financial Crisis as a Catalyst for a Stronger Union Representation?, in: Waele, Kuipers, The European Union's Emerging International Identity, 2013, 211; see Article 134 TFEU above for further literature.

In order to establish and enhance trust in the common currency, also a coordinated, 1
coherent and reliable representation of the Member States in international organisations
and conferences is necessary. Article 138 TFEU entrusts the Council with this interna-
tional representation of the Euro, para. 1 focussing on the formulation of common posi-
tions, para. 2 focussing on the institutional aspects of such representation. Article 138
TFEU exists notwithstanding the capacity of the Council to conclude international
agreements on exchange rates with third countries (Article 216 TFEU). Both, Article 138
and 216 TFEU, weaken the independence of the ESCB since there is a considerable
overlapping with the responsibility of the ESCB for the monetary policy.¹ Thus, at
least consultation with the ECB prior to the decision-making in the Council has to be
ensured.

The scope of the present provision is limited to (a) matters of 'particular' interest for 2
economic and monetary union, which (b) serve the security of the Euro's place in the
international monetary system, by (c) coordinating positions and representation in in-
ternational institutions. These criteria should be interpreted in a correspondingly narrow
manner, preventing both conflicts of competence with the ESCB and with the Member
States.

Such conflict could emerge quickly since, according to Article 6 of the ESCB-Statute, 3
inasmuch as the tasks entrusted to the ESCB are involved, the ECB shall decide how the
ESCB shall be represented internationally. This competence of the ECB is, however,
without prejudice to Article 138 TFEU (Article 6 para. 3 ESCB-Statute).

Since Article 138 TFEU is concerned with the role of the Euro in the international sys- 4
tem, only Member States that introduced the common currency (Article 139 TFEU) are
eligible for voting in the Council.

¹ See *Puccio*, The EU and the IMF: The Financial Crisis as a Catalyst for a Stronger Union Representation?, in: Waele, Kuipers, The European Union's Emerging International Identity, 2013, 226.

CHAPTER 5 TRANSITIONAL PROVISIONS

Article 139 [Member States with a derogation]

1. Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as ‘Member States with a derogation’.

2. The following provisions of the Treaties shall not apply to Member States with a derogation:

- (a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(2));
- (b) coercive means of remedying excessive deficits (Article 126(9) and (11));
- (c) the objectives and tasks of the ESCB (Article 127(1) to (3) and (5));
- (d) issue of the euro (Article 128);
- (e) acts of the European Central Bank (Article 132);
- (f) measures governing the use of the euro (Article 133);
- (g) monetary agreements and other measures relating to exchange-rate policy (Article 219);
- (h) appointment of members of the Executive Board of the European Central Bank (Article 283(2));
- (i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article 138(1));
- (j) measures to ensure unified representation within the international financial institutions and conferences (Article 138(2)).

In the Articles referred to in points (a) to (j), ‘Member States’ shall therefore mean Member States whose currency is the euro.

3. Under Chapter IX of the Statute of the ESCB and of the ECB, Member States with a derogation and their national central banks are excluded from rights and obligations within the ESCB.

4. The voting rights of members of the Council representing Member States with a derogation shall be suspended for the adoption by the Council of the measures referred to in the Articles listed in paragraph 2, and in the following instances:

- (a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article 121(4));
- (b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article 126(6), (7), (8), (12) and (13)).

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

- 1 The creation of an economic and monetary union is one of the objectives of the EU formulated in the TEU (Article 3 para. 4 TEU). However, even after the formal introduction of the Euro currency, there are still a number of Member States which for various reasons do not yet take part in the common currency. Thus, Article 139 et seq. TFEU provide for transitional provisions applicable to those Member States. Throughout the Treaties, they are termed ‘**Member States with a derogation**’ (Article 139 para. 1 TFEU). It can be said generally that the Treaties understand this status as temporary and aim at

the establishment of one single currency area for all EU members. With the exception of Denmark and the United Kingdom, all Member States have the **legal obligation to join the Euro area** under Article 140 TFEU. While in theory, it would be possible to enforce this legal obligation (Article 258 TFEU), such enforcement is practically neither feasible nor helpful.

On 1 January 1999, the third stage of the EMU entered into force for all (then) Member States – except for the United Kingdom and Denmark which formally opted out, Sweden, which until today does not fulfil the legal requirements for membership and Greece, which did not fulfil the economic requirements set out in Article 140 TFEU.¹ Greece, however, was allowed to introduce the Euro in 2001.² With the enlargement of the EU, additional Member States joined the group of Member States with a derogation. Meanwhile of the new Member States, Slovenia (2007), Cyprus, Malta (both 2008), Slovakia (2010) and Estonia (2011) introduced the Euro and abandoned their former national currencies.

Today, the following Member States have not yet introduced the Euro:

- Bulgaria
- Croatia
- Czech Republic
- Denmark (exception in Edinburgh Agreement of 1992³ recognised by Protocol No 22 TFEU)
- Hungary
- Latvia (scheduled introduction of the Euro: 2014)
- Lithuania
- Poland
- Romania
- Sweden (no formal exception, unilateral non-participation⁴)
- United Kingdom (exception in Protocol No 15 TFEU)

(Member States without additional information do in any case not fulfil the requirements of Article 140 TFEU, irrespective of their political will to introduce the common currency.)

Article 139 para. 2 TFEU enumerates those **provisions** which are **not applicable to Member States with a derogation**. This is a significant improvement compared to the pre-Lisbon situation when such a catalogue did not exist. The list includes most (but not all) provisions on the economic and monetary union. In addition, Member States with a derogation are excluded from rights and obligations within the ESCB according to Article 139 para. 3 TFEU.⁵ In addition to this, the United Kingdom has been granted an even broader exception in Protocol No 15, which in its No 3 does not only state that the United Kingdom shall retain its powers in the field of monetary policy but that it does so according to its national law.

Article 139 para. 4 TFEU draws procedural consequences from the fact that a number of Member States with a derogation exist: Member States whose currency is the Euro form a distinct group of states; states with a derogation are largely barred from interfering into the monetary and economic policy affairs of such states by suspending their right to vote if such affairs are concerned.

¹ Council Decision 98/317/EC of 3 May 1998.

² Council Decision 200/427/EC of 19 June 2000.

³ OJ C 348/1-3 of 31 December 1992.

⁴ The legal validity of this opt-out is highly questionable; it presumably constitutes a breach of the legal obligation to introduce the Euro under the TFEU.

⁵ See also Article 42 ESCB Statute.

Article 140 [Convergence report]
(ex Articles 121(1), 122(2), second sentence, and 123(5) TEC)

1. At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:

- the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability,
- the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6),
- the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro,
- the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.

The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to the Treaties. The reports of the Commission and the European Central Bank shall also take account of the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.

2. After consulting the European Parliament and after discussion in the European Council, the Council shall, on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1, and abrogate the derogations of the Member States concerned.

The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. These members shall act within six months of the Council receiving the Commission's proposal.

The qualified majority of the said members, as referred to in the second subparagraph, shall be defined in accordance with Article 238(3)(a).

3. If it is decided, in accordance with the procedure set out in paragraph 2, to abrogate a derogation, the Council shall, acting with the unanimity of the Member States whose currency is the euro and the Member State concerned, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the euro as the single currency in the Member State concerned.

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I. Overview

1

According to Article 3 para. 4 TEU, the European Union aims at introducing a single currency for the common European market – the Euro. Originally the plan was to introduce the Euro in all Member States and there is a legal obligation of the Member States to support this process¹. Article 140 TFEU provides details for preparatory measures and defines thresholds which have to be fulfilled before the Euro can be introduced in a Member State.

The provisions of Article 140 TFEU are relevant for Member States which, although 2 members of the Union at the time of the introduction of the Euro currency, have not yet introduced the single currency. They likewise apply to all those states that became members of the Union at a later point. After the introduction of the Euro, the regime of Article 140 TFEU is replaced by the economic governance mechanisms of Articles 121 and 126 TFEU.

Article 140 TFEU sets up a system of regular evaluation of Member States with a deroga- 3 tion² based on the **convergence criteria** defined in its **para. 1**. If the criteria are fulfilled, the Council renders a decision in accordance with **para. 2** and finally decides on the introduction of the Euro in accordance with **para. 3**.

II. The evaluation process of para. 1

4

The Commission and the ECB are obliged to deliver reports on the progress of the Member States in fulfilling their obligations regarding the achievement of the convergence criteria on a regular basis ('Convergence Reports'). These reports have to be drafted at least every second year. In addition, every Member State with a derogation can request such a report.

The evaluation is based on the criteria named in Article 140 para. 1 TFEU. They en- 5 compass a number of economic criteria as well as one legal criterion. The criteria are based on the idea that the fulfilment of the various requirements defined therein are necessary for a sustainable membership in a stable monetary union as defined by the theory of optimum currency areas (see Article 119 TFEU for details).

1. Price stability

6

This criterion evaluates the inflation rate of the Member State concerned. In order to guarantee long-term price stability, the inflation rate shall be kept as low as possible.

¹ See Article 139 mn. 1.

² See Article 139 mn. 3.

Thus, in order to become a member of the monetary union, the Member State has to demonstrate that the local inflation rate does not exceed the average inflation rate of the three Member States with the lowest inflation rate by more than 1.5% during a period of one year and that the price stability is sustainable.

2. Budgetary sustainability

Generally, every Member State of the European Union is responsible for its own sovereign debts (principle of fiscal independence). There is no bailout automatism (Article 125 TFEU). Henceforth, national deficits have to be kept at a moderate level so that each Member State is able to finance its debts independently from any assistance of the Union or other Member States. In order to achieve this, excessive deficits as defined in Article 126 para. 6 TFEU shall be prevented already before the accession to the EMU.

8 3. Exchange bandwidth

The convergence of national economies can also be judged by the degree of exchange rate fluctuations between these two states. Devaluating and revaluating the national currency against foreign currencies is one of the major policy tools a Member State outside the EMU possesses in order to influence the economic development within its borders³. When becoming a member of the EMU, this important policy tool disappears. Therefore, a state that intends to become a member of the monetary union has to demonstrate that it can keep its exchange rate within a predefined bandwidth to the Euro without deteriorating effects to the national economy. The bandwidth of the ERM II (see Article 142 TFEU) currently is 15%, which is far from the original corridor of 2.25%⁴ and surely does not guarantee sustainable convergence.

9 **4. Stable long-term interest rates**

Stable long-term interest rates at capital markets can help to assess the level of convergence with the business cycles of the other Member States. The long-term interest rate is measured by the nominal interest rate of long-term government bonds.

10 **5. Independence of the national central bank**

As a legal requirement for accession to the Euro area, an applicant has to implement national legislation that ensures the independence of the national central bank from political decision-making. This independence is a necessary requirement for the later compliance of this Member State with (inter alia) Articles 123 and 124 TFEU. The lack of sufficient national legislation in this regard is one of the reasons why Sweden has not yet introduced the Euro.

11 **6. Further criteria**

Article 140 para. 1 subpara. 2 TFEU names further criteria that have to be taken into account: the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices. As the attempts of the Union to avoid economic imbalances among the Member States show⁵, such further criteria are significantly im-

³ See *De Grauwe*, 6 et seq.

⁴ See Article 142 TFEU mn. 2.

⁵ See Article 121 TFEU mn. 12.

portant for sustainable economic governance in Europe. Though the present article does not contain any benchmarks to measure these (soft) criteria, this does not mean that they are rather unimportant or that they can be neglected.

The criteria are explained in detail in Protocol No 13 of the TFEU. Until now, no secondary legislation replacing this protocol has been adopted. 12

III. Introduction of the Euro – decision-making 13

The procedure for an abrogation of the derogation is dealt with in Article 140 para. 2 TFEU. The decision is made by a qualified majority vote in the Council on an initiative of the Commission; the EP is heard but does not actively take part in the decision-making. In the decision-making, only those Member States which have already introduced the Euro have a right to vote. Before the Council decides, the abrogation has to be discussed additionally in the European Council, which underlines the highly political nature of such a decision.

In a second step, the introduction of the Euro requires the final definition of the exchange rates between the present national currency and the Euro. This decision is made separately based on Article 140 para. 3 TFEU, requiring unanimous voting of the Euro area members in the Council plus the consent of the newly acceding state. 14

IV. Exit or expulsion from the Euro area 15

The Euro has been designed as an integral part of the European Union. Consequently, the Treaties do not contain provisions on the unilateral exit or an exclusion from the Euro area. The EMU is, like market freedoms or European citizenship, one of the cornerstones of the Union. Due to the interdependence between the elements of the *acquis communautaire*, a unilateral exit from the Union cannot be justified by an *argumentum a maiore ad minus* with a view to Article 50 TFEU. The *clausula rebus sic stantibus* is also not applicable. A Member state cannot leave the Euro, just as it cannot unilaterally abandon the applicability of the free movement of goods. However, it would be possible for the Member States to negotiate an amendment of primary law that explicitly allows a certain Member State to abandon its membership in the Euro area. This would have to be done, for instance, by means of an additional protocol to the Treaties and would need the consent of all Member States.

Article 141 [General Council of the ECB] (ex Articles 123(3) and 117(2) first five indents, TEC)

1. If and as long as there are Member States with a derogation, and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank.

2. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States:

- strengthen cooperation between the national central banks,
- strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability,
- monitor the functioning of the exchange-rate mechanism,

- **hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets,**
- **carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute.**

- 1 The present provision creates a third organ (the General Council) of the ECB, next to the Governing Council and the Executive Board, whose administrative powers remain untouched. This third decision-making body is of a temporary nature and reflects the fact that there are a number of Member States with a derogation (Article 139 TFEU).
- 2 The General Council includes representatives from all central banks of the EU Member States (including Denmark and the United Kingdom, as to their special status see Art. 139 mn. 3). The tasks of the General Council are described in Article 141 para. 2 TFEU. It serves as an instrument of information gathering and exchange, policy coordination with Member States with a derogation and a forum for preparations necessary for enlarging the Euro area.
- 3 Third countries which have adopted the Euro currency, either by monetary agreements (Andorra, Monaco, San Marino, Vatican) or by unilateral action (Montenegro, Kosovo), are not represented in any ECB organ. This is in line with international standards and vital interests of sovereignty over monetary affairs of the European Union.

Article 142 [Exchange-rate policy]
(ex Article 124(1) TEC)

Each Member State with a derogation shall treat its exchange-rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the exchange-rate mechanism.

Bibliography: *Bordo/Eichengreen*, A Retrospective on the Bretton Woods System, 1993; *Gros/Thygesen*, European Monetary Integration, 2nd ed., 1998; see Article 134 TFEU above for further literature.

- 1 The proper functioning of the internal market rests, besides all the other conditions it has, on predictable exchange rates for the national currencies of the Member States. The reason for this is that transactions between business partners in different Member States can be negatively affected if the exchange rate significantly changes between the conclusion of a contract and its implementation. The resulting **foreign exchange risk** has to be hedged and its costs put an additional financial burden on one or both of the contracting parties. Therefore, from early on the EEC started to manage exchange rates between the national currencies. At the beginning, this undertaking was part of the greater Bretton Woods system of fixed exchange rates. But after the collapse of the Bretton Woods system in 1971, the exchange rate management between the EEC-members continued and was transferred into a **European Monetary System (EMS)** including an **Exchange Rate Mechanism (ERM)** in 1979. The system worked with a relatively narrow exchange rate band of $\pm 2.25\%$ and the European Currency Unit (ECU) as a unit of account (i.e. not a currency in its own right). Later the bandwidth of the system had to be enlarged to up to 15%. The EMS did not comprise all EEC and later EC members. In particular it allowed for Member States with grave economic difficulties to leave the system and to return at a later point.
- 2 With the **introduction of the Euro currency**, the EMS was abandoned. For those Member States who became part of the Euro area, the single currency replaced the national currencies and the EMS became superfluous. Article 142 TFEU is therefore only

relevant for **Member States with a derogation** (Article 139 TFEU). The problem of foreign exchange risk remains relevant only for these Member States.

Against this background, Article 142 TFEU contains an **obligation for these Member States** to treat the individual exchange rate policy as a matter of common interest. A duty to exchange information, to coordinate decisions and to consider the impact of unilateral measures follows this obligation.¹ Accordingly, the Member States concerned have to install some kind of exchange rate management. Article 142 TFEU recommends considering the experiences made with the EMS. However, this does not amount to a legal obligation of the individual Member State to become part of a comparable institution. So today there is one group of states who form a so-called Exchange Rate Mechanism II (**ERM II**) (Denmark, Latvia and Lithuania) comparable to the classical EMS with an exchange rate bandwidth of 15% (or less if the Member State decides so), while the other Member States do not yet participate (such as many eastern European countries, Sweden and the UK) but trade their currencies under a more or less floating exchange rate regime.² An obligation to become part of the ERM II at a later point follows indirectly from Article 140 para. 1 TFEU since all Member States who did not explicitly opt out from the Euro (Denmark and the UK) have the legal obligation to introduce the Euro, which requires participation in ERM II for two consecutive years. In practice any form of enforcement measures in this regard are, however, neither likely nor helpful.

ERM II was originally based on an Agreement of 1998 which has now been replaced ⁴ by the 'Agreement between national central banks of the non-Euro states and the ECB' of 2006³ which itself has been amended several times.

***Article 143 [Difficulties regarding the balance of payments]
(ex Article 119 TEC)***

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

¹ See Streinz/*Kempen*, Article 142 AEUV mn. 2.

² For details on the individual states see also: European Central Bank, Convergence Report, May 2012, 49.

³ OJ 2006, C 73/21.

- (a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;
- (b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;
- (c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.

Bibliography: *Seidel*, Escape Clauses in European Community Law with special reference to capital movements, 15 CMLR 1978, 283. See Art. 134 above for further literature.

- 1 Article 143 TFEU has been characterised as an emergency or escape clause. Historically the present provision was already part of the European Treaties at the very beginning of European integration and can be found more or less in the same wording already in the TEC Treaty¹.
- 2 The article **only applies to Member States with a derogation**, meaning countries who are not members of the Euro area (Article 139 TFEU). Article 122 TFEU contains similar but not identical provisions for all other Member States. Article 122 TFEU is applicable besides Article 143 TFEU.²
- 3 The balance of payments describes all transactions of one country and the rest of the world. It includes all payments, import and export of goods and services, development aid etc. of that country. It consists of various components.³ Article 143 TFEU therefore is concerned with the national economy as such, including both private and public actors. It does not only deal with sovereign debts. On the contrary, difficulties with the balance of payments can occur in states with a very low amount of public debts (e.g. in Latvia in 2009), typically because the national banking sector and the national central bank are lacking sufficient foreign currency resources. This can be the case when trust in the stability of the national economy is decreasing and foreign investors move out large quantities of invested capital within a short period of time.
- 4 Decisions are made without significant participation of the EP.
- 5 Article 143 TFEU provides for **cooperative measures** between the EU and its Members.⁴ They can be divided into three steps: (a) the Commission ex officio investigates the position of the State in question, (b) the Council can by qualified majority vote take various measures (para. 2), (c) as an *ultima ratio* an authorisation by the Commission to take unilateral measures based on para. 3 is possible.
- 6 The most important instrument to manage such kind of crises under Article 143 para. 2 TFEU is Regulation (EC) No 332/2002 of 18 February 2002 establishing a **facility providing medium-term financial assistance for Member States' balance of payments**, as amended by Regulation (EC) No 431/2009.⁵ Based on this regulation, Member

¹ See Article 108 TEC.

² Cf. Schwarze/*Potacs*, Article 143 AEUV mn. 4.

³ For an introduction, see: *Gowland*, International Economics, 2010, 52.

⁴ Case 95/81 *Commission v Italy* [1982] ECR 2187, mn. 17.

⁵ Replacing Regulation (EEC) No 1969/88 of 24 June 1988 establishing a single facility providing medium-term financial assistance for Member States' balances of payments.

States can receive assistance in the form of **loans**. Several Member States have received such assistance in recent times (namely: Hungary, Latvia, Poland and Romania). Measures under Article 143 TFEU can be combined with other measures, including those from third parties like the International Monetary Fund (IMF) or the World Bank. Usually, all these measures are subject to **conditions** for economic reform⁶. Before a Member State agrees to IMF and other third party conditions, it has to consult the Commission and the other EU members⁷ since such conditions could affect common interests of the EU members. In order to supervise better compliance with conditions set out by the EU, the Member State shall make all the necessary information available to and fully cooperate with the Commission⁸. The facility currently has a volume of a maximum of € 50 billion.

If the Council does not grant assistance under Article 143 para. 2 TFEU or if such 7 measures are not sufficient, the Commission can allow unilateral protective measures to be taken by the Member State concerned. This authorisation can be revoked or amended by the Council.

**Article 144 [Sudden crisis in the balance of payments; protective measures]
(ex Article 120 TEC)**

1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 143(2) is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.

3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above.

If measures are not available under Article 143 TFEU, Article 144 TFEU provides for 1 an emergency clause for unilateral protective measures of the Member State concerned. Like Article 143 TFEU, the present provisions are only applicable to **Member States with a derogation**.

The Article is applicable in cases where (a) the difficulties regarding the balance of 2 payments (see Article 143 para.1 TFEU) amount to a sudden crisis *and* (b) the Council did not approve measures in accordance with Article 143 para. 2 TFEU. Difficulties amount to a crisis if they are severe, they can be considered sudden if they are unpredictable. Thus, the situation has to be **deeper and more instantaneous than it is the case in Article 143 TFEU**. Many other preconditions for an application of Art. 144 are somewhat unclear. What, for example, if the Council did approve measures under Article 143 TFEU but the Member State affected is taking the position that the measures taken are not sufficient enough or – and this will often be a preferred argument – that the situation suddenly changed after the measures took effect and that the current situation is there-

⁶ As an example, see Council Decision 2009/290/EC [on Latvia], in particular Article 3 No 5.

⁷ Article 2 Regulation 332/2002.

⁸ Article 5 Regulation 332/2002.

fore not covered by the Council's measures under Article 143 para. 2 TFEU? Such questions cannot be entirely solved and have a strong political dimension. The Member States concerned keep certain discretion. The article is largely anachronistic in the present stage of integration among the EU Member States, due to its unilateral character. It can heavily affect the freedoms of the internal market that are legal positions of the individual European citizens. With a view to Article 143 para. 3 and Article 144 para. 2 s. 2 TFEU, unilateral measures are largely superfluous from both a practical and a theoretical perspective. Because unilateral actions have the aforementioned pitfalls, their occurrence has to be limited as much as possible.

- 3 In this regard, three principles apply: (a) Unilateral measures have to be **notified** to the Commission and the individual Member States according to Article 144 para. 2 TFEU no later than when they enter into force. Article 144 para. 2 s. 2 TFEU is based on the same idea as Article 143 para. 3 TFEU, meaning that the Commission with a view to both the individual situation of the Member State concerned and the common interest of the Union as a whole, shall decide which measures to take. (b) If unilateral measures are taken, they have to cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than it is strictly necessary. This formulation is one specific form of appearance of the principle of **proportionality** and of **loyal cooperation** enshrined in Article 4 para. 3 TEU. (c) The Member State can be forced to **suspend or revoke the measures** taken by the Council on a recommendation by the Commission. The Union organs can also call for the Member State to **amend** the measures taken in order to bring them in line with the Union's interests. There are no material requirements for the decision of the Commission, meaning that the Member State has to comply with whatever the Council decides on the Commission's initiative.
- 4 According to a significant number of voices in academic literature, the practical relevance of the present article is low.¹ This is inter alia the case due to the facility providing medium-term financial assistance.² However, measures under Article 144 TFEU are not limited to financial payments. They can, for example, also include a limitation of buying and selling securities at the capital market of the Member State or of the granting of loans to foreign investors by banks situated within its territory.³ Also a restriction of the cross-border exchange of foreign currency is possible, i.e. restrictions on capital movements can be introduced or reintroduced, meaning a (temporary) derogation from Articles 63 et seq. TFEU. In the future such restrictions could become politically attractive in the course of the ongoing financial crisis in several Member States. A scenario where foreign exchange transactions are stopped in a first step, foreign currency accounts are closed in a second step, and, where the money from such accounts would be compulsory exchanged into local currency would go far beyond what is allowed by Article 144 TFEU.
- 5 A further question arises when an individual European citizen wants the Member State who took unilateral measures to compensate him for losses. In such cases the principle of compensation based on the accountability of Member States for infringements of EU law may apply, provided that the unilateral measures clearly contravened the preconditions set out in Article 144 TFEU. This is to be decided by the ECJ who will presumably read the article in a narrow manner.⁴ Therefore the application of Article 144 TFEU is not only in the discretion of the individual Member State but also on its own risk.

¹ Schwarze/Potacs Article 144 AEUV mn. 2; Streinz/Kempen, Article 144 AEUV mn. 2.

² See Article 143 mn. 6.

³ As to the example of German measures under this article (at that time Article 109 EEC) in 1973, see Seidel, *Escape Clauses in European Community Law*, CMLR 15 (1978), 283 and BGBl. I 1973, 49.

⁴ ECJ Case 26/83 *Carbone* [1984] ECR 377 mns. 30–32.

TITLE IX
EMPLOYMENT

Bibliography: *Ardy/Begg*, The European Employment Strategy: Policy Integration by the Back-Door?, 11 *Current Politics and Economics of Europe* 2002, 187 et seq.; *Rodgers*, Labour Law and Employment Policy in the EU: Conflict or Consensus?, 27 *The International Journal of Comparative Labour Law and Industrial Relations* 2011, 387; *Runggaldier*, Der neue Beschäftigungstitel des EG-Vertrages und die Übernahme des ‘Sozialabkommens’ in den EG-Vertrag, in: Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, 197 et seq.; *Steinle*, Europäische Beschäftigungspolitik, 2001; *Stephan*, Die Beschäftigungspolitik der EU, 2008; *Van Rie/Marx*, The European Union at Work?: The European Employment Strategy from Crisis to Crisis, 50 *Journal of Common Market Studies* 2012, 335; *Velluti*, Towards the Constitutionalisation of New Forms of Governance: A Revised Institutional Framework for the European Employment Strategy, 22 *Yearbook of European Law* 2003, 353; *id.*, New Governance and the European Employment Strategy, 2010.

Article 145 [Coordinated strategy for employment]
(ex Article 125 TEC)

Member States and the Union shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

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I. General remarks 1

The Title about Employment (ex Articles 125–130 TEC, now Articles 145–150 TFEU) was incorporated by the Treaty of Amsterdam. It complements the provisions on the economic and monetary policy and on social policy by emphasising the **employment policy strategy** of economic policy actions but without neither speaking of an ‘employment policy’ of the Union itself nor opening a completely new range of activities. Today, Article 145 TFEU replaces Article 125 TEC without substantial change. Especially the character of the norm with its **cross-sectoral** and **cross-policy** dimension remains the same. The employment policy is linked to many other policies of the Union. Its importance for the internal market and its interconnection to social policies should be emphasised particularly. Regarding the development of the norm, some historical milestones were set by the European Employment Pact of 1999, the Employment Summit of Lisbon in 2000 and the Council Decision 2003/174/EC establishing a Tripartite Social Summit for Growth and Employment.¹

Article 145 TFEU specifies the tasks of the employment policy as such. Article 146 2 TFEU outlines the tasks of the Member States, whereas Article 147 TFEU outlines the tasks of the Union. The cooperation between the Union and the Member States is deter-

¹ OJ 2003 L 70/31.

mined in Article 148 TFEU (guidelines of the Council) and in Article 149 TFEU (incentive measures of the Union). Article 150 TFEU establishes an Employment Committee with advisory status.

3

II. Objectives and tasks

Article 145 TFEU mentions some of the concrete targets and tasks for the realisation of the general objectives of the Treaties named in Article 3 TEU. It aims to support the coordination of the employment policies of the Member States by strengthening their effectiveness through the development of a coordinated **employment strategy**. Article 3 para. 1 lit. i TEC had explicitly used the term ‘employment strategy’; its successor Article 5 para. 2 TFEU has not picked up that terminology but introduces a limitation to the ‘establishment of guidelines’ and only preserves a coordination competence for the EU. Target of this coordination is supporting the qualification, the education and the flexibility of employees more effectively and efficiently, as well as establishing labour markets that are able to react to the requirements of economic change. The (theoretical) framework of the economic policy is built upon a social market economy but not an interventionist labour policy.²

4

The first European Employment Strategy (EES) was developed by the European Council³ in Luxembourg in November 1997. It was a framework for actions which was based on the obligations of the Member States to determine a catalogue of common objectives for an employment policy. This strategy was revised by the European Council of Lisbon in March 2002 (‘new EES’), which set the strategic objective for the European Union for the next decade, namely establishing the conditions for full employment and greater cohesion until 2010 (which was made impossible by the crisis after 2008); especially the **adaptability of the employees**, the so-called **employability**, is highly important. Individual employees as well as the labour market need to be able to react to constantly changing framework conditions.⁴ The European Union has the **responsibility** to generally support this process. In April 2012, the ‘Employment Package’ was issued by the European Commission, identifying opportunities for new jobs and reaching for a ‘smart, sustainable and inclusive growth’ in the area of employment policy and other policy areas.⁵ Today, the EES is inspired by the comprehensive Europe 2020 strategy⁶ and the ‘agenda for new skills and jobs’⁷.

Article 146 [Consistent employment policies of the Member States] (ex Article 126 TEC)

1. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 145 in a way consistent with the broad guidelines of the economic policies to the Member States and to the Union adopted pursuant to Article 121(2).

2. Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of com-

² Cf. CR/Krebbber, Article 145 AEUV mn. 11.

³ See Article 148 para. 1 TFEU.

⁴ See Schwarze/Krefsel, Article 145 AEUV mn. 28.

⁵ COM (2012) 173 final.

⁶ http://ec.europa.eu/europe2020/index_en.htm.

⁷ COM (2010) 682 final.

mon concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148.

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I. Achievement of objectives by the Member States

1

Article 146 TFEU finds its predecessor in Article 126 TEC and there are no changes apart from editorial adjustments caused by the Lisbon mandate. In general, employment policy still remains a competence of the Member States ('their employment policies'). Especially the collective bargaining autonomy is not affected by the chapter on employment.¹ However, according to Article 146 para. 1 TFEU, the Member States have the obligation to contribute to the achievement of the goals mentioned in Article 145 TFEU through their employment policy. The respective national strategies need to be coordinated with the basic principles of the economic policy of the Member States and the Union, which are adopted once a year by the Council in form of a recommendation under Article 121 para. 2 TFEU.

II. Coordination of national policies

2

Parallel to the general economic policy in Article 121 para. 1 TFEU, the Treaty declares the promotion of employment as a matter of common interest. Consequentially, a special obligation of cooperation and coordination for the Member States is also following from this provision. Regarding the manner of cooperation, Article 146 para. 2 TFEU refers to the procedure of Article 148 TFEU, which also deals with the reciprocal coordination of the national employment policy involving the European Council and the institutions of the Union. Thus, cooperation as a structural principle of **multilevel governance** receives a more precise definition for the employment sector.

In the process of coordination, the Member States and the Union need to consider the competences of the social partners (employers and employees) regarding the measures with impact on the employment policy. There is debate about whether a corresponding duty of the social partners (to respectively consider the interests of the Member States) results from this.² The term 'responsibility' does not exclude such a possible impact of the norm.

Article 147 [High level of employment] (ex Article 127 TEC)

1. The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

¹ See Schwarze/Kreßel, Article 146 AEUV mn. 1.

² For further reference, see *Runggaldier*, in: Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, 197 et seq.

Content

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1 I. General remarks

Article 147 TFEU adopts the substance of Article 127 TEC, which is its predecessor in primary law. It deals with the specific task of the Union – which will be substantiated in the following two articles – to contribute to a high level of employment. It has a programmatic character¹ and formulates an **obligation to optimise the employment policy**, based on the terminology of *Robert Alexys* which, of course, was developed in a different context. Articles 148 et seq. TFEU specify this in normatively binding terms.

2 With a view to the general competence of the Member States particularly required by Article 147 para. 1 s. 2 TFEU, the Union can only **encourage** the cooperation between the Member States, as well as give support to the Member States and eventually complement their actions. This is, however, a relatively modest general description of the Union’s activities. Articles 148 and 149 TFEU show that the Union can take great influence on the employment policy of the Member States.

3 II. Horizontal policy clause, justiciability and instruments

Article 147 para. 2 TFEU is to be understood as an **horizontal policy clause**. It is phrased significantly weaker than its environmental counterpart in Article 11 TFEU (here: ‘shall be taken into consideration’, there: ‘must be integrated’). The Union’s objective of ‘full employment’ under Article 3 para. 3 TFEU can be broken down to a – more realistic – ‘high level of employment’. This level has to be considered when defining and implementing all policies and measures of the Union regarding all of the Unions’ activities. In the ‘new coordinated European Employment Strategy’ of 2000 and 2001, the European Council sets the objective of increasing the general employment rate within the EU to an average level of 70%, the employment rate of women to 57% and the one of older employees (55–62 years) to 50%. Today it is the central goal of the Europe 2020 strategy to bring 75% of the working-age population (20–64 years) in work; to finally reduce early school-leaving to a rate under 10% and to bring more young people in ‘higher’ education; and finally to reduce the risk of poverty and social exclusion for at least 20 million people – until 2020.

4 The provision is only of limited **justiciability**. Although Article 147 para. 2 TFEU extends beyond a mere programmatic character, it does not contain specific enforceable substantive requirements. The formal aspect, whether Article 147 para. 2 TFEU has been taken into consideration during the (legislative) procedure of designing the Union’s policies and implementing the Union’s measures, can be subject to judicial review.²

5 The **European Social Fund (ESF)** is one of the most important (financial) instruments of the employment policy of the Union. The last full programme period took place from 2007 to 2013 and contained the following four core areas: an increased adaptability³ of employees and companies; an improved access to employment in general; strengthening of social integration; and the promotion of partnerships to carry out mutually consis-

¹ See *Steinle*, Europäische Beschäftigungspolitik, 75.

² See *CR/Krebbber*, Article 147 AEUV mn. 2.

³ See Article 145 mn. 4.

tent reforms in the fields of employment and integration. From 2014 onwards, the ESF takes part in the Europe 2020 strategy for generating smart, sustainable and socially inclusive growth within the whole EU. Priorities will be the boosting of the adaptability of employees with new skills and employers with new ways of working, improving the access to employment, especially for untrained or less-skilled workers or for people from disadvantaged groups.

**Article 148 [Guidelines for employment]
(ex Article 128 TEC)**

1. The European Council shall each year consider the employment situation in the Union and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.

2. On the basis of the conclusions of the European Council, the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 150, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 121(2).

3. Each Member State shall provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment as referred to in paragraph 2.

4. The Council, on the basis of the reports referred to in paragraph 3 and having received the views of the Employment Committee, shall each year carry out an examination of the implementation of the employment policies of the Member States in the light of the guidelines for employment. The Council, on a recommendation from the Commission, may, if it considers it appropriate in the light of that examination, make recommendations to Member States.

5. On the basis of the results of that examination, the Council and the Commission shall make a joint annual report to the European Council on the employment situation in the Union and on the implementation of the guidelines for employment.

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I. General remarks

1

Article 148 TFEU adopts the wording of Article 128 TEC (only ‘Community’ is replaced by ‘Union’). Article 148 TFEU specifies the objectives of Articles 145 et seq. TFEU and deals with the cooperation procedure that is used by the Member States to coordinate their employment policies, with the European Council and the other institutions of the Union participating. Core elements are the development and the implementation of guidelines on the employment policy of the Council.

- 2 Whereas the ‘Broad Economic Policy Guidelines in the Member States and the Union’ of the Council under Article 121 para. 2 TFEU are explicitly adopted in form of a recommendation (within the meaning of Article 288 para. 5 TFEU), the guidelines mentioned in this context cannot be assigned clearly to a specific act of legislation. Guidelines can certainly not be treated equally to directives, which are binding in their objectives.¹ Article 148 para. 2 s. 1 TFEU quotes that the Member States ‘shall take [the guidelines] into account in their employment policies’. ‘To take into account’ does not mean ‘to follow’. The requirement of consideration demands to include the guidelines into the decision-making process; deviation is only admissible in particularly severe exceptional cases. Guidelines therefore have a recommending character.² However, an infringement proceeding might be promising if a Member State completely ignores a certain recommendation.³

3 II. Determination of employment policy guidelines

- The **Council** has the overall competence to enact guidelines. The annual procedure of coordinating the employment policy of the Member States begins, according to Article 148 para. 1 TFEU, with the joint annual report by the Council and the Commission, considering the employment situation in the Union (see Article 148 para. 5 TFEU) by the **European Council**. The European Council⁴ prepares conclusions in which it develops respectively changes or complements the employment strategy.⁵
- 4 The Council determines employment policy guidelines on the basis of these conclusions (see Article 148 para. 2 TFEU). These guidelines need to be in accordance with the broad guidelines of the Council that are adopted under Article 121 para. 2 TFEU. The Council acts on a proposal of the Commission. The following parties must be consulted within the procedure: the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee, which is formed according to Article 150 TFEU. The Council acts by qualified majority.⁶ If the Council deviates from the proposal of the Commission, unanimity is required.⁷
- 5 The (old) employment policy guidelines under **Council Decision 2003/578/EC** on guidelines for the employment policies of the Member States, which are still imprinting to the present day, focused on three comprehensive **objectives**. They dealt with (a) full employment, (b) quality and productivity at work, as well as (c) social cohesion and social inclusion. In this respect, the proposed **measures** were assigned to the following ten sections: (1) active and preventive measures for the unemployed and inactive, (2) job creation and entrepreneurship, (3) addressing change and promoting adaptability and mobility in the labour market, (4) promoting development of human capital and lifelong learning, (5) increasing labour supply and promoting active ageing, (6) gender equality, (7) promoting the integration of and combating the discrimination against people at a disadvantage in the labour market, (8) making work pay through incentives to enhance work attractiveness, (9) transforming undeclared work into regular employment, (10) addressing regional employment disparities. The Decision included a chapter on good

¹ Cf. Streinz/Niedobitek, Article 148 AEUV mn. 11.

² Cf. CR/Krebbler, Article 148 AEUV mn. 6, stating that the provision does not create new possible actions.

³ See also Article 147 mn. 4.

⁴ See Article 15 TEU.

⁵ See Article 145 mn. 4.

⁶ See Article 16 paras 2 and 3 TEU.

⁷ See Article 293 para. 1 TFEU.

governance and partnership for the implementation of these guidelines by the Member States (for instance involvement of parliamentary bodies, social partners and other relevant actors).

Currently, the content **Council Decision 2010/707/EU on guidelines for employment policy measures of the Member States** is still applicable. It considers a new strategy for jobs and growth as part of the comprehensive strategy Europe 2020. Within the Europe 2020 strategy, Member States and the Union shall implement reforms that are aiming at ‘smart growth’, meaning growth driven by knowledge and innovation. As priority areas, it demands to increase labour market protection, to develop a skilled workforce, to improve education and training systems and to combat social exclusion. The new Council Decision 2013/208/EU on guidelines for the employment policies of the Member States only refers to the ones annexed to Decision 2010/707/EU. The overall objectives and priorities expressed in the guidelines for the employment policies therefore remain valid. 6

III. Monitoring on the basis of the guidelines

7

For the purpose of monitoring that the Member States act in accordance with the guidelines, ‘soft’ measures are implemented. The extensive margin of discretion of the Member States does not allow a review in respect of their content by the ECJ.

1. Report of the Member States

8

Political control is carried out by the reporting obligation of the Member States. According to Article 148 para. 3 TFEU, each Member State provides the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of the guidelines for employment referred to in Article 148 para. 2 TFEU.

2. Examination of the Council

9

The Council, on the basis of the reports and having received the view of the Employment Committee, examines the implementation of the employment policies of the Member States in the light of the guidelines of employment. According to Article 148 para. 4 TFEU, the Council, on a recommendation from the Commission, may address recommendations to the Member States by qualified majority vote.

3. Annual report to the European Council

10

Finally, Article 148 para. 5 TFEU states that the Council and the Commission make a joint annual report to the European Council on the employment situation in the Union and on the implementation of the guidelines for employment based on the examination.

Article 149 [Incentive measures designed to encourage cooperation between Member States] (ex Article 129 TEC)

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, may adopt incentive measures designed to encourage

cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.

Those measures shall not include harmonisation of the laws and regulations of the Member States.

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1

I. General remarks

Article 149 TFEU, a revised version of its predecessor Article 129 TEC, authorises the European Parliament and the Council to enact incentive measures in the field of employment policy in accordance with the ordinary legislative procedure¹. These measures are strictly limited in terms of content, in particular to incentives in the form of pilot projects. They shall only accompany the employment policy of the Member States. The complex and stylistically unfortunate wording of the provision exposes its mainly political intention and does not reveal too much of its substantive content.² The special rules of Article 149 TFEU are to be considered in the application of the Title ‘social policy’ in general³. They merely exceed the possible measures of the Commission according to Article 256 TFEU and therefore have a very low level of innovation.⁴

2

II. Incentive measures

1. Content

As a comparison with other language versions shows, the term ‘incentive measures’ corresponds to the commonly used term ‘support measures’.⁵ These measures can be of financial or non-financial nature. According to their supporting objective, the following incentive measures can be distinguished: (a) measures to support the cooperation between the Member States; (b) initiatives to support the employment measures of the Member States.

3

- Purposes of incentive measures can (only) be the following:
- developing exchanges of information and good practice (best practice);
 - providing of comparative analyses and advice;
 - support of innovative approaches;
 - evaluation of experiences.

¹ See Article 294 TFEU.
² See CR/Krebbber, Article 149 AEUV mn. 5.
³ Cf. in particular Article 156 TFEU and Articles 162 et seq. TFEU.
⁴ See Schwarze/Kreßel, Article 149 AEUV mn. 2.
⁵ Cf. Steinle, Europäische Beschäftigungspolitik, 385.

2. Limits

4

Any harmonisation of the laws and administrative provisions of the Member States is explicitly excluded. However, the objective of a high level of employment can be highly important when harmonisation on the basis of other competences, in particular Article 115 TFEU, is carried out.⁶

Declaration No 23 adapted by the closing conference on the Treaty of Amsterdam determines that the incentive measures must specify: 5

- an objective assessment of their need and the existence of an added value at Unions level;
- their duration which should not exceed five years;
- the maximum amount of their financing, which should reflect the incentive nature of such measures.

Finally, according to Declaration No 24 on the Treaty of Amsterdam, it is understood 6 that the expenditures fall under Heading 3 of the financial perspective. This heading regulates the accompanying ‘internal’ policies (for instance research and technological development, education). The incentive measures are credited to the budget of this heading.

III. Decision-making procedure

7

A **mandatory consultation** of the Economic and Social Committee as well as of the Committee of the Regions is necessary before EP and Council can make their decision.

*Article 150 [Employment Committee]
(ex Article 130 TEC)*

The Council, acting by a simple majority after consulting the European Parliament, shall establish an Employment Committee with advisory status to promote coordination between Member States on employment and labour market policies. The tasks of the Committee shall be:

- **to monitor the employment situation and employment policies in the Member States and the Union,**
- **without prejudice to Article 240, to formulate opinions at the request of either the Council or the Commission or on its own initiative, and to contribute to the preparation of the Council proceedings referred to in Article 148.**

In fulfilling its mandate, the Committee shall consult management and labour. Each Member State and the Commission shall appoint two members of the Committee.

The Employment Committee was established by the Treaty of Amsterdam.¹ Thus, the 1 independence of the employment policy from the economic policy was institutionally secured.² The Committee is composed of two members of each Member State’s choice and two members appointed by the Commission. The Committee is set up by a Council

⁶ ECJ Case C-233/97 *KappAhl* [1998] ECR I-8069; also see Streinz/*Niedobitek*, Article 149 AEUV mn. 10.

¹ See Council Decision 2000/98/EC of 24 January 2000 establishing the Employment Committee.

² Critical: *Steinle*, Europäische Beschäftigungspolitik, 334.

Decision with simple majority and after consulting the European Parliament. Legal basis of the Employment Committee is Article 150 TFEU (former Article 130 TEC).

- 2 Just like the Economic and Social Committee, the Employment Committee performs an advisory function only. The ability to act on its own initiative, without a request of other bodies of the EU, strengthens its position and allows the continually and critically accompanying of political decision-making processes. In practice, Council or Commission often ask for an advisory opinion only when the internal decision-making has already been completed long time before. In particular, the Committee acts as an advisor on the procedure of the enactment of guidelines of the Council (Article 148 TFEU).
- 3 In fulfilling its mandate, the Committee consults the social partners that are present at the Union's level.³ It shall cooperate closely with the Economic Policy Committee.⁴

TITLE X SOCIAL POLICY

Article 151 [Objectives and measures of coordinated and common social policy] (ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Bibliography: *Barnard*, EC Employment Law, 2006; *Blanpain*, The European Social Model (ESM): Myth or Reality?, 2 European Labour Law Journal 2011, 142; *Jacobs*, Labor Law, Social Security Law and Social Policy after the Entering into force of the Treaty of Lisbon, 2 European Labour Law Journal 2011, 119; *Kotzur*, Die soziale Marktwirtschaft nach dem Reformvertrag, in: Pernice (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung, 2008, 191 et seq.; *Pascual/Jepsen* (eds), Unwrapping the European Social Model, 2006; *Steinmeyer*, Sozialrecht, in: Schulze/Zuleeg/Kadelbach (eds), Europarecht, Handbuch der deutschen Rechtspraxis, 2nd ed. 2010, § 40; *Ulasziuk/Moreau* (eds), Before and After the Economic Crisis: What Implications for the 'European Social Model?', 2011.

³ See Article 154 TFEU; cf. CR/Krebbler, Article 150 AEUV mn. 2.

⁴ Cf. the Resolution of the European Council on the Stability and Growth Pact, OJ 1997 C 236/3.

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I. General remarks

1

The policy of the Union and its Member States must be guided by the objectives of social policy, as clearly stated by Article 151 TFEU. Its identically worded predecessor in primary law is Article 136 TEC. The ‘social market economy’ is both the common European approach to policy-making as well as a constitutional guiding principle. This already follows from the wording of the Preamble to the TEU (*inter alia* the reference to the fundamental social rights, the European Social Charter and the promotion of ‘social progress’) as well as the Preamble to the TFEU (‘constant improvement of the living and working conditions’). It is confirmed by Article 3 TEU: para. 1 (‘well-being of its peoples’) and para. 3 (‘social market economy’; ‘full employment’; ‘social progress’; ‘social protection’; ‘social justice’, in this context understood in the sense of sustainability, meaning ‘solidarity between generations’). Article 4 para. 2 lit. b TFEU establishes a shared competence of the Union and the Member States for the ‘social policy, for the aspects defined in this Treaty’. The ‘welfare state’ as a **European constitutional principle** and **one of the Unions’ objectives** is emphasised by the European Social Charter and, even more important, the fundamental social rights of the Charter of Fundamental Rights of the EU.¹ Article 151 TFEU has a programmatic character, meaning it is neither directly applicable nor suitable to create individual rights. The main function of Article 151 TFEU is to inspire and guide the interpretation of Union law.²

The original EEC was lacking social orientation, not least because its integration programme was only economically determined.³ The intention to include broader provisions for a common social policy upon the founding of the – now also politically integrated – EU by the Treaty of Maastricht failed due to the resistance of the UK. However, the at that time remaining eleven Member States concluded an ‘Agreement on Social Policy’, which introduced options to act in this field. This Agreement on Social Policy was annexed as a Treaty Protocol, which allowed these eleven Member States to treat the agreement as a rule of Community (now: Union) law with a binding effect only on them and which allowed them to use the institutions and procedures of the Union for its implementation. The agreement was binding for the Member States which acceded later, namely Austria, Sweden and Finland. The Treaty of Amsterdam ended the period of a ‘two-speed Europe’ regarding social policy. It introduced the respective rules on social policy into primary law, binding on all Member States. Despite this upgrading, the concept of a European social policy remained competitively motivated, believing in a spillover from successful economic policy to social integration.⁴ It depends not least on the jurisdiction of the ECJ whether this approach will eventually be changed by the (future) softening of the competitive orientation of the EU, going back to French insistence under the presidency of Sarkozy.⁵

¹ See Enders, VVDStRL, 64 (2005), 7 et seq., 31.

² Cf. Schwarze/Rebhahn/Reiner, Article 151 AEUV mn. 8.

³ On the historical development, see Streinz/Eichenhofer, Article 151 AEUV mns 11 et seq.

⁴ Cf. CR/Krebbler, Article 151 AEUV mn. 7.

⁵ Cf. Häberle, Europäische Verfassungslehre, 695.

II. Social policy in the TFEU

1. Objectives

Article 151 para. 1 TFEU describes the common objectives of the Union and its Member States as follows:

- promotion of employment, considering the special provisions of Title IX. Employment⁶ (promotion, qualification, support of mobility and flexibility);
- improved living and working conditions (the preamble now speaks of ‘conditions of employment’), to enable the approximation by progress; therefore, the Union shall be guided by those Member States whose social policy and social law is highly progressive;
- proper social protection (meaning social security benefits, health protection at work, prevention of work-related accidents and diseases);
- social dialogue (a dialogue between the Unions’ institutions and organisations of employers and employees that act at Union level was introduced by the SEA);
- the development of the labour potential with a view to lasting high employment (with regard to the objective of full employment of Article 3 para. 3 TEU);
- the combating of exclusion (with focus on an enhanced inclusion of women, long-term unemployed, disabled and disadvantaged groups into the labour market).

4 More objectives appear in reference to the **fundamental social rights** of the European Social Charter of 18 October 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989, which is contained in a declaration by the Heads of State and Government of the Member States (except for the UK) of 9 December 1989. However, these objectives only serve the interpretation of the objectives mentioned above. Whereas the European Social Charter is a (binding) international treaty which was concluded within the Council of Europe, the Community Charter of Fundamental Social Rights is of non-binding character. In addition, the Charter of Fundamental Rights of the EU grants – after highly controversial debates in the convent – broader space for fundamental social rights in comparison to the most catalogues of fundamental rights of the Member States.⁷

5 Like the former Article 117 TEC (Maastricht Version), Article 151 TFEU is not directly applicable.⁸

2. Instruments

The objectives of social policy as laid down by Article 151 para. 1 TFEU, which are also binding the Union, do not constitute any competences as such.⁹ The competence in respect of social policy remained with the Member States even after Amsterdam.¹⁰ Today, Article 4 para. 2 lit. b TFEU applies, granting the Union and its Member States a shared competence in compliance with the principle of subsidiarity (see mn. 1 above). However, the Union still has the competences to coordinate and to act as a catalyst. The Union has a complementary function in the field of social policy in relation to the Member States; and it interacts in a supporting, complementing, and ideally also optimizing

⁶ See Articles 145–150 TFEU.

⁷ Cf. Tettinger/Stern/Lang, Article 27 CRFEU mn. 1; Bernsdorff, *Soziale Grundrechte in der Charta der Grundrechte der Europäischen Union*, VSSR 2001, 1 et seq.

⁸ ECJ Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887.

⁹ Cf. GHN/Langenfeld/Benecke, Article 151 AEUV mn. 10.

¹⁰ ECJ Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Migration Policy* [1987] ECR 3203.

way.¹¹ This ‘complementary’ factor can ensure impulses for coordination and harmonisation in practice.

Article 151 para. 3 TFEU provides for the general means to achieve the objectives of social policy. Even this provision does not establish an independent competence to act. In order to turn Europe as an ‘area of freedom, security and justices’ into a ‘area for social security’, the harmonisation of the laws and administrative provisions of the Member States is particularly important. The method of ‘open coordination’, which does not commit the social policy of the Member States to uniform objectives and uniform measures but rather wants to achieve an approximation of the effects of individual measures throughout the Member States, is another instrument. Instead of the reception of similar legal standards which can be problematic with regard to the respective legal culture common economic and social policy priorities, even in different form, should be realized equally effective.¹²

3. Limits

8

Article 151 para. 2 TFEU sets particular limits on the activity of the Union and the Member States in the field of social policy. On the one hand, the Union must take into account the diversity of national behaviours – in line with the principle of subsidiarity¹³ –; on the other hand, a limit can be seen in the necessity to uphold the competitiveness of the economy of the Union.

Article 152 [Role of the social partners; social dialogue]

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Bibliography: *Barnard*, The Social Partners and the Governance Agenda, 8 ELJ 2002, 80; *Schönemann*, EU Integration and EU Initiatives on Employee Participation and Social Dialogue, in: 17 Transfer: European Review of Labour and Research 2011, 239; *Vigneau*, The Future of European Social Dialogue, in: Ulasiuk/Moreau (eds), Before and After the Economic Crisis: What Implications for the ‘European Social Model’?, 2011, 227; *Weiss*, The European Social Dialogue, 2 European Labour Law Journal 2011, 155.

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I. General remarks

1

Following the traditions of the Member States in the field of (employment and) social policy, social partners (meaning management and labour) may be involved in the development and implementation of rules and other measures. The legislative bodies do not have the monopoly to regulate these matters. Furthermore, the introduction of a uniform

¹¹ See Articles 147 para. 1 and 153 para. 1 s. 1 TFEU.

¹² Cf. *Eichenhofer*, Der aktuelle Stand europäischer Sozialpolitik, DRV 2002, 75 et seq.

¹³ See Article 5 para. 3 TFEU.

currency has led to the necessity for enhanced international cooperation of the social partners. Already the establishment of the Economic and Social Committee took account of the important position of the social partners in society; the same is true for the Standing Committee on Employment established in 1970 by Council Decision 70/532/EEC and reformed by the Council Decision 1999/207/EC. Since the entering into force of the Single European Act, the TEC contained provisions on social dialogue. The Treaty of Amsterdam adopted further provisions of the Agreement on Social Policy¹ on consultation of social partners (now Article 154 TFEU) and social dialogue (now Article 155 TFEU). The provisions based upon an agreement between the European social partners have been incorporated into the Agreement on Social Policy.

- 2 The newly introduced Article 152 TFEU follows this tradition. It incorporates the wording of draft-Article I-48 TECE, which itself finds its role model in Article 139 TEC. The article acknowledges the general role of the social partners at Union level; at the same time it respects, in accordance with the European slogan 'United in Diversity', its role within the national legal systems of the Member States. The Union commits itself to respect the autonomy of the social partners and to promote their role, including the social dialogue.

3

II. Legal nature and objectives

Article 152 TFEU is a typical basic provision laying down the conceptual parameters with programmatic character. It is neither directly applicable nor does it grant individual rights. It does not include a 'guarantee of existence' for the social partners involved.² Objectives and tasks must be understood systematically in the context of Articles 154 and 155 TFEU, which specifically regulate the procedures of the consultation of and the dialogue with the social partners. Article 152 para. 2 TFEU also refers to the Tripartite Social Summit for Growth and Employment, which was launched in 2003 and institutionalised at Union level.³ Finally, Article 152 TFEU is complemented by the freedom of association for trade unions (according to Article 12 CFREU) and the right of collective bargaining and action (according to Article 28 CFREU).

Article 153 [Competences of the Union] (ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;**
- (b) working conditions;**
- (c) social security and social protection of workers;**
- (d) protection of workers where their employment contract is terminated;**
- (e) the information and consultation of workers;**
- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;**
- (g) conditions of employment for third-country nationals legally residing in Union territory;**

¹ See Article 151 TFEU mn. 2.

² Cf. VHVH/Gassner, Article 152 AEUV mn. 10.

³ See Fischer, Der Vertrag von Lissabon, 2nd ed. 2010, 319.

- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

- (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
- (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Bibliography: *Bercusson*, European Labour Law, 1996; *Howes*, Who is responsible for health and safety of temporary workers?: EU and UK perspectives, 2 *European Labour Law Journal* 2011, 254; *Malmberg* (ed.), *Effective Enforcement of EC Labour Law*, 2003.

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1

I. General remarks

Pursuant to Article 153 TFEU, the main competence for measures in the field of social policy is granted to the Union. The provision is as complex as its predecessor in primary law, Article 137 TEC. Both norms have the identical wording and legislative content; they differ only in some minor amendments. According to Article 153 para. 2 TFEU, the applicable voting procedure is the ordinary legislative procedure now. Thereby, the rights of the EP, which under the old law had to be consulted only, have been significantly enhanced. But there are still exceptions from the ordinary legislative procedure, leading to the procedural complexity of the norm: In the cases of Article 153 para. 1 lit. c, d, f and g TFEU, the Council shall act unanimously according to a special legislative procedure, which equals to the former process of consultation. However, the Council may decide to shift to the ordinary legislative procedure in the future in the cases of Article 153 para. 1 lit. d, f and g TFEU. All other amendments are just editorial, caused by the change of the Lisbon mandate.¹

2 Article 153 TFEU serves two purposes: it is a legal basis and it names the instruments to achieve the given objectives. Already in its introductory sentence, the provision states clearly that the Union's activities in social policy are (only) supporting and complementing in relation to the Member States. This basic principle limits the extent and scope of the permitted measures. According to Article 153 para. 5 TFEU, the article does not apply to pay², the right of association, the right to strike and the right to impose lock-outs.

3

II. Regulatory content

Article 153 TFEU deals with the following matters:

Lit. a: Improvement of the **working environment** to protect workers' health and safety. Article 118a TEC already included this subject. It is not only limited to the technical workplace safety but also includes the social workplace safety. The term 'health' is to be understood in a broad sense.³ Newer decisions of the ECJ concern in particular the rules on working time.⁴ There are many different legal acts of secondary legislation on the health and security of employees. Examples: Directive 2003/88/EC concerning cer-

¹ Cf. *Fischer*, *Der Vertrag von Lissabon*, 2nd ed. 2010 321.

² See Article 157 para. 2 TFEU for the term 'pay'.

³ With regard to the Directive on working time, ECJ Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755.

⁴ For example the concepts of working time and rest periods for on-call service/night service in proportion to the daily respectively weekly maximum duration of work: ECJ Case C-151/02 *Jaeger* [2003] ECR I-8389 (concerning the contradiction of the typical German model of on-call service to the European working time legislation); Case C-397/01 *Pfeiffer* [2004] ECR I-8835; Case C-14/04 *Abdelkader Dellas* [2005] ECR I-10253; Case C-134/05 *FNV* [2007] ECR I-6251.

tain aspects of the organisation of working time (a revision was provided but has not been carried out after the negotiations between EP and Council finally failed in April 2009); Directive 1991/383/EC on temporary agency work, now Directive 2008/104/EC; Directive 94/33/EC on the protection of young people at work; Directive 92/85/EC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding;

Lit. b: Working conditions. As already mentioned above in mn. 2, the pay remains 4 excluded (para. 5). Apart from that, the norm might be qualified as a catch-all provision. Regarding recent secondary law on lit. b, see Directive 2008/104/EC on temporary agency work;

Lit. c: Social security and social protection of employees and thus, the social law related to the employee; for the protection of employees in the event of insolvency of their employer, see Directive 2008/94/EC;

Lit. d: Regarding the protection of employees in case of a **termination** of their **contract of employment** (no matter what kind of termination), see Directive 98/59/EC⁵ on the approximation of the laws of the Member States relating to collective redundancies; concerning collective redundancies, also see the ECJ judgment in the case *Junk*⁶ which makes clear that – contrary to § 17 *Kündigungsschutzgesetz* (German Law on Employment Protection) for instance – the event constituting redundancy (and leading to the employee's reporting obligation at the employment office) consists of the declaration by the employer of his intention to terminate the contract of employment (and not the redundancy itself); concerning 'transfers of undertakings', including a definition of the term, see Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. As for the jurisdiction of the ECJ, see the cases *Süzen*⁷, *Temco*⁸, *Abler*⁹ and *Güney-Görres*¹⁰; as for the protection of fixed-term workers against discrimination, see the Court's decision in the case *Marrosu*¹¹; due to various overlaps, the demarcation line to lit. c is blurred;

Lit. e: Information and **consultation of employees**; cf. Directive 94/45/EC (last 7 amended by Directive 2006/109/EG on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, or the establishment of a procedure for the information and consultation of employees of businesses which act throughout the Union¹². Co-determination is regulated by Article 153 para. 3 TFEU as an exceptional rule;¹³

Lit. f: Representation and collective defence of the interests of employees and employers including co-determination; the subjects stated in Article 153 para. 5 TFEU are not affected;

⁵ There was a recent amending proposal for Directive 98/59/EC regarding seafarers, see COM (2013) 798 final.

⁶ ECJ Case C-188/03 *Junk* [2005] ECR I-885.

⁷ ECJ Case C-13/95 *Süzen v Zehnacker Gebäudereinigung Krankenhausservice* [1997] ECR I-1259.

⁸ ECJ Case C-51/00 *Temco* [2002] ECR I-969.

⁹ ECJ Case C-340/01 *Abler and Others* [2003] ECR I-14023.

¹⁰ ECJ Joined Cases C-232/04 and C-233/04 *Güney-Görres* [2005] ECR I-11237.

¹¹ ECJ Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213.

¹² ECJ Case C-440/00 *Kühne and Nagel* [2004] ECR I-787.

¹³ Concerning workers' participation: ECJ Case C-62/99 *Bofrost* [2001] ECR I-2579; Case C-440/00 *Kühne and Nagel* [2004] ECR I-787; also discussed in: *Dorsemont*, 41 CMLRev 2004, 1701 et seq.

- 9 **Lit. g:** Conditions of employment of **third-country nationals** legally residing on the territory of the Union; pay is excluded (para. 5);
- 10 **Lit. h: Integration of people who are ‘excluded’** from the labour market into working life; the special provision of Article 166 TFEU has priority, as well as Article 153 paras 3, 5 TFEU and probably also Article 149 TFEU (see mn. 15 below);
- 11 **Lit. i: Equal opportunities for men and women** in the labour market and equal treatment at work. In the light of Article 157 para. 3 TFEU, there is no apparent need for this provision. Concerning the nature of the legal acts (directives/‘measures’) and concerning the consultation of the Committee of the Regions, the two articles differ with regard to the applicable procedure. Article 153 para. 1 lit. i TFEU might only be applicable together with further legal acts of any kind that will be adopted according to Article 153 TFEU. As for secondary law, see Directive 96/34/EC on the framework agreement on parental leave. Council Recommendation 92/241/EEC on child care is also relevant under this provision;
- 12 **Lit. j: Combating social exclusion.** Regarding the combat of social exclusion in the field of labour law and labour market policy, Article 166 TFEU on vocational training takes precedence over this provision. The relation of Article 153 para. 1 lit. j TFEU to Article 149 TFEU is unclear and was obviously not considered. It is plausible to assume that Article 149 TFEU as a special regulation has priority over the more general provision of Article 153 para. 1 lit. j TFEU;
- 13 **Lit. k:** The **modernisation of social security systems.**

14 III. Measures of the Union

Article 153 para. 2 TFEU distinguishes between three groups of sectors for different types of legal acts with different procedures of adoption. Contrary to the first impression of the catalogue in Article 153 TFEU, the Union is confronted with special limits that occur in the field of social policy – a field which is still a domain of the Member States. Additionally, Article 153 para. 4 TFEU clearly states that the provisions adopted pursuant to this provision shall not affect the existing right of the Member States to define the fundamental principles of their social security systems. It must also not significantly affect the financial equilibrium of these systems. Finally, the Member States are not hindered to maintain or implement more stringent protective measures. But these more stringent protective measures need to be compatible with the other obligations of the TFEU. As far as the provisions restrict the free movement of goods¹⁴, they must be qualified as ‘mandatory requirements’ in terms of the *Cassis*-jurisdiction of the ECJ¹⁵ or in terms of Article 36 TFEU.

15 1. Measures of support

The measures of the Union are generally limited to support measures, in particular to initiatives which give support to the cooperation between the Member States for the achievement of the following purposes: (a) to improve knowledge, (b) to develop the exchange of information and good practice, (c) to support innovative approaches and (d) to evaluate experiences. The measures must not be used for a harmonisation of the laws and administrative provisions of the Member States¹⁶.

¹⁴ See Article 34 TFEU.

¹⁵ See Article 34 TFEU mn. 15.

¹⁶ See Article 153 para. 2 lit. a TFEU.

2. Competence for the adoption of directives

16

The Council, together with the EP, has the power to adopt directives¹⁷, excluding the last two matters of Article 153 para. 1 TFEU (lit. j: combating social exclusion; lit. k: modernisation of the social protection systems). The ordinary legislative procedure applies.

The Council is obliged to respect the following (legal) barriers:

17

- Only **measures establishing minimum rules** are permitted and need to be implemented progressively.¹⁸ Transitional periods need to be provided for the increase of protection – wherever it is necessary. The Member States may provide a more stringent protection within their laws and administrative provisions. In this respect, they can enter into international agreements.¹⁹
- The conditions and technical standards existing in each Member State need to be considered.
- The directives shall not prescribe constraints on administration, finance or law which might be an obstacle to the establishment of small- and medium-sized enterprises (SMEs). Differentiations in favour of these SMEs are permitted. When interpreting this provision, however, it has to be taken into account that the employees of SMEs cannot be placed in a worse position than the employees of big enterprises without an objective reason.²⁰

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IV. Procedure

20

The Council and the EP decide in accordance with the **ordinary legislative procedure**. The position of the EP is clearly strengthened. Decisions in the following areas are **excluded**: Article 153 para. 1 lit. c TFEU (social security and social protection of workers), lit. d (termination of employment contracts), lit. f (collective interests of workers and employers, as far as they are included into Article 153 TFEU – see Article 153 para. 5 TFEU) and lit. g (conditions of employment for third-country nationals). In these cases, the Council decides unanimously in accordance with a special legislative procedure. Therefore it is necessary to consult the EP. The Economic and Social Committee and the Committee of the Regions must be consulted in any case.

In the cases of Article 153 para. 1 lit. d, f and g TFEU, the Council may replace the decision procedure by the ordinary legislative procedure according to Article 294 TFEU. This requires a unanimous decision which is adopted on a proposal of the Commission after the consultation of the EP.

21

V. Implementation by social partners

22

Any Member State may transfer the implementation of the directives and decisions which are based on Article 153 TFEU to the social partners (meaning management and labour taking part in the social dialogue) at their common request. The social partners implement the directive respectively the decision by an agreement. The necessary precautions must be taken at that time which the directive (respectively the decision) pre-

¹⁷ See Article 288 subpara. 3 TFEU.

¹⁸ Cf. CR/Krebbler, Article 153 AEUV mns 30 et seq.

¹⁹ Opinion 2/91 of the ECJ on the Convention No 170 of the ILO [1993] ECR I-1061.

²⁰ Declaration No 26 attached to the Final Act of the Treaty of Amsterdam; concerning the legal effect of those declarations in general cf. Article 51 TEU.

scribes as the beginning of the time-limit. But a transfer is only permitted if the social partners are able to implement the directive (respectively the decision) under national law.

23 The Member State is obliged to control the implementation, it has to guarantee, that the objectives required by the directive will be achieved.²¹

Article 154 [Consultation of the social partners]
(ex Article 138 TEC)

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.
3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Bibliography: *Franssen*, Legal Aspects of the European Social Dialogue, 2002; see also the literature to Article 152 TFEU.

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1

I. General remarks

Article 154 TFEU amends the wording of Article 138 TEC, although maintaining its contents. In the field of (employment and) social policy, the social partners can, as a result of the traditions of the Member States, be included in the process of establishing and implementing regulations for they are particularly responsible and powerful actors of civil society. To this regard, the legislators do not have a monopoly on adopting regulations. Because of the introduction of a common currency an enhanced **cooperation** of social partners became necessary at the international level as well as within the Union. The establishment of the Economic and Social Committee already took into account the important social position of the social partners. The same is true for the Standing Committee on Employment, which was established in 1970. Since the Treaty was amended by the Single European Act, the former TEC itself had contained regulations on social dia-

²¹ ECJ Case 312/86 *Commission v France* [1988] ECR 6315.

logue. The Treaty of Amsterdam then introduced the more specific requirements of the Agreement on Social Policy¹, the consultation of social partners (see Article 154 TFEU) and on social dialogue (see Article 155 TFEU) into the TEC. These provisions were based on an agreement of the European social partners adopted by the Treaty. They continue to live in the TFEU.

II. Consultation of the social partners

2

1. Task of the Commission

The Commission is generally responsible for the promotion of the consultation of the social partners at Union level (Article 154 para. 1 TFEU). The Communication COM (1993) 600 concerning the application of the Agreement on Social Policy, presented by the Commission to the Council and the EP, contains internal implementing provisions; as to this, the further Communications on the social dialogue COM (2002) 341 and COM (2004) 557 should be considered.

According to these communications, social partner organisations must, in order to be considered representative (a) be cross-industry, or relate to specific sectors or categories and be organized at European level, (b) consist of organisations which are themselves an integral and recognized part of the Member States' social partner structures having the capacity to negotiate agreements and which can represent – as far as possible – all Member States and (c) have adequate structures to ensure their effective participation in the consultation process². The most important organisations are UNICE (Union of the Industrial and Employers' Confederations of Europe), CEEP (European Centre of Enterprises with Public Participation) and ETUC (European Trade Union Confederation). Overall, it is about associations of employees or employers (coalitions), which are targeted on having influence on the working conditions. Therefore, a 'freedom of opposition' as well as a minimum of representativeness is required.³

2. Measures of the Commission

4

The Commission is authorised to adopt all relevant measures to facilitate the dialogue between the social partners by ensuring balanced support of the parties. It has to act neutrally and is therefore not allowed to privilege one party (Article 154 para. 1 TFEU).

The formal measures are substantiated in Article 154 paras 2 and 3 TFEU. These provisions distinguish between two stages:

- Before submitting proposals in the field of social policy, the Commission shall consult management and labour about the possible target of a Union action (Article 154 para. 2 TFEU).⁴
- If, after such consultation, the Commission considers a Union action as advisable, it shall consult management and labour on the content of the envisaged proposal again (Article 154 para. 3 TFEU). Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation. The two stage procedure is meant to ensure the participation of social partners in the respective procedure.

¹ See Article 151 TFEU mn. 2.

² CFI Case T-135/96 *UEAPME v Council* [1998] ECR II-2335.

³ Cf. Schwarze/*Rebhahn*, Article 154 AEUV mns 8 et seq.

⁴ Cf. CR/*Krebbler* Article 154 AEUV mn. 29.

3. Transition to ‘social dialogue’

On the occasion of their consultations according to Article 154 paras 2 and 3 TFEU, the social partners can also notify to the Commission that they want to launch a ‘social dialogue’ according to Article 155 TFEU, meaning that they want to adopt a rule by themselves (by an agreement, Article 155 TFEU). The duration of the proceedings must not exceed a period of nine months until the conclusion of the agreement,⁵ unless management and labour concerned as well as the Commission jointly decide to extend it. The outstanding role of the social partners recognised by the law of the Union is hereby procedurally safeguarded.

Article 155 [Dialogue between the social partners]
(ex Article 139 TEC)

- 1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
- 2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

Bibliography: See the literature to Article 154 AEUV.

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I. Conclusion of agreements

Article 155 TFEU replaces Article 139 TEC, adopting its para. 1 without any substantial changes. Para. 2 subpara. 1 s. 2, which goes back to the last sentence of Article III-212 para. 2 subpara. 1 TECE, introduces a right of the European Parliament to be informed. Article 155 TFEU directly builds on Article 154 TFEU. In general, the social dialogue can lead to the establishment of contractual relations and, in particular, to the conclusion of social policy matters by agreements between the social partners. The implementation of these agreements causes a so-called third-party-effect. There is no obligation on the social partners to conclude those agreements. The procedure which results in the conclusion of agreements can develop from the consultation procedure which is performed by the Commission under Article 155 para. 4 TFEU. But it can also be independent from that.¹ Applicable law to this agreement would be, in analogy to Article 340 subpara. 2

⁵ See CR/Krebber, Article 154 AEUV mn. 39.
¹ See CR/Krebber, Article 155 AEUV mn. 1; with a different view: Birk, EuZW 1997, 458.

TFEU, the (unwritten) Union law which is based on the general principles common to the laws of the Member States.²

It is obvious that the social partners are free to reach agreements independent from Union law.³ Article 155 para. 1 TFEU develops its legislative nature only with regard to its para. 2: They can be the basis for legislation either at national level (1st alternative) or at Union level (2nd alternative).⁴

II. Implementation of the agreements

3

1. Autonomous implementation

The agreement, which was reached at Union level, can – according to the basic principle of subsidiarity – be implemented in accordance with national procedures and/or national practices without any further involvement of the institutions of the Union.

2. Implementation by a Council decision

4

The agreement can also be implemented – as a competence of the Union according to Article 153 TFEU – by a Council decision at the joint request of the signatory parties on a proposal of the Commission. The Council acts by qualified majority⁵. Unanimity is requested for the certain subjects.⁶ Until the entering into force of the Treaty of Lisbon, a participation of the European Parliament or other institutions (as in Article 271 TFEU) was not provided by the Treaties; today the European Parliament has a right to be informed.

Article 156 [Support measures of the Commission] (ex Article 140 TEC)

With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating to:

- employment,
- labour law and working conditions,
- basic and advanced vocational training,
- social security,
- prevention of occupational accidents and diseases,
- occupational hygiene,
- the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising

² This is highly controversial, see *Däubler*, Europäische Tarifverträge nach Maastricht EuZW 1992, 329, 332.

³ Cf. COM (2004) 557; see *Schwarze/Rebhahn*, Article 155 AEUV mns 1 et seq.

⁴ Well established examples from secondary law are for instance the Directives 96/34/EC and 97/81/EC on the framework agreement on parental leave or on part-time work concluded by UNICE, CEEP and ETUC; more recently, Council Directive 2005/47/EC on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector.

⁵ See Article 16 para. 3 TEU and Article 293 TFEU.

⁶ See Article 153 TFEU mn. 21.

ing at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

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1

I. General remarks

Article 156 TFEU adopts the regulatory content of Article 140 TEC to a great extent; only subpara. 2, going back to Article III-213 subpara. 2 TECE, has been amended. In addition to the previous powers of the Commission to carry out studies, to deliver opinions and to arrange consultations in order to guarantee the achievement of objectives, the Commission now also has the power (‘in particular’) to take initiatives aiming at the establishment of guidelines and indicators, to organise the exchange of ‘best practice’ and to set up elements for periodic monitoring and evaluation (‘monitoring’, ‘benchmarking’).

2

The **Commission**, which has been strengthened in this regard, has got the task to promote a close cooperation between the Member States concerning questions of social policy. More extensive (special) tasks of the Union remain untouched. The catalogue of social policy matters, meant to bring about a cooperation of the Member States, is not exhaustive. The cooperation concerns the national level as well as actions in international organisations (Article 156 para. 2 TFEU). ‘Migration policy’ with regard to third-country nationals is also a matter of this cooperation, as far as it aims to prevent interferences of the Union’s social policy in favour of citizens of the Member States;¹ see also Articles 67 et seq. TFEU. Because of the existence of these comprehensive competences to coordinate, Article 156 TFEU has become less important.

3

II. Cooperation of the Member States

As a means for achieving the cooperation of the Member States by the Commission, Article 156 para. 2 TFEU only refers to non-binding measures of the Commission, namely studies, opinions, the arrangement of consultations and the initiatives mentioned under mn. 1 above. Furthermore, the European Parliament must be fully informed. This strengthens its position and takes into account the ideal of ‘well-informed’ representatives.

4

Following the *effet utile* principle², Article 156 TFEU is to be interpreted in a way that the Commission cannot prescribe substantial objectives which are binding on the Member States but to respect special procedures of cooperation.³ For the adoption of binding

¹ ECJ Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Migration Policy* [1987] ECR 3254.

² See Article 19 TEU.

³ ECJ Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Migration Policy* [1987] ECR 3254.

measures of the Union (in particular directives), other provisions transferring competence to the Union, are needed (for instance Articles 149 para. 2, 153 para. 2, 166 para. 4 TFEU).

The Commission must consult the Economic and Social Committee⁴, which is particularly composed of the social partners, before it delivers an opinion (para. 2). The Commission also consults the Standing Committee on Employment, which was established by Council Decision 70/532/EC. This Committee consists of representatives of the governments, the Commission and the social partners.

III. European institutions

The Centre for the Development of Vocational Training, seated in Thessaloniki (Greece), was established in 1975 by Regulation 337/75/EC on the basis of Article 235 TEC (now Article 352 TFEU). The centre supports the Commission in terms of documentation, information and research.

On 26 May 1975, the Council established the European Foundation for the Improvement of Living and Working Conditions, seated in Dublin (Ireland), by Regulation 1365/75/EC; the foundation shall particularly fulfil research and information tasks in the field of working conditions and work organisation as well as the improvement of the working environment; legal basis is also today's Article 352 TFEU.

Article 157 [Principle of equal pay for male and female workers for equal work] (ex Article 141 TEC)

1. 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.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Bibliography: *Barnard*, EC Employment Law, 2006; *Burrows/Robinson*, An Assessment of the Recast of Community Equality Laws, 13 ELJ 2007, 186; *Ellies*, EU Anti-Discrimination Law, 2012; *Radloff*, Women's Quotas under EU Equality Law, 2012.

⁴ See Article 300 para. 2 TFEU.

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1

I. General remarks

The special principle of equality of Article 157 TFEU traces back to its substantially identical predecessor Article 141 TEC. Only para. 3 has newly introduced the ordinary legislative procedure. The wording of para. 1 seems to be narrower than the teleology of the provision itself. It demands the equality of men and women ‘only’ **with regard to pay**. But certainly the provision, which is divided into three independent parts, constitutes one of the basic principles of the Union, due to its broad aspiration, which was realised by the objective extension of the Treaty of Amsterdam. The provision is the initial point for **general equal treatment at work** and has the quality of a fundamental right.¹

2

Since the first stage of the transitional period expired on 1 January 1962, today’s Article 157 TFEU is completely applicable for the (original) Member States.² The provision was to serve both a social-political purpose and as a safeguard measure for fair competition by preventing enterprises from being discriminated by competitors who reside in the territory of a Member State but have not yet eliminated gender-based inequalities of pay.³ As mentioned above in mn. 1, the Treaty of Amsterdam introduced paras 3 and 4. The general equality of men and women is subject to Article 2 TEU and Article 8 TFEU at the level of the Union, which is substantiated by the commandment of equal treatment in Articles 21 and 23 CFREU.⁴

3

II. Commandment of equal treatment

1. Equal pay for equal work

Article 157 TFEU demands equal treatment for persons of different gender in their status as **employees**. It does not contain a **general commandment of equal treatment** going beyond labour law (but cf. Article 8 TFEU). Especially, paras 1 and 2 can be qualified as **special principle of equal treatment**. The provision does not deal with the question of unequal treatment on the grounds of ‘sexual orientation’ (refusal of travel concessions to cohabitantes of the same sex).⁵ The principle of equal treatment of genders has meanwhile been further developed by secondary law and, according to the ECJ, is also held attributable to the regulatory context of Article 157 TFEU.⁶ The provision explicitly requires the principle of equal treatment for equal work in private and public services.

¹ Cf. CR/Krebbber, Article 157 AEUV mn. 1.
² ECJ Case 80/70 *Defrenne I* [1971] ECR 445.
³ ECJ Case 43/75 *Defrenne II* [1976] ECR 455.
⁴ Cf. Schwarze/Rebhahn, Article 157 AEUV mn. 1.
⁵ ECJ Case C-249/96 *Grant* [1998] ECR I-621.
⁶ For example ECJ Case C-17/05 *Cadman* [2006] ECR I-9583.

An extension of the commandment of equal treatment to other working conditions is not excluded. In fact, it was undertaken by Council directives based on Articles 114 and 352 TFEU (see mn. 13 below).

Article 157 TFEU is **directly applicable** as far as one can straightforward detect a discrimination on grounds of 'equal work' and 'equal pay';⁷ being directly applicable means that the individual can rely on it (cf. also Article 3 para. 3 TEU). It is not only directed at discriminating provisions of the Member States but it also includes **private** legal relationships (collective agreements, individual employment contracts).⁸ It aims at the individual employer and does not compare different employers. Differentiations which do not go back to the one and same resource are not covered by Article 157 para. 1 TFEU. However, it is sufficient if the case relates to different pay by different employers bound by the same collective agreement or legal provision.⁹

Despite the direct applicability, the Member States are obliged to adapt their legal provisions to the commandment of equal treatment of Article 157 TFEU.

2. Pay

The legislative content of paras 1 and 2 has been supplemented and substantiated by secondary law through Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which has the same paradigm of gender equality (cf. its Article 4): 'Equal pay for equal work'. Pay in this context means any current or future benefit (money of benefits in kind) rendered by the employer to the employee directly or indirectly in respect of the employment. Such benefits are, for instance, travel benefits to railway staff after retirement, even if granted without an actual contractual obligation but in consideration of the former employment¹⁰; compensation for compulsory redundancies paid upon the retirement because of shortage of work¹¹; the same applies to payments in the context of a socially unjustified dismissal; temporary allowances upon the termination of an employment relationship¹²; compensation for attendance at training courses that provide work council members with the necessary knowledge for performing their duties¹³.

Benefits granted within statutory pension schemes and the contributions to it are not covered by Article 157 TFEU; their social aspects outweigh the employment aspects.¹⁴ However, **occupational pensions**, which are financed by the employer alone or jointly by the employer and the employee (without support by the public authorities), are included; in this context, it is irrelevant if the contributions and benefits partially replace the contributions and benefits by the statutory pension scheme. The benefits and rewards can be considered as remuneration relating to the specific employment.¹⁵ This also applies to survivor's pension¹⁶ and pensions which are paid by the public employer¹⁷. The French

⁷ ECJ Case 43/75 *Defrenne II* [1976] ECR 455; Case 12/81 *Garland* [1982] ECR 359.

⁸ ECJ Case C-28/93 *van den Akker* [1994] ECR I-4527; Case C-400/93 *Dansk Industri* [1995] ECR I-1275.

⁹ ECJ Case C-320/00 *Lawrence* [2002] ECR I-7345.

¹⁰ ECJ Case 12/81 *Garland* [1982] ECR 359.

¹¹ ECJ Case C-262/88 *Barber* [1990] ECR I-1889; cf. further: Case C-173/91 *Commission v Belgium* [1993] ECR I-673 and Case C-109/91 *Ten Oever* [1993] ECR I-4879.

¹² ECJ Case 19/81 *Burton* [1982] ECR 554.

¹³ ECJ Case C-457/93 *Lewark* [1996] ECR I-243.

¹⁴ ECJ Case 80/70 *Defrenne I* [1971] ECR 445.

¹⁵ ECJ Case C-262/88 *Barber* [1990] ECR I-1944; Case C-110/91 *Moroni v Collo* [1993] ECR I-6591.

¹⁶ ECJ Case C-200/91 *Coloroll v Russel* [1994] ECR I-4389.

¹⁷ Concerning the civil service pension of the Netherlands: ECJ Case C-7/93 *Bestuur van het Algemeen burgerlijk pensioenfonds v Beune* [1994] ECR I-4471; concerning the retirement pension scheme for public servants in Finland: ECJ Case C-351/00 *Pirkko Niemi* [2002] ECR I-7007.

pension scheme of public services falls within the scope of Article 157 TFEU. The principle of equal pay is violated if, in the case that the spouse suffers from a disability or incurable illness which makes it impossible for him or her to undertake any form of employment, the right of retirement is only granted to women.¹⁸ It is further violated if male civil servants who assumed the task of bringing up their children are excluded from the credits granted to female civil servants with regard to the years of pensionable service.¹⁹ Article 157 TFEU applies to all benefits that an employee receives out of the occupational pension scheme, regardless whether it is a contributory or non-contributory system.²⁰ Furthermore, the provision covers both the right to receive benefits and the right to join an occupational pension scheme.²¹ The term 'pay' also includes paid sick leave²², survivor's pension²³ or pay during maternity leave²⁴.

8 **All other work conditions** do not fall under the term 'pay'. They are not covered by Article 157 TFEU. For instance, this applies to the fixing of different age limits for employees.²⁵

9

3. Equal treatment

Article 157 para. 2 subpara. 2 TFEU requires equal treatment for work at piece rates or time rates. The question whether a **combined pay**, consisting of a basic remuneration and different allowances, is to be considered as discrimination on grounds of sex cannot be answered on the basis of a comprehensive assessment but rather each element of the remuneration has to be assessed separately.²⁶ Allowances for inconvenient working hours must not be taken into consideration for the purpose of calculating the salary used as the basis for a pay comparison.²⁷ Where a system of pay is totally intransparent, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. The employer must prove the criteria for allowances and that those allowances are of a non-discriminatory nature.²⁸ Discrimination between men and women in respect of the age at which their spouse is entitled to a survivor's pension of an occupational supplementary pension scheme is prohibited even in cases of an obligation of membership.²⁹ It does not contradict Union law that, when calculating the amount of a bridging pension which is paid by an employer to male and female employees who have taken early retirement, the employer has not taken into account the fact that they have not yet reached the age required for payment of the State pension.³⁰ The same applies to discrimination on grounds of different professional education and professional qualification.³¹ As to part time work, see the ECJ judgment in the *Wippel* case³².

¹⁸ ECJ Case C-206/00 *Mouflin* [2001] I-10222.

¹⁹ ECJ Case C-366/99 *Griesmar* [2001] ECR I-9413.

²⁰ ECJ Case C-200/91 *Collorol v Russell* [1994] ECR I-4389.

²¹ ECJ Case C-57/93 *Vroege* [1994] ECR I-4541.

²² ECJ Case C-191/03 *McKenna* [2005] ECR 7631.

²³ ECJ Case C-117/01 *National Health Service* [2004] ECR 514.

²⁴ ECJ Case C-147/02 *Alabaster* [2004] ECR 3101.

²⁵ ECJ Case 149/77 *Defrenne III* [1978] ECR 1365.

²⁶ ECJ Case C-262/88 *Barber* [1990] ECR I-1944.

²⁷ ECJ Case C-236/98 *Örebro* [2000] ECR I-2206.

²⁸ ECJ Case 109/88 *Danfoss* [1989] ECR 3199.

²⁹ ECJ Case C-50/99 *Podesta* [2000] ECR I-4055.

³⁰ ECJ Case C-132/92 *Birds Eye Walls v Roberts* [1993] ECR I-5579.

³¹ ECJ Case C-309/97 *Angestelltenbetriebsrat Wien* [1999] ECR I-2907 (Psychologists and psychotherapists).

³² ECJ Case C-313/02 *Wippel* [2004] ECR 9483.

Furthermore, Article 157 TFEU **prohibits indirect discrimination**. Such indirect discrimination is given if pay is determined independently of the employees' gender but, as a matter of fact, differently for two groups of workers, of which one group consists of women with a lower average pay and one group consists of men with a higher pay, without a proper justification based on objective criteria.³³ For an example of a lower remuneration for over-time work in part-time employment compared with over-time in full-time employment, see the *Elsner-Lackner* case³⁴.

However, different levels of pay are justified if the employer needs to remunerate employees for being more flexible with regard to working hours and working places. The length of services rendered justifies different pay in any case³⁵; concerning the burden of proof, see the cases *Brunner*³⁶. Furthermore, see Article 19 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Part-time employment, which applies mainly to women, can on its own not justify a less favourable treatment. Moreover, it is to be considered as discrimination based upon gender if the different benefits for full-time employers cannot be rectified on objective grounds which, on their part, must not be discriminatory either (continued payment in the event of illness³⁷; severance grant following termination of employment³⁸; exclusion of small businesses of the legislation against unfair dismissal³⁹; calculation of length of service⁴⁰; corresponding to that, see also the judgment in the cases *Kording*⁴¹, *Hill*⁴², and *Krüger*⁴³, the latter concerning end-of-a-year-bonus). The obligation to undertake certain periods of full-time training during part-time training in general medical practice is justified by objective criteria.⁴⁴ Social protection measures are objective grounds which might exclude an indirect discrimination (downgrading of part-time medical practices).⁴⁵ Compensation for training courses exceeding part-time work hours attended by employees in part-time who are members of work councils can be discriminatory⁴⁶ if the activity as a member of the work council is not necessarily for free in order to guarantee the independence of the members of the work council⁴⁷.

III. Positive measures (promotion of women)

According to **Article 157 para. 4 TFEU**, the basic principle of equal treatment does not preclude the granting of **specific advantages** in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers ('**affirmative action**' or **positive discrimination**). This provision shall, in the first place, improve the situation of women in professional life (explicitly in the Declaration No 28 annexed to the Treaty of Amsterdam; for the legal

³³ ECJ Case C-400/93 *Dansk Industri* [1995] ECR I-1275.

³⁴ ECJ Case C-285/02 *Elsner-Lackenberg* [2004] ECR 5861.

³⁵ ECJ Case C-109/88 *Danfoss* [1989] ECR 3199; Case C-127/92 *Enderby* [1993] ECR I-5535.

³⁶ ECJ Case C-381/99 *Brunner* [2001] ECR 4961.

³⁷ ECJ Case 171/88 *Rinner-Kühn* [1989] ECR 2743.

³⁸ ECJ Case C-33/89 *Kowalska* [1990] ECR I-2607.

³⁹ ECJ Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185.

⁴⁰ ECJ Case C-1/95 *Gerster* [1997] ECR I-5253.

⁴¹ ECJ Case C-100/95 *Kording v Senator für Finanzen* [1997] ECR I-5289.

⁴² ECJ Case C-243/95 *Hill and Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739.

⁴³ ECJ Case C-281/97 *Krüger* [1999] ECR I-5141.

⁴⁴ ECJ Case C-25/02 *Rinke* [2003] ECR I-8349.

⁴⁵ ECJ Case C-226/98 *Jorgensen* [2000] ECR I-2467.

⁴⁶ ECJ Case C-360/90 *Bötel* [1992] ECR I-3607.

⁴⁷ ECJ Case C-278/93 *Freers* [1996] ECR I-1165; see also Case C-131/02 *Wippel* [2004] ECR 9483.

effect of such declarations see Article 51 TEU). Before Article 157 para. 4 TFEU was introduced, the ECJ gave two judgments on the admissibility of the **'priority quota of women'** based on Directive 76/207/EEC (see mn. 15 below).⁴⁸ The wording of Article 157 para. 4 TFEU does also allow for its usage to interpret the new provision of primary law.⁴⁹ In the case *Kalanke*, the ECJ held that national rules which automatically (and without consideration of any other criteria) give priority to women in sectors where they are under-represented compared with equally qualified men are an infringement of the principle of equal treatment; under-representation is regarded to exist if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organisation chart. In the case *Marschall*⁵⁰, however, the Court held that a national rule which in a case of fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidating for the post being equally qualified in terms of their suitability, competence and professional performance, requires that priority is to be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour, was permitted. In the case *Badeck*⁵¹, the Court stated that the quota system of the Gender Equality Act of the German State of Hesse has been flexible enough not to violate the equal treatment principle. A limited number of subsidised nursery places for female officials is permissible if, in cases of emergency, male officials (in particular those who take care of their children by themselves) also have access.⁵² In a more recent judgement,⁵³ the ECJ dealt with a national provision which reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried but excludes widowers who have not remarried either. The ECJ held that such a differentiation is not objectively justified and therefore violates Directive 76/207/EEC, now repealed by Directive 2006/54/EC.

14

IV. Directives

The prohibition of gender-based discrimination has been substantiated and extended by various directives.⁵⁴ As far as the paras 1 and 2 of Article 157 TFEU are qualified as specifications, the directives prohibiting gender-based discrimination are only of a declaratory nature because of the direct applicability of Article 157 TFEU. Since the Treaty of Amsterdam has adopted para. 3, legal acts on the implementation of equal opportunities and the equal treatment of men and women at work and employment can be based on this paragraph. The Council and the European Parliament decide in accordance with the ordinary legislative procedure of Article 294 TFEU after having consulted the Economic and Social Committee. The following comments give an overview of the directives which have been issued until now and will then discuss the **consolidating meaning of Directive 2006/54/EC** (see mn. 20 below).

15

1. Council Directive 75/117/EC

This directive rules on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. The amendment

⁴⁸ ECJ Case C-450/93 *Kalanke* [1995] ECR I-3096 and Case C-409/95 *Marschall* [1997] ECR I-6363.

⁴⁹ See CR/Krebbler, Article 157 AEUV mn. 85.

⁵⁰ ECJ Case C-450/93 *Kalanke* [1995] ECR I-3096; Case C-409/95 *Marschall* [1997] ECR I-6363.

⁵¹ ECJ Case C-158/97 *Badeck* [2000] ECR I-1902.

⁵² ECJ Case C-476/99 *Lommers* [2002] ECR I-2921.

⁵³ ECJ Case C-319/03 *Briheche* [2004] ECR I-8807.

⁵⁴ See Articles 114, 352 TFEU.

of Article 141 para. 1 TEC by the Treaty of Amsterdam made clear that the basic principle also includes the pay 'of equal value'.⁵⁵ Concerning full pay during maternity, see cases *Gillespie*⁵⁶, *Health Board*⁵⁷ (the matter of this case was whether the principle of equal pay for men and women requires that women should continue to receive full pay during maternity leave, or whether pregnancy-related illnesses are subject to the general sick-leave scheme which leads to a reduction in pay in the case where the absence exceeds a certain duration; the ECJ did not see an infringement of Article 157 TFEU) and *Hlozek*⁵⁸ (concerning benefit granted on a different pension entitlement age according to the sex of the dismissed workers; the ECJ did not see an infringement in this case either).

2. Council Directive 76/207/EEC

16

This directive deals with the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. As to this leading cases are: *Marshall I*⁵⁹ and *Marshall II*⁶⁰ concerning the dismissal because of reaching the **age limit** which is lower for women than for men, compensation, direct applicability of the directive to the State as employer; *Kutz-Bauer*⁶¹; *Steinicke*⁶², the latter concerning a scheme of part-time work for older employees, direct applicability of the directive in case of wage agreement, decisiveness of the more favourable conditions); *Commission v Italy*⁶³ on the inadmissibility of the prohibition of night work for women; *Habermann-Beltermann*⁶⁴; *Tele Danmark*⁶⁵; *Wiebke Busch*⁶⁶ holding that a discreet **pregnancy** is no reason for contestation; *Webb*⁶⁷ on dismissal because of pregnancy; *Thibault*⁶⁸ holding that maternity leave is to be treated like absence due to illness; *Brown*⁶⁹ holding that dismissal because of absence due to illness during a pregnancy is forbidden in any case; *Boyle*⁷⁰ ruling on the rights of pregnant women in respect of sick leave, annual leave and the accrual of pension rights; *Høj Pedersen*⁷¹ concerning working conditions for a pregnant woman; *Lewen*⁷² on the entitlement to a Christmas bonus while parental or maternity leave. It is not permitted to refuse to employ a woman under a contract for an indefinite period due to her pregnancy if she cannot, from the outset, perform as set out in the job description.⁷³ **Council Directive 92/85/EEC** on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are

⁵⁵ ECJ Case C-400/93 *Dansk Industri* [1995] ECR I-1275.

⁵⁶ ECJ Case C-342/93 *Gillespie and others* [1996] ECR I-475.

⁵⁷ ECJ Case C-191/03 *McKenna* [2005] ECR I-7631.

⁵⁸ ECJ Case C-19/02 *Hlozek* [2004] ECR I-11491.

⁵⁹ ECJ Case 152/84 *Marshall I* [1986] ECR 723.

⁶⁰ ECJ Case C-271/91 *Marshall II* [1993] ECR I-4367.

⁶¹ ECJ Case C-187/00 *Kutz-Bauer* [2003] ECR I-2771.

⁶² ECJ Case C-77/02 *Steinicke* [2003] ECR I-9027.

⁶³ ECJ Case C-207/96 *Commission v Italy* [1997] ECR I-6869.

⁶⁴ ECJ Case C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1668.

⁶⁵ ECJ Case C-109/00 *Tele Danmark* [2001] ECR I-7013.

⁶⁶ ECJ Case C-320/01 *Busch* [2003] ECR I-2041.

⁶⁷ ECJ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567.

⁶⁸ ECJ Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECR I-2011.

⁶⁹ ECJ Case C-394/96 *Brown v Rentokil* [1998] ECR I-4185.

⁷⁰ ECJ Case C-411/96 *Boyle and Others* [1998] ECR I-6401.

⁷¹ ECJ Case C-66/96, *Høj Pedersen and others* [1998] ECR I-7327.

⁷² ECJ Case C-333/97 *Lewen* [1999] ECR I-7266.

⁷³ ECJ Case C-207/98 *Mahlburg* [2000] ECR I-562.

breastfeeding provides for a prohibition of dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. A preference to male applicants who have completed military or civilian service for the access to practical legal training is justified in order to counterbalance the delay in the professional career.⁷⁴ Against a general exclusion of women from military posts involving the 'use of arms', see the case *Kreil*⁷⁵; on the inadmissibility of an '**inflexible quota of women**', see mn. 12 above.

17

3. Council Directive 79/7/EEC

This directive stipulates the progressive implementation of the principle of equal treatment for men and women in matters of social security. As to this, see the following case law: *Equal Opportunities Commission*⁷⁶, *Jackson*⁷⁷, *van Gemert-Derks*⁷⁸ and *Roks*⁷⁹. This directive does not oblige to consider periods of bringing up children for the entitlement of benefits. Family benefits are excluded, too.⁸⁰ Referring to the different pensionable ages, see the cases *De Vriendt*⁸¹, *Graham*⁸² and *The Queen, ex parte Richardson*⁸³. For the requirement of former employment for an incapacity benefit for work, see the case *Posthuma-van Damme*⁸⁴.

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4. Council Directive 86/378/EEC

This directive concerns the implementation of the principle of equal treatment for men and women in occupational pension schemes.

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5. Council Directive 86/613/EEC

This directive concerns the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity; it also deals with the protection of self-employed women during pregnancy and motherhood.

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6. Directive 2006/54/EC

This directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation is aiming at consolidating a substantial amount of the existing secondary law. It codifies the **equal treatment acquis** and merges the following directives into one: Council Directive 75/117/EEC on equal pay; Council Directive 76/207/EEC (amended by Council Directive 2002/73/EC) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and work-

⁷⁴ ECJ Case C-79/99 *Schnorbus* [2000] ECR I-11015.

⁷⁵ ECJ Case C-285/98 *Kreil* [2000] ECR I-69.

⁷⁶ ECJ Case C-9/91 *The Queen v Secretary of State for Social Security, ex parte the Equal Opportunities Commission* [1992] ECR I-4297.

⁷⁷ ECJ Case C-63/91 *Jackson and Cresswell v Chief Adjudication Officer* [1992] ECR I-4737.

⁷⁸ ECJ Case C-337/91 *Van Gemert-Derks v Bestuur van de Nieuwe Industriële Bedrijfsvereniging* [1993] ECR I-5435.

⁷⁹ ECJ Case C-343/92 *Roks and Others* [1994] ECR I-587.

⁸⁰ ECJ Case C-245/94 *Hoever* [1996] ECR I-4895.

⁸¹ ECJ Joined Cases C-377/96, C-378/96, C-379/96, C-380/96, C-381/96, C-382/96, C-383/96, C-384/96 *De Vriendt and Others* [1998] ECR I-2105.

⁸² ECJ Case C-92/94 *Graham* [1995] ECR I-2521.

⁸³ ECJ Case C-137/94 *The Queen, ex parte Richardson* [1995] ECR I-3407.

⁸⁴ ECJ Case C-280/94 *Posthuma-van Damme* [1996] ECR I-179.

ing conditions; Council Directive 86/378/EEC (amended by Council Directive 96/97/EC) on the implementation of the principle of equal treatment for men and women in occupational pension schemes; Council Directive 97/80/EC (amended by Council Directive 98/52/EC) on the burden of proof in cases of discrimination based on sex. The implementation of the directive repeals the other directives with effect of 15 August 2009.

V. Consequences of infringements

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1. Establishment of equal treatment

If, according to Article 157 TFEU, a prohibited discrimination occurs, the members of the discriminated group have a right to equal treatment and the applicability of the same rules **as the other employees**. As to this, see the judgments of the ECJ in the cases *Nimz*⁸⁵ (concerning the classification in a higher salary grade), *Smith*⁸⁶ and *Dimossia Epicheirissi Ilektrismou*⁸⁷ (concerning survivor's pension for male and female survivors). The claim to pay arrears can be limited by non-discriminatory prescription periods or procedural deadlines.⁸⁸ Because of the severe difficulties of these legal consequences, the ECJ, according to Article 264 para. 2 TFEU, ruled several times that the direct effect of Article 157 TFEU cannot be relied on in order to support claims concerning pay periods **prior to the date of this judgment**, except for those cases in which legal proceedings have already been initiated or an equivalent claim has been made before the time of this judgment; as to this see *Defrenne II*⁸⁹ concerning the direct applicability of Article 157 TFEU before 8 April 1976; see also the *Magorrian* case⁹⁰ and the *Barber* case⁹¹ concerning direct applicability of Article 157 TFEU on private pension schemes before 17 May 1990; cf. Protocol No 33, concerning Article 157 TFEU which was annexed to the TEC by the Final Act of the Treaty of Maastricht as well as the judgments in *Coloroll v. Russell*⁹², in *Beune*⁹³, in *Vröge*⁹⁴ and in *Dietz*⁹⁵. Regulations of collective agreements that infringe Article 157 TFEU may be declared as inapplicable or ineffective by the ECJ.⁹⁶

2. Sanctions

22

If directives have not been fully implemented and/or have not been transposed correctly, the individual may invoke the **direct effect** of the directives according to the general rules.⁹⁷ The person affected can only invoke this direct effect if she or he is employed by the State⁹⁸ and if, additionally, the public authorities act as a private employer (as a treasury).⁹⁹ As in the case of an infringement of Article 157 TFEU, the person affected

⁸⁵ ECJ Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.

⁸⁶ ECJ Case C-408/92 *Smith and others v Avdel Systems* [1994] ECR I-4435.

⁸⁷ ECJ Case C-147/95 *Dimossia Epicheirissi Ilektrismou v Evrenopoulos* [1997] ECR I-2057.

⁸⁸ ECJ Case C-326/96 *Levez* [1998] ECR I-7835.

⁸⁹ ECJ Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

⁹⁰ ECJ Case C-246/96 *Magorrian and Cunningham* [1997] ECR I-7153.

⁹¹ ECJ Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1944.

⁹² ECJ Case C-200/91 *Coloroll Pension Trustees v Russel and others* [1994] ECR I-4389.

⁹³ ECJ Case C-7/93 *Bestuur van het Algemeen burgerlijk pensioenfonds v Beune* [1994] ECR I-4471.

⁹⁴ ECJ Case C-57/93 *Vroege v NCIV* [1994] ECR I-4541.

⁹⁵ ECJ Case C-435/93 *Dietz v Stichting Thiszorg Rotterdam* [1996] ECR I-5223.

⁹⁶ ECJ Case C-256/01 *Allonby* [2004] ECR 73.

⁹⁷ See Article 288 TFEU mn. 17.

⁹⁸ See Article 288 TFEU mn. 17.

⁹⁹ ECJ Case 152/84 *Marshall I* [1986] ECR 723.

may invoke the more favourable provision.¹⁰⁰ In other cases, the Member State has the obligation to adopt a **sanction** if discrimination occurs. If the Member State decides to order liability for compensation as a sanction, the compensation needs to be in appropriate proportion to the damages suffered. It is not permissible to set a ceiling for awards of compensation.¹⁰¹ Interest has to be paid if an obligation to pay interest exists according to the national legislation.¹⁰² If an application of a person to a certain position is not taken into account because of unjustified reasons of his or her gender, the compensation must amount to more than the expenses incurred in connection with the application.¹⁰³ The possibility of a claim which seeks to establish State liability is also to be considered against the defaulting Member State.

Article 158 [Paid holiday schemes]
(ex Article 142 TEC)

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

- 1 The wording of Article 158 TFEU, succeeding Article 142 TEC, remained unchanged since 1957. It contains a **declaration of intent** of the Member States, originally with competitive background. It is not directly applicable. The Council adopted Recommendation 75/457/EEC on the principle of the 40-hour week and four weeks paid holiday per year.
- 2 The Council Directive 93/104, as amended by Directive 2000/34/EC, (today based on Article 153 para. 2 TFEU) provides maximum work periods and minimum rest periods, as well as a minimum of paid annual holidays of four weeks, which must not be replaced by pay, except in case of termination of employment. Although, according to former Community law, the provision has become obsolete to a large extent, the TFEU has adopted the rule under the current article.

Article 159 [Report on the social and demographic situation]
(ex Article 143 TEC)

The Commission shall draw up a report each year on progress in achieving the objectives of Article 151, including the demographic situation in the Union. It shall forward the report to the European Parliament, the Council and the Economic and Social Committee.

- 1 The provision goes back to Article 143 TEC which became part of primary law by the Treaty of Amsterdam. It corresponds to Article 7 Agreement on Social Policy. Apparently, it was not noticed that the TEC already contained a corresponding provision (cf. the former Article 145 TEC, today's Article 161 TFEU). Particular characteristics of Article 159 TFEU are the reference to the demographic situation for the reporting obligations and that the report also shall be submitted to the Council and the Economic and Social Committee.

¹⁰⁰ ECJ Case 286/85 *McDermott* [1987] ECR 1463; Case 384/85 *Clarke* [1987] ECR 2877; Case C-337/91 *van Gemert-Derks* [1993] ECR I-5435.

¹⁰¹ ECJ Case C-180/95 *Draehmpaehl* [1997] ECR I-2195.

¹⁰² ECJ Case C-271/91 *Marshall II* [1993] ECR I-4367.

¹⁰³ ECJ Case 14/83 *von Colson and Kamann* [1984] ECR 1891.

The Social Situation Report, which has been published annually since 2000, is the result of the cooperation between the European Commission and Eurostat. The report provides an overview of social trends in the EU by the preparation and analysis of different social indicators and offers a basis for comparative analyses. 2

The Treaty of Lisbon repealed Article 143 para. 2 TEC and, consequently, the right of the European Parliament to ask the Commission for individual reports concerning the social situation. The same was provided for in draft-Article III-216 TECE. However, the rights of the Parliament are not reduced by this repeal; it only corrects an unnecessary duplication since Article 161 subpara. 2 TFEU applies, obliging the Commission to report to the European Parliament. 3

**Article 160 [Social Protection Committee]
(ex Article 144 TEC)**

The Council, acting by a simple majority after consulting the European Parliament, shall establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The tasks of the Committee shall be:

- **to monitor the social situation and the development of social protection policies in the Member States and the Union,**
- **to promote exchanges of information, experience and good practice between Member States and with the Commission,**
- **without prejudice to Article 240, to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative.**

In fulfilling its mandate, the Committee shall establish appropriate contacts with management and labour.

Each Member State and the Commission shall appoint two members of the Committee.

Article 160 TFEU goes back to Article 144 TEC. The provision was introduced by the Treaty of Nice. It provides an **explicit legal basis** for the Social Protection Committee within the Treaty. The Committee is established by the Council after consulting the European Parliament. Each Member State and the Commission appoint two members of the Committee. Sentence 1 was amended to the effect that the Council now acts by **simple majority**. 1

The Committee only has an **advisory status**. It shall promote cooperation on social protection policies between Member States and with the Commission. To fulfil its mandate, the Committee establishes appropriate contacts with the social partners (meaning management and labour). 2

In particular, the Committee has the following **tasks**: 3

- to monitor the social situation and the development of social protection policies;
- to promote the communication between the Member States and the Commission;
- to prepare reports and to formulate opinions, at the request of either the Council or the Commission, or on its own initiative. The tasks of the Permanent Representatives Committee and the General Secretariat of the Council¹ remain untouched.

¹ See Article 240 TFEU.

**Article 161 [Annual report of the Commission]
(ex Article 145 TEC)**

The Commission shall include a separate chapter on social developments within the Union in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

- 1 Article 161 TFEU, which adopts Article 145 TEC without any substantial changes, underlines the special importance of parliamentary discussion of the social policy of the Union. The annual general report on the activities of the Union must contain a separate chapter on social developments within the Union. Furthermore, the European Parliament may ask for reports on any particular problem concerning social conditions.
- 2 The provision corresponds with Article 159 TFEU. The formal division between Article 161 TFEU and Article 159 TFEU is a systematic deficit which the Reform Treaty missed to remedy.

TITLE XI
THE EUROPEAN SOCIAL FUND

**Article 162 [Setting up and aim of the European Social Fund]
(ex Article 146 TEC)**

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Bibliography: *Brine*, The European Social Fund and the EU, 2002; *Stabenow*, The European Social Fund, 14 CMLRev 1977, 435; *Vandamme*, The revised European Social Fund and action to combat unemployment in the European Community, 123 International Labour Review 1984, 167.

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1 I. General remarks

The European Social Fund (ESF) is, together with the European Regional Development Fund (ERDF) (see Article 176 TFEU) and the European Agricultural Guidance and Guarantee Fund (EAGGF) (see Article 40 para. 3 TFEU), one of the three structural funds of the Union.¹

¹ For the role of these structural funds, see Article 175 para. 1 TFEU.

Article 162 TFEU directly establishes the ESF. Its predecessor in primary law is Article 146 TEC. The existence of Title XI on the Social Fund underlines its outstanding position. But it still remains closely connected, especially in secondary law (Council Regulation 1083/2006/EC), with the cohesion and structural policy of the Union, as well as with the employment policy. The reform of 2006 and the above-mentioned regulation (laying down general provisions) integrated the Cohesion Fund into the interaction of the structural funds. The ESF does not have legal personality. It is a **financial instrument** of the Union which shows up in its budget.

II. Aim and tasks

Article 162 TFEU provides, as general aim of the ESF, its contribution to raise the standard of living by improving employment opportunities for workers in the internal market.² Together with the Structural Fund and other financial instruments, the ESF shall strengthen the economic and social cohesion in order to promote a harmonic development of the Union as a whole.³

The specific task of the ESF is to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining. The ESF fulfils this obligation by granting subsidies to labour market measures of the Member States. The ESF is the most important financial instrument of the ‘coordinated employment strategy’ (Article 145 TFEU). Today, Regulation No 1304/2013 on the European Social Fund and repealing Council Regulation No 1081/2006 is applicable for the ESF.

Concerning the promotion period from 2007 to 2013, there are three priority objectives mentioned. The ESF was involved in the realisation of these objectives twice. Since the ‘European Territorial Cooperation’ is reserved for the ERDF, there is cooperation between ESF, ERDF and CF with view to the convergence objective, and cooperation between ESF and ERDF concerning the objective of regional competitiveness and employment policy.⁴ Today, from 2014 onwards, a new promotion period, under the impression of the comprehensive Europe 2020 strategy, has started.

Article 163 [Administration of the European Social Fund] (ex Article 147 TEC)

The Fund shall be administered by the Commission.

The Commission shall be assisted in this task by a Committee presided over by a Member of the Commission and composed of representatives of governments, trade unions and employers’ organisations.

Article 163 TFEU adopts Article 147 TEC without any changes. The **Commission** administers the ESF and therefore issues guidelines. The Commission decides about applications for grants of the Member States, makes the payments and controls the use of funds. The Commission cooperates with the Member States at any stage of the complex procedure of administration.

² See Article 145 TFEU.

³ See Articles 174, 177 TFEU.

⁴ In detail, see Schwarze/Ross, Article 162 AEUV mns 9 et seq.

- 2 If a grant application is denied or reclaimed, this decision may be arraigned not only by the Member States¹ but also by the affected person within an infringement procedure.²
- 3 The Commission is assisted in the administration of the Fund by a **Committee** ('ESF Committee') with advisory function. Details on the composition of this Committee can be found in Article 25 Regulation 1304/2013.

***Article 164 [Implementing regulations relating to the European Social Fund]
(ex Article 148 TEC)***

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, shall adopt implementing regulations relating to the European Social Fund.

- 1 Article 164 TFEU adopts Article 148 TEC with three amendments: The European Parliament and the Council now act together; the procedure of Article 251 TEC is replaced by the ordinary legislative procedure¹ and, instead of implementing decisions, 'implementing regulations' are adopted. Article 164 TFEU is the provision conferring the power to issue implementing regulations.
- 2 The regulations are adopted according to the ordinary legislative procedure by the European Parliament and the Council having consulted the Economic and Social Committee² and the Committee of the Regions³. The former Regulation 1784/99/EC and Regulation (EC) No 1081/2006 on the European Social Fund, as well as the currently applicable Regulation 1304/2013, were adopted on this legal basis.

**TITLE XII
EDUCATION, VOCATIONAL TRAINING, YOUTH AND SPORT**

***Article 165 [Contribution of the Union on the field of education; aims]
(ex Article 149 TEC)***

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the harmonization of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

¹ ECJ Case 44/81 *Germany v Commission* [1982] ECR 1855.

² ECJ Case C-213/87 *City of Amsterdam* [1990] ECR I-221; Case C-200/89 *FUNOC v Commission* [1990] ECR I-3669; concerning a claim for compensation see ECJ Case 310/81 *EISS v Commission* [1984] ECR 1314.

^{1*} See Article 294 TFEU.

^{2*} See Article 300 para. 3 TFEU.

³ See Article 300 para. 2 TFEU.

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
- promoting cooperation between educational establishments,
- developing exchanges of information and experience on issues common to the education systems of the Member States,
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,
- encouraging the development of distance education,
- developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.

4. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.

Bibliography: *Bekemans/Balodimos*, Le Traité de Maastricht et l'éducation, la formation professionnelle et la culture, 2 *Revue du Marché unique européen* 1993, 99; *Gori*, Towards an EU Right to Education, 2001; *Granieri/Renda*, *Horizont*, 2020: Innovation Law and Policy in the European Union: Towards Horizon 2020, 2012; *Häberle*, Die deutsche Universität darf nicht sterben, *JZ* 2007, 209; *id.*, Bürgerschaft durch Bildung als europäische Aufgabe, in: *Häberle*, *Verfassungsvergleichung in europa- und weltbürgerlicher Absicht*, 2009, 161; *Huber*, Excluding Any Harmonisation of the Laws and Regulations of the Member States – Reflections on the Meaning and Scope of Any in the Context of the European Higher Education and Research Area, 5 *Vienna Journal on International Constitutional Law* 2011, 22; *Kotzur*, Kultur, Forschung und Technologie, in: *Schulze/Zuleeg/Kadelbach* (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, § 38, 2010; *Lenaerts*, Education in European Community Law after Maastricht, 31 *CMLRev* 1994, 7.

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I. General remarks

1

The original EEC was based upon an economic integration. It did not contain competences of the Community in the field of education. The relevant **legal bases**, Articles 149 and 150 TEC, were introduced into primary law by the Treaty of Amsterdam. Later, fol-

lowing international role models (Article 26 UDHR, Article 13 para. 1 ICESCR and regional Article 2 of the Additional Protocol to the ECHR), Article 14 CFREU was added, at first as soft law and now binding via Article 6 TEU. Article 165 TFEU takes up Article 149 TEC but introduces the following extensions and modifications: Sport as a promotion task of the European Union is now already mentioned in the Title and is specified in Article 165 para. 1 subpara. 2 TFEU. With indent 5 of Article 165 para. 2 TFEU, the ‘encouraging of the participation of young people in democratic life in Europe’ is added as a main goal of education.¹ The connection between the strengthening of democratic legitimacy on the one hand and the activation of a European civil society on the other hand is obvious. Indent 7, concerning sport, is newly introduced to Article 165 para. 2 TFEU, using special grammatical pathos. Indent 1 of Article 165 para. 4 TFEU finally introduces the ordinary legislative procedure. According to indent 2 of Article 165 para. 4 TFEU, the Council can adopt recommendations on proposal of the Commission without consulting the European Parliament. The constitutional role model for these changes was draft-Article III-282 TECE.

- 2 Since the entering into force of the Treaty of Amsterdam, the Union has an **(due to the principle of subsidiarity severely restricted) explicit competence** in the field of general education.² Since the entering into force of the Treaty of Lisbon, a competence in the field of sport has been added. The horizontal meaning of education in all policy fields is illustrated by Article 9 TFEU. Within the legal framework of competences³, Article 165 TFEU belongs to the field, in which the Union is responsible for actions to support, coordinate or supplement the actions of the Member States.⁴ More competences for flanking educational measures can be found in other policy matters, for instance research, nuclear or agricultural policy.⁵ The promotion of education is a real cross-sectoral task, which is also important within the chapter on social policy.
- 3 However, even before the Treaty of Amsterdam entered into force, the Union acted **with regard to education**. Since 1976, the Union and the Member States have cooperated in the field of general education according to the so-called mixed formula (“The Council and the Ministers for Education meeting within the Council”).
- 4 The **civil aspect of education** finds its expression in the judgments of the ECJ concerning the citizenship of the Union. A citizen of the Union who is reaching out for education may oppose against all hindrances to free access to education. According to the jurisdiction of the ECJ, this includes a right to the granting of non-discriminating social benefits for students.⁶

5

II. Task

1. Objective

The development of high quality education is the objective of the Union as well as Member States.⁷ In contrast to the concept of vocational training in Article 166 TFEU, the general education includes initial and continuing education (including higher and

¹ Cf. Häberle, Bürgerschaft durch Bildung als europäische Aufgabe, in: Häberle, Verfassungsvergleichung in europa- und weltbürgerlicher Absicht, 2009, 161 et seq.

² On vocational training, see Article 166 TFEU; for the general cultural policy, see Article 167 TFEU.

³ Cf. the new, stricter scheme of competences under Article 2 TEU.

⁴ See Article 6 TFEU.

⁵ Cf. Schwarze/Simm, Article 165 AEUV mns 5 et seq.

⁶ ECJ Case 293/83 *Gravier* [1985] ECR 593; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-209/03 *Bidar* [2005] ECR I-2119.

⁷ See also Article 6 lit. e TFEU.

adult education). Before Article 149 TEC was introduced, the ECJ assigned the higher education to the vocational training if the educational goal was professional.⁸ The Union contributes to the desired development by **promoting the cooperation** between the Member States and by **supporting** and **supplementing** the activities of the Member States if this is necessary to realise the objectives.

The Member States have the exclusive competence for the contents of teaching and the organisation of education systems, whereas the Union strictly has to respect these competences of the Member States and their cultural and linguistic diversity ('United in Diversity'). Article 2 para. 5 TFEU in connection with Article 6 TFEU clarifies that the competences of the Union in the field of education cannot replace the competences of the Member States.

Another objective is to foster the European dimension in sport. The basic elements of a European policy on sport include 'fair play', the non-discriminatory possibility to take part in competitions, the protection of the 'moral and physic integrity of young sports-people' (particularly meaning an effective anti-doping policy) and international cooperation. Since sport, especially professional sport, can often be qualified as an economic activity, the fundamental freedoms of the internal market and especially the free movement of persons, may apply.⁹

2. Fields of action of the Union

The objectives of the Union in education, youth and sport policy are substantiated in Article 165 para. 2 TFEU:

- developing the European dimension in education, particularly through the teaching and dissemination of the **languages** of the Member States;
- encouraging **mobility** of students and teachers by encouraging, *inter alia*, the academic recognition of diplomas and periods of study. The mutual recognition can be regulated as a requirement for a profession according to Article 53 TFEU;¹⁰ the so-called Bologna process want to meet these criteria of mobility but is, because of its practical faults (the tendency to modularise university courses and to turn them into school-like classes), highly controversial, especially in Germany;¹¹ the Copenhagen process, the enhanced version of the Bologna progress, aims to improve the performance, quality and attractiveness of vocational education and training (VET)¹²;
- promoting cooperation between **educational establishments**;
- developing **exchanges of information and experience** on issues common to the **education systems** of the Member States;
- encouraging the development of **youth exchanges** and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe (see mn. 1 above);
- encouraging the development of **distance education**;
- developing the European dimension in **sport** by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports and by

⁸ Cf. Article 166 mn. 4.

⁹ Classical cases: ECJ Case 36/74 *Walrave and Koch* [1974] ECR 1405; Case C-415/93 *Bosman* [1995] ECR 4921.

¹⁰ ECJ Case 242/87 *ERASMUS* [1989] ECR 1425.

¹¹ *Häberle*, Die deutsche Universität darf nicht sterben, JZ 2007, 183.

¹² See Declaration of the European Ministers of Vocational Education and Training, and the European Commission, convened in Copenhagen on 29 and 30 November 2002, on enhanced European cooperation in vocational education and training – 'The Copenhagen Declaration', not officially published in the OJ.

protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen (see mn. 7 above);

- 16 – to foster cooperation with **third countries** and the competent international organisations in the field of education and sport, in particular the Council of Europe (para. 3).

17

III. Competences of the Council

Under this Union's task, the Council can adopt the following measures (support measures only together with the European Parliament and within the ordinary legislative procedure¹³:

- 18 – **Support measures** (of financial and organisational nature) to strengthen the cooperation between the Member States or to supplement their activities, including financial support of programmes of the Union or national respectively common measures. The Economic and Social Committee and the Committee of the Regions must be consulted. The provision **excludes** any **harmonisation** of national laws (e.g. by adopting directives).
- 19 – **Recommendations**¹⁴: the Council shall act by qualified majority on a proposal of the Commission¹⁵.

20

IV. Action programmes

Even before this article was introduced, the Council had adopted action programmes (ERASMUS, LINGUA), which, *inter alia*, touched the fields of general education and youth: the comprehensive action programme on general education 'SOCRATES' (Decision 253/2000 establishing the second phase of the Community action programme in the field of education 'Socrates') as well as the common programme 'Youth' (Decision 1031/2000 of the European Parliament and the Council). Other programmes concern sport (Decision 291/2003/EC establishing the European Year of Education through Sport 2004) and education (Communication from the Commission 'Education and Training 2010' – The success of the Lisbon Strategy hinges on urgent reforms COM (2003) 685 final). In 2006, the second generation of the EU education programmes SOCRATES and LEONARDO ended. The above-mentioned new education programme 'Lifelong Learning' includes the sub-programmes COMENIUS (school education), ERASMUS (higher education), LEONARDO DA VINCI (vocational training) and GRUNDTVIG (adult education); the programme SOCRATES was replaced by these. Subsequently, the Commission made a proposal for a decision to establish an **integrated action programme** for the period from 2007 until 2013 **in the field of 'lifelong learning'** (COM (2004) 474 final; now: Decision 1720/2006/EC establishing an action programme in the field of lifelong learning) which includes the existing action programmes into a more coherent system. Also for the period from 2007 until 2013, the programme **'Youth in Action'** (Proposal for a Decision of the European Parliament and of the Council Creating the 'Youth in action' programme for the period 2007–2013 COM (2004) 471, now: Decision 1719/2006/EC establishing the Youth in Action programme for the period 2007 to 2013), was notified. It aimed at strengthening social responsibility and civil commitment. From 2014 onwards, the education policy is taking part in the general strategy **'Europe 2020'** respectively the action programme **'Horizon 2020'** on the education and training sector

¹³ See Article 294 TFEU.

¹⁴ See Article 288 para. 5 TFEU.

¹⁵ See Article 293 para. 1 TFEU.

that includes a concept for education, vocational training and retraining within the EU as part of a comprehensive overall strategy for Europe in the following years. Especially, the Conclusions of 12 May 2009 on a **strategic framework for European cooperation in education and training (ET 2020)** is applicable, providing a strategic framework for European cooperation in education and training and following up the Bologna and Copenhagen processes. The strategic framework mainly aims to build up enhanced education and training systems in the EU, having the four main strategic objectives in mind: (a) making lifelong learning and mobility a reality, (b) improving the quality and efficiency of education and training, (c) promoting equity, social cohesion and active citizenship, and (d) enhancing creativity and innovation, including entrepreneurship, at all levels of education and training.

**Article 166 [Vocational training; aims]
(ex Article 150 TEC)**

1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

2. Union action shall aim to:

- facilitate adaptation to industrial changes, in particular through vocational training and retraining,
- improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,
- facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,
- stimulate cooperation on training between educational or training establishments and firms,
- develop exchanges of information and experience on issues common to the training systems of the Member States.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

4. 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, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.

Bibliography: See literature to Article 165 TFEU.

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1

I. General remarks

The provision has been introduced for the first time by the **Treaty of Maastricht**. It goes back to Article 150 TEC, which was mainly taken over in the TFEU but, next to editorial changes, it was also partly modified in its content. Para. 4 replaces the procedure according to Article 251 TEC by the ordinary legislative procedure¹; also in para. 4, the Council receives the additional competence to adopt recommendations on proposal of the Commission. These changes find a parallel in Article 165 TFEU. However, the possibility to support measures of vocational training at the Union's level is older than the Treaty of Maastricht. Article 128 TEEC, within the framework of the Economic Community and by **reading it in favour of integration**, already presented a legal basis on which the Council adopted several support programmes in the field of vocational training earlier. Article 128 TEEC old version contained the competence to establish 'general principles for the implementation of a common policy on vocational training', which was understood as a competence for vocational promotional actions by the ECJ on grounds of the *effet utile* principle^{2,3}.

2 Besides Article 166 TFEU (and Article 165 TFEU⁴), the TFEU provides the Union with **selective competences** in the field of vocational training at several points, such as in connection with the agricultural policy (Article 41 TFEU), the freedom of establishment and the freedom to provide services (Article 53 TFEU), the employment policy (Article 145 TFEU), the social policy (Article 156 TFEU) and – in merely indirect connection – with the free movement of workers (Article 45 TFEU). From the area of Euratom, Article 4 para. 1 and Article 9 EURATOM Treaty are to be mentioned.

3

II. Vocational training

1. Term

Vocational training under Article 166 TFEU is, following the system of the Treaties, *lex specialis* to Article 165 TFEU. The concept of vocational training means any form of initial vocational education or training, which contributes to the achievement of a vocational qualification or a profession. It is not a matter of age or the level of education of the pupil or student. Studying at the academy of fine arts as well as at the university can be vocational training.⁵ An exact definition of the scope of the concept is difficult in practice. Overlapping programmes are based on Article 165 TFEU as well as on Article 166 TFEU; since both provisions require the ordinary legislative procedure and allow the Council to give recommendations, there are no differences within the procedure. A prime example for such an overlapping is the **integrated action programme in the field of lifelong learning** (COM (2004) 474 final; now: Decision 1720/2006/EC establishing

¹ See Article 294 TFEU.

² Cf. Article 4 para. 3 TEU.

³ ECJ Case 242/87 *ERASMUS* [1989] ECR 1425; Case 56/88 *PETRA* [1989] ECR 1615; Joined Cases C-51/89 and C-94/89 *COMETT II* [1991] ECR I-2757.

⁴ See Article 165 TFEU mn. 2.

⁵ ECJ Case 293/83 *Gravier* [1985] ECR 593 (concerning academy of fine arts); Case 24/86 *Blaziot* [1988] ECR 379 (concerning veterinary medicine); Case 309/85 *Barra* [1988] ECR 355 (concerning vocational school).

an action programme in the field of lifelong learning). Criteria for a differentiation might be the following.

2. Demarcation

4

General educational lessons are not part of vocational training. However, it is (still) considered as vocational training in the meaning of Article 166 TFEU if the courses have their focus on vocational training but include general educational lessons⁶, or at least contain aspects of vocational training that do not have to be specifically related to vocational training⁷. Whether one school year which contains basic general education elements is to be considered as vocational training within a programme of study that lasts several years, depends on its objective.⁸

The **area of research** at a university does not belong to the field of vocational training.⁹

5

III. Task of the Union

6

The task of the Union is to follow a policy on vocational training which **supports and supplements** the measures of the Member States. The Union fully respects the competence of the Member States for contents and organisation of vocational training; it excludes harmonisation.

The fields of activity of the Union are exhaustively listed in paras 2 and 3.

7

IV. Competence of the Council

8

The Council may adopt (also binding) measures on the mentioned fields of activity. The harmonisation of national laws of the Member States (for example by directives) is excluded. The mutual recognition of diplomas, certificates and other evidence of formal qualifications may be achieved under the special provision of Article 47 TFEU.¹⁰

V. Action programmes

9

Even before the Article was introduced, the Council had adopted **action programmes** on vocational training. The action programme 'LEONARDO DA VINCI' summarises the former programmes COMETT (cooperation of universities and economy), PETRA (initial vocational training), FORCE (continuous vocational training) and EURO-TECNET (innovation in teaching methods); see Council Decision 1999/382/EC establishing the second phase of the Community vocational training action programme 'LEONARDON DA VINCI'. 'LEONARDO DA VINCI' is one of the sectoral specific programmes of the above mentioned (see mn. 3 above) **umbrella programme 'lifelong learning'**. From 2014 onwards, the action programmes become a part of the comprehensive programme 'ERASMUS+', which continues the just mentioned single programmes under one roof.¹¹

⁶ ECJ Case 293/83 *Gravier* [1985] ECR 593.

⁷ ECJ Case 242/87 *ERASMUS* [1989] ECR 1425.

⁸ ECJ Case 263/86 *Humbel* [1988] ECR 5365.

⁹ ECJ Case 242/87 *ERASMUS* [1989] ECR 1425.

¹⁰ ECJ Case 242/87 *ERASMUS* [1989] ECR 1425.

¹¹ For more details of the comprehensive new strategy of the EU, see Article 165 TFEU mn. 20.

- 10 The Commission is supported by the **European Centre for the Development of Vocational Training**, seated in Thessaloniki (Greece), which was established by the Regulation 337/75/EC (on the legal basis of today's Article 352 TFEU).

11 VI. General prohibition of discrimination

1. Access to educational establishments

Since the scope of the TFEU extends to the field of vocational training, the ECJ considers the applicability of the **general prohibition of discrimination** of Article 18 para. 1 TFEU to the access to educational establishments. Nationals of any Member State of the Union must have free access under the same conditions as the nationals of the Member State (registration fee; school fee).¹² In addition, see the case *Commission v Austria*¹³ where the Republic of Austria has failed to fulfil its obligations under Articles 12, 149 and 150 EC because it did not ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education under the same conditions as holders of secondary education diplomas awarded in Austria¹⁴; as to earlier judgments, see *Commission v Belgium*¹⁵ as an example. In the case *Lyyski*¹⁶, the ECJ held that the Community (now Union) law does not preclude national legislation which organises, on a provisional basis, training courses intended in the short term to meet the need for qualified teachers in a State from requiring that candidates for that training are employed in a school in that State, provided, however, that the manner in which that legislation is applied does not lead to the exclusion, as a matter of principle, of all applications made by teachers who are not employed in such a school without prior individual assessment of the merits of those applications in the light, *inter alia*, of the aptitude of the person concerned, and the possibility of monitoring the practical part of the training received or possibly of exempting that person from it.

- 12 **Scholarships to cover subsistence** are difficult issues: The ECJ allows the citizens of the Union who are reaching out for vocational training to oppose all obstacles to free access to education due to the free movement of the Union's citizens. This includes, following a highly controversial jurisdiction¹⁷, a right to non-discriminatory granting of social benefits for students: In the *Bidar* case, the ECJ revised its judgements *Lair* and *Brown* and affirmed a right to education grants if the student is integrated enough into the Member State. The reason for this change within the ECJ's jurisdiction traces back to the introduction of the EU citizenship and explicitly to the new chapter on general and vocational education.

13 2. More extensive rights

The rights of family members within the scope of the **right of free movement** have long been recognised. They have the same right of granting social benefits (Article 7 para. 2 and Article 10 Regulation 1612/68/EEC; such as study sponsorship) as nationals.¹⁸ Reference

¹² ECJ Case 293/83 *Gravier* [1984] ECR 593; Case C-47/93 *Commission v Belgium* [1994] ECR I-1601.

¹³ ECJ Case C-147/03 *Commission v Austria* [2005] ECR I-5969.

¹⁴ Also discussed by *Rieder*, CMLRev 2006, 1711 and *Hilpold*, Hochschulzugang und Unionsrecht; Das Urteil des EuGH vom 7.7.2005 in der Rs C-147/03, Kommission gegen Österreich, EuZW 2005, 647.

¹⁵ ECJ Case C-65/03 *Commission v Belgium* [2004] ECR I-6427.

¹⁶ ECJ Case C-40/05 *Lyyski* [2007] ECR I-99.

¹⁷ ECJ Case 293/83 *Gravier* [1985] ECR 593; Case C-184/99 *Grzelczyk* [2001] ECR 6193; Case C-209/03 *Bidar* [2005] ECR 2119.

¹⁸ ECJ Case 9/74 *Casagrande* [1975] ECR 109 (concerning BAföG, the German Federal Law on Support in Education); Case 68/74 *Alaimo-Préfet du Rhône* [1975] ECR 109; Case 32/75 *Cristini* [1975] ECR 1085;

shall also be made to Directive 2004/38/EC: Article 24 para. 1 Directive 2004/38/EC provides students with a right to social assistance and aid for studies right from the beginning of their residence.

TITLE XIII CULTURE

Article 167 [Contribution of the Union to the cultures of the Member States, respecting their cultural diversity] (ex Article 151 TEC)

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.

Bibliography: Aronstein, The Union Shall Respect Cultural Diversity and National Identities' Lisbon's Concessions to Euroscepticism – True Promises or a Booby-Trap, 6 Utrecht Law Review 2010, 89; *Diacomu*, Report of Free Movement of Persons and Cultural Policy of the European Union, Revista de Drept Public 2012, 166; *Häberle*, Europäische Rechtskultur, 1997; *id.*, Verfassungslehre als Kulturwissenschaft, 2nd ed. 1998; *id.*, Europäische Verfassungslehre, 7th ed. 2011; *Hochbaum*, Der Begriff der Kultur im Maas-trichter und Amsterdamer Vertrag, BayVbl. 1997, 641 and 680; *Kotzur*, Kultur, Forschung und Technologie, in: Schulze/Zuleeg/Kadelbach (eds), Europarecht. Handbuch für die deutsche Rechtspraxis, § 38, 2nd ed. 2010; *Sefton-Green*, Multiculturalism, Europhilia and Harmonization: Harmony or Disharmony, 6 Utrecht Law Review 2010, 50; *Smith*, From heritage conservation to European identity: Article 151 EC and the multi-faced nature of community cultural policy, 1 ELRev 2007, 48.

Case 39/86 *Lair* [1988] ECR 3161; 235/87 *Matteucci* [1988] ECR 5589 concerning scholarships because of an exchange programme between the Member States; Case 263/86 *Humbel* [1988] ECR 5365.

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1

I. General remarks

According to its narrow economic integration concept, the former TEEC did not include a title on culture – *a fortiori* because the Member States were deliberate to secure their **cultural identity**; in the Federal Republic of Germany for example, the cultural sovereignty belongs to the traditional competences of the States ('Bundesländer') and is not part of the Federal Republic ('Bund'). Even when the Treaty of Maastricht introduced Article 151 TEC, it happened against the background of a European unity in cultural diversity, together with the awareness of the high cultural relevance of the Union's activities. Article 151 TEC, for the first time, described the requirements and limits of a general activity of the Union in the field of cultural policy. Especially its para. 4 has had the effect of a '**cultural horizontal clause**' ever since. Article 167 TFEU takes over the wording and content of Article 151 TEC without major changes. Only para. 5 leads to a change of the applicable procedure, which is not the procedure according to Article 251 TEC any more but the ordinary legislative procedure¹. Concerning the special rules on education policy, see Articles 165, 166 TFEU.

2 Even before the Treaty was changed by the Treaty of Maastricht, the Union did not exclude matters on cultural policy from its activities, although it was agreed that it remained a competence of the Member States in principle. On the one hand the Union had the competence to regulate the 'cultural-economic' field of the free movement of goods, persons and services but national reservations were of particular high importance (Article 36 TFEU for instance: the maintenance of fixed book price system according to national law).² On the other hand, the Union took actions to support culture, based on Article 308 TEC (today but with substantial changes Article 352 TFEU) and adopted them in accordance with the 'mixed formula' by the Council and the Ministers of the Member States meeting within the Council³. According to the Commission's Communication 'New impetus for the action of the EC on cultural matters'⁴, the support referred to the following five sectors: establishment of a European cultural area; promoting the European audio-visual industry; access to cultural resources; initial and continuous training in the cultural field; cultural dialogue with other parts of the world.

3 The Treaty of Lisbon particularly emphasises the Union's competence on culture. The Preamble of the TEU, which is of high importance for the interpretation of the operational parts of the Treaty, emphasises the important meaning of culture: reference is made to the '**cultural heritage of Europe**' in para. 2 of the Preamble of the TEU, which also includes the religious heritage. Furthermore, culture was added to the objectives of Article 3 para. 3 TEU (and could therefore have influence on the flexibility clause of Ar-

¹ See Article 294 TFEU.

² ECJ Cases 229/83 *Leclerc* [1985] ECR I; 243/83 *Binon* [1985] ECR 2015.

³ See Article 16 TEU.

⁴ EC-Bulletin, supplement 1987/4.

ticle 352 TFEU). Finally, culture is determined as an individual field of policy in Article 6 lit. c TFEU.

II. Task

4

1. Objective

The Union shall make a contribution to the general task to develop the cultures of the Member States. On the one hand, national and regional diversity must be protected; on the other hand, the common cultural heritage must be emphasised. The term 'culture' is not defined in the TFEU and its interpretation is unclear: A wide concept could not be limited (Decision of the UNESCO General Conference 26 July to 6 August 1982)⁵. A narrow concept (for example: 'education, science and art') would not meet the tasks of 'culture' because of the existence of special regulations on education and science (Articles 165, 166 and 179 TFEU)⁶. Especially the openness of the term 'culture' allows including new forms and concepts of culture (media culture, internet culture⁷) and counteracts the narrowing to 'advanced culture' of the 'true, good and beautiful'. A pragmatic solution which refers to national cultural policy of the Member States and includes the (exhaustively listed) fields of Article 167 para. 2 TFEU might be most favourable. The task of the Union is limited to the fields mentioned in Article 167 para. 2 TFEU.

The enumeration of areas refers to 'encouraging cooperation'. Because of the relation of the Union towards the Member States within this intense field, a restrictive interpretation is necessary.

2. Actions of the Union

6

The activities of the Union is limited to

- (a) encouraging cooperation between the Member States (para. 2);
- (b) supporting and supplementing the actions of the Member States, if this is necessary to achieve the Union's objectives (para. 2);
- (c) and to foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe (para. 3). This support – e.g. when concluding international agreements – must not exceed the activities according to (a) and (b) with regard to its retroactive effect.

III. Cultural compatibility clause

9

The Union must consider cultural aspects in all other fields of activities (**'horizontal cultural clause'**). Cultural subsidies of the Member States can be excluded from the general prohibition of State aid (Article 107 para. 3 lit. d TFEU). If a Union programme on the promotion of linguistic diversity mainly is regarded as an economic matter and only secondly as a measure to communicate culture, Article 173 TFEU is the only relevant provision.⁸

⁵ Cf. *Hochbaum*, BayVBl. 1997, 642: 'Culture is the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs'.

⁶ Cf. GHN/Ress/Ukrow, Article 167 AEUV mns 88 et seq.

⁷ See LB/Fischer, Article 167 AEUV mn. 4, although speaking of a narrowed interpretation of culture but meaning open for new culture expressions.

⁸ ECJ Case C-42/97 *European Parliament v Council of the European Union* [1999] ECR I-869.

10

IV. Competences

To achieve the Union's task, the **Council**, together with the European Parliament, adopts measures of support (having an organizational and financial nature). The former requirement of unanimity has been abandoned. The ordinary legislative procedure applies⁹. The Committee of the Regions must be consulted, not at last because of the protection of regional diversity and a possible inter-regional cooperation in the field of culture. Examples for such incentive measures are contained in Decision 508/2000/EC on the programme 'Culture 2000' and the follow-up programme 'Culture 2007' for the period from 2007 to 2013.¹⁰ From 2014 onwards, culture will be part of the comprehensive EU strategy 'Europe 2020' respectively the programme 'Horizon 2020'. Since 1 January 2006, the Education, Audiovisual and Culture Executive Agency is in place. Its main task is the administration of the respective programmes.¹¹

11 In the past, the Council could adopt recommendations unanimously on proposal of the Commission (para. 5 indent 2); today, the requirement of unanimity is no longer in place. However, overall, the cultural competence of Article 6 lit. c TFEU remains limited to support, coordination and supplement measures. Even recommendations must not exceed this level and do have to meet with the principle of subsidiarity.

12

V. Member States

In principal, the general cultural policy remains a matter of the Member States, even if the competences of the Union are expanded. The Union shall make a contribution within the framework of tasks ('protection of unity in diversity')¹². Para. 5 emphasises that Article 167 TFEU excludes harmonisation of the laws of the Member States through the Union. Apart from that, the general principle of subsidiarity applies¹³.

TITLE XIV PUBLIC HEALTH

Article 168 [Contribution of the Union to public health, ensuring a high level of protection] (ex Article 152 TEC)

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their

⁹ See Article 294 TFEU.

¹⁰ Cf. http://eacea.ec.europa.eu/culture/index_en.php.

¹¹ Cf. http://eacea.ec.europa.eu/index_en.php.

¹² Cf. *Nettesheim*, JZ 2002, 165.

¹³ See Article 5 TEU.

transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) 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, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

- (a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
- (b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
- (c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

5. 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, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

Bibliography: *Alemanno*, Out of Sight, out of Mind – Towards a New EU Tobacco Products Directive, 18 ColumJEurL 2012, 197; *Bélanger*, L'espace sanitaire européen selon le traité de Maastricht, 372 RMC

1993, 785; *De La Rosa*, The Directive on cross-border healthcare or the art of codifying complex case law, 49 CMLRev 2012, 15; *Hervey*, The European Union, its Court of Justice and 'super-stewardship' in public health, 62 NILQ 2011, 633; *Hervey/McHale*, Health Law and the European Union, 2004; *Tacconi*, Freedom of Health and Medical Care Services within the European Union. Recent Jurisprudence of the European Court of Justice, with Particular Reference to Case C-372/04 – Yvonne Watts, 16 May 2006, ZaöRV 2008, 195; *van de Gronden/Szyszczak/Neergaard/Krajewski*, Health Care and EU Law, 2011.

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1

I. General remarks

Public Health has been an issue of Community Law (now: Union Law) since the EEC Treaty entered into force; thus, the market freedoms could be restricted on **grounds of public health** from the beginning. However, an independent policy area or title of competence concerning 'public health' was not introduced into the TEC until the Treaty of Maastricht. It was already modified by the Treaty of Amsterdam. Since that time, it provides an explicit competence for measures related to general health – apart from special provisions concerning the protection of workers' health and safety¹ or the harmonisation of national legislation according to Articles 115, 36, 53 para. 2, 62 TFEU. The Reform Treaty of Lisbon retains these basic structures but introduces significant and substantive amendments to Article 168 TFEU. It has to be highlighted that the Intergovernmental Conference of 2007 did not resort to the draft TECE but looked for its own solutions in the light of developments in the recent past.²

- 2 In detail: The amendments contain **clarifications, specifications** but also **enlargements of the Union's competence**. Regarding the general division of responsibilities, reference can be made to Article 4 para. 2 lit. k TFEU (shared competence) and Article 6 para. 2 TFEU (competence to support, coordinate or supplement). Article 168 para. 1 TFEU defines more precisely the general concept of health ('preventing physical and mental illness'); the scope of application is expanded by including 'monitoring, early warning of and combating serious cross-border threats to health'. In Article 168 para. 2 TFEU, a specification is made concerning the 'encourage[ment of] cooperation': subpara. 1 aims to 'improve the complementarity of their health services in cross-border areas' and subpara. 2 renders the competences of the Commission more precisely (by naming major fields in which initiatives are possible). A right of the European Parliament to be kept informed is added in the last sentence of para. 2 subpara. 2. To meet common safety concerns, Article 168 para. 4 TFEU formulates an exemption in order to make the ordinary legislative procedure applicable for certain measures taken. Another new provision is Article 168 para. 4 lit. c TFEU: 'measures setting high standards of quality and safety for medicinal products and devices for medical use'. The previous lit. c becomes the new para. 5 and is amended, both in procedural and substantive aspects. In particular, the protection of public health regarding tobacco and the abuse of alcohol have been

¹ See Article 153 para. 1 TFEU.

² Cf. *Fischer*, Der Vertrag von Lissabon, 333.

introduced. Article 168 para. 6 TFEU is reworded; it takes over the wording of the previous Article 152 para. 4 subpara. 2 TEC. Finally, Article 168 para. 7 TFEU is newly added. It adapts Article 152 para. 5 TEC. In addition, attention has to be drawn to Declaration No 32 on the application of Article 168 para. 4 lit. c TFEU, which clarifies that any measure taken under this norm 'must meet common safety concerns and aim to set high standards of quality where national standards affecting the internal market would otherwise prevent a high level of human health protection being achieved'.

II. Scope and aims of the provision

3

1. General objective

The particular importance of public health is emphasised by Article 168 para. 1 s. 1 TFEU. According to this provision, a high level of protection of public health has to be ensured during determination and implementation of all Union policies and activities. This general responsibility stretches beyond the particular regulatory content of Article 168 TFEU. It is designed as a horizontal policy clause, demanding that public health protection does not only have to be 'integrated' into the decision-making process in other policy fields of the Union (as in the case of environmental protection requirements for example, see Article 11 TFEU) but shall be 'ensured'.

2. Specific target

4

In the framework of Article 168 TFEU, the Union's targets are:

- the improvement of public health,
- the prevention of physical and mental illnesses and diseases, and
- the oviation of sources of danger to physical and mental health. Insofar the Union acts mainly in a preventive manner but is able to intervene stronger in key aspects of health protection; in this regard, health protection contains an '**optimisation requirement**'³.

Article 168 TFEU focuses on the fight against the widespread major health scourges through the promotion of research of the causes of illnesses, their transmission and their prevention as well as health information and education. 'Monitoring, early warning of and combating serious cross-border threats to health' are newly added priorities (see Article 168 para. 1 subpara. 2 TFEU). This again leads to a strengthening of the preventive aspect (**prevention by warning in the sense of good neighbourhood**, a principle borrowed from public international law).

An additional central priority is the reduction of drug-related health damage.

6

III. Tasks

7

The Union does not pursue its own health policy that could replace the respective policies of the Member States. It rather supplements the politics and measures of the Member States within the scope described above (see mns 3 et seq.). The competences of the Union have been newly allocated to Article 4 and Article 6 TFEU (as mentioned in mn. 2 above). A clear distinction can be made between the fields in which the Union can only support, coordinate and supplement and those areas in which, according to Article 2 para. 2 and Article 4 para. 2 lit. k TFEU, there is a shared competence.

³ German technical term: '*Optimierungsgebot*', see CR/Kingreen, Article 168 AUEV mn. 10.

- 8 According to Article 168 para. 2 TFEU, the Union has the task
- (a) to improve the cooperation between the Member States (probably through supporting of the Member States). The cooperation consists of the coordination of the policies of the Member States and of programmes of the Member States in liaison with the Commission. The Commission may take initiatives in this respect (see Article 168 para. 2 TFEU). The improvement of the cooperation was extended and was made concrete in para. 2 subpara. 1: ‘complementarity of their health services in cross-border areas’. Likewise, the competence of the Commission to take initiatives has been specified in para. 2 subpara. 2.
 - (b) to encourage the cooperation with third States and international organisations besides the Member States.

9 **IV. The Council’s competences**

Corresponding to the limitation of the Union’s tasks to measures supporting the policies of the Member States, the Union has very limited facilities to act in its range of competences.

- 10 In terms of substantive legal provisions, the Council together with the EP can, after consulting the Economic and Social Committee and the Committee of the Regions in the framework of the ordinary legislative procedure⁴, enact the following measures. A new element in this context is the concrete objective ‘to meet common safety concerns’:
- (a) measures setting high standards of quality and safety for organs and substances of human origin, blood and blood derivatives (more stringent protective measures by the Member States remain approved);
 - (b) measures in the veterinary and phytosanitary fields which have the protection of public health as their direct objective. By having primacy over Article 43 TFEU, this provision significantly strengthens health protection in the field of agricultural policies;
 - (c) lit. c is added as a new provision: ‘measures setting high standards of quality and safety for medicinal products and devices for medical use’; in addition, see the Community code relating to medicinal products for human use, Directive 2001/83/EC (and its later amendments): There is an obligation of the Member States to apply a marketing authorisation procedure in order to authorise the use of medicinal products⁵; products which do not fall within the definition of medicinal products of the directive cannot be treated as such products by the Member States – this would constitute an infringement of Article 34 TFEU.
 - (d) The former lit. c is now located in Article 168 para. 5 TFEU, the protection objectives are specified there, the ordinary legislative procedure applies. The provision still deals with incentive measures, aiming at the protection and improvement of human health (although any harmonisation of the laws or administrative provisions of the Member States is excluded). The exclusion of harmonisation measures is not to be bypassed. However, harmonisation under any other provision of the Treaty is not excluded as long as the general conditions for the application of this provision are met.⁶
- 11 In addition, the Council can make recommendations regarding all objectives referred to in Article 168 TFEU. The Commission does not have an original competence to enact binding legal acts here.

⁴ See Article 294 TFEU.

⁵ ECJ Case C-319/05 *Commission v Germany* [2007] ECR I-9811.

⁶ ECJ Case C-376/98 *Tobacco Advertising* [2000] ECR I-2247; C-74/99 *Tobacco Advertising* [2000] ECR I-8599.

A particular limitation of the areas of possible Union measures concerns the organisation and delivery of health services and medical care. These fields remain in the responsibility of the Member States. Thereto Article 168 para. 7 TFEU contains a formulation which is more precise than before and additionally refers to 'the [Member States'] definition of their health policy'. The ECJ decided on this in its *Watts*⁷ case (on the obligation to take over the costs of hospital treatment in another Member State based on Article 56 TFEU and Regulation 1408/71 which is not covered by Article 168 paras 5 and 7 TFEU).

V. Implementation

The Union created, *inter alia*, programmes of action on health promotion, information, education and training (Decision 645/96); on the combat of cancer (Decision 646/96); on the prevention of AIDS and certain other communicable diseases (Decision 647/96); on the prevention of drug dependence (Decision 102/97); finally, on health monitoring (Decision 1400/97). In addition, the European Monitoring Centre for Drugs and Drug Addiction has been set up (by Regulation (EEC) No 302/93).

In the context of cooperation in the area of justice and home affairs, the Joint Action 96/750/JHA on combatting drug addiction and preventing and combatting illegal drug trafficking has been adopted. Further reference has to be made to Article 35 CFREU which implements health protection on the level of **fundamental rights**. In addition, human health has been included in the general horizontal policy clause of Article 9 TFEU. New programmes or institutions comprise: Decision 1786/2002 of the EP and the Council on a programme of Community action in the field of public health (2003–2008)⁸, renewed by a program in the field of public health 2008–2013 (Decision of the Council and the EP 1350/2007⁹); the establishment of an executive agency to support the implementation of the public health programme by Decision of 15 December 2004¹⁰. By Decision of 20 June 2008, the Commission extended the mandate of its executive agency. In addition to the health programme, the agency now also deals with the execution of the consumer program and the training initiative for safer food. The mandate was prolonged until 31 December 2015. Since its foundation the agency has had its seat in Luxembourg, Decision 2008/544¹¹.

Finally, the following decisions are noteworthy: ECJ Cases C-380/03 *Germany v. Parliament and Council*¹² and CFI T-311/03 *Nürburgring v. Parliament and Council*¹³ (on the recent action for annulment of the German government against Directive 2003/33/EC and the subsequent dismissal of the action); ECJ C-210/03 *Swedish Match*¹⁴ (on the validity of the prohibition on the marketing of tobacco products for oral use as prescribed by the tobacco products directive – internal market competence; ECJ Joined Cases C-171/07 and C-172/07 *Deutscher Apothekerverband*¹⁵ as well as ECJ C-531/06 *Commission v Italy*¹⁶ confirming the **permissibility of provisions restricting the right to operate a**

⁷ ECJ Case C-372/04 *Watts* [2006] ECR I-4325.

⁸ OJ 2002 L 271/1.

⁹ OJ 2007 L 301/3.

¹⁰ OJ 2004 L 369/73.

¹¹ OJ 2008 L 173/27. See http://europa.eu/agencies/executive_agencies/eahc/index_en.htm.

¹² ECJ Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

¹³ CFI Case T-311/03 *Nürburgring v Parliament and Council* [2006] ECR II-46.

¹⁴ ECJ Case C-210/03 *Swedish Match* [2004] ECR I-11893.

¹⁵ ECJ Joined Cases C-171/07 and C-172/07 *Deutscher Apothekerverband* [2009] ECR I-4171.

¹⁶ ECJ Case C-531/06 *Commission v Italy* [2009] ECR I-4103.

pharmacy to pharmacists only; in this context, see also ECJ Case C-84/11 *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala*¹⁷.

TITLE XV
CONSUMER PROTECTION

*Article 169 [Contribution of the Union to consumer protection;
minimum standards]
(ex Article 153 TEC)*

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
- (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
 - (b) measures which support, supplement and monitor the policy pursued by the Member States.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Bibliography: *Benöhr*, Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures, 3 J Consum Policy 2013, 36; *Howells/Wilhelmsson*, EC Consumer Law: Has it Come of Age?, ELRev 2003, 370; *Twigg-Flesner*, A Cross-Border-Only Regulation for Consumer Transactions in the EU, 2012; *Unberath/Johnston*, The double-headed approach of the ECJ concerning consumer protection, 44 CMLR 2007, 1237; *Weatherhill*, Consumer Law and Policy, 2005; *id.*, The Consumer Rights Directive: How and why a quest for ‘coherence’ has (largely) failed, 49 CMLR 2012, 1279.

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1

I. General remarks

The European consumer protection law finds its foundation in a long row of case law based on the *Cassis* decision¹. According to this jurisprudence of the court, every product that is (legally) marketed in one Member State is also to be allowed on the markets of the other Member States as long as such marketing is not in contradiction with mandatory requirements of public interest, in particular the defence of consumer interests. An inde-

¹⁷ ECJ Case C-84/11 *Marja-Liisa Susisalo, Olli Tuomaala and Merja Ritala* ECLI:EU:C:2012:374.

¹ ECJ Case 120/78 *Rewe Zentral AG* [1979] ECR 649, also known as ‘Cassis de Dijon’.

pendent Community (now: Union) policy on ‘**consumer protection**’, however, had not been introduced before the Treaty of Maastricht in 1992. Later, the Treaty of Amsterdam made major amendments. Since that time, Article 153 TEC has provided an explicit competence for measures in the area of consumer protection policy. In a move away from mere sectoral and individual rules, its (former) para. 2 established a **horizontal policy clause**: Consumer protection requirements always have to be taken into account during defining and implementing all other Union policies and activities. This clause has been moved to the general provisions of the TFEU and can be found in Article 12 TFEU now. Consequently, Article 153 para. 2 TEC was deleted, while the other provisions of the predecessor norm were taken over by Article 169 TFEU without major amendments. Apart from editorial changes caused by the Lisbon mandate, only para. 3 provides a substantially new aspect by introducing the ordinary legislative procedure.

The TFEU does not contain any explicit definition of the term ‘**consumer**’. Essentially, a ‘consumer’ is a natural person who is acting on the market for his or her private (not for professional or commercial) purposes.² Depending on the respective provision, the term ‘consumer’ can be interpreted in a broader sense (compare e.g. the directive on package travel³). In general, the jurisprudence of the ECJ follows the **model of a reasonably well-informed, reasonably observant and circumspect consumer**.⁴

From the earlier Union activities, the following are noteworthy: Harmonisation measures in the field of the composition of specific substances and of food law as well as product safety according to Article 114 TFEU, such as Directive 2001/95/EC on general product safety, which is still valid in a consolidated version of 1 January 2010, and Directive 85/374/EEC on liability for defective products (Product Liability Directive). Directive 1999/44/EC on the sale of consumer goods and associated guarantees should be mentioned, too.

II. Task

The Union strives to **contribute** to the promotion of consumer interests and to the establishment of a high level of consumer protection. In this respect, the EP and the Council adopted (*inter alia*) Decision 283/1999 on establishing a general framework for Community activities in favour of consumers, which has been implemented by the consumer policy action plan from 1999 to 2001 of the Commission⁵. Secondary legislation particularly concerns the areas of safety and health protection, product safety, economic interests (ban on certain kinds of product advertisements), and the increasingly important questions of consumer information.

Interests of consumers and safety of consumers within the meaning of this article are:

- Protection of health, safety and the economic interests of the consumers.

The Council has adopted numerous directives focussing on health policy and on product safety (e.g. Directive 92/59/EEC on general product safety, already repealed by the above mentioned Directive 2001/95/EC on general product safety). Additional directives have protected the economic interests of consumers, partly in strong interference with the laws of the Member States. These are: Directive 97/55/EC concerning misleading advertising so as to include comparative advertising; Directive 85/374/EEC on the

² See LB/*Grub*, Article 169 AEUV mn. 6.

³ Cf. *Reich/Micklitz*, 678 et seq.

⁴ For reference see *Meyer*, WRP 1993, 222; *Schwarze/Berg*, Article 169 AEUV mn. 8.

⁵ On this, see Resolution 1999/C 206/01.

approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC; Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises; Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; Directive 93/13 on unfair terms in consumer contracts; Directive 98/7/EC amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive)⁶; as well as the Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC on distance contracts. In this context, reference should be made to the ECJ's Case C-350/03 *Schulte*⁷ on the interpretation of Article 95 para. 3 TEC as well as Directive 85/577 concerning the effects of a cancellation of a secured credit agreement under the applicable national law on doorstep selling.⁸

- 6 – Promotion of the consumers' right to information, to education and to organise themselves in order to safeguard their interests.

Besides numerous directives and action programmes in this field, Directive 2009/22/EC on injunctions for the protection of consumers' interests by consumer organisations in cases of intra-Community (now: intra-Union) infringements has to be highlighted.

- 7 The policy of the European Union on consumer protection complements the respective competences of the **Member States**, which still keep the primary responsibility for consumer welfare. The Union only makes a contribution to achieve this objective. Those Union measures which are directly based on Article 169 TFEU can be characterised as measures of support, supplementation and monitoring towards the policy of the Member States. Insofar Council and EP are acting, after consulting the Economic and Social Committee (Article 169 para. 3 TFEU), according to the ordinary legislative procedure. In terms of competences, consumer protection can be classified as a shared competence, according to Article 4 para. 2 lit. f TFEU. Measures taken by the Union do not hinder the Member States to maintain or to implement more stringent protective measures. However, these national options must be compatible with the other provisions of the TFEU (in particular Articles 34 et seq. TFEU). They have to be notified to the Commission (Article 169 para. 4 TFEU). The competence under Article 169 para. 4 TFEU only relates to measures under Article 169 para. 2 lit. b TFEU but it does not relate to measures under para. 2 lit. a.⁹

- 8 Furthermore, Article 169 para. 2 lit. a TFEU refers to the competence of the Union to **legal harmonisation in the internal market** according to Article 114 TFEU. This is probably the practically most important option to realise a common consumer protection policy.

⁶ For details, see *Stuyck/Terryn/van Dyck*, Confidence through fairness: The new directive on unfair business-to-consumer commercial practices in the internal market, 43 CMLR 2006, 107 et seq.

⁷ ECJ Case C-350/03 *Schulte* [2005] ECR I-9215.

⁸ A further analysis can be found in Terryn, ECJ Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG*, judgment of the Grand Chamber of 25 October 2005 [2005] ECR I-9215; Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads and Others*, judgment of the Second Chamber of 25 October 2005, 44 CMLR 2007, 501–518.

⁹ ECJ Joined Cases C-418/00 and C-419/00 *Fishery Policy* [2002] ECR I-3969.

Finally, Article 12 TFEU contains a **horizontal policy clause**, which has to be mentioned in this context because it has been developed out of Article 153 para. 2 TEC and because it contains a direction for the interpretation of Article 166 TFEU. Accordingly, consumer protection requirements shall be taken into account while defining and implementing other Union policies and activities. This means that consumer protection requirements have to be considered when dealing with any concrete measure in the other policy areas. However, there is no general rule that consumer protection does prevail. In addition, reference has to be made to Article 38 CFREU.

TITLE XVI TRANS-EUROPEAN NETWORKS

Article 170 [Contribution to the establishment and development of trans-European networks] (ex Article 154 TEC)

1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union.

Bibliography: *Fischerauer*, Bringing Together European Energy Markets: The New Regulation on Guidelines for Trans-European Energy Infrastructure (TEN-E), 22 *European Energy and Environmental Law Review* 2013, 70; *Mayet*, Le réseau transeuropéen de transport: le dessous des cartes, 484 *RMCE* 2005, 11; *Stephenson*, The Role of Working Groups of Commissioners in Co-ordinating Policy Implementation: The Case of Trans-European Networks (TENs), 48 *JCMS* 2010, 709.

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I. General remarks

1

The provisions on Trans-European-Networks (TEN) (Articles 170–172 TFEU) have been introduced to the TEC by the Maastricht Treaty. The Treaty of Amsterdam took account of the interests of a stronger cooperation with private investors. The Treaty of Nice did not amend anything in this policy field. The Treaty of Lisbon also did not bring any substantial changes to the articles. Articles 170–172 TFEU still serve the realisation of the internal market according to Article 26 TFEU and the strengthening of the re-

gional policy¹ by improving cross-border infrastructure. Due to practical needs, the policy area falls within the shared competences of the Union and the Member States².

2

II. Task

As an infrastructural **service of public interest**, the Union's task concerns the development and expansion of trans-European networks for transport, telecommunications and energy-related purposes. Its competence is limited to these explicitly mentioned areas. Insofar, the Union aims to improve the possibility to access the networks of the Member States and to establish links between such networks (so-called **interoperability**). The contribution of the Union to these networks has to consider the principle of subsidiarity. In addition, it has to be taken into account that infrastructural projects are not necessarily financed by the State (any more) but also by private investors, especially after intensive privatisation.

- 3 Article 170 TFEU contains the following baseline provisions, which are binding to the Union:
- 4 – The Union's activities have to be chosen from within the system of open and competitive markets and cannot go beyond this framework.
- 5 – The Union has to give special consideration to the needs of link island, landlocked and peripheral regions to connect it with the central regions of the Union; in addition, interoperability of national networks shall be promoted, meaning compatibility within different networks of the Member States in a connected operation of networks as well as access to such networks shall be enhanced.³

Article 171 [Measures of the Union] (ex Article 155 TEC)

1. In order to achieve the objectives referred to in Article 170, the Union:
 - shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,
 - shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,
 - may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

The Union's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

¹ See Article 174 TFEU.

² See Article 4 para. 2 lit. h TFEU.

³ Cf. Schwarze/Voet van Vormizeele, Article 170 mns 15 et seq.

3. The Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

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I. Measures of the Union

1

As already in former times provided for in Article 156 TEC, incentive measures of the Union under Article 171 TFEU may comprise:

- **Guidelines** for measures defining the objectives, priorities and basics as well as projects of common interest. Council and EP have so far formulated such guidelines in decisions addressed to the Member States. For the qualification of a decision as a certain legal act of the Union, see Article 288 para. 4 TFEU. While, according to the German version of the Lisbon Treaty, the terminology for such acts has been changed from ‘Entscheidung’ to ‘Beschluss’, there is no such new terminology to be observed in the English version of the Treaty but the word ‘decision’ remains the same. One example for these guidelines is Decision 1692/96 of the EP and the Council on Community guidelines for the development of the trans-European transport network. A comprehensive revision of the TEN-guidelines had been presented by Decision 884/2004/EC of 29 April 2004, amended again by Council Regulation 1791/2006 of 20 November 2006.¹ In addition, note should be taken of Decision 1254/96 of EP and Council on guidelines for trans-European energy networks and Decision 1336/97 of EP and Council on guidelines for trans-European telecommunications networks, with (minor) amendments introduced by Decision 1376/2002/EC of EP and Council of 12 July 2002. By adopting Decision 1364/2006/EG of 6 September 2006, the Union repealed the old guidelines based on Article 171 TFEU and adopted new guidelines, updating the rules for the development of trans-European energy networks.² Finally, note should be taken of Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest.
- **Measures** that serve to ensure the interoperability of the networks, in particular in the field of technical standardisation, as far as such measures prove to be necessary. Such measures have to fit into the framework of the above-mentioned guidelines; however, the existence of a guideline is no precondition for the validity of the measures.³ The interoperability can be reached not only by ensuring the compatibility of the national networks but also by harmonisation or measures of standardisation.
- **Financial Assistance** to projects of common interest that have been initiated by the Member States and that are mentioned in the guidelines. The support is provided in particular by feasibility studies, loan guarantees or interest-rate subsidies, and additionally, in the area of traffic infrastructure by contributions of the Cohesion Fund⁴. The details were defined in Regulation 2236/95 of the Council, until substituted by

¹ As to the content, see http://www.europarl.europa.eu/ftu/pdf/de/FTU_4.7.1.pdf.

² Compare http://www.europarl.europa.eu/ftu/pdf/de/FTU_4.7.1.pdf.

³ ECJ Case C-271/94 *Parliament v Council* [1996] ECR I-1689.

⁴ See Article 177 TFEU.

Regulation 680/2007 (TEN-T Financial Regulation), last amended by Regulation 670/2012.

- 4 The potential economic viability of the projects has to be considered. In particular, commercially unsustainable projects, leading to a waste of public funds, shall be avoided. A case specific cost-benefit-analysis has to be accomplished.⁵

5 **II. Coordination obligation**

According to Article 170 para. 2 TFEU, the Member States have the obligation to coordinate their national policies in cooperation with the Commission, provided that such projects affect the objectives set out in Article 170 TFEU. As to the latter question, the Member States have a broad margin of appreciation.⁶ The Commission can promote such coordination also on its own initiative. However, this does not result in a competence to adopt binding legal acts.

6 **III. External relations**

The Union can cooperate with third countries in order to develop projects of mutual interest and to ensure the interoperability of networks. The provision is relevant especially for the successor States of the former Soviet Union (in particular Russia) and the Mediterranean States.⁷ As a matter of course, the positions of the affected Member States have to be taken into account while shaping the cooperation since they are bearing the major responsibility for the realisation of the infrastructure.

Article 172 [Decision-making procedure] **(ex Article 156 TEC)**

The guidelines and other measures referred to in Article 171(1) shall 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.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

- 1 Nowadays, **guidelines**, measures and financial assistance under Article 171 para. 1 TFEU are adopted by EP and Council, according to the ordinary legislative procedure¹ and after consulting the Economic and Social Committee² and the Committee of Regions³. In all other respects, the provision takes over the wording of the former Article 156 TEC without amendments.
- 2 As to the **cooperation with third countries**, Article 171 para. 3 TFEU forms the legislative basis while the legislative procedure follows the rules set up by Article 218 TFEU.
- 3 Guidelines and projects of mutual interest need the prior **consent of the Member State** that is affected regarding its territory.

⁵ Cf. Schwarze/*Voet van Vormizeele*, Article 171 AEUV mn. 12.

⁶ Cf. CR/*Calliess*, Article 171 AEUV mn. 36.

⁷ Cf. Streinz/*Schäfer/Schröder*, Article 171 AEUV mn. 49.

¹ See Article 294 TFEU.

² See Article 300 para. 2 TFEU and Articles 301 et seq. TFEU.

³ See Article 300 para. 3 and Articles 305 et seq. TFEU.

TITLE XVII INDUSTRY

Article 173 [Encouraging the competitiveness of the Union's industry; ban on subsidies] (ex Article 157 TEC)

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

- speeding up the adjustment of industry to structural changes,
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,
- encouraging an environment favourable to cooperation between undertakings,
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

Bibliography: *Adamski*, Europe's (Misguided) Constitution of Economic Prosperity, 50 CMLRev 2013, 47; *Buigues/Sapir*, Community Industrial Policies, in: Nicolaides (ed.), Industrial Policy in the European Community, 1993, 24 et seq.

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I. General remarks

The provisions on industrial policy have been initially introduced by the Treaty of Maastricht. This was relatively late for a community that is based on economic integration. Today, Article 173 TFEU builds on its predecessor norm in Article 157 TEC but formulates certain aspects more precisely. Article 173 para. 2 TFEU sets out the thematic focus of the measures (initiatives) by the Commission in more detail. Article 173 para. 3 TFEU replaces the codecision procedure of Article 251 TEC by the ordinary legislative procedure¹ and adds a clause prohibiting harmonisation, being completely in line with the Member States' interests in sovereignty and guaranteeing plurality within the Union.

2 Article 157 TEC was the first norm that, based on preparatory work of the Commission,² identified the industry policy, meaning **strengthening of the efficiency of the industry in the Union**³, as a common task of the European Community. The TEEC originally did not include this objective as a particular Community policy because the idea of government intervention in the market is in contradiction to *ordo-liberal* economic thinking. However, regarding the coordination of (then Community and now) Union measures within the framework of general or sectoral tasks, already the Declaration of the Paris Summit of 21 October 1972 'consider[ed] it necessary to seek to establish a single industrial base for the Community as a whole'⁴.

3 This involved the elimination of technical barriers to trade; the elimination of barriers which hinder closer relations and mergers between firms; the adoption of a European company statute; the opening up of public sector purchases; the promotion on a European scale of competitive firms in the field of high technology; the transformation and conversion of declining industries under acceptable social conditions; the formulation of measures to ensure that mergers affecting firms established in the Community (now: Union) are in harmony with the economic and social aims of the Community (now: Union); the maintenance of fair competition within the internal market and in external markets.

4 The Representatives of the Governments of the Member States, meeting within the Council on 10 and 11 December 1993 in Brussels, advocated an approach to industrial development which is based on **global competitiveness** as a factor for economic growth and employment. In its resolution of 21 November 1994, the Council stated that the framework conditions for competitiveness and competition must be enhanced in order to ensure that the European Union remains an attractive **business location** and new enterprises and new employment would develop. The guidelines of the Community action programme of 25 June 1996 served this objective (see mn. 12). The industry policy, however, is also strongly linked to the other fields of Union law (in particular education, research, development, competition and environment). Due to this, the industry policy played a key role within the so called '**Lisbon Strategy**', according to which the Union should become 'the most competitive and dynamic knowledge-based economy in the world'.⁵ This objective, with a timeframe that ended in 2010, proved to be over-ambitious and undynamic, as it constantly happens in the course of open processes. The global financial crisis and the Euro crisis tightened the difficulties. To establish new initiatives of

¹ See Article 294 TFEU.

² Cf. Schwarze/Mellein, Article 172 AEUV mns 2 et seq.

³ See Oppermann/Classen/Nettesheim, § 18 mns 46 et seq.

⁴ See Europa Archiv 1972 D 506.

⁵ See the Presidency Conclusions of the European Council of Lisbon, 23 and 24 March 2000.

economic growth, an integrative industry policy guided by the paradigm of sustainable development, industry policy is part of the new and comprehensive strategy of **Europe 2020**, which is applicable from 2014 onwards.

II. Task

5

1. Objective

As the objective of the industry policy of both the Union and the Member States, Article 173 para. 1 subpara. 1 TFEU names the creation of conditions necessary for the competitiveness of the Union's industry. This objective is further elaborated in Article 173 para. 1 subpara. 2 TFEU:

- The adjustment of industry to structural changes shall be enhanced; financial aid of the structural and cohesion funds come into consideration; 6
- encouraging an environment favourable to the infrastructure and further development of undertakings throughout the Union, in particular of small and medium-sized undertakings/enterprises (SMU/SME); thereto, see Council Resolution of 22 November 1993 on strengthening the competitiveness of enterprises in particular of small and medium-sized enterprises and craft enterprises, and developing employment (93/C 326/01) and the 'multiannual programme for enterprise and entrepreneurship' from 2001–2005, which was replaced by the 'Competitiveness and Innovation Framework Programme' (CIP) in 2007⁶; this programme was running until 2013 and will be continued by the 'Programme for the Competitiveness of enterprises and SMEs' (COSME) 2014–2020. An 'Enterprise Europe Network' is going to be built up, the 'Small Business Act' has been adopted by the Commission⁷; as well as the promoting of cooperation between the undertakings, 7
- the (better) exploitation of the industrial potential of policies in the fields of innovation, research and technological development shall be fostered; it is questionable if this can lead to an improvement of the economic efficiency apart from the separate policy areas of research and technology. However, the **horizontal character** of the provision becomes visible here.

2. Activities

8

The Union has the specific task to promote the coordination of the policies of the Member States in this area and shall contribute to the achievement of the above-mentioned objectives through the policies and activities based on other provisions of the Treaties. Finally, the Union may support the Member States through specific measures.

3. Limitations

9

The task has to be fulfilled within a system of open and competition-oriented markets. The industry policy does not entitle the Union to enact measures that could lead to a distortion of competition. Also, tax-related provisions or provisions relating to the rights and interests of employed persons cannot be based on Article 173 TFEU. A further limitation of the industry policy is constituted by the prohibition of harmonising measures in Article 173 para. 3 TFEU.

⁶ OJ 2006 L 310/15.

⁷ COM (2008) 394 final.

10

III. Competences of the institutions of the Union

The **Commission** participates in the coordination of measures of the Member States. A newly-added half-sentence in Article 173 para. 2 TFEU identifies possible initiatives that the Commission can particularly participate in.

11 The **Council** contributes to the fulfilment of the task

- within the framework of its other competences defined in the Treaty; the objectives of the industry policy in Article 173 para. 1 TFEU have to be taken into consideration when exercising these competences ('horizontal character'). An explicit horizontal policy clause can be found in Article 173 para. 3 TFEU, referring to the objectives in para. 1.

12 – by specific support of measures of the Member States. According to Article 173 para. 3 s. 2 TFEU, the Council now decides together with the Parliament according to the ordinary legislative procedure⁸ under exclusion of any harmonisation.

13

IV. Action programmes

In Decision 96/413/EC, the Council decided on guidelines of a Community action programme to strengthen the competitiveness of European industry which comprise **four objectives**: (a) the modernisation of the role of the public authorities, in particular in order to free enterprises (particularly small and medium-sized enterprises) from unnecessary legal and administrative constraints; (b) to ensure undisturbed competition, both internal and external to the Union; (c) to strengthen industrial cooperation; (d) to promote intangible competitiveness factors. Subsequent programmes comprised the already mentioned **Lisbon strategy**.⁹ In 2005, the Lisbon strategy was already renegotiated and reviewed. The European Council called for the Commission to implement a 'Community Lisbon Programme' as a counterpart to the national programmes, covering all measures which have to be taken at the Union level. The measures suggested in the programme¹⁰ could be grouped into three major objectives: support of knowledge and innovation; making Europe a more attractive place to invest and work; creating more and better jobs. From 2014 onwards, these objectives will be fostered by the new comprehensive strategy called **Europe 2020**.

The European Institute of Innovation and Technology headquartered in Budapest (based on Regulation 294/2008, which has been adopted on the basis of Article 153 para. 3 TEC, operational since 2010) helps to implement the aims of the current European strategy.¹¹

TITLE XVIII ECONOMIC, SOCIAL AND TERRITORIAL COHESION

Bibliography: *Bache*, The Politics of European regional politics, 1998; *Bovis*, The Role and Function of Structural and Cohesion Funds and the Interaction of the EU Regional Policy with the Internal Market Policies, in: Panara/de Becker (eds), The Role of the Regions in EU Governance, 2011, 81; *Garcia-Duran*

⁸ See Article 294 TFEU.

⁹ For the implementation programmes of the Commission: COM (2005) 330; 474, which confirms again the competitiveness as leitmotiv.

¹⁰ COM (2005) 330.

¹¹ For more, up-to-date information, see <http://eit.europa.eu/>.

Huet, Vers l'Europe des Eurorégions: L'objectif de 'cohésion territoriale', 491 R.M.C. 2005, 499; *Holder/Layard*, Drawing out the Elements of Territorial Cohesion: Rescaling EU Spatial Governance, 30 Yearbook of European Union Law 2011, 358; *Molle*, European Cohesion Policy, 2007, *Nehl*, Legal Protection in the Field of EU Funds, 10 European State Aid Law Quarterly 2011, 629; *Nicola*, False Promise of Decentralization in EU cohesion Policy, 20 Tu.J. Int'l & Com. L. 2011–2012, 65.

Article 174 [Aims of the structural policy of the Union] (ex Article 158 TEC)

In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.

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I. General remarks

1

The present Articles 174–178 TFEU have already been introduced to European law by the SEA with effect from 1 July 1987. They are an expression of the territorial dimension of European integration (**territorial governance structures**). They specify the Treaty objectives of the promotion of a harmonious economic development, in particular by a reduction of the differences existing between the various regions, as already laid down in the preamble (para. 5) and in Article 3 TFEU. They provide a new basis for a common regional policy, which hitherto had to resort to Article 308 TEC (now: Article 352 TFEU). In addition to the internal market and the EMU, the provisions on **economic**, **social** and now also **territorial** cohesion formed the basis for a 'third pillar of European integration'.¹ Article 174 TFEU builds upon Article 158 TEC. The scope of this predecessor norm is extended in para. 1 by the inclusion of territorial cohesion as a new objective, which correlates with the new headline of Title XVIII ('Economic, Social and Territorial Cohesion'). The new para. 3 incorporates, with editorial amendments, the wording of draft-Article III-220 subpara. 3 TECE. A list of regions that are particularly relevant in the context of the norm is added. However, there is only a very limited gain of precision since almost the whole territory of the EU falls within the definition. A negative definition excluding regions with specific characteristics surely would have been more precise²; however, it would not be politically tenable and in practice not flexible enough.

¹ Cf. LB/Borchardt, Article 174 AEUV mn. 5.

² Cf. Fischer, Der Vertrag von Lissabon, 339.

2

II. Purpose of the structural and regional policy

Article 174 para. 1 TFEU formulates the general task of the Union in the field of structural policy, meaning to develop and pursue actions leading to the strengthening of the Union's economic, social and territorial **cohesion**, in order to enhance the harmonious development of the Union as a whole. The provision is of a programmatic character³ and can be understood as a **general clause on structural policy**⁴ or even as an **obligation to optimise structural policy**.

3 Article 174 para. 2 TFEU highlights the aspect of regional policy which is linked to this task. It formulates the objective of 'reducing disparities between the levels of development of the various regions', which aims at existing economic and social disparities and includes asynchronous developments with a special focus on the backwardness of the least favoured regions. Article 174 para. 3 TFEU tries to specify the regions concerned but makes use of criteria that encompass, at least if examined individually, more or less most of the regions in Europe. In this context, note has to be taken of Declaration No 33 on the TFEU which states that the term 'island regions' can include island States in their entirety, as long as the necessary criteria are met.

4 Article 175 TFEU defines the legal obligations of both the Union and the Member States which have been imposed on them in order to achieve these objectives. Articles 176–178 TFEU deal with the coordinated use of the most important financial instruments of the Union, in particular the three Structural Funds.

5 Further specification of the respective obligations of the Union can be found in the provisions of the specific policies to which they relate. This is particularly true for Article 39 para. 2 lit. a TFEU (agricultural policy), Article 46 lit. d TFEU (free movement of workers), Articles 91 lit. 2, 96 para. 2 TFEU (transport policy), and Articles 107, 108 TFEU (EU-supervision of State aid). The provisions on economic, social and territorial cohesion are complemented by the Title IX on employment (Articles 145–150 TFEU), originally introduced by the Treaty of Amsterdam.

6

III. Distribution of powers

The common structural and regional policy is implemented through cooperation between the Union and the Member States. It leads to a horizontal system of revenue redistribution among economically weak and economically strong Member States.

7 The Union is entitled to formulate a common structural and regional policy. It has to observe these guidelines when applying its financing instruments. In addition, it influences the respective policies of the Member States as much as it promotes certain projects of the Member States while prohibiting or regulating others which may conflict with the development of competition and the internal market⁵.

Article 175 [Role of the Structural Funds; actions outside the Funds] (ex Article 159 TEC)

Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formula-

³ ECJ Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

⁴ Cf. GHN/*Eggers*, Article 174 AEUV mns 21 et seq.

⁵ See Articles 107, 108 TFEU.

tion and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.

The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.

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 Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The provision, going back to Article 159 TEC, specifies the obligation of the Member States and the Union to pursue the objectives of structural policy formulated in Articles 174 und 176 TFEU, in particular the principles of regional policy. In para. 2, the Reform Treaty of Lisbon extends the scope by including territorial cohesion as in Article 174 TFEU. In para. 3, the procedure of Article 251 TEC is replaced by the ordinary legislative procedure under Article 294 TFEU.

These principles form a **horizontal policy clause** which has to be observed when the Member States or the Union carry out their policies.¹

The horizontal policy clause is applicable to the **Member States** in respect to the economic policy they conduct (and which they have to coordinate)². It is also applicable to the Union and its Member States (including the aims laid down in Article 176 TFEU) when implementing common policies and in the process of the establishment of the internal market³. Hence, it implies a **responsibility to coordinate**.

The Union gives support to the efforts of the Member States by making use of its major financial instruments, in particular the original three structural funds (European Social Fund (ESF), Article 162 TFEU; European Agricultural Guidance and Guarantee Fund (EAGGF), Article 40 para. 3 TFEU; European Regional Development Fund (ERDF), Article 176 TFEU) and the European Investment Bank (EIB), Article 308 TFEU. To this end, Articles 176–178 TFEU contain detailed provisions.⁴ Regulation (EC) No 1290/2005, valid until the end of 2013, was concerned with the financing of the common agricultural policy. Following this regulation, the EAGGF was split into the European Agricultural Fund for Rural Development (EAFRD) and the European Agricultural Guarantee Fund (EAGF).⁵ Since 2007, the task of rural development, originally provided by the EAGGF, has been

¹ In detail, see the references on interdependences with other Union policies being typical for horizontal policies, e.g. the policy concerning the internal market, the agricultural policy, the environmental policy, the free movement of persons or the provisions on economic aids in: Schwarze/Priebe, Article 175 AEUV mns 3 et seq.

² See Article 121 TFEU.

³ See Article 27 TFEU.

⁴ See also Zuleger, EG-Strukturfondspolitik und EG-Beihilferecht – Strukturfonds als staatliches Mittel i. S. v Article 87 Abs. 1 EG, EWS 2008, 369 et seq.

⁵ See http://ec.europa.eu/agriculture/fin/index_en.htm.

taken over separately by the structural funds.⁶ From 2014 onwards, Regulation (EU) No 1306/2013 of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78 (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 is in place.

- 5 Acting under the ordinary legislative procedure⁷, Council and EP can initiate **specific actions** also outside the existing structural funds if this proves necessary (Article 175 para. 3 TFEU). The ESC and the Committee of the Regions have to be consulted. In recent times, Regulation (EC) No 1082/2006 on a **European grouping of territorial cooperation (EGTC)** has been formed on this basis.
- 6 The Commission is obliged to **report** to the EP, the Council, the ESC and the Committee of the Regions every three years on the progress made towards achieving cohesion. The Fourth Report on Economic and Social Cohesion (May 2007 'Growing Regions, growing Europe') evaluates the cohesion policy for the programme period of 2000–2006 and makes recommendations for the planning period 2007–2013. The Fifth Report on Economic, Social and Territorial Cohesion ('Investing in Europe's Future') was presented in November 2010 with a particular focus on regional competitiveness and the role of the European regions in dealing with the economic and financial crisis. The current Eighth Progress Report on Economic, Social and Territorial Cohesion ('The urban and regional dimension of the crisis') presented in June 2013 deals with the consequences of the EU crisis and lays the focus on the need to reduce the unemployment throughout the Union by promoting lasting jobs and growth.

**Article 176 [European Regional Development Funds]
(ex Article 160 TEC)**

The European Regional Development Fund is intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions.

- 1 The European Regional Development Fund (ERDF) has been created in 1975 by a regulation which was at first based on Article 235 EEC, later on Article 308 TEC and today on Article 352 TFEU. Since the entering into force of the SEA on 1 July 1987, the ERDF has found a **legislative basis in European primary law**, which was enshrined in Article 160 TEC until its legislative content has been taken over by Article 176 TFEU without amendments. It plays a key role for the implementation of the policy of economic, social and territorial cohesion.¹
- 2 The Fund does not possess legal personality. It constitutes a legally dependent body of the European Union. Its financial means are included in the **general budget** of the Union. It is administered by the Commission.
- 3 According to Article 176 TFEU, it is the **task** of the ERDF to contribute to redress the main regional imbalances in the Union. The contribution consists of a participation (a) in the development and structural adjustment of regions whose development is lagging behind, and (b) in the conversion of declining industrial regions. By this, the TFEU establishes a horizontal financial equalisation scheme in favour of Member States with a significant number of structurally weak regions.

⁶ Cf. Schwarze/Priebe, Article 178 AEUV mns 1, 6 and Article 175 AEUV mn. 6.

⁷ See Article 294 TFEU.

¹ Cf. CR/Puttler, Article 176 AEUV mn. 1.

More details are regulated by Articles 177 and 178 TFEU and can be found in acts of 4 secondary legislation based upon them.

The so-called **Regional Fund Regulation** (Regulation (EC) No 1080/2006 until 31 5 December 2013, repealed by the new Regulation (EU) No 1301/2013 of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006) specifies the major tasks and scope of the Regional Fund. In addition, it contains provisions dealing with the eligibility for financial assistance. Territorial cohesion has been explicitly included, meaning measures regarding 'sustainable urban development' under the old regulation and measures regarding 'smart, sustainable and inclusive growth' under the presently applicable regulation.

Article 177 [Structural Funds; Cohesion Funds] (ex Article 161 TEC)

Without prejudice to Article 178, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, shall define the tasks, priority objectives and the organisation of the Structural Funds, which may involve grouping the Funds. The general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments shall also be defined by the same procedure.

A Cohesion Fund set up in accordance with the same procedure shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure.

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I. Legislative competence of Council and European Parliament

1

Article 177 TFEU goes back to Article 161 TEC. The norm has been introduced to primary law by the SEA. Article 177 TFEU takes over the provisions of the predecessor norm without major amendments. However, there are a few changes in the details. While para. 1 originally called for a unanimous decision of the Council, now the ordinary legislative procedure of Article 294 TFEU applies. Therefore, the Council and the EP have gained the competence to define the tasks, priority objectives and the organisation of the three existing Structural Funds. This may include a grouping of Funds. A further amendment follows from an expiration of time. Following the cut-off date of 1 January 2007, para. 3 became obsolete.¹ It had been added by the Treaty of Nice and provided for a replacement of the need for unanimous voting in the Council by the introduction of **voting by qualified majority** applicable from **1 January 2007** onwards. However, a prerequisite for this was that the multiannual financial perspective applicable from the same

¹ Cf. Fischer, Der Vertrag von Lissabon, 341.

date and the related interinstitutional agreement would have been adopted². After difficult negotiations, the Heads of State and Governments agreed on a multiannual financial perspective for the period of 2007–2013 on 17 December 2005. The interinstitutional agreement was adopted on 17 May 2006.³ By this mechanism, the content of today's para. 1 had already been anticipated.

- 2 In addition, Article 177 TFEU empowers Council and EP to enact general rules for the Funds, as well as provisions necessary to ensure the effective operation of the Funds and to **coordinate** them with one another and with the other existing Financial Instruments.
- 3 In the future, according to the **ordinary legislative procedure**, Council and EP will act on an initiative by the Commission and after consulting the Economic and Social Committee and the Committee of the Regions.

4 **II. The Framework Regulation**

Regulation 2052/88/EEC on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing **Financial Instruments** was based on Article 177 TFEU and on its predecessor norm, respectively.

- 5 The regulation outlined five objectives of the financial aid provided by measures of structural policy, in the interest of which the structural funds intervened, partly overlapping one another. In its 'Agenda 2000' action programme, the Commission gave the impetus to reform these provisions and make them more efficient and more transparent from 1 January 2000 onwards.

Tailored for the eligibility period of 2000–2006, the Council replaced the Regulation 2052/88 by the (still applicable) **Regulation (EC) No 1260/99** laying down general provisions on the Structural Funds and reducing the number of objectives to the following three:

- 6 **Objective 1:** Promoting the development and structural adjustment of **regions whose development is lagging behind**, including regions in which the per capita GDP is less than 75 % of the EU average.
- 7 **Objective 2:** Supporting the economic and social conversion of **areas facing structural difficulties**, especially areas undergoing socio-economic change in the industrial and service sectors, declining rural areas, urban areas in difficulty and depressed areas dependent on fisheries.
- 8 **Objective 3:** Supporting the adaptation and modernisation of **policies and systems of education, training and employment**. This objective covers areas not eligible for financing under objective 1 and serves as a political frame of reference for all actions carried out at national level for developing 'human resources'.
- 9 In favour of objective 1, all three structural funds and the 'Financial Instrument for Fisheries Guidance' (FIFG) can intercede, to the benefit of objective No 2 ERDF and ESF and to the benefit of objective No 3 the ESF.

- 10 A proposal by the Commission of 14 July 2004⁴ had already advocated a further reform of the cohesion policy: Beginning in 2007, the financial instruments of the regional policy are supposed to be focussed on the following three objectives: Convergence (ERDF, ESF and Cohesion Fund), Regional competitiveness and employment (ERDF, ESF) as well as European territorial cooperation (ERDF). Meanwhile, for the eligible period of 2007–2013, **Regulation (EC) 1083/2006 laying down general provisions on the**

² See Article 270 TEC, now essentially replaced by Article 310 para. 4 TFEU.

³ OJ 2006 C 139/1.

⁴ COM (2004) 492.

European Regional Development Fund, the European Social Fund and the Cohesion Fund, in short the **Structural Funds Regulation**, summarises all fundamental provisions concerning the aims and purposes as well as the organisational structure of the funds. In addition to provisions on coordinating measures, it contains procedural rules and it also structures the functioning of the funds. Insofar the programme of Article 177 TFEU was implemented by secondary legislation already before the Lisbon reform. It is an expression of the subsidiarity-oriented teleology of the Reform Treaty that, in addition to a simplification of structural assistance procedures, the Member States shall bear greater responsibility.

III. The Cohesion Fund

11

Article 177 para. 3 TFEU deals with the Cohesion Fund, which is established by the Council and the EP: It shall make financial contribution to projects in the fields of **environment**⁵ and **trans-European networks**⁶. Details are determined in the Protocol on Economic, Social and Territorial Cohesion, which is part of the TFEU⁷. The Cohesion Fund has been introduced by Regulation (EC) No 1164/94 (amended by Council Regulation (EC) No 1264/99). The protocol, which corresponded to the old procedure of Article 161 para. 3 TEC, had already become obsolete with the erection of the Cohesion Fund. For the timeframe of 2007 until 2013, **Regulation (EC) 1084/2006**, establishing a Cohesion Fund and repealing Regulation (EC) 1164/94, contains the detailed provisions on the functioning of the Cohesion Fund. Assistance out of the Cohesion Fund is provided for Member States which have a per capita GDP of less than 75 % of the Union average (Article 5 para. 1 Regulation (EC) 1083/2006). This comprises not only the new Member States but also vast parts of the eastern regions of Germany and parts of Portugal, while the number of regions in Spain, Italy, Greece and the United Kingdom fulfilling this criterion has decreased compared to previous times.

From 2014 onwards, the structural and cohesion policy will be part of the strategy **Europe 2020** which has a stronger focus on cohesion policy, due to the current problematic economic situation in Europe and the increasing scarcity of public resources. 12

IV. Final overview of the relevant secondary legislation

13

Finally, a collection of the relevant secondary legislation concerning structural and cohesion policy shall be given:

- **Regulation (EC) No 1080/2006** on the European Regional Development Fund and repealing Regulation (EC) 1783/1999 (from 2007 until 2013) and **Regulation (EU) No 1301/2013** on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 (from 2014 onwards);
- **Regulation (EC) No 1081/2006** on the European Social Fund and repealing Regulation (EC) 1784/1999 (from 2007 until 2013) and **Regulation (EU) No 1304/2013** on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 (from 2014 onwards);
- **Regulation (EC) No 1082/2006** on a European grouping of territorial cooperation (EGTC) with validity from 2007 onwards;

⁵ See Article 191 TFEU.

⁶ See Article 170 TFEU.

⁷ See also Article 51 TEU.

- **Regulation (EC) No 1083/2006** laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) 1260/1999, applicable from 2007 until 2013; **Regulation (EU) No 1303/2013** of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, applicable from 2014 onwards;
- **Regulation (EC) No 1084/2006** establishing a Cohesion Fund and repealing Regulation (EC) 1164/94 (from 2007 until 2013); **Regulation (EU) No 1300/2013** of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006 (from 2014 onwards);
- **Regulation (EC) No 1085/2006** establishing an Instrument for Pre-Accession Assistance (IPA), applicable from 2007, as amended by **Regulation (EU) No 540/210**.

***Article 178 [Implementing regulations]
(ex Article 162 TEC)***

Implementing regulations relating to the European Regional Development Fund shall be taken 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.

With regard to the European Agricultural Guidance and Guarantee Fund, Guidance Section, and the European Social Fund, Articles 43 and 164 respectively shall continue to apply.

- 1 The provision deals with the competence of **Council and EP** to adopt implementing regulations to the basic legislative acts provided for in Article 177 TFEU (and its predecessor Article 162 TEC). By the Reform Treaty, the term ‘implementing decisions’ has been replaced by ‘implementing regulations’ and the ordinary legislative procedure under Article 294 TFEU has been introduced.¹ By this means, the abstract and general character of the legislative measures is taken into account. Even the old Treaty version did not have in mind individual cases to be addressed but meant legislation when speaking of ‘decisions.’²
- 2 Implementing regulations concerning the **ERDF** are adopted by Council and Parliament under the ordinary legislative procedure³, after consulting the Economic and Social Committee and the Committee of the Regions.
- 3 Implementing regulations concerning the **ESF** remain governed by the competence norm of Article 164 TFEU. For the **European Agricultural Guidance and Guarantee Fund (EAGGF)/Guidance Section**, Article 43 TFEU shall continue to apply. Meanwhile, the EAGGF has been split into two new funds.⁴ Agriculture-related issues have been completely taken out of the structural funds. The Guidance Section has been replaced by the European Agricultural Fund for Rural Development (EAFRD) in Regulation (EC) No

¹ Cf. *Fischer*, Der Vertrag von Lissabon, 341 et seq.

² Cf. *Schwarze/Priebe*, Article 178 AEUV mn. 2.

³ See Article 294 TFEU.

⁴ See Article 175 mn. 4.

1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD). Therefore, the reference to Article 43 TFEU is superfluous. A correction by the Reform Treaty would have been an option; however, it might have been avoided due to possible further amendments to the secondary legislation in the future.

Implementing regulations can be found in Regulation (EC) No 1080/2006 for the 4
Regional Development Fund (respectively in Regulation (EU) No 1301/2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 from 2014 onwards) and Regulation (EC) No 1081/2006 for the European Social Fund (respectively in Regulation (EU) No 1304/2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 from 2014 onwards).

Based on these regulations, the Commission decided on **Community Support Frame- 5**
works (CSF) and the operational programmes to carry them out. The priorities which the Commission set out for Community assistance in early 2000 can be found in the 'Guidelines for programmes in the period 2000 to 2006' of 1 July 1999⁵. Until the end of 2013, Decision 2006/702/EC on Community (today Union) strategic guidelines on cohesion was applicable; see also the Communication from the Commission of 5 July 2005 'Cohesion Policy in Support of Growth and Jobs: Community Strategic Guidelines, 2007–2013'⁶. In 2011, legislative proposals for cohesion policy for the period 2014–2020 were adopted by the Commission. The new Regulations entered into force in 2014.⁷

TITLE XIX RESEARCH AND TECHNOLOGICAL DEVELOPMENT AND SPACE

Article 179 [Aims of the Union in the European research area] (ex Article 163 TEC)

1. The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.

2. For this purpose the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation.

3. All Union activities under the Treaties in the area of research and technological development, including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title.

⁵ COM (1999) 344 final.

⁶ COM (2005) 299.

⁷ OJ 2013 L 347.

Bibliography: von Bogdandy/Westphal, The legal framework for an autonomous European Research Council, 29 ELRev 2004, 788; De Elera, The European Research Area: On the way towards a European Scientific Community? 12 European Law Journal 2006, 559; Hoffmann, The European Research Council as Case Study for Agency Design in the EU, 17 European Public Law 2012, 175; Krull/Sommer, Independent research Funding in Europe, 39 WissR 2004, 190; Madsen, Scientific Europe: policies and politics of the European research areas (Multi Science Publishing, 2010); Protogerou/Caloghirou/Siokas, Twenty-five years of science-industry collaboration: the emergence and evolution of policy-driven research networks across Europe, 38 JTechnolTransf 2013, 873.

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1 I. General remarks

1.1 Development

Until the title on Research and Technological Development had been introduced to the EEC by the SEA (with effect of 1 July 1987), the policy on research and development had not been explicitly mentioned as a Community (now Union) competence. However, even at that time it was implicitly included in the Treaties, in particular in the context of the ECSC Treaty and the EAEC (see Articles 4 et seq. EAEC Treaty for example) and it was also of great relevance for **the former Community, now Union in matters of economy and development**. Article 41 TFEU, which goes back to a provision of the TEEC, not at least has mentioned the need for research in the field of agricultural knowledge. A more general competence of the Union in the field of research and development later has been deduced from Article 2 TEU. Consequently, Union measures could only be based on the former Article 308 TEC (today Article 352 TFEU). The present title has been further elaborated by the Treaties of Maastricht and Amsterdam.

2 This dynamic development has been continued by the Lisbon Reform Treaty by extending both the objectives of the research policy and the competences of the Union. Following a more general approach, Article 179 para. 1 TFEU eliminates the dominance of the industry and therefore application-oriented focus of its predecessor norm, Article 163 para. 1 TEC. In a ‘**European research area**’, fundamental research is of equal importance and is legally protected by Article 13 CFREU. The right of free movement of the citizens of the Union has always been a freedom of the market citizens and is now also interpreted as a freedom for researchers. This ‘**free movement of researchers**’ is specified by Article 179 para. 2 TFEU for the context of research cooperation. The remaining amendments are not of a substantial nature but are mere editorial adjustments. Special emphasise has to be made to Declaration No 34 on Article 179 TFEU. In the very interest of the Member States to strengthen the principle of subsidiarity and to protect national sovereignty, it formulates that the Union’s action in the area of research and technological development has to pay respect to the fundamental orientations and choices of the research policies taken at the level of the Member States.

3 2. Overview

Article 179 TFEU defines in a programmatic manner the overarching political objectives for the **civil rights based ‘European research area’**: These objectives include the

free movement of researchers, the undisturbed transnational exchange and circulation of scientific findings and technological innovations, serving the competitiveness of the European Union in the globalised world of the 21st century; also measures supporting the industry are comprised (by making grants to application-oriented research). For the purpose of a **horizontal policy clause**, the Union also is endowed with the task to promote research activities in the context of the other policy areas.

Article 180 TFEU elaborates these objectives in further detail. Article 181 TFEU calls 4 for the Member States to ensure coordination and cooperation. The power (and duty) to enact multiannual framework programmes, conferred to Council and EP, is defined in Articles 182–184 TFEU. The participation of the Union in programmes of the Member States is discussed in Article 185 TFEU, the international cooperation with third States and with international organisations in Article 186 TFEU. Article 187 TFEU entitles the Union to set up particular structures necessary for the execution of Union research, especially the setting up of joint undertakings. Article 188 TFEU deals with the decision-making procedure of either the Council or of Council and EP. Article 189 TFEU adds the field of space exploration, following the example of draft-Article III-254 TECE. Finally, Article 190 TFEU regulates reporting obligations of the European Commission.

II. Goal perspectives

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The **general objective** of the Union in the field of research and development policy, as stated in Article 179 para. 1 TFEU, is the creation of a **European research area**. It is focussed on strengthening the scientific and technological bases of the Union in general, not only industry-related research. Of course, the ‘Lisbon strategy’ has to be considered, which aims at establishing ‘the most competitive and dynamic knowledge-based economy in the world’ by 2010 (Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000) but ultimately failed, at least in respect to its time frame. Subsequently, the Europe 2020 strategy is applicable from 2014 onwards; especially, regarding the research and development policy, the Horizon 2020 programme. The far-reaching horizon of the objectives formulated in Article 179 para. 1 TFEU further comprises the free movement of researchers and the unhindered exchange of scientific knowledge and of technology. The competitiveness has not been taken out of consideration; it is not limited to the industry sector anymore but explicitly formulated and taken into account in a broad and general way, corresponding to the approach already taken by the Lisbon strategy.

Beneficiaries of the research and development policy under Article 179 para. 2 TFEU 6 are:

- **Undertakings**, whereas small and medium-sized enterprises (SME) are particularly emphasised (see also the Commission Recommendation 2003/361/EC of 6 May 2003 on a SME-definition which has taken effect on 1 January 2005 replacing Recommendation 96/280/EC¹). Since 2008, the ‘Small Business Act’ for Europe (SBA)² has served the development of the medium-sized enterprises. The SBA formulates the following 10-points-programme, which is also emphasised under the Europe 2020 strategy³:
 ‘(1) Create an environment in which entrepreneurs and family businesses can thrive 7
 and entrepreneurship is rewarded. (2) Ensure that honest entrepreneurs who have faced bankruptcy quickly get a second chance. (3) Design rules according to the ‘Think

¹ OJ 2003 L 24/36.

² COM (2008) 394 final.

³ COM (2012) 795 final.

Small First' principle. (4) Make public administrations responsive to SMEs' needs. (5) Adapt public policy tools to SME needs: facilitate SMEs' participation in public procurement and better use State Aid possibilities for SMEs. (6) Facilitate SMEs' access to finance and develop a legal and business environment supportive to timely payments in commercial transactions. (7) Help SMEs to benefit more from the opportunities offered by the Single Market. (8) Promote the upgrading of skills in SMEs and all forms of innovation. (9) Enable SMEs to turn environmental challenges into opportunities. (10) Encourage and support SMEs to benefit from the growth of markets.'

- 8 – Research centres, universities, researchers.** The addressees shall be supported in their efforts in the field of research and development activities of high quality as well as in their efforts to cooperate with one another. The researchers as such also become beneficiaries, as their unhindered cooperation across national borders is now explicitly acknowledged by EU primary legislation. Apart from Article 179 TFEU, their activities are also protected by Article 13 CFREU. However, the freedom of science and research creates (ethical) obligations. In recent times, the Commission formulated recommendations addressing the Member States which comprise a European Charter for Researchers and a Code of Conduct for the Recruitment of Researchers.⁴ The Charter calls for the researchers in particular to observe ethical principles and names certain rules of conduct for researchers as well as their employers and their sponsors. The Code of Conduct in contrast is more focussed on the creation of an efficient European research area.
- 9** In this context, the advantages of the concept of the internal market under Article 26 TFEU are emphasised, which first of all consist of the opening of the procurement markets, in the formulation of common standards⁵ and in the elimination of conflicting legal and tax-related hurdles⁶.
- 10** With respect to the provisions on the internal market and other policy fields, **goal conflicts** can emerge regarding ongoing processes of concentration and cooperation of research and development undertakings and the financial assistance granted to them. This is especially true for the field of economic competition (in particular Articles 101, 106, 107 TFEU) and trade (Articles 34 et seq., 207 TFEU). In this regard, it should be aimed for balance in order to minimise the goal conflict. In this context, the Block Exemption Regulations on certain categories of research and development agreements (Regulation (EC) No 2659/2000 on the application of Article 81 para. 3 of the Treaty to categories of research and development agreements) and on technology transfer agreements (Regulation (EC) No 772/2004 on the application of Article 81 para. 3 of the Treaty to categories of technology transfer agreements, expiring on 30 April 2014) are important secondary legislation.
- 11** All measures of the Union in the area of research and development have to be decided on and implemented in accordance with the provisions of Articles 184–187 TFEU and by the means named therein, namely the framework programs and the specific programmes (Article 179 para. 3 TFEU).

***Article 180 [Complementing activities]
(ex Article 164 TEC)***

In pursuing these objectives, the Union shall carry out the following activities, complementing the activities carried out in the Member States:

⁴ OJ 2005 L 75/67.

⁵ See Article 115 TFEU.

⁶ See Article 110 TFEU.

- (a) implementation of research, technological development and demonstration programmes, by promoting cooperation with and between undertakings, research centres and universities;
- (b) promotion of cooperation in the field of Union research, technological development and demonstration with third countries and international organisations;
- (c) dissemination and optimisation of the results of activities in Union research, technological development and demonstration;
- (d) stimulation of the training and mobility of researchers in the Union.

Article 180 TFEU, adapting Article 164 TEC with only minor editorial changes, names the different measures as **concrete tasks** of the Union within the scope of the research and development policy. It does not contain a competence in itself but the respective competence provisions can be found in Articles 182–188 TFEU.

The **Union's own measures** shall **complement** actions taken by the Member States (which, according to Article 181 TFEU, have to be coordinated; this – regarding the European research area – indispensable obligation to coordinate has to be taken very seriously). The distribution of competences in the area of research, technological development and space is provided for by Article 4 para. 3 TFEU. The competences of the Union are only of a supportive character. In particular, the Member States are not to be prevented from exercising their primary right to effectively decide on matters of research and development. The obligation to mutual consideration applies. In the same way, the principle of subsidiarity applies, according to which the **'added value of common action by the Union'** (for instance in cases of the development of large-scale projects) has to be evaluated.¹

The **measures** comprise the following:

- Implementation of research, technological development and demonstration programmes of the Union, while the cooperation with and between undertakings, research centres and universities is promoted², now due to the amendment to Article 179 TFEU, also including the single researchers as such. As to the operation of joint research undertakings, also in the non-nuclear area, see Article 187 TFEU. Demonstration programmes have the objective to prove the technical feasibility of a new technology, including its (economic) advantages.
- Promotion of research cooperation with third States and with international organisations (as to the implementation, see Article 186 TFEU).
- Dissemination and optimisation of the results.
- Stimulation of the education and mobility of researchers of the Union. In its 7th framework programme, the paragraph titled 'people' emphasised the need for research training and the promotion of scientific carriers of researchers; the so-called 'Marie-Curie-Measures' of previous framework programmes shall be enhanced to this purpose.³ The follow-up strategy Horizon 2020, applicable from 2014 onwards, goes even beyond this, with a strong focus on the comprehensive concept of Europe 2020.⁴

¹ See Schwarze/Mellein, Article 180 AEUV mn. 2; Streinz/Trute, Article 180 AEUV mn. 3.

² See Article 179 TFEU mn. 5.

³ See OJ 2006 L 412/1, Annex I section III.

⁴ COM (2011) 808 final.

**Article 181 [Coordination; role of the Commission]
(ex Article 165 TEC)**

1. The Union and the Member States shall coordinate their research and technological development activities so as to ensure that national policies and Union policy are mutually consistent.

2. In close cooperation with the Member State, the Commission may take any useful initiative to promote the coordination referred to in paragraph 1, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

- 1 Article 181 TFEU calls for the Union and the Member States to coordinate their research and development policy, including their research and development programmes. It wants to give a specific shape to the **European research area** as and within the **political multilevel system**¹. By division of tasks or grouping of similar national efforts, the efficiency of programmes shall be enhanced while reducing the costs. Also, the processes of project planning and project implementation shall be harmonised step by step. This objective was already present in Article 165 TEC. Article 181 TFEU takes over this objective, while modifying the predecessor norm. In Article 181 para. 2 TFEU, initiatives by the Commission are defined more precisely in respect to their scope (establishment of guidelines and indicators, exchange of best practice, monitoring and evaluation). Additionally, following the concept of the ‘well informed representative’, the EP and its Members have a right to be fully informed of the measures taken.²
- 2 The **Commission** takes part in the process of coordination; it has the task to facilitate the effective use of the **cooperation potentials** among the Member States. Although the Commission is explicitly entitled to take any useful initiative, which from the perspective of the *effet utile* principle could be understood as allowing or binding measures (compare e.g. ECJ Joined Cases 281/85, 283–285/85, 287/85 *Migration Policy* on Article 118 TEC (old)³), coordinating measures are by their very nature non-binding acts.⁴ The Commission is asked to act in close cooperation with the Member States and to stick to the principle of mutual consideration. In general, the method of open coordination is of great importance in the field of research policy.⁵
- 3 From secondary legislation, emphasis has to be made to the Recommendations of the Commission of 11 March 2005 on a European Charter for Researchers and a Code of Conduct for the Recruitment of Researchers⁶, which has a coordinating character. The Charter for Researchers outlines rights and duties of researchers and of the institutions giving research grants; the subsequent Code of Conduct for the Recruiting of Researchers formulates principles for the assignment of researchers and the award of research grants.

¹ Cf. Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, 36 CMLR 1999, 703 et seq.

² See Fischer, Der Vertrag von Lissabon, 344.

³ ECJ Joined Cases 281/85, 283, 284, 285/85, 287/85 *Migration Policy* [1987] ECR 3203, 3254.

⁴ Cf. CR/Ruffert, Article 181 AEUV mn. 2.

⁵ See Schwarze/Mellein, Article 181 AEUV mn. 3.

⁶ OJ 2005 L 75/67.

**Article 182 [Multiannual framework programme; specific programmes]
(ex Article 166 TEC)**

1. A multiannual framework programme, setting out all the activities of the Union, shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee.

The framework programme shall:

- establish the scientific and technological objectives to be achieved by the activities provided for in Article 180 and fix the relevant priorities,
- indicate the broad lines of such activities,
- fix the maximum overall amount and the detailed rules for Union financial participation in the framework programme and the respective shares in each of the activities provided for.

2. The framework programme shall be adapted or supplemented as the situation changes.

3. The framework programme shall be implemented through specific programmes developed within each activity. Each specific programme shall define the detailed rules for implementing it, fix its duration and provide for the means deemed necessary. The sum of the amounts deemed necessary, fixed in the specific programmes, may not exceed the overall maximum amount fixed for the framework programme and each activity.

4. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, shall adopt the specific programmes.

5. As a complement to the activities planned in the multiannual framework programme, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the measures necessary for the implementation of the European research area.

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I. Framework programme

1

Article 182 TFEU, as already its predecessor Article 166 TEC, deals with the **framework programme** and the **specific programmes** developed thereof. In their joint operation, these programmes are the major means of building and enhancing the common European research area. A new aspect is the introduction of the ordinary legislative procedure in Article 182 para. 1 TFEU; another novelty is the special legislative procedure (consultation procedure), which is identical to the old provision in principle. Article 182 para. 5 TFEU is newly added to the Treaty. It promulgates the continuous development of the European research area and therefore gives EP and Council the additional right to take necessary measures under the ordinary legislative procedure¹. By the Reform Treaty

¹ See Article 294 TFEU.

of Lisbon, the **means of possible Union action** are therefore generally **extended** and become **more flexible**.²

- 2 In order to realise the research and development policy in the European research area, the Union sets up a **multiannual framework programme** combining all Union action in this policy area (Article 180 TFEU) and aims at developing a stringent overall strategy.³ The special provision of Article 7 EAEC Treaty applies in the field of nuclear research (see also Article 106a para. 3 EAEC Treaty in the new version as amended by the Lisbon Treaty; the amendment became necessary because of the lapse of Article 305 TEC).
- 3 The framework programme defines (a) the scientific and technological objectives of the measures; (b) their priorities; (c) the broad lines of the activities; (d) the financial overall budget deemed necessary; (e) detailed rules for the financial participation of the Union in the framework programme; (f) an indicative breakdown by the thematic areas. The objectives are generally formulated in a very **broad and open** way. With respect to financial aspects, they are **pragmatic**.
- 4 The Council and the EP adopt the framework programme in accordance with the **ordinary legislative procedure**⁴, which is consistent with the general and abstract character of the provision and the intended effect. The EESC has to be heard. The 6th framework programme (see Decision 1513/2002/EC of the EP and the Council concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006)) and the 7th framework programme (Decision 1982/2006/EC concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013))⁵ have been adopted, still based on the previous legal basis (procedure according to Article 251 TEC, voting by qualified majority). The new programme is called Horizon 2020 and will be implemented from 2014 onwards.⁶

5 II. Specific programmes

The framework programme is implemented by **specific programmes**. These programmes include details on their implementation, duration and the (financial) means deemed necessary. The financial means are bound to the maximum amounts defined in the framework programme. The implementation can also be carried out by referring to the means defined in Articles 184–187 TFEU. A distinction has to be made between ‘**direct actions**’ (research directly by EU institutions, for example by the Joint Research Centre of the EU) and ‘**indirect actions**’ (third party research).

- 6 The estimated means are included in the **budget** of the Union. Under previous law, they were part of the non-compulsory expenditures according to Article 272 TEC. According to Article 314 TFEU, the procedural differences between compulsory and non-compulsory expenditures have been abrogated.
- 7 The decision on the specific programmes is made by the Council in a **special legislative procedure**, after hearing the European Parliament and the EESC; see also Council Decision of 30 September 2002 (2002/834–836/EC) on integrating and strengthening the European research area and on the Joint Research Centre.

² Cf. *Fischer*, Der Vertrag von Lissabon, 345.

³ Cf. *Schwarze/Mellein*, Article 182 AEUV mn. 2.

⁴ See Article 294 TFEU.

⁵ OJ 2006 L 412/1.

⁶ COM (2011) 808 final.

The newly added Article 182 para. 5 TFEU **enlarges** the power of Council and Parliament. They can, in accordance with the ordinary legislative procedure, adopt further measures which are deemed necessary for the realisation of the European research area. The EESC is again to be heard respectively consulted. This takes into account the specific **dynamics** of this area. 8

**Article 183 [Implementation of the multiannual framework programme]
(ex Article 167 TEC)**

For the implementation of the multiannual framework programme the Union shall:

- **determine the rules for the participation of undertakings, research centres and universities,**
- **lay down the rules governing the dissemination of research results.**

Article 183 TFEU takes over the wording of Article 167 TEC without substantive 1 amendments. The European Parliament and the Council adopt procedural rules with effect for all specific programmes¹ in accordance with the ordinary legislative procedure² and after hearing the EESC³. These rules deal with the **participation** of undertakings, research centres and universities (Article 179 para. 2 TFEU), as well as with the **dissemination** of research results (Article 180 lit. c TFEU). The rules are effective over the duration of the respective framework programme. For the 7th framework programme, Regulation 1906/2006/EC of the European Parliament and the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities and for the dissemination of research results (2007–2013)⁴ applied. From 2014 onwards, a programme named Horizon 2020, part of the Europe 2020 strategy, is applicable.⁵

The rules on participation aim to ensure, despite all necessary flexibility, the **coherent** 2 **implementation of the programmes**; while the rules on dissemination aspire to a coherent and coordinated dissemination of the results found in course of the implementation of the specific programmes. In the course of dissemination, two aspects have to be brought into a balance: On the one hand, the legitimate interests of the respective contract and cooperation partners have to be ensured (**property rights and rights to exploitation**); and on the other hand, the interests of the Union to make use of research results for the European research area have to be taken into account (see: Chapter III of Regulation No 1906/2006/EC).

**Article 184 [Supplementary programmes]
(ex Article 168 TEC)**

In implementing the multiannual framework programme, supplementary programmes may be decided on involving the participation of certain Member States only, which shall finance them subject to possible Union participation.

The Union shall adopt the rules applicable to supplementary programmes, particularly as regards the dissemination of knowledge and access by other Member States.

¹ See Article 182 TFEU.

² See Article 294 TFEU.

³ See Article 188 para. 2 TFEU.

⁴ OJ 2006 L 391/1.

⁵ COM (2011) 808 final.

- 1 Supplementary programmes of the Union, as already provided for by Article 168 TFEU, are a special form of the specific programmes¹. They are joined only by a **certain** number of Member States, in fact those which are financing them.² Article 184 TFEU is only amending its predecessor norm in so far as the supplementary programmes are no longer adopted by the Council but by the Union (see mn. 2 below). Potential supplementary programmes allow a vanguard to emerge in the European research area and are an example for the **variable geometry of the European integration process**, which allows, surely limited, asymmetric speed and intensity of European integration.
- 2 Decision-making on the creation of supplementary programmes is vested in EP and Council in accordance with the ordinary legislative procedure under Article 294 TFEU, further specified by Article 188 para. 2 TFEU. This includes also rules dealing with the dissemination of knowledge and access by other Member States not participating in the programmes. The adoption of a supplementary programme requires the consent of all participating Member States³. The practical impact of the norm is remarkably low; so far there are no practical cases of such programme.⁴ Article 184 TFEU is not to be confused with the supplementary research programmes for Euratom (see e.g. Council Decision 2009/410/EURATOM of 25 May 2009) based on Article 7 EAEC Treaty.

***Article 185 [Participation of the Union in research and development
programmes undertaken by Member States]
(ex Article 169 TEC)***

In implementing the multiannual framework programme, the Union may make provision, in agreement with the Member States concerned, for participation in research and development programmes undertaken by several Member States, including participation in the structures created for the execution of those programmes.

- 1 As a special form of the implementation of the framework programme according to Article 182 TFEU, the Union can **participate** in the research and development programmes of the Member States. The underlying principle is a **cooperative understanding of integration**, which was already contained in Article 169 TEC and taken over by Article 185 TFEU without changes in the content. The Member States concerned have to give their consent to the participation. Parliament and Council decide according to the procedure laid down in Article 188 para. 2 TFEU.
- 2 As to the participation of third States or international organisations in projects, see Article 186 TFEU. Although the instrument of Union participation was unused for a long period of time, the 6th framework programme^{1*} already explicitly suggested its application. Also, the 7th framework programme^{2*} highlighted the importance of Union participation because this allows a variable geometry of the European integration process. Under the new programme Horizon 2020, several initiatives are supported by the Union under which the participation of the Union is justified by the scope of the objective of the initiative (e.g. the European Metrology Research Programme, EMPIR).

¹ See Article 182 para. 3 TFEU.

² See Streinz/*Trute/Pilniok*, Article 184 AEUV mn. 1.

³ See Article 188 para. 2 s. 2 TFEU.

⁴ Cf. Schwarze/*Mellein*, Article 184 AEUV mn. 2.

^{1*} See Article 182 TFEU mn. 4.

^{2*} See Article 182 TFEU mn. 4.

***Article 186 [Cooperation with third countries
or international organisations; agreements]
(ex Article 170 TEC)***

In implementing the multiannual framework programme the Union may make provision for cooperation in Union research, technological development and demonstration with third countries or international organisations.

The detailed arrangements for such cooperation may be the subject of agreements between the Union and the third parties concerned.

Article 186 TFEU goes back to Article 170 TEC, only the reference to Article 300 TEC 1 in Article 170 para. 2 TEC was deleted since it had become obsolete in the meantime. The provision opens the European research area for third countries, and thereby creates a global dimension. The Union is explicitly endowed with the **competence** to cooperate with third countries or international organisations when implementing the multiannual framework programmes. Research policy therefore always bears aspects of foreign policy and at the end is part of global politics.

In order to establish such international cooperation, the Union can conclude agree- 2 ments under public international law, following the procedures defined in Article 218 TFEU, regulating the details of cooperation. Notwithstanding Article 186 TFEU, cooperation with private entities in third countries below the level of public international law is possible.

***Article 187 [Setting up of joint undertakings]
(ex Article 171 TEC)***

The Union may set up joint undertakings or any other structure necessary for the efficient execution of Union research, technological development and demonstration programmes.

Article 187 TFEU entitles the Union to take **organisational measures** for carrying out 1 its research programmes. In particular, the Union may establish its own research centres (organised as departments of the Commission) or create joint undertakings, as they have already been defined more precisely in Articles 45–51 EAEC Treaty. Insofar, the wording of the predecessor norm, Article 171 TEC, remains unchanged. Different from Articles 184–186 TFEU, no linkage to a framework programme is required.

The decision on a potential **creation of an undertaking** and on **structural decisions** is 2 made by the Council according to Article 188 para. 1 TFEU and the procedure defined therein.

Special emphasis shall be made to the **Joint Research Centre (JRC)**. It is a Director- 3 ate-General of the Commission and it carries out programmes of both, the Union and Euratom (see already Decision 2002/836/EC on the 6th framework programme; Decision 2006/975/EC of the Council of 19 December 2006 concerning the Specific Programme to be carried out by means of direct actions by the Joint Research Centre under the 7th framework programme of the European Community for research, technological development and demonstration activities (2007–2013)). The research centre operates several independent **research institutes**, in particular the Institute for Reference Materials and Measurements (IRMM) in Geel (Belgium), the Institute for Transuranium Elements

(ITU) in Karlsruhe (Germany), the Institute for Energy and Transport (IET) in Petten (Netherlands), the Institute for Prospective Technological Studies (IPTS) in Seville (Spain) and in Ispra (Italy) the Institute for the Protection and Security of the Citizen (IPSC), the Institute for Environment and Sustainability (IES) and the Institute for Health and Consumer Protection (IHCP).

- 4 As a **joint undertaking** under Regulation (EC) No 876/2002, the joint undertaking *Galileo*, a satellite navigation programme, was founded. The regulation, however, was later changed by Regulation (EC) No 1943/2006 in order to dissolve the joint undertaking effective from 31 December 2006. Since the developing phase *Galileo* had to be prolonged until the end of 2008, the activities of the undertaking have been transferred to the GNSS Supervisory Agency (of the year 2004, today replaced by the GNSS Agency). Within the 7th framework programme¹ from 2007 to 2013, four more undertakings have been founded: 'Clean Sky', ENIAC (Nanoelectronics), IMI (Innovative Medicines) and Artemis (Embedded Computing Systems).

**Article 188 [Decision-making procedure]
(ex Article 172 TEC)**

The Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions referred to in Article 187.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the provisions referred to in Articles 183, 184 and 185. Adoption of the supplementary programmes shall require the agreement of the Member States concerned.

- 1 As already its predecessor Article 172 TEC, Article 188 TFEU contains differentiating procedural rules, which have been amended several times in the course of the European integration process. The Reform Treaty of 2007 also provides a modification: In Article 188 para. 2 TFEU, the procedure under Article 251 TEC is replaced by the ordinary legislative procedure. Still, the norm defines the **competent organs** and the **procedural rules** for the legislative acts under the title Research and Technological Development and Space, as long as there are no specific rules for the multi-annual research programmes and for the specific programmes^{1*} as well as international cooperation².
- 2 The **foundation of joint undertakings** or the creation of other structures for the sufficient implementation of the programmes is decided upon by the Council by qualified majority, based on a proposal by the Commission and after consulting the Economic and Social Committee and the European Parliament³.
- 3 In accordance with the ordinary legislative procedure under Article 294 TFEU, the EP and the Council define the rules for the **implementation of the multiannual framework programme** mentioned in Article 183 TFEU. The same is true for the decision in respect to the **supplementary programmes**⁴, which additionally requires the agreement of the Member States concerned, and for the participation of the Union in research and development programmes of several Member States⁵.

¹ See Article 182 TFEU mn. 4.

^{1*} See Article 182 TFEU.

² See Article 186 TFEU.

³ See Article 188 para. 1 TFEU, Article 187 TFEU.

⁴ See Article 184 TFEU.

⁵ See Article 185 TFEU.

The inclusion of the EESC finds its justification in the detailed expertise and practical experience of the groups represented therein. Also, the Commission, which possesses the monopoly of legislative initiative in all the variants, does not have to decide without the **expertise of external counsels**. It can, for example, have recourse to the European Research Advisory Board.

Article 189 [European space policy]

1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.

2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space programme, excluding any harmonisation of the laws and regulations of the Member States.

3. The Union shall establish any appropriate relations with the European Space Agency.

4. This Article shall be without prejudice to the other provisions of this Title.

Bibliography: *Hobe/Kunzmann/Neumann/Reuter*, New Chapter for Europe in Space (Part I), 54 *German Journal of Air and Space Law* 2005, 336; *Lafferranderie/Tuinder*, The Role of ESA in the Evolution of Space Law, 22 *J. Space L.* 1994, 97; *Mazurelle/Wouters/Thiebaut*, The Evolution of European Space Governance: Policy, Legal and Institutional Implications, 6 *Int'l Org. L. Rev.* 2009, 155; *Smith*, The legal personality of the European Union and its effects on the development of space activities in Europe, in: *Schrogl/Pagkratis/Baranes* (ed.), *Yearbook on Space Policy* 2009, 2010, 199 et seq.

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I. General remarks and genesis of the norm

1

Article 189 TFEU has been newly introduced by the Lisbon Treaty. There had been no corresponding provision in the TEC, while the draft Treaty on a **Constitution for Europe** contained rules for a **European space policy in draft-Article III-254 TECE**. The content and wording of the latter has been broadly taken over by the Lisbon Treaty. A substantial amendment can be found in Article 189 para. 2 TFEU, which introduces the ordinary legislative procedure (while the draft TECE used a so-called European law or framework law, in accordance with the new terminology of the draft TECE). Also, Article 189 para. 4 TFEU has been added in order to prevent the scope of the other provisions of the title from being restricted and in order to safeguard a separate policy field for space policy.¹

¹ Cf. *Fischer*, *Der Vertrag von Lissabon*, 348.

- 2 The newly added norm forms the **legal basis for Union action** in the area of space (policy). In Article 4 para. 3 TFEU, space policy (like research and technological development) is defined as part of the shared competences. However, the general limitation applies, meaning that the exercise of the competence by the Union does not prevent the Member States from exercising theirs. Until now, measures in the field of space policy could only be carried out under the general research competence.² The new legislative competence enlarges the margin for Union action and defines it more precisely. By this, it adopts recommendations of the Commission on the implementation of an extended European Space Policy, which had been formulated in a Green Paper and later in White Paper.³

3 **II. Scope and means of a European space policy (para. 1)**

The provision formulates a specific **duty of the Union to promote research and development**: The Union is obliged to define the contours of a European space policy, in particular with the aim not to leave this cost- and research-intensive field to other actors in the global technological competition. Likewise, the synergies of space policy with other policy areas of the Union shall be utilised. Several concrete objectives are formulated as follow:

- 4 In the first place, space policy is about the **promotion of scientific and technical progress** (e.g. development of space technologies, related infrastructure and services, and particularly important new satellite technologies). But also the **competitiveness** of the industry shall be enhanced by the help of space technologies. The Union shall be able to keep pace in the global competition as a centre for economy and research. In particular, the Union hopes that its space policy provides a **thrust of innovation** for a community in which communication plays an ever more important role and which therefore is in need for the most modern satellite technology. With a focus on the CFSP, an increase at the security level based on technology is envisaged. But also more general and overarching objectives, like the promotion of economic growth, the creation of new jobs, the creation of sustainable development and the fight against poverty, play a role here. Although such horizontal objectives are not a speciality of the space policy, they can receive significant impulses from new technologies and technology policies.
- 5 An important means to reach the formulated objectives is the **promotion of joint initiatives**. The Withe Paper (see mn. 1) names three of these core initiatives: satellite-based European capability for navigation, timing and positioning⁴; global monitoring for the environment and security; bridging the digital divide by all available broadband technologies. **The support of research and technological development** (which is a cross-reference to Articles 179 et seq. TFEU) is a further way to strengthen a European knowledge-based society by high-level research. Finally, an essential measure is the **co-ordination of the exploration and exploitation of space** referring to an integrated European concept, e.g. efforts to prepare a new generation of carrier rockets including basic research for general carrier systems.

² See Article 179 et seq. and Article 163 et seq. TEC.

³ Green Paper: European Space Policy, COM (2003) 17, and White Paper: Space: a new European frontier for an expanding Union; An action plan for implementing the European Space policy, COM (2003) 673.

⁴ See Article 187 TFEU mn. 4.

III. Measures (para. 2)

6

In order to reach the objectives set out in Article 189 para. 1 TFEU, the Council and the Parliament define the necessary measures in accordance with the **ordinary legislative procedure**⁵. This can be organised in particular in the form of a **European space programme** (which would be an additional programme besides the framework programme, the specific programmes and the complementing measures, Article 181 paras 1, 3 and 5 TFEU). In a space programme both, space research as well as space usage, could be elaborated. International cooperation, like the participation in the International Space Station ISS, opens the European research area and strengthens it through the transfer of knowledge. In the interest of the Member States' sovereignty and the plurality of their research policies, any harmonisation of the laws and administrative provisions of the Member States is excluded.

IV. The cooperation with ESA (para. 3)

7

Article 189 para. 3 TFEU contains the obligation of the Union to establish any appropriate relations with the **European Space Agency (ESA)**⁶ in order to ensure coherent actions of both the ESA and the Union. The ESA is an independent international organisation in its own right, located in Paris. It was founded on 30 May 1975 with the objective to sustainably strengthen the European space activities in order to diminish step by step the technological gap existing towards the advanced space faring nations, like Russia (at that time the USSR) and the USA. ESA has 20 Member States (Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, The Netherlands, Norway, Poland, Portugal, Romania, Sweden, Switzerland, Spain and the United Kingdom). In certain projects, nine other States (Canada, Cyprus, Estonia, Hungary, Latvia, Lithuania, Slovenia and the Slovak Republic) are involved within the framework of cooperation agreements. Bulgaria and Malta are currently negotiating co-operation agreements with the ESA.

V. The clause of para. 4

8

Article 189 para. 4 TFEU, which has been introduced by the Reform Treaty of 2007, makes sure that the other provisions of the present title are applicable **irrespective** of this new article and vice versa. The objective of this provision can clearly be identified: The scope of the other norms shall not be limited, while at the same time space policy shall be carried out under its own competence (see already above mn. 1).

Article 190 [Annual report on research and technological development] (ex Article 173 TEC)

At the beginning of each year the Commission shall send a report to the European Parliament and to the Council. The report shall include information on research and technological development activities and the dissemination of results during the previous year, and the work programme for the current year.

⁵ See Article 294 TFEU.

⁶ See 'www.esa.int' for more information.

- 1 Article 190 TFEU has been introduced into the TEC by the Maastricht Treaty (Article 173 TEC). It remained unchanged under the Lisbon Reform Treaty of 2007. The provision calls for the Commission to provide the Parliament and the Council with a report on the activities in the fields of research and technological development and on the dissemination of results every year¹.
- 2 The report shall be a **retrospective** survey of the activities of the past year and it shall show a **prospective** working programme for the year to come. It serves to enhance transparency as well as information. It sets impulses for public discussion and might lead to the development of a European political public.²

TITLE XX ENVIRONMENT

Bibliography: *Gehring*, Case Note Air Transport Association of America v. Energy Secretary: Clarifying Direct Effect and Providing Guidance for a Green Economy in the European Union, 21 RECIEL 2012, 149; *Jans/Vedder*, European Environmental Law, 4th ed. 2012; *Krämer*, EC Environmental Law, 6th ed. 2007; *Morgera*, The external environmental policy of the European Union, 2012; *Michael*, Gibt es eine europäische Umweltöffentlichkeit?, in: Liber amicorum Häberle, 2004, 435; *Pernice*, Europäischer Binnenmarkt und Umweltrecht, NVwZ 1990, 201; *de Sadeleer*, Case law: Case C-1/03, Paul van der Walle, Judgment of the Court (Second Chamber) of 7 September 2004, nyr, 43 CMLR 2006, 207; *Wenneras*, Towards an ever Greener Union? Competence in the Field of the Environment and Beyond, 45 CMLR 2008, 1645 et seq.

Article 191 [Environmental objectives; protection measures; international cooperation] (ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,

¹ See also Article 233 TFEU.

² Cf. Schwarze/Mellein, Article 190 AEUV mn. 2; specifically on a 'European public', see Häberle, Europäische Verfassungslehre, 168 et seq.

- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

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I. General remarks

1

The provisions on the environmental policy of the Union were included into the TEEC not before the SEA (effective from 1 July 1987) and have been amended by the Maastricht Treaty and the Treaty of Amsterdam. The Treaty of Nice did not bring any changes. However, already before the SEA entered into force, the Union had carried out its own environmental policy, primarily based on Article 94 TEC or Article 308 TEC. In 1973, the Council concluded the first action programme of the Communities on environmental protection. Further action programmes followed in 1977, 1983, 1987 and 1992. In order to support these measures, the **European Environment Agency** (headquartered in Copenhagen) was founded and began its operation in 1993 (see Regulation (EEC) No 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network).

The TFEU encounters a European **environmental law which is already tightly woven**, which developed very fast since the SEA and which almost completely replaced the national provisions dealing with environmental law by European provisions. By now, it forms an independent and specialised field of European law. In its development, it has been heavily influenced by impulses of public international law. Such an impulse is taken over by Article 191 para. 1 TFEU, when the need to combat climate change is highlighted under the fourth indent. This may be an act of **legislative symbolism**, since without any doubt climate protection is already comprised by the general objective of environmental protection. But the strengthened political avowal for climate protection can unfold a positive and activating influence to the political public in Europe (also and in particular when it does not lead to a more effective regime of environmental protection and thereby

causes public criticism¹). The *causa environment* can help to make the Union becoming the common endeavour of its citizens – thanks **to** and with a view **at** a ‘European environmental public’.² Above these aspects – notwithstanding some editorial amendments – Article 191 TFEU leaves its predecessor Article 174 TEC unchanged as the basic provision of European environmental law.

- 3 Before a detailed competence in EU primary law and an independent policy area were formulated, the environmental policy was deduced from Article 2 TEC, which was read in the light of the **Preamble** (‘constant improvements of the living and working conditions of their peoples’) and which today is mainly replaced by Article 3 TEU, whose para. 3 particularly contains the normative basis for environmental protection; the detailed competences to act in this matter were deduced from what are today Articles 115, 43 and 352 TFEU.
- 4 Today, the provisions of Articles 191–193 TFEU formulate objectives and basic principles of the environmental policy (Article 191 paras 1, 2 and 3 TFEU), create competences of the Council to act in this matter within the Union (Article 92 TFEU) and in respect to third countries (Article 194 para. 4 TFEU), and allow the Member States to adopt more stringent protective measures (Article 193 TFEU). In its Declaration No 9, the Treaty Conference of Nice of 2001 affirmed the determination of the Member States to see the European Union play a leading role in promoting environmental protection in the Union and in pursuing the same objective at a global level. To this end, full use shall be made of all possibilities offered by the Treaty, including the use of incentives and instruments, which are market-oriented and intended to promote sustainable development. The **‘added European value’** of environmental protection in the Union and in the eco-system of the Union finds specific expression at this point.³ Particularly because influences endangering the environment are not limited to the internal realm of the Member States, the European multilevel system must create competences of the Union and must allow the Union to take over responsibility also with a worldwide perspective.
- 5 In addition to these provisions on the Union’s environmental policy, there is an environment-related objective in Article 11 TFEU, which serves as a **horizontal policy clause** with relevance for all Union policies. In conjunction with Article 3 para. 3 TEU and Article 4 para. 2 lit. e TFEU, it elevates the protection of the environment to the rank of a general and overarching objective.

6

II. The task of environmental protection

1. The concept of environmental protection

The TFEU does not contain a **definition of the term ‘environment’**. It neither focuses solely on an anthropocentric nor on an ecocentric approach to environmental protection. The manifold action programmes of the Union indicate a very broad interpretation. In that sense, the 3rd environmental action programme of 1983 contains the following wording: ‘The ultimate objectives of environment policy are the protection of human health, the long-term availability of all the resources which determine the quality of life, of adequate quality and in sufficient quantity, namely, water, air, space – from both the land-use and landscape points of view – climate, raw materials, the built environment, and the

¹ On the prerequisites of a functioning European public debate, see *Häberle*, Europäische Verfassungslehre, 168 et seq.

² See *Michael*, Gibt es eine europäische Umweltöffentlichkeit?, in: *Liber amicorum Häberle*, 2004, 435.

³ Cf. *CR/Calliess*, Article 191 AEUV mn. 3.

natural and cultural heritage, as well as the maintenance and, where possible, the restoration of the natural environment with suitable habitats for flora and fauna.' However, the ECJ did not consider 'ensuring the welfare of animals' to belong to the basic principles of the Treaty (and therefore also not to the field of environmental protection⁴); also the protocol on the protection and welfare of animals of the Amsterdam Treaty would not allow any other understanding since it only refers to the fields of agriculture, transport, the internal market and research.⁵ This view can no longer be supported after the inclusion of the objective of animal protection into Article 13 TFEU. Already its systematic position in the Treaty as primary law of the Union indicates that it has become part of the general objectives of the Union. The 6th environmental action programme confirms a broad understanding of the concept of environment: It focuses on climate protection, the protection of biodiversity, a sustainable management of resources and waste (Decision No 1600/2002/EC of 22 July 2002). A further aspect is added by the renewed EU strategy for sustainable development (Decision of the European Council of 15/16 June 2006, Council Document 10917/06). Also, Directive 2008/1/EC calls for a broad understanding of the term. It characterises pollution as 'the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment (...)'. Especially the last alternative confirms the ambivalence of anthropocentrism and ecocentrism in the European environmental law.

2. Objectives of environmental protection

7

Article 191 para. 1 TFEU states **four general objectives**, which are to be approached as tasks of the Union.

- The objective to preserve, protect and improve the quality of the environment.

8

The preservation and improvement of the environment both call for an active organisation as well as the protection against threatening dangers. In the **6th action programme** (2001–2010; Decision 1600/2002/EC of the European Parliament and the Council in accordance with Article 192 para. 3 AEUV), the Union named – insofar with a concretising effect – the following primarily important objectives: protecting, conserving, restoring and developing the functioning of natural systems, natural habitats, wild flora and fauna with the aim of halting desertification and the loss of biodiversity, including diversity of genetic resources, both in the European Union and on a global scale. The objectives in point 1 therefore also include the protection of animals.

- The objective to contribute to the protection of human health.

9

In this objective, the relation of the environmental policy to the health policy is highlighted. According to the jurisprudence of the ECJ, the protection of human health against environmentally caused dangers justified emergency measures of the Commission taken as protection against BSE.⁶ In the **6th action programme** (see mn. 8 above), the concretised objective is formulated as 'contributing to a high level of quality of life and social wellbeing for citizens by providing an environment where the level of pollution does not give rise to harmful effects on human health and the environment and by encouraging a sustainable urban development'.⁷ The objective of protection is specified through different secondary legislation of the EU. This includes the REACH-Regula-

⁴ See *Scheuing*, EuR 2002, 622.

⁵ ECJ Case C-189/01 *Jippes* [2001] ECR I-5689.

⁶ ECJ Case C-180/96 *BSE* [1998] ECR I-2265.

⁷ See COM (2005) 718 final.

tion (Regulation (EC) No 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals etc., OJ 2006 No L296/1).

- 10 – The objective to **ensure a prudent and rational utilisation of natural resources** calls for a sensitive use of the environment. This objective, however, initially had to be interpreted narrowly, considering the energy policy of the Member States. The reason for this is a declaration of the conference of the representatives of the governments of the Member States which had been adopted in parallel to the ratification of the SEA final act and which declared that the activities of the Union in the field of environmental protection are not to be carried out in a manner disturbing the Member States' policy concerning the use of energy resources. This declaration has not been repeated in later Treaty amendment and has finally become obsolete. The renewed EU strategy on sustainable development (see mn. 7 above) today asks in particular to 'respect the limits of [...] natural resources' and to 'promote sustainable consumption and production' in order to 'break the link between economic growth and environmental degradation'.
- 11 Already in the **6th action programme** (see mn. 8 above), a comparable objective was envisaged, namely 'better resource efficiency and resource and waste management to bring about more sustainable production and consumption patterns, thereby decoupling the use of resources and the generation of waste from the rate of economic growth and aiming to ensure that the consumption of renewable and non-renewable resources does not exceed the carrying capacity of the environment'.
- 12 – The objective to promote measures at an international level which deal with regional or worldwide environmental problems, and in particular combating climate change. This objective emphasises the cross-border dimension of questions of environmental policy. In the fifth environmental programme, the following four main topics with worldwide relevance were named: climate change, the depletion of the ozone layer, the loss of biodiversity and deforestation. The following questions are highlighted as regional ones: air-pollution, desertification, the unsound management and disposal of hazardous waste and toxic chemical substances, industrial risks, the rapid growth of cities and the decreasing freshwater resources.⁸
- 13 The **6th action programme** (see mn. 8 above; for the follow-up programme, see mn. 14 below) particularly emphasised climate change as a central challenge. In a long-term perspective, a stabilisation of the concentration of greenhouse-gases in the atmosphere shall be targeted at a level that would prevent dangerous anthropogenic interference with the climate system. To this end, global warming shall be stabilised at 2°C above the pre-industrial era and the concentration of CO₂ below 550 ppm. This calls for a reduction of the emission of greenhouse-gases of 70 % on a global level, compared to 1990, as assessed by the Intergovernmental Panel on Climate Change (IPCC).
- 14 The Reform Treaty of 2007 adds an explicit mentioning of climate change to the fourth point and articulates a specific anxiety of the Member States. Since climate protection is, by its nature, part of the broader field of environmental protection, the amendment is of a more political-symbolic importance. In its systematic context of international cooperation, it is a reminder for the **global responsibility** in the area of climate protection. The **7th environmental action programme**, part of the Europe 2020 strategy, is following up (Decision No 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet') with a focus
 - a) on protection, conservation and enhancement of the union's natural capital;
 - b) to turn the EU into a resource-efficient, green and competitive low-carbon economy;

⁸ OJ 1993 C 138/83.

c) to safeguard the Union's citizens from environment-related pressures and risks to health and well being.

Article 191 TFEU does not answer the question how the promotion of measures at the international level shall be organised. One option is the **conclusion of international agreements**. However, the provision is not to be interpreted in a way that leads to an extension of the competences of the Union.

III. Principles of the environmental policy

The principles named in Article 191 para. 2 s.1 TFEU **specify** the tasks of the Union within the scope of the goals formulated in Article 191 para. 1 TFEU. Thereby, a **high level of protection** shall be guaranteed⁹, while the diversity of situations in the various regions of the Union has to be taken into account. A high level of protection is not necessarily identical to the highest possible level; as compensation, each Member State possesses the competence to extend the level of compensation in its jurisdiction under Article 193 TFEU.¹⁰ In its jurisprudence, the ECJ justified its broad interpretation of the concept of waste *inter alia* as a result of the requirement of a high level of protection in the EU.¹¹

1. The principles of precaution and prevention

The environmental policy shall prevent ecological damage, meaning it shall already hinder such damage to occur (**prevention instead of repression**). According to this, it is the duty of the Union and of the Member States to reduce known risks of environmental damage at their possible source and, if possible, to prevent them.¹² Especially the following cross-environmental provisions have to be mentioned: Directive No 85/337/EEC which obliges the Member States to introduce an **environmental risk assessment**. It is obligatory for projects subject to Annex I to Directive 85/337/EEC (e.g. hydro-electric power plants, integrated chemical installations, motorways); for projects under Annex II to Directive 85/337/EEC an environmental risk assessment is required where the Member States consider that it is required because of the (possible) impact on the environment of the project. The Directive 2008/1/EC, concerning integrated pollution prevention and control (**IIPC directive**) aims at a reduction of imissions into air, water and soil by industrial installations including waste processing. The impulses coming from private groups are promoted by Directive 2003/4/EC on public access to environmental information¹³. A system of self-assessment of companies supervised by public institutions is envisaged Regulation (EC) No 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC (**environmental audit scheme EMAS**). Concerning the (likewise voluntary) product-related protection of the environment, Regulation (EC) No 880/92 on a Community eco-label award scheme (**'Eco Label'**) is worth mentioning. See also: Commission Communication on the precautionary principle of 2 February 2000¹⁴. In any case, the risk assessment cannot be based on purely hypothetical considerations.¹⁵

⁹ See Article 114 para. 3 TFEU and – now also binding – Article 37 CFREU.

¹⁰ ECJ Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301.

¹¹ ECJ Case C-1/03 *van der Walle* [2004] ECR I-7613.

¹² ECJ Case C-318/98 *Fornasar* [2000] ECR I-4785.

¹³ As to the term 'environmental information': ECJ Case C-316/01 *Glawischnig* [2003] ECR I-5995.

¹⁴ COM (2000) 1 final.

¹⁵ ECJ Case C-95/01 *Greenham and Abel* [2004] ECR I-1333.

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2. Origin principle

In the course of fighting dangers to the environment, measures have to be taken preferably at their origin, meaning that – in the chain of causes – the chain link closest to the origin has to be addressed. This leads to the justification of the principle of waste disposal in the country of origin.¹⁶ However, this is not applicable for a prohibition of waste export that includes recoverable waste which itself is not toxic to the environment.¹⁷ In general terms, this means that the origin principle is realised by the ‘**principle of regional disposal**’ in the field of waste management. Accordingly, Article 5 para. 2 of the former Directive 2006/12/EC on waste called for the Member States to take care that ‘waste [is] to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.’ The new Directive 2008/98/EC on waste and repealing certain Directives (Waste Framework Directive) continues this idea under Article 16 (**Principles of self-sufficiency and proximity**).

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3. Polluter-pays-principle

The **polluter-pays-principle** says that, in principle, the person or organisation that caused damage to the environment has to pay for preventive or cleaning measures – and not the public (which would lead to the principle of common burden). Pollution in this context is the damage caused by the polluter by directly or indirectly damaging the environment, or by creating conditions leading to such damage.¹⁸ The polluter-pays-principle has been realised in particular by the directive on environmental liability (Directive 2004/35/EC). Directive 2008/1/EC concerning integrated pollution prevention and control is based on the same principle.

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IV. Criteria for ecology-related measures

Article 191 para. 3 TFEU names criteria which have to be taken into account when preparing policy measures relating to the environment. These criteria have to be carefully balanced (**‘obligation to balance’**).¹⁹ The criteria are actually self-evident and have been incorporated into Article 191 TFEU due to the specific wish of certain Member States, taking into account the fear that concrete environmental measures otherwise could be disproportionate.

- 21 – Consideration of **available scientific and technical data**. The explicit mentioning of this criterion is based on anxieties of the United Kingdom concerning scientific evidence for the origin of acid rain. In respect to the question whether the Union has correctly identified such substances that are harmful for the ozone layer, the ECJ considered only evident error of appraisal as relevant.²⁰
- 22 – Consideration of environmental conditions in the various **regions of the Union**. This requires the consideration of specific regional characteristics, possibly the limitation of certain measures to certain regions. The term ‘region’ in this context is not to be understood in an administrative or political way but in a non-technical manner.²¹

¹⁶ ECJ Case C-422/92 *Commission v Germany* [1995] ECR I-1097.

¹⁷ ECJ Case C-203/96 *Dusseldorf* [1998] ECR I-4075; Case C-209/98 *Sydhavns Sten & Grus* [2000] ECR I-3743.

¹⁸ Community guidelines 2008/C 82/01 on state aid for environmental protection, OJ 2008 C 82/1; also ECJ Case C-293/97 *Standley* [1999] ECR I-260.

¹⁹ Cf. GHN/*Nettesheim*, Article 191 AEUV mns 137 et seq.

²⁰ For further reference, see CR/*Calliess*, Article 191 AEUV mns 37 et seq.

²¹ ECJ Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301.

- Consideration of the potential benefits and costs of action or lack of action. This requires a comprehensive **costs-benefit-analysis**. It is in dispute whether this relates to a pure economic analysis or whether a comprehensive impact-assessment has to be carried out.²² 23
- Consideration of the **economic and social development** of the Union as a whole and the balanced development of its regions. This criterion meets the concerns of some Member States that environment-related measures may have a negative economic and (as a result) social impact. The cohesion fund allows for Union aid in the field of environmental policy to such regions that need particular support. 24

V. Delimitation of competences between Union and Member States 25

1. Subsidiarity of the Union level

The original version of Article 191 TFEU contained a clause according to which the Union, in the field of environmental protection, could act only as long as the respective policy objectives could be reached better at Union level than at the level of the individual Member States. The provision defined a relation based on the **principle of subsidiarity**, which today, after the introduction by the Maastricht Treaty, already follows from the **general subsidiarity clause in Article 5 para. 3 TEU**. Only if the objectives of the environmental policy may not be sufficiently reached at the level of the Member States but can be reached better at the Union level, measures can be taken by the Union. Otherwise only the Member States are responsible. An equal standard of environmental protection in the Union is as such not an aim that justifies measures at Union level; this is already made clear by the right of the Member States to apply stricter standards, according to Article 193 TFEU, which explicitly allows differences in the standards of environmental protection between the Member States.²³

2. Protection clauses 26

Article 191 para. 2 subpara. 2 TFEU explicitly provides for **harmonisation measures** of the Union that include, where appropriate, a **safeguard clause** allowing Member States to take differing provisional measures, for non-economic environmental reasons. These measures are subject to a procedure of inspection by the Union²⁴. The option to enact stricter rules in the Member States under Article 193 TFEU remains untouched by this provision.

VI. International cooperation 27

Union and Member States are obliged to **get involved** in international cooperation in the field of environmental protection (Article 191 para. 4 subpara. 1 TFEU). In most cases, this amounts to the exchange of information or the conclusion of non-binding resolutions. Further rules (such as the Protocol of Cartagena on biological safety) are based on Article 192 para. 1 TFEU in connection with the AETR principles developed by the ECJ²⁵.

Article 191 para. 4 subpara. 1 s. 2 TFEU forms the basis for an explicit **(institutional) competence** of the Union. The principle of subsidiarity of Article 5 para. 3 TEU also applies 28

²² See CR/Calliess, Article 191 AEUV mn. 42.

²³ Cf. Frenz, Europäisches Umweltrecht, 1997, 199.

²⁴ See also Article 114 para. 10 TFEU.

²⁵ ECJ Opinion 2/00 *Avis* [2001] ECR I-9717. See below mn. 29.

here (see Article 191 para. 4 s. 1 TFEU: 'within their respective spheres of competence'). Concerning the procedure of treaty conclusion, reference is made to Article 218 TFEU.

- 29 Article 191 para. 4 subpara. 2 TFEU deals with the competences of the Member States in view of the Union competence; this is misleading. According to a Declaration of the Conference of the Representatives of the Governments of the Member States, which has to be observed in the course of interpreting the provision, Article 191 para. 4 subpara. 2 TFEU does not interfere with the principles based on the **AETR jurisprudence** of Case 22/70 *Commission v. Council*²⁶. This means that competences of the Member States to conclude treaties under public international law are excluded only when and only insofar as the Union has exercised its legislative and treaty-making competence.²⁷ However, Article 193 TFEU has to be taken into consideration, leading to a limitation to the principles laid down in the AETR judgment because the Member States at least have a competence to apply stricter rules; insofar an exclusive external competence of the Union cannot emerge.²⁸

30

VII. Final overview of newer secondary legislation

Finally, a selection of norms of particular practical relevance shall be introduced exemplar reflecting the huge amount of **secondary legislation**: Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage; Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC; Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC; Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (an example for Article 191 para. 2 TFEU); Directive 2003/30/EC on the promotion of the use of biofuels for the transport sector; Directive 2008/98/EC on waste and repealing certain Directives. In this context see also Case C-472/02, *Siomab* on the shipment of waste and the Environment-Waste-Regulation.²⁹ Reference shall be made to the following case-law of the ECJ: Case C-113/02 *Commission v. Netherlands*³⁰ with a focus on the recovery of waste; Case C-215/04 *Pedersen*³¹ also with a focus on shipment and recovery of waste. Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (notified under document number C(2000) 1147) are important, too.

Article 192 [Decision-making procedure; financing; polluters-pay-principle] (ex Article 175 TEC)

1. 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, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

²⁶ ECJ Case 22/70 *Commission v Council* [1971] ECR 263.

²⁷ See Article 218 TFEU mn. 25; on the concurring competence in the field of environmental policy also ECJ Opinion 2/00 *Avis 2/00* [2001] ECR I-9717.

²⁸ See ECJ Opinion 2/91 *ILO* [1993] ECJ I-1064; *Geiger*, JZ 1995, 979.

²⁹ ECJ Case C-472/02 *Siomab* [2004] ECR I-9971.

³⁰ ECJ Case C-113/02 *Commission v Netherlands* [2004] ECR I-9707.

³¹ ECJ Case C-215/04 *Pedersen* [2006] ECR I-1465.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

- (a) provisions primarily of a fiscal nature;
- (b) measures affecting:
 - town and country planning,
 - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,
 - land use, with the exception of waste management;
- (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

3. General action programmes setting out priority objectives to be attained shall 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.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

- temporary derogations, and/or
- financial support from the Cohesion Fund set up pursuant to Article 177.

Bibliography: *Anderson/Skinner*, The European Union's Approach to Reducing Greenhouse Gas Emissions, 4 *EurUP* 2005, 92; *Bär/Homeyer/Klasing*, Fit for Enlargement? Environmental Policy After Nice, 10 *EELR* 2001, 212; for further reference, see literature on Article 191 TFEU.

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I. Competence and procedure

1

1. Legislative competence

Article 192 TFEU contains the procedural rules for the creation of environment-related legislation of the Union. It therefore represents the primary legislative basis for the EU environmental law. Its predecessor norm in primary law is Article 175 TEC,

which was adopted by the Lisbon Reform Treaty with a slightly new wording and with editorial changes but without substantial amendments. Only the special legislative procedure is newly included in para. 2 subpara. 1 and the ordinary legislative procedure in para. 2 subpara. 2. The norm gives the **Council**, partly together with the **EP**, the competences that are necessary to fulfil the tasks formulated in Article 191 TFEU. As legal acts, all measures of the catalogue in Article 288 TFEU come into consideration. In addition, also political instruments like resolutions and conclusions are possible measures. The choice of the measures that suit best in a given case is generally up to the Union. However, in doing so it has to observe the criteria of subsidiarity and of functional adequacy.¹

2

2. Decision-making procedure

Usually, Council and Parliament decide in accordance with the **ordinary legislative procedure** under Article 294 TFEU, after consulting the EESC and the Committee of the Regions.

3

As an **exception**, the Council can decide in a special legislative procedure by **unanimous** vote after consulting the EP, the EESC and the Committee of Regions in the fields mentioned in para. 2 (as to the term ‘management of water resources’ see Case C-36/98 *Spain v. Council*²). The Council may, however, decide that under certain circumstances decisions can be made according to the ordinary legislative procedure with a **qualified majority** voting procedure. This could comprise, for example, certain fields of ecological policy, amendments to legislative acts adopted by unanimous voting or implementing provisions on rules of a general nature.

4

A further exception is formed by general action programmes. If they do not cover an area specified in Article 192 para. 2 TFEU, the Council and the European Parliament decide according to the **ordinary legislative procedure** under Article 294 TFEU and after consulting the EESC and the Committee of Regions. In both cases, the Council or the Council together with the EP adopt the measures necessary for the implementation (Article 192 para. 3 TFEU), depending on the applicability of either the procedure of Article 192 para. 1 TFEU or the procedure of Article 192 para. 2 TFEU, which is now explicitly clarified by Article 192 para. 3 s. 2 TFEU.

5

The possibility to assign the competence to adopt provisions for the implementation³ to the Commission remains untouched by this.

6

II. Competing competences

As Article 11 TFEU shows, environment-protecting provisions can also be found in other policy fields (in particular internal market, agriculture and transport) according to the procedural rules laid down in the respective provisions. The **horizontal policy clause** on environmental law and policy in Article 11 TFEU provides for a **cross-sectoral interlocking**.⁴

7

The demarcation between the general environmental policy according to Articles 191–193 TFEU and the other policy areas is to be carried out with respect to the policy field which forms the main focus of the provision at hand. **Articles 115 and 114 TFEU** are to be applied if the objective of the norm is the approximation of the national provisions with a view to the establishment and functioning of the internal market, i.e. avoiding of

¹ Cf. CR/Calliess, Article 192 AEUV mns 2 et seq.

² Case ECJ C-36/98 *Spain v Council* [2001] ECR I-779, 810.

³ See Article 17 TEU.

⁴ As to the difficult demarcation with multiple references to respective case law see, Schwarze/Kähler, Article 175 mns 4 et seq.

distortion of competition (for instance in relation to product-related norms)⁵; specific environmental objectives that are associated more closely with the complex 'reduction of trade barriers' are in contrast to be dealt with on the basis of Article 192 TFEU⁶. The same is true for measures relating to foreign trade, see Article 207 TFEU. The relevance for the internal market is particularly high for product-related environmental rules (e.g. concerning the definition of thresholds for exhaust gas and noise emissions of motor vehicles).

Rules relating to competences in **special policy areas** (Article 43 TFEU – agricultural policy⁷; Articles 91 and 100 para. 2 TFEU – traffic policy; Article 153 para. 1 TFEU – working environment) are prevailing as special regulations. But Article 192 para. 2 TFEU derogates Article 113 TFEU in relation to product-related indirect taxes that are motivated by environmental policy considerations.

If there is no obvious regulative focus of the norm, the question arises whether there can be various corresponding legal bases for the competence. In its jurisprudence, the ECJ allows such dual legal basis under the exceptional condition that the rule is aimed at several equally important objectives which are inseparably linked to each other.⁸ However, this does not apply if the consulted legal bases provide for different procedural rules and if the application of the procedures provided for in one norm endangers the procedural rules of the other, e.g. by skipping the rights of the Parliament in the legislative procedure.⁹

III. Implementation and financing

According to the general provisions, the administrative implementation of environmental measures of the Union is, in principle, the task of the **Member States**. The Member States are generally also responsible for the financing of the environmental measures (Article 192 para. 4 TFEU). The provision of reliable information on the environment belongs to the tasks of the **European Environment Agency**, created under Article 192 TFEU and located in Copenhagen (Regulation 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network). (Financial) support of the Union to environmental projects had been allowed for by Regulation 1973/92 on the establishment of a **financial instrument for the environment (LIFE)**. LIFE expired at the end of 2006. It was continued by 'LIFE+' (Regulation (EC) No 614/2007). From 2014 onwards, Regulation (EU) No 1293/2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EC) No 614/2007 is applicable. In addition, financial aid for measures that have a possible influence to the environment is also provided for by the Structural Funds and the Cohesion Fund.

Measures under Article 192 para. 1 TFEU (according to the ordinary legislative procedure) can cause disproportionately high costs for a certain Member State (Article 192 para. 5 TFEU). Taking this into account, temporary derogations have to be established, possibly combined with financial support from the Cohesion Fund¹⁰. Possible excep-

⁵ See ECJ Case C-300/89 *Titaniumdioxid* [1991] ECR I-2867.

⁶ ECJ Case C-155/91 *Directive on waste* [1993] ECR I-939; Case C-187/93 *Parliament v Council* [1994] ECR I-2857, 2874.

⁷ ECJ Case C-405/92 *Mondiet* [1993] ECR I-6133.

⁸ ECJ Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107; Case C-94/03 *Commission v Council* [2006] ECR I-1.

⁹ Cf. *Epiney*, Umweltrecht, 65 et seq.

¹⁰ See Article 177 TFEU.

tional measures include longer implementation periods as well as infrastructural support. Unfortunately, the practical importance of the provision to allow also relatively poorer Member States ambitious environmental measures so far is very small.¹¹

12

IV. Secondary legislation of the EU

Based on the competence of Article 192 TFEU, a huge amount of secondary legislation has been enacted, which partly include general provisions (e.g. concerning environmental liability or environmental information) and which in parts also follow a media-related approach (concerning air quality, the protection of water, the protection of soil including the so-called ‘green genetic engineering’ and the prevention of noise). Chemical substances and their regulation, as well as the management of natural resources and waste, are other important fields.¹²

Article 193 [Protective measures of the Member States]
(ex Article 176 TEC)

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

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1

I. General remarks

For the relation between the competences of the Union and the legislative powers of the Member States within the field of environmental protection, the **general rules** apply.¹ This means that, initially, the competences of the Member States are not limited by those of the Union; only insofar as the Union has comprehensively exercised its competence, corresponding competences of the Member States are overruled. In the interest of higher standards of environmental protection, Article 193 TFEU formulates an exception from this kind of primacy of Union law (see Article 153 para. 4 alternative 2 TFEU for a similar exception in the field of working conditions; see Article 114 paras 4, 5 TFEU for the harmonisation in respect to the internal market). Such a **clause of enhanced protection**² had already been introduced by the SEA; it was later modified by the Maastricht Treaty and remained unchanged in Article 176 TEC since that time. Also, the TFEU does not make any substantial amendments apart from some linguistic customisation. The provision illustrates once more that a legal framework of Union law does not lead to a levelling of the protective standards of the Member States and therefore does not want integration based on the lowest common denominator.

¹¹ See Schwarze/Kaller, Article 192 AEUV mn. 48.

¹² Detailed reference and a systematic categorisation of secondary legislation can be found in CR/Calliess, Article 192 AEUV mns 4 et seq.; a short selection is also available at Article 19 TFEU mn. 30.

¹ See Article 4 para. 3 TEU.

² Cf. CR/Calliess, Article 193 AEUV mn. 1; Schwarze/Kaller, Article 193 AEUV mns 1 et seq.

II. The Member States' competence for enhanced protection

2

Irrespective of the existence of provisions of secondary legislation based on Article 192 TFEU, certain rules of the Member States in the subject matter are possible. They do not fall under the rule of the primacy of EU law and do not participate in its derogating effect³. This includes rules enacted before the creation of Article 192 TFEU, and therefore based on other Treaty provisions, but now fall within the scope of Article 192 TFEU.

- The Member State's provisions in question have to enhance the standard of environmental protection compared to the standard provided for by Union law. In this respect, they have to serve as a good example and support the securing of the future standard of protection at the Union level. Such enhancing provisions of the Member States are allowed to be maintained or can be introduced newly. The rules of Union legislation therefore function only as a mandatory **minimum standard**. This applies to all Member States. Their individual voting in the legislative process at Union level is irrelevant. In order to apply Article 193 TFEU, it is essential that the measures taken by the individual Member State prove to **enhance** the minimum standard of the Union. If the Member State follows an alternative concept of protection (e.g. emission-oriented rules instead of quality-oriented rules), it is free to do so as long as the Union legislation does not contain an explicit and exclusive concept but defines only an objective that shall be reached.⁴
- The Member State's (enhancing) rules must be **compatible** with the other Treaty provisions. In particular, the rules on non-discrimination and on the free movement of goods⁵ have to be observed. Secondary legislation based on another competence (i.e. a competence other than Article 193 TFEU) has to be observed in the same way.⁶
- The Member State's (enhancing) rules have to be **notified** to the Commission. An approval by the Commission (like in Article 114 para. 6 TFEU) is not necessary. At the most, the Commission can initiate an infringement procedure⁷ against the Member State concerned because also the omission of a notification constitutes a breach of Union law.⁸

TITLE XXI ENERGY

Article 194 [European energy policy; aims and measures]

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;

³ See Article 4 para. 3 TEU.

⁴ Cf. *Vorwerk*, 101 et seq.

⁵ See Articles 34 et seq. TFEU.

⁶ Disputed, cf. *LB/Breier*, Article 193 AEUV mn. 4.

⁷ See Article 258 TFEU.

⁸ Cf. *Jarass*, NVwZ 2000, 529.

- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Bibliography: *Classen*, The Draft Treaty Establishing a Constitution for Europe: A Contribution to the Improvement of Transparency, Proximity, and Efficiency of the European Union, 46 GYIL 2003, 323; *Gramlich*, Regulating Energy Supranationally: EU Energy Policy, in: Herrmann/Terhechte (eds), European Yearbook of International Economic Law 2012 (Springer), 371; *Roggenkamp et al.*, Energy Law in Europe, 2007; *Roggenkamp/Barrera-Hernández/Zillman/del Guayo*, Energy Networks and the Law: Innovative Solutions in Changing Markets, 2012.

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1 I. General remarks and normative development

The need for a **transnationally coordinated energy policy** gave important impulses to the European integration already in the founding years of the integration project.¹ However, energy policy was separated according to the different forms of energy, manifest in the independent institutional integration of ECSC and EAEC. Comprehensive concepts became necessary with the oil crisis of 1973/79, as well as an ever more intensive competition for energy and the emergence of renewable energy resources.² In the TEC, the energy policy initially found its place in Article 3 para. 1 lit. u TEC (today Article 4 para. 2 lit. c TFEU), which, however, did not constitute a legislative competence. Energy as an economic good was always governed by the free movement of goods of Articles 23 et seq. TEC because energy (especially the sources of energy) is a good in the sense of Union law – with the exception of nuclear energy that has been dealt with separately in the Euratom Treaty from the beginning.

- 2 However, the energy sector possesses several special attributes that are going beyond the typical characteristics of market goods, limiting the process of liberalisation which is likewise typical for the internal market. These are, in particular, the relevance of the en-

¹ See *Jerusalem*, Das Recht der Montanunion, 1954.
² Cf. *Oppermann/Classen/Nettesheim*, § 33 mns 13 et seq.

ergy policy for the environment and its dimension as services in the public interest.³ The normative formulation as an independent Union policy hence became a desideratum of effective Union action in the energy sector. For a long time, the creation of such rules failed due to sovereignty concerns of the Member States. Draft-Article III-256 TECE created an independent competence for energy policy for the first time. Article 194 TFEU is formulated very closely to its constitutional role model but includes some modifications. In Article 194 para. 1 TFEU, an explicit reference is made that the energy policy is to be implemented in the spirit of solidarity between the Member States. With view to the more general solidarity clause of Article 3 para. 3 TEU, this emphasis is of a declaratory nature only. Substantially relevant, however, is the addition of a Article 194 para. 1 lit. d TFEU (promotion of the interconnection of energy networks).

The newly introduced competence norm generally reflects the increasing importance 3 of energy supply (in particular after the termination of the ECSC Treaty).⁴ Euratom, which remains a separate legal entity under international law, also has to be taken into consideration for future Union measures in the context of energy policy. The EAEC Treaty is not substantially amended by the Reform Treaty of Lisbon. The amendments provided for in Protocol No 2 amending the Treaty establishing the European Atomic Energy Community are only structural adjustments.⁵

II. Relationship to other policy fields 4

Until now, the energy policy of the Union was based on Articles 352, 114, 192, 179 et seq. and Articles 170 et seq. TFEU. Therefore, overlappings with Article 194 TFEU can emerge. Especially, **interdependencies** with the climate policy⁶ complicate a clear distinction. Relating to the Euratom Treaty, Article 194 TFEU is of a supplementary nature only, due to the safeguard clause in Article 106a para. 3 EAEC Treaty. In all other cases, Article 194 TFEU is the more specific provision.⁷

III. Objectives 5

Article 194 para. 1 lit. a-d TFEU **enumerates the objectives of the energy policy of the Union in the form of a catalogue**. The functioning of the energy market (lit. a) relates to the internal market. On the one hand, this provision wants to strengthen the competition within the Union's energy sector and on the other hand, it wants to enhance the Union's external competitiveness in the global energy competition. Lit. b is, already in its language, formulated as a service in the public interest: '[to] ensure security of energy supply in the Union'. In the multilevel system of the Union, such services of public interest are no longer a task to be carried out by the states but also by the Union. The responsibility to ensure their functioning calls for the action of both, the Union and the Member States. Lit. c appears to be innovative: '[to] promote energy efficiency and energy saving and the development of new and renewable forms of energy'; here, energy and environmental policy are particularly intertwined and the **principle of sustainability** works as the necessary link. Finally, the Lisbon Treaty introduced a new objective with lit. d: the promotion of 'the interconnection of energy networks'. System compatibility

³ Cf. Ringwald, Daseinsvorsorge als Rechtsbegriff, 2008.

⁴ See VHVH/Rodi, Article 194 AEUV mn. 1.

⁵ The protocol is published in OJ 2007 No C 306/01.

⁶ See Oppermann/Classen/Nettesheim, § 23 mn. 22.

⁷ See VHVH/Rodi, Article 194 AEUV mn. 2.

becomes the key term in the 'European Energy Network'; it is obvious that the protection and improvement of the environment are connecting necessities.

6

IV. Competences

Article 194 para. 2 TFEU contains a general legislative competence which serves to fulfil the objectives formulated in Article 194 para. 1 TFEU. The ordinary legislative procedure applies; the EESC and the Committee of the Regions have to be consulted. This competence exists irrespective of the application of other Treaty provisions (see mn. 4 above). Article 194 para. 2 subpara. 2 TFEU codifies the right of the Member States under Article 192 para. 2 lit. c TFEU to determine independently the conditions for the use of energy resources, the choice between different energy sources and the general structure of energy supply. Reaching far beyond the sovereignty over resources, the provision is an expression for sovereign rights reserved by the Member States in the energy sector. Also, due to the protection of national sovereignty as an exception from para. 2, the Council decides unanimously and after consulting the European Parliament in a special legislative procedure if the measures taken are primarily of a fiscal nature. This paragraph has been included into the Treaty due to an initiative of the United Kingdom.

7

V. Secondary legislation

Despite the missing of an independent competence, there already is a tightly woven network of secondary legislation which includes the directives on the realisation of the internal market (at least for natural gas and electricity): Directive 2003/55/EC concerning common rules for the internal market in natural gas and Directive 2003/54/EC on rules for the internal market in electricity; further measures focus on safeguarding security of natural gas supply (Directive 2004/67/EC) and security of electricity supply and infrastructure investment (Directive 2005/89/EC). The fact that important rules have already been adopted based on other competence norms shows that the present article provides only a very limited growth of competences for the Union in the end. It also emphasises that there is a need for coordination, which is reflected by the new Title XXI. ('Energy') being systematically in close relation with the environmental competence.

TITLE XXII TOURISM

Article 195 [Measures in the touristic sector]

1. The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector.

To that end, Union action shall be aimed at:

- (a) encouraging the creation of a favourable environment for the development of undertakings in this sector;**
- (b) promoting cooperation between the Member States, particularly by the exchange of good practice.**

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States to achieve the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.

Bibliography: *Bech Serrat*, The role of the DCFR in travel contracts: towards an optional instrument?, *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht* 2012, 95; *Tichadou*, Der Schutz der Touristen in der Rechtsprechung des EuGH, *ZEuS* 2002, 299.

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I. General remarks and normative development

1

The title on Tourism has been newly created by the Lisbon Reform Treaty. Article 195 TFEU adopts (with some minor editorial changes) the provisions of draft-Article III-281 TECE, which for the first time suggested a specific competence for the tourism sector and, by this, highlighted the importance of tourism as an independent economic sector. There are conspicuous parallels to the industry policy of the Union. Even before the introduction of the new competence, however, a 'freedom of tourism' existed within the Union, based on the free movement of the EU's citizens and the freedoms of the internal market, in particular the freedom to provide services¹. Examples include businesses in the hotel and restaurant sector. It is not without reason that many impulses for the travel contracts law of the Member States come from impulses set by the Union, in particular via directives.²

II. Objectives

2

Article 195 para. 2 s.1 TFEU names the objectives of the tourism policy. As in the field of industry policy, the competitiveness of the companies concerned shall be promoted, on the internal market as well as in the global competition. This is supposed to create a favourable environment for the development of the companies of the tourism sector. In addition, the cooperation among the Member States is to be enhanced (in particular by the exchange of good practice). Generally, the prohibition of State aid under Article 107 TFEU applies for all measures of the Member States; however, exceptions under Article 107 para. 3 lit. a or lit. c TFEU are possible.³

III. Competences

3

Tourism is part of the competences to support, coordinate and supplement Member States' actions by the Union⁴. However, it has to be taken into account that the wording

¹ See Articles 56 et seq. TFEU.

² Cf. *Tichadou*, Der Schutz der Touristen in der Rechtsprechung des EuGH, *ZEuS* 2002, 299 et seq.

³ Cf. *VHvH/Vedder*, Article 195 AEUV mn. 3.

⁴ See Article 6 lit. d TFEU.

of Article 195 paras 1 and 2 TFEU implies that the Union can only take **complementary** action and therefore has to act particularly **aware of the Member States’ sovereignty and of the principle of subsidiarity**. The measures of the Union have to be taken excluding any harmonisation of the laws of the Member States (safeguarding of subsidiarity and plurality). Article 195 paras 1 and 2 half-sentence 2 TFEU imply that the Member States have the obligation to realise the objectives formulated in para. 1 (**substantive responsibility**).

4

IV. Legislative procedure

The measures are enacted by Council and European Parliament in accordance with the ordinary legislative procedure under Article 294 TFEU.

TITLE XXIII

CIVIL PROTECTION

Article 196 [Encouraging the cooperation of the Member States on the field of civil protection]

1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. Union action shall aim to:
- (a) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or manmade disasters within the Union;
- (b) promote swift, effective operational cooperation within the Union between national civil-protection services;
- (c) promote consistency in international civil-protection work.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

Bibliography: *Alexander*, The Study of Natural Disasters, 1977–1997: Some Reflections on a Changing Field of Knowledge, Disasters 1997 (21), 284; *Casolari*, The External Dimension of the EU Disaster Response, in: de Guttry/Gestri/Venturini (eds), International Disaster Response Law, 2012, 129; *Ekengren et al*, Solidarity or sovereignty? EU cooperation in civil protection, European integration, Vol. 28, No. 5, 457; *Gestri*, EU Disaster Response Law: Principle and Instruments, in: de Guttry/Gestri/Venturini (eds), International Disaster Response Law, 2012, 105.

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I. General remarks, normative development, normative context

1

Cooperation in cases of disasters is both a concern of public international law and an expression of solidarity within the Union¹. By introducing such a provision on civil protection, the TFEU accomplishes the duty to act in solidarity for cases of disasters by creating a Union competence. Until then, such a competence did not exist. However, civil protection was already formulated as a task of the former EC in Article 3 para. 1 lit. u TEC. In absence of an explicit competence, programmes and measure were based on Article 308 TEC (now: Article 352 TFEU) – (e.g. Council Decision 1999/847/EC establishing a Community action programme in the field of civil protection).²

The term ‘disaster’ includes, often with difficult questions of demarcation, natural and manmade disasters. In addition, the term implies a high threshold as to the quality and the quantity of the event.

Article 196 TFEU has to be read in a close systematic relation to Articles 122 and 222 TFEU as well as Article 21 TEU. Due to Article 122 para. 2 TFEU, the Union may provide financial assistance to a Member State that is affected by a (natural) disaster (a catastrophic flood of 2002 in Central Europe led to the creation of the EU-Solidarity Fund, based on that norm, Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund³). The solidarity clause of Article 222 TFEU applies with a view to the prevention of terrorist attacks and aid in cases of a terrorist attack or a natural or man-made disaster. Article 21 para. 2 lit. g TEU finally defines the assistance of the population, countries and regions confronted with natural or manmade disasters as an objective of the Union policy (idea of a global social responsibility).⁴

II. Objectives

4

Article 196 para. 1 s. 1 TFEU calls for the improvement of systems for **preventing** and **protecting** against natural or man-made disasters. The term ‘prevention’ has a two-fold focus in this context. In its **preventive** aspect, it aims at preventing and avoiding future disasters; in its **reactive** aspect, it asks for protective measures necessary in order to avoid and to minimise damage caused by already occurred disasters.⁵ This includes (also see mn. 2 above) both natural disasters and man-made disasters (e.g. industrial or nuclear catastrophes). By comparing with the wording of Article 222 TFEU, it appears that terrorist attacks do not fall within the scope of Article 195 TFEU because these attacks are not explicitly mentioned in Art. 195 TFEU but are listed in Art. 222 TFEU. In this respect, Article 222 TFEU is the more special norm that prevails.

Union action comprises (**Article 196 para. 1 s. 2 TFEU**) measures: a) to support and complement Member States’ action at national, regional and local level (most notably concerning risk prevention, preparing civil-protection personnel and responding to natural or man-made disasters within the Union); b) to promote swift and effective operational cooperation within the Union between national civil protection services (empowerment of cooperative civil protection); finally, the improvement of the consistency in international civil-protection work (coordination of cooperation with an international focus).

¹ See Article 3 para. 3 TEU.

² Cf. VHVH/Vedder, Article 196 AEUV mn. 2.

³ OJ 2002 L 311/3.

⁴ Cf. Kotzur, *Soziales Völkerrecht für eine solidarische Völkergemeinschaft?*, JZ 2008, 265 et seq.

⁵ Cf. VHVH/Vedder, Article 196 AEUV mns 3.

III. Competences

Civil protection is part of the competences to support, coordinate and to complement⁶. Therefore, the Member States remain primarily responsible for the matter; the principle of subsidiarity, mutual consideration and obligations to solidarity have to be taken into account. Article 196 para. 1 s. 1 TFEU (competence to promote cooperation between the Member States) represents a sole competence to coordinate; Article 196 para. 2 s. 2 TFEU incorporates a competence to support, coordinate and to supplement at national, regional and local level.⁷

IV. Measures

The measures taken to achieve the objectives of Article 196 para. 1 TFEU are enacted by Council and EP in accordance with the ordinary legislative procedure. Legislative harmonisation is prohibited with view to the fact that the **primary responsibility for civil protection remains a task of the Member States**.

TITLE XXIV ADMINISTRATIVE COOPERATION

Article 197 [Effective implementation of Union law by the Member States regarding administrative cooperation]

1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.

Bibliography: *Craig*, EU Administrative Law, 2nd ed. 2012; *Häberle*, Der kooperative Verrfassungsstaat (1978), in: *id.*, Verfassung als öffentlicher Prozess, 3rd ed. 1998, 407 et seq.; *H. C. Hofmann/Türk* (eds), EU Administrative Governance, Cheltenham, 2006; *H. C. Hofmann/Türk*, The Development of Integrated Administration in the EU and its Consequences, 13 ELJ 2007, 253; *Jans/de Lange/Prechal/Widdershoven*, Europeanisation of Public Law, Groningen, 2007; *Schütze*, From Rome to Lisbon: 'Executive Federalism' in the (New) EU, 47 CMLRev 2010, 1385.

⁶ See Article 6 lit. f TFEU.

⁷ See VHVH/*Vedder*, Article 196 AEUV mns 3 et seq.

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I. General remarks and normative development

1

Today, **cooperation in the field of public administration** has become part of the identity of the cooperative constitutional State.¹ For the process of European integration, it is an indispensable **precondition for integration and a proper functioning**. It was implicitly present also in the hitherto existing EC law and already explicitly mentioned in some special cases (e.g. in the field of customs cooperation) but had not been codified in an independent competence. This was to be changed by draft-Article III-285 TECE. Article 197 TFEU adopts this constitutional predecessor norm with editorial amendments and lays the foundation for a new and generally applicable Union competence to support the Member States in the process of the administrative implementation of Union law.² It gives an answer also to the obligation formulated as a fundamental right in Article 41 CFREU (Right to good governance), which, according to Article 51 CFREU, has also to be guaranteed by the Member States and which has to be made effective in cooperative action by Union and Member States.

II. Objectives

2

According to Article 197 para. 1 TFEU, which has a merely **appellative character**, it is the objective of the provision to **effectively implement Union law** through the administrations in place in the Member States. The obligation of the Member States to implement Union law is presupposed, it follows from the whole legal system of the EU, in particular from Article 4 para. 3 TEU. It is emphatically emphasised that this obligation is in the vital interest of the Union. The competence as such nevertheless remains with the Member States. However, they have to consider the common interest of the Union and the other Member States. This interdependence of a shared responsibility for the common welfare between the Member States and the Union reflects the **general obligation to loyal cooperation** defined in Article 4 para. 3 TFEU. The implementation measures of the Member States include all measures taken by administrative organs at the national, regional and the local level.

In its Articles 4 et seq., the TFEU contains the distribution of powers concerning the **legislative branch**, whereas an explicit definition of the administrative competences – comparable to Articles 83 et seq. Grundgesetz (German Constitution) – does not exist. The distribution of powers follows from the general principles and at least from the **functional logic of the multilevel system**. Only in exceptional cases, the Union itself does implement the Union law directly through the Commission, e.g. in the fields of State aid and export law. Regularly, the Union law is directly or indirectly implemented by the Member States according to the respective national administrative law.³ However, in the

¹ Cf. Häberle, Der kooperative Verfassungsstaat, (1978), in: id., Verfassung als öffentlicher Prozess. 3. ed. 1998, 407 et seq.

² Cf. VHVH/Vedder, Article 197 AEUV mn. 1.

³ ECJ Joined Cases 205 to 215/82 *Milchkontor* [1983] ECR 2633.

course of implementation, the Member States are bound to (unwritten) principles of primary law (principles of effectiveness – *effet utile*, principle of non-discrimination, rule of equivalence, principle of proportionality, the obligation to obey the fundamental rights of the citizens). Therefore, a modification of national administrative law provisions can occur in certain cases. The national administrative law has to be interpreted in a manner that is consistent with EU law; it can even be modified or derogated by EU law in certain cases (principle of primacy of Union law). The problem becomes important in administrative cases which are non-appealable under national law (principle of *res judicata*) but the Union law calls for the revision of the administrative decision.⁴

4 However, the **duties of loyalty** in the process of implementation do not constitute a one-sided obligation of the Member States. The Union also has a responsibility to cooperate. According to Article 197 para. 2 TFEU, the Union may support the Member States in their efforts to improve the capacities of their administrations (meaning discretionary provisions). Relevant measures may include facilitating the exchange of information and of civil servants between the various administrative organs, as well as supporting training schemes. There is no obligation of the Member States to seek such support.

5 III. Competences

The administrative cooperation is part of the **competences to support, coordinate and to supplement**⁵. The Member States remain primarily responsible for the matter, which is consistent with the functional logic of the executive branch. Article 197 para. 2 TFEU limits the measures that can be taken to coordinative measures.

6 IV. Procedure

Union action in the sphere of general and abstract rules on administrative law shall be taken in the form of regulations⁶ in accordance with the ordinary legislative procedure⁷. The measures cannot have a harmonising effect.

7 **V. Non-affection clause**

Article 197 para. 3 TFEU limits the application of the present article and constitutes a **‘non-affected clause’**.⁸ Article 197 TFEU does neither affect the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission nor does it affect the provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union (e.g. the customs cooperation of Article 33 TFEU). This paragraph emphasises the subordinated function of Article 197 TFEU which is derogated by more specific provisions like Article 33 TFEU. There is also a connection to Article 291 TFEU (legislative implementation of legislative acts of the Union) and Article 298 TFEU (obligation of the Union concerning its tasks to ensure an efficient administration).

⁴ ECJ Case C-453/00 *Kühne & Heinz NV v Productschaap voor Pluimvee en Eieren* [2004] ECR I-837.

⁵ See Article 6 lit. g TFEU.

⁶ See Article 88 para. 2 TFEU.

⁷ See Article 294 para. 2 s. 3 TFEU.

⁸ See VHvH/*Vedder*, Article 197 AEUV mn. 7.

PART FOUR

ASSOCIATION OF THE OVERSEAS COUNTRIES AND TERRITORIES

Bibliography: *Adler-Nissen* (ed), European integration and postcolonial sovereignty games: The EU overseas countries and territories, 2012; *Baetens*, European Community and Union, Association of Overseas Countries and Territories, MPEPIL, 2012; *Bast*, European Community and Union, Association Agreements, MPEPIL, 2012; *Dekker*, The Ambit of the Free Movement of Goods under the Association of Overseas Countries and Territories, 23 European Law Review 1998, 272; *Hendry/Dickson*, British Overseas Territories Law, 2011; *Karagiannis*, A propos du règlement des conflits d'intérêts entre les territoires dépendant d'États membres et les Communautés européennes, 75 Revue de Droit Internationale et de Droit Comparé 1998, 330; *Kochenov*, Substantive and procedural issues in the application of European law in the overseas possessions of European Union member states, 17 Michigan State Journal of International Law 2008/2009, 195; *Kochenov*, The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community, 36 Legal Issues of Economic Integration 2009, 239; *Kochenov* (ed.), EU Law of the Overseas. Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis, 2011; *Kochenov*, The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon, 20 Michigan State International Law Review 2012, 669; *Murray*, The EU and Member State Territories: The Special Relationship under Community Law, 2004; *van Rijn*, Brussel, Den Haag en de landen en gebieden overzee: problemen en perspectieven, in: de Groot and others (ed.), *OnzeKeuz*, Pirouettes in het Gemeenschapsrecht, 2001, 126; *Ziller*, L'association des pays et territoires d'outre-mer à la Communauté européenne, 101 Revue Française d'Administration Publique 2002, 127; *Zuber*, Changement de statut de Mayotte et Saint-Barthélemy: les enjeux de la mise en œuvre de l'acquis dans ces territoires, Revue du droit de l'Union européenne 2012, 473.

Article 198 [Aim and purpose of association] (ex Article 182 TEC)

The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the 'countries and territories') are listed in Annex II.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

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I. General remarks

1

Overseas Countries and Territories (OCTs) are neither sovereign States themselves nor are they fully integrated into any other sovereign State. The association of the OCTs with

the Union flows from the special constitutional ties that link these countries and territories to four EU Member States (Denmark, France, Netherlands and the UK). Articles 198–204 TFEU are solely concerned with the relationship between the Union and those OCTs explicitly listed in Annex II of the Treaty. Countries and territories enumerated here do not fall within the territorial scope of the TEU/TFEU.¹ Irrespective of the fact that their ‘nationals’ are fully-fledged EU citizens,² **OCTs are therefore no constituent parts of the EU.**³ Their legal status *vis-à-vis* the Union is rather governed exclusively by the special legal regime provided for in Part IV, developed and supplemented by detailed secondary legislation (see Article 203 TFEU). Thus, apart from Part IV and save in the exceptional case of an explicit cross-reference to EU law (e.g. Article 199 no. 5 TFEU), the latter is not applicable to OCTs within the meaning of Article 198 TFEU.⁴ In contrast, and subject only to (minor) modifications provided for in Articles 349, 355 TFEU,⁵ the whole body of European law does apply to other non-European territories of Member States (e.g. the French Overseas Departments or the Spanish exclaves Ceuta and Melilla on the North African coast⁶).

- 2 OCTs have been associated with the European Communities/the European Union ever since the entering into force in 1958 of the Rome Treaty. This special ‘associate’ status of OCTs constitutes the starting point and – to a certain extent – the blueprint for an autonomous EC/EU development policy. Within the European Commission and Directorate-General for Development and Cooperation – EuropeAid, the **OCT Task Force** (DEVCO.DGA2.TF) is responsible for the coordination of all activities in the sphere of EU-OCT relations.
- 3 In the course of the 1960s **decolonization process**, the overwhelming majority of one-time OCTs gained full independence and these ‘newly’ independent states have been linked to the Union by means of (multilateral) association agreements under Article 217 TFEU (Yaoundé (1963/69)/Lomé (1975/1979/1984/1990/rev. 1995)/Cotonou (2000)) since then.⁷ The **remaining group of currently 25 countries and territories** (see mn.7 below), mostly small and sometimes very remote islands, is not only very different from the original addressees of the OCT regime, but has also very specific needs and faces particular and rapidly changing social, economic and ecological challenges. It is quite obvious, therefore, that the legal framework governing the European Union’s policies and strategies towards the OCTs is in constant need of revision and readjustment, too.⁸ After its withdrawal from the European Communities in 1985 without, however, gaining full

¹ ECJ Case C-100/89 *Kaefer* [1990] ECR I-4667. Cf. also Article 52 TEU, Article 355 para. 2 TFEU.

² ECJ Case C-300/04 *Eman/Sevinger* [2006] ECR I-8055: ‘Persons who possess the nationality of a Member State and who reside or live in a territory which is one of the overseas countries and territories referred to in Article 299 para. 3 TEC may rely on the rights conferred on citizens of the Union in Part Two of the EC Treaty.’ As a matter of fact, all nationals of Greenland, the French and the Dutch OCTs have always automatically held the nationality of the related Member States and are therefore EU citizens within the meaning of Article 9 TEU. As from 21 May 2002, the citizens of all British OCTs are also British citizens, but they can renounce it in favor of remaining British overseas territories citizens only. On the difficulties arising from the discrepancy between the application of EU law *ratione personae* and *ratione loci*: *Kochenov*, ‘EU citizenship in the Overseas’, in: *Kochenov* (ed), *EU law in the Overseas*, 199 et seq.; see also Article 202 TFEU.

³ ECJ Case C-390/95 P *Antillean Rice Mills* [1999] ECR I-769, mn. 36.

⁴ Critical on this almost unanimously agreed issue *Ziller*, *Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States’ Territories*, in: *Burca and Scott* (eds), *Constitutional Change in the EU – From Uniformity to Flexibility?* (2000), 119.

⁵ ECJ Case C-300/04 *Eman/Sevinger* [2006] ECR I-8055, mn.46.

⁶ See *Khan*, *Ceuta and Melilla*, MPEIL mn. 19 et seq.

⁷ See Article 217 TFEU.

⁸ See Article 203 TFEU mn. 1.

independence from Denmark, Greenland joined the OCT group (for details, cf. Article 204 TFEU).

II. Association: notion and types

4

International law knows of no authoritative meaning of the term ‘association’. The term is generally used to denominate a **privileged relationship** short of (formal) membership of certain states, territories or international organizations with another international organization. As regards content, the notion of ‘association’ presupposes, in very general terms, ‘a voluntary grouping for a common goal’⁹.

The TFEU makes a clear distinction between **associations established unilaterally** (sometimes referred to as ‘constitutional association’ – see Articles 198 et seq. TFEU) and **treaty-based associations** (see Article 217 TFEU). Whereas the former set of rules (Articles 198–204 TFEU) is concerned with and strictly limited to the special relationship with certain non-self-governing overseas territories of Member States, in the relationship between equal partners, including in particular but not limited to (newly) independent developing States¹⁰, a particular proximity may of course only be created and framed by treaty law. Article 217 TFEU vests the Union with the power to enter into that latter, treaty-based association with third States. With regard to preferential market access, financial assistance and most other aspects regarding the privileged cooperation with the Union, the position of OCTs closely resembles the treatment of their sovereign siblings under the ACP–EU Partnership Agreement.¹¹ According to a recent analysis of the EU Commission, however, such parallelism does no longer correspond to the reality in the field, the specific social, economic and environmental challenges faced by the OCTs today, and the close historical, institutional and political ties between the OCTs and the EU.¹²

III. Countries and territories affected

6

Countries and territories falling within the scope of Articles 198 et seq. TFEU are enumerated in **Annex II**. Hence, an Annex II listing is a *conditio sine qua non* for a given territorial entity to be qualified as an OCT within the meaning of Part IV TFEU¹³. For qualification purposes, the significant differences between the OCTs themselves in terms of the degree of autonomy vis-à-vis the Member States to which they are linked are of no relevance whatsoever. The application of the OCT regime terminates at the very moment of the attainment of independence. However, upon request and on the basis of an accord under international law, the OCT regime may continue to apply up to and until accession to the ACP–EU Partnership Agreement has become effective for the newly independent

⁹ Borrowed from a civil law context (trade union): Opinion of the European Commission of Human Rights of 14 December 1979 in the Case of *Young, James and Webster v The United Kingdom* (Application No 7601/76; 7806/77), mn. 167 (3 Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights, 1984, 506).

¹⁰ See Article 217.

¹¹ See also *Bast*, European Community and Union, Association Agreements, mn. 4.

¹² Roadmap (08/2011). Decision replacing Decision on the association of the overseas countries and territories (http://ec.europa.eu/governance/impact/planned_ia/docs/2012_devco_002_oct_en.pdf). On the ongoing process of a modernization of the EU–OCT relationship see *infra* mn. 13 et seq. and Article 203 mn. 1.

¹³ Constitutive effect: Article 198 para. 1, s. 2 TFEU; see also Article 355 para. 2 subpara. 1 TFEU.

state¹⁴. This procedure has routinely been followed in the past, with the exception of the Sultanate of Brunei.

- 7 According to Article 355 para. 6 TFEU, the Annex II catalogue of overseas countries and territories may be modified by a European Council decision, adopted unanimously after consulting the Commission (particular form of a simplified revision procedure).¹⁵ As of 1 January 2014, Annex II lists the following countries and territories:

- (1) OCT which has special constitutional ties with **Denmark**: Greenland (see also the special provision in Article 204 TFEU).
- (2) OCTs which have special constitutional ties with the **French Republic**: New Caledonia and Dependencies – French Polynesia – French Southern and Antarctic Territories – Wallis and Futuna Islands – Saint Barthelemy – Saint-Pierre-et Miquelon.
- (3) OCTs which have special constitutional ties with the **Kingdom of the Netherlands**: Aruba – Curaçao – Sint Maarten – Bonaire – Saba – Sint Eustatius.
- (4) OCTs which have special constitutional ties with the **United Kingdom of Great Britain and Northern Ireland**: Anguilla – Bermuda – British Antarctic Territory – British Indian Ocean Territory – British Virgin Islands – Cayman Islands – Falkland Islands – Montserrat – Pitcairn – South Georgia and South Sandwich Islands – Saint Helena, Ascension Island, Tristan da Cunha – Turks and Caicos Islands.

- 8 In recent years, this catalogue was subject to three modifications: (a) Upon request of France that the status of the island of **Saint Barthélemy** should change from that of outermost region (cf. Article 349 TFEU) to that of overseas country or territory, covered by Part IV of the TFEU (letter of 30 June 2010), Annex II was adapted accordingly (effective from 1 January 2012).¹⁶ (b) Following the accession of **Mayotte** to the status of a 'département d'outre-mer' on 31 March 2011,¹⁷ effective as from 1 January 2014, the French island was deleted from Annex II¹⁸ and changed its status to an outermost region of the EU (cf. Article 349 TFEU), as envisaged in Declaration No 43 on Article 355 para. 6 TFEU.¹⁹ (c) Up to 10 October 2010, part of the disbanded **Netherlands Antilles**, the Dutch islands Curaçao, Sint Maarten, Bonaire, Saba and Sint Eustatius, due to a change in their constitutional status within the Kingdom of the Netherlands²⁰ as anticipated in Declaration No 60 by the Kingdom of the Netherlands on Article 355 TFEU,²¹ now appear as separate territorial units on that very list.

- 9 **Bermuda**, due to its extremely high stage of economic development – more than US \$ 104,000 per capita (2012) gives the island probably the highest GNI per capita in the world –, has never properly applied the association regime.²² The inclusion of **Antarctic Territories** in the OCT regime claimed by France and the United Kingdom

¹⁴ See Article 94 para.1 Cotonou Agreement.

¹⁵ On this so-called 'passarelle clause' see *Ziller*, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in: *Kochenov* (2011), 78 et seq.

¹⁶ Council Decision 2010/718/EU of 29 October 2010, (OJ L 325/4).

¹⁷ See: *Loi n° 2010-1487* of 7 December 2010 relative au Département de Mayotte (*JORF* n°0284 du 8 décembre 2010).

¹⁸ Council Decision 2012/419/EU of 11 July 2012, (OJ L 204/131).

¹⁹ OJ 2010 C 83/351.

²⁰ By virtue of the (revised) Charter for the Kingdom of the Netherlands, Aruba, Curaçao, Sint Maarten and the Netherlands proper are now (as of 10 October 2010) constituent countries of the Kingdom of the Netherlands and as such constitutional equal partners (Article 1 para. 1). Bonaire, St Eustatius and Saba instead gained the status of special municipalities of the Netherlands (Article 1 para. 2). For a concise overview see: *Kochenov*, *Dutch Caribbean Territories Facing EU Law*, *West Indian Law Journal* 2012, 147 et seq.

²¹ OJ 2010 C 83/358.

²² Cf. preliminary consideration No 22, Overseas Association Decision 2001/822/EC of 27 November 2001 (OJ L 314/01).

(both void of a permanent local population) is not inconsistent with the Antarctic Treaty System of 1959 (Article IV: 'freezing' of territorial sovereignty claims, 402 UNTS 71).

The **economic importance** of most OCTs rests primarily upon the marine resources 10 within their 200 mile Exclusive Economic Zone (cf. Articles 55 et seq. UNCLOS III). However, some OCTs also dispose of rich raw material deposits (e.g. Nickel in New Caledonia²³).

IV. Aims and purposes

11

In view of the somewhat unfortunate omission by the Lisbon Treaty of the express mentioning of OCT-EU relations from the catalogue of EC activities (ex Article 3 para. 1 lit. s TEC: 'the activities of the Community shall include ... the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development'), this entire policy area must be deemed to be now covered by the Union's general 'competence to carry out activities and conduct a common policy ... [i]n the area[...] of development cooperation ...' (**Article 4 para. 4 TFEU**). And in fact, in far-reaching analogy with the principles and objectives of the Union's general development cooperation policy (see Articles 208 et seq. TFEU), Article 198 subpara. 2 TFEU is strongly committed to the donor/beneficiary approach of a (traditional) development association (Promotion of the economic and social development of the countries and territories and establishment of close economic relations). However, tying in with the old Article 3 para.1 lit. s TEC, Article 198 subpara. 3 TFEU, with its explicit reference to the need for development policy to include a social and cultural dimension, goes clearly beyond a narrow politico-economic approach only. Both subparagraphs must further be read in the context of para. 7 of the preamble to the TFEU, in which the Union and its Member States both emphasize the solidarity which binds Europe and the overseas countries as well as their desire to ensure the development of the OCTs prosperity, in accordance with the principles of the Charter of the United Nations. This latter reference is primarily made to Article 73 UN Charter, a provision committed to a **very broad development concept**, the key parameter of which being the respect for and the promotion of the interests of the inhabitants of territories concerned.²⁴ Apparently, this approach bears a resemblance to the right to self-determination of peoples, a core principle of today's general international law. However, unlike Chapter XI of the UN Charter, Part IV TFEU does not explicitly provide a vision for a path towards full independence of OCTs, since '[t]he political aspirations of the peoples'²⁵ of the overwhelming majority of these territories²⁶ are simply not directed at that goal.²⁷ Due to their economic weakness as well as the very close political and historical ties to the European mainland, for almost all OCTs independence is neither a realistic option nor is this political perspective seriously pursued. However, Articles 198 et seq. TFEU do certainly not prevent a territory to choose

²³ Cf. *Wacaster*, The Mineral Industry of New Caledonia, USGS, 2008 Minerals Yearbook, 18.1.

²⁴ See *Fastenrath*, Commentary on Article 73, in: Simma/Khan/Nolte/Paulus (eds), The Charter of the United Nations. A Commentary (3rd edn 2012), mn. 19.

²⁵ See Article 73 lit. b UN-Charter.

²⁶ For the time being, exception may be made only regarding developments in Greenland and – possibly – (French) New Caledonia, a territory with quite fierce pro-independence forces (see: *Custos*, New Caledonia, a Case of Shared Sovereignty within the French Republic, 13 Eur. Pub. L. 2007, 97, and *Berman*, The Nouméa Accords: Emancipation or Colonial Harness?, 36 Tex. Int'l L. J. 2001, 277.

²⁷ Cf., for instance, the results of the 2013 Falkland Referendum: Of 1,517 votes cast – a turnout of more than 90 % – 1,513 were in favour of remaining a UK overseas territory, while just 3 votes were against.

full independence and in a mid-term perspective Greenland (and/or New Caledonia) may well become test cases for such a scenario.

- 12 Founded in 2003 by the OCTs self-governing authorities as a non-profit organization under Belgian law, the strategic objectives of the **Association of Overseas Countries and Territories of the European Union (OCTA)**²⁸ include, *inter alia*, the consolidation and reinforcement of solidarity between OCTs and EU stakeholders and the making of recommendations and carrying out of various projects/programmes to enhance opportunities, comparative advantages and natural assets in order to strengthen the position of OCTs at regional and global levels.²⁹ The founding of OCTA has not only met with the express approval of the EU and its Member States, in particular those directly concerned.³⁰ Over the past decade, OCTA has rather been involved with increasing intensity into the dialogue and cooperation between the OCTs and the EU, *inter alia*, through the presentation of position papers (cf., for instance, the 2009 Political Declaration and the 2010 Strategic Plan) and its input to multilateral meetings (involving the European Commission, all OCTs, and the relevant EU States), including in particular the annual OCT Forum but also other (multilateral) meetings of policy makers and technical experts. The increased involvement of OCTA as a most valuable negotiation tool fits perfectly into the philosophy of a renewed OCT-EU relationship to be guided by a reciprocal partnership rather than a classic development cooperation approach.
- 13 **Declaration No 36** annexed to the Final Act of the **Amsterdam Treaty (1997)**³¹ acknowledged that the special arrangements for the association of OCTs in force were highly outdated: Designed in the mid-1950s for countries and territories that were numerous, covered vast areas and had large populations, the legal framework for the OCT-EU relationship had indeed changed little ever since – regardless of a dramatic change in the size and composition of the group of beneficiaries, which had been reduced over the years to hardly more than a handful of extremely scattered island territories with a total population of less than 1 million and struck by particularly severe geographical and economic handicaps. In order to keep the ability to effectively pursue the purpose of association to promote the OCTs economic and social development of the countries and to establish close economic relations between OCTs and mainland Europe, the Conference therefore invited the Council to review the association arrangements with a fourfold objective of (a) promoting the economic and social development of the OCTs more effectively; (b) developing economic relations between the OCTs and the European Union; (c) taking greater account of the diversity and specific characteristics of the individual OCTs, including aspects relating to freedom of establishment; and finally (d) ensuring that the effectiveness of the financial instrument is improved.
- 14 On 27 November 2001, acting under Article 203 TFEU (then: Article 187 TEC), the Council complied with that request by adopting the Decision 2001/822 on the association of the overseas countries and territories with the European Community (**‘Overseas Association Decision (OAD)’**). After providing for a comprehensive set of (new) rules and procedures for more than a decade, Decision 2001/822 expired on 31 December 2013. It was followed by Decision 2013/755/EU of 25 November 2013 on the association

²⁸ Current membership is 22, including all inhabited OCTs and TAAF (French Southern and Atlantic Lands).

²⁹ For detailed information, see ‘www.octassociation.org’ and *Baetens*, The Overseas Countries and Territories Association: The Added Value of a Concerted Approach, in: Kochenov, European Union Law of the Overseas (2011), 383 et seq.

³⁰ See also the Joint (OCT/EU stakeholders) Position Paper (2011), which expressly acknowledges ‘[t]hat the Association of OCTs (OCTA) has evolved considerably in accordance with its strategic objectives and the imminent establishment of long term technical assistance.’

³¹ See Decision 528/2012/EU of 24 September 2012 (OJ L 264/1).

of the overseas countries and territories with the European Union ('Overseas Association Decision')³², applicable as of 1 January 2014.³³

**Article 199 [Objectives of association]
(ex Article 183 TEC)**

Association shall have the following objectives.

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.

2. Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which it has special relations.

3. The Member States shall contribute to the investments required for the progressive development of these countries and territories.

4. For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.

5. In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 203.

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I. General overview

1

The use of the term 'objectives' in the article's introductory sentence is somewhat misleading: The objectives as such having already been specified in Articles 198 subpara. 2 TFEU, 199 TFEU (merely) provides certain basic criteria for the concrete shaping of the contents and substance of the EU-OCT association regime. For certain policy areas, these binding guidelines are further specified and supplemented in the treaty itself (duties: Articles 200, 201 TFEU; free movement of workers: Article 203 TFEU). All these provisions exert binding force on the modalities of implementation measures taken under Article 203 TFEU and secondary legislation does indeed expressly commit itself to 'the overall objectives laid down in Article 199 TFEU'.¹ However, the general legal and programmatic framework provided for in Article 199 TFEU gives ample room for a priority setting: Very much committed to a traditional development policy approach, 'the reduction, prevention and, eventually, eradication of poverty and [the] sustainable development and gradual integration into the regional and world economies'² was still placed centre stage in the 2001 OAD, valid until 31 December 2013. In view of the 'post-

³² OJ L 344/1.

³³ See Article 99 of the Decision. For details and current developments regarding the follow-up regime, see Article 203 TFEU mn. 2.

¹ Article 3 para. 2 OAD 2013/755.

² Article 1 para. 1 subpara. 2 Overseas Association Decision 2001/822.

colonial' structure of today's group of OCTs and the progressive approximation of OCTs to the European legal space, in recent years this backward-looking strategic orientation met with growing criticisms.³ Unfortunately enough, new realities are (still) not well reflected in EU treaty law, and the Lisbon Treaty has missed another opportunity for a long overdue adjustment mirroring OCTs actual needs, their potential and their unique relationship with the EU. However, matching OCTs actual development priorities, **OAD 2013/755**, in rather sharp contrast to former legislation (and in particular OAD 2001), now **commits itself to new objectives**, namely OCT's competitiveness, the strengthening of the OCTs' resilience, the reduction of their economic and environmental vulnerability and the promotion of cooperation between them and other partners.⁴

2

II. Principles (nos 1–5)

It follows from **Article 199 nos 1 and 2 TFEU** that, although the movement of goods between OCTs and Member States is no intra EU-trade, the applicable trade regime is of a particularly privileged nature. Due to the developmental objectives of Part IV, arrangements draw a distinction between the direction of the flow of good. With duty free and quota free access to the EU market, goods originating in OCTs benefit from conditions very similar, but not identical⁵ to those prevailing on the internal EU market (see Article 199 no. 1 TFEU). In contrast, exports from EU Member States to OCTs merely enjoy a legal guarantee of equal treatment with those from the Member State with which the OCT has special relations (see Article 199 no. 2 TFEU), in other words a specific kind of most favourite nation treatment.⁶ In sum, obligations flowing from Article 199 nos 1 and 2 TFEU amount to, and end with, hardly more than a unilateral liberalization of trade in favour of OCTs 'achieved by a dynamic and progressive process [...] which is in no way automatic'.⁷

3 According to **Article 199 no. 3 TFEU**, OCTs are entitled to financial assistance from EU-Member States. However, this provision itself being silent on the issue, detailed information on the nature and extent of these obligatory allocations are provided in Part III of OAD 2001/822 (Articles 18 et seq.) and – with effect as of 1 January 2014 – in Part IV of OAD 2013/755 (Articles 74 et seq.). For the period of 2008 to 2013 (10th European Development Fund), a sum of 286 million Euro was provided for⁸; further budget was granted through the European Investment Bank⁹, a special OCT-investment facility¹⁰, and through participation in budgetary aid for developing countries¹¹ as well as other

³ See Green Paper (COM (2008) 383 final and *Bartels*, The Trade and Development Policy of the European Union, in: Cremona (ed), *Development in EU External Relations Law* (2008), 129 et seq., 171.

⁴ Cf. Article 3 para. 2 OAD 2013/755.

⁵ ECJ Case C-106/97 *Dutch Antillian Dairy Industries* [1999] ECR I-5997, mn. 38: 'Trade between the OCTs and the Community does not necessarily benefit from a regime identical to that governing trade between Member States since, although association of the OCTs with the Community is governed by a special regime, the relationship remains one of association [...] there is a fundamental difference between the regime governing trade between the OCTs and the Community and the regime established by the Treaty in respect of trade between the Member States. The latter is trade transacted within the framework of the internal market, as distinct from trade between OCTs and the Community, which is governed by the imports regime.'

⁶ See also Article 46 OAD 2013/755. With respect to third states, most favourable treatment for EU Member States is granted only in relation to 'major trading economies' (cf. Article 45 paras 2 and 4 OAD 2013/755: 'share of world merchandise exports above one per cent').

⁷ ECJ Case C-310/95 *Road Air* [1997] ECR I-2229, mn. 40.

⁸ Article 1 Annex II A OAD 2001/822 (approx. 1 % of the total budget).

⁹ Annex II B OAD 2001/822.

¹⁰ Annex II C OAD 2001/822.

¹¹ Annex II E OAD 2001/822.

community programmes¹². For the period 2014–2020 financial resources are available under the 11th European Development Fund.¹³

According to **Article 199 para. 4 TFEU**, the principle of non-discrimination also applies to the participation in tenders and supplies of all investments financed by the Union. This maxim applies to all natural and legal persons who are nationals of a Member State or of one of the countries and territories. Although, at least as a general rule, residents of OCTs hold EU citizenship via Member State nationality, the second alternative of this formula ('or of one of the countries and territories') recognizes the possibility of a (separate) OCT citizenship, something which is at present of practical importance in particular with respect to the British OCTs.¹⁴ Article 20 para. 3 lit. b OAD 2001/822 (now Article 85 para. 4 lit. a OAD 2013/755) provides for (rudimentary) means to secure compliance with this obligation. However, it has remained unclear how the strict non-discrimination rule enshrined in Article 199 no. 4 TFEU can be reconciled with the objective to 'promote the development of enterprises by taking such steps as are necessary to improve the business environment ...' (Article 26 lit. g OAD 2001/822), an objective which may also, under certain circumstances, call for the granting of (certain) privileges to OCT enterprises in the area of public procurement.

According to the wording of **Article 199 no. 5 TFEU**, the principle of non-discrimination also prevails with respect to the right of establishment in EU Member State-OCT relations, and it does so in full reciprocity. Thus, as a matter of principle, not only nationals, companies and enterprises from OCTs are to benefit from the freedom of establishment under Articles 49 et seq. TFEU, but OCTs, too, are to guarantee a non-discriminatory treatment of respective economic activities by natural and legal persons from Member States. However, the enjoyment of these legal positions is explicitly made subject to special regulations adopted pursuant to Article 203 TFEU. And indeed, the OAD 2001/822 contained strong qualifications with regard to the freedom of establishment – as does (in a very similar way) the follow-up regulation in Article 51 OAD 2013/755): According to Article 45 para. 2 lit. a OAD 2001/822/Article 51 para. 1 lit. a OAD 2013/755, the liberalization with respect to the establishment in economic activities for entrepreneurs from OCTs does, as a matter of fact, not go beyond the respective GATS standards. Pursuant to lit. b), of the 2001 provision, OCT authorities on their part are merely obliged to 'afford nationals, companies or enterprises of the Member States treatment that is no less favourable than that which they extend to nationals, companies or enterprises of third countries and ... not [to] discriminate between nationals, companies or enterprises of Member States'.¹⁵ This non-discrimination standard is not only very similar to the one applied for the flow of goods (see Article 200 para. 3 TFEU), but is further qualified by the possibility of OCT authorities to adopt measures 'promoting or supporting local employment, adopt regulations to aid their inhabitants and local activities'¹⁶. However, it may be recalled that restrictions on the right of establishment may not apply for the bulk of routine cases that an OCT resident holds an EU Member State nationality and is as such entitled to EU citizenship status. EU law does indeed not know of a (discriminatory) differentiation according to the EU citizen's place of residence.

¹² Annex II F OAD 2001/822.

¹³ See Article 77 (a) OAD 2013/755 and for details Annex II OAD 2013/755. For further and up-to-date information, see also http://ec.europa.eu/budget/biblio/documents/FED/fed_en.cfm.

¹⁴ On the peculiarities of British citizenship with respect to OCT residents see Article 202 mn. 1 note 2019.

¹⁵ For the new, somewhat more complex, albeit in its essence identical formula, see Article 51 para. 1 lit. b OAD 2013/755. For further qualifications regarding the right to establishment see para. 2 of this provision.

¹⁶ See Article 45 para. 3 OAD 2001/822 and Article 51 para. 3 OAD 2013/755.

**Article 200 [Prohibition of customs duties; exemptions]
(ex Article 184 TEC)**

(1) Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of the Treaties.

(2) Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.

(3) The countries and territories may, however, levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.

The duties referred to in the preceding subparagraph may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.

(4) Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff.

(5) The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.

- 1 The customs regime between the OCTs on the one hand and the Union and its Member States on the other is of a peculiar, *sui generis* nature: Since OCTs guard their right to conduct an autonomous customs policy *vis-à-vis* third states, mutual relations in this field may certainly not be qualified as a customs union. However, the strict prohibition of the levy of customs duties (and charges having equivalent effect)¹ applying with all vigour to imports of goods from and originating in² the OCTs only, we are not even facing a full-fledged free trade zone, but only an imperfect one – something which leads to the **inapplicability of Article XXIV GATT** (preferential trade agreements) to this special relationship. Indeed, in the opposite direction – that is regarding goods moving from the Union to the OCTs (but also between the latter) – the same rule applies but rhetorically (Article 200 para. 2 TFEU). Subject to far-reaching qualifications (Article 200 para. 3 TFEU: permission for OCTs to levy duties which meet the needs of their development and industrialization or produce revenue for their budgets), the customs regime for exports from the Union to the OCTs must, in its practical application, merely comply with the principle of non-discrimination: In order to avoid the perpetuation of a preferential trade relation between OCTs and the Member States to which they are linked, Article 200 para. 5 TFEU provides that in the levy of duties OCTs may not differentiate between the various Member States.³ It is a matter of serious doubt whether this unidirectional free trade practice, ultimately based purely on political opportunism, is really compatible with the precept of rule (free trade) and exception embodied in Article 200 paras 2 and 3

¹ ECJ Case C-260/90 *Leplat* [1992] ECR I-643. Cf. also Article 34 TFEU.

² ECJ Case C-310/95 *Road Air* [1997] ECR I-2229.

³ Reiterated and confirmed in Article 46 para. 1 OAD 2013/755: ‘The Union shall not discriminate between OCTs and the OCTs shall not discriminate between Member States of the Union.’

TFEU.⁴ The provision contained in Article 200 para. 4 TFEU is long since obsolete and should have been deleted (at the latest) during the Lisbon redrafting process.

As far as the **movement of goods** is concerned, Article 200 para. 1 TFEU implements 2 and substantiates the basic principle of the EU-OCT cooperation regime laid down in Article 199 No 1 TFEU: The flow of goods between OCTs and the Union is to follow the same rules as applied on the internal EU market. It was hardly compatible with this programmatic approach that Article 42 Overseas Association Decision 2001/822 allowed for safeguard measures in case of 'serious disturbances,' something which is absolutely unthinkable in the relationship between Member States.⁵ Further, by virtue of Article 45 OAD 2013/755, the criteria for the (exceptional) admissibility of the levy of duties by OCTs for goods originating in the EU listed in Article 200 para. 3 TFEU have now been transformed into a broad, indeed virtually unrestricted and exclusive discretionary power of OCTs.⁶

The customs regime set out in Article 200 TFEU is thus strongly shaped by secondary 3 legislation and, in a certain disregard of the rather clear wording of Article 199 no. 1 TFEU and Article 200 para. 1 TFEU, only of quite **limited similarity with** the rigid treaty prohibitions (in particular Article 30 TFEU) governing **the internal market regime**.

Article 201 [Deflections of trade] (ex Article 185 TEC)

If the level of the duties applicable to goods from a third country on entry into a country or territory is liable, when the provisions of Article 200(1) have been applied, to cause deflections of trade to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures needed to remedy the situation.

Although not part of the Union's customs territory and thus in principle free to apply 1 their own, self-chosen duty rates to goods from third countries, OCTs enjoy comprehensive preferential treatment under Article 200 para. 1 TFEU. Under very specific and limited circumstances, the OCT's exercise of its autonomous customs jurisdiction may cause trade distortions to the detriment of an EU Member State and thus affect adversely the functioning of the internal market. This may in particular occur if the rate applied by the OCT for a certain good lies below the Common Customs Tariff (see Article 31 TFEU) and the EU tax exemption (see Article 200 para.1 TFEU) is – by way of exception – extended to non-originating products in free circulation in the OCTs – something which has now, however, under the regime of the new OAD, become **a mere theoretical scenario**.¹ All relevant issues having been regulated through the rules of origin and the

⁴ See, to that effect, also *Tietje*, Art. 200, in GHN, *Das Recht der Europäischen Union* (50th edn 2013), mn. 6.

⁵ Legislation endorsed, however, by a settled case-law: Overall assessment and weighing of all relevant policies 'not only of the principles in Part Four of the Treaty but also of the other principles of Community law, including those relating to the common agricultural policy': Case C-110/97 *Netherlands v Council* [2001] ECR I-8763, mn. 53. A similar regime is now provided in Annex VII and VII of OAD 2013/755.

⁶ Para. 1 of this provision entitles OCTs 'to retain or introduce, in respect of imports of products originating in the Union, such customs duties or quantitative restrictions as they consider necessary in view of their respective development needs.'

¹ See Article 36 OAD 2001/822, which, however, also provided for safeguard measures in case of 'serious disturbances' in the sense of Article 42 para. 1 OAD. By virtue of the new OAD 2013/755, the cate-

measures to ensure its proper implementation being set out in the OAD, remedies provided in Article 201 TFEU are indeed of very little practical value (if of any at all).

**Article 202 [Legal acts on the freedom of movement of workers]
(ex Article 186 TEC)**

Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203.

- 1 EU treaty law itself contains no rules whatsoever concerning the free movement of workers from OCTs to Member States and *vice versa*. Legislation on the subject is expressly envisaged in Article 202 TFEU. However, no legal act regulating this matter has ever been adopted. Since the right of entry to Member States flows directly from the EU citizen status of the (overwhelming majority of) OCT residents,¹ one may with good reasons argue that Article 202 TFEU has lost (most of) its *raison d'être*: **EU citizens residing in the OCTs enjoy full EU citizenship rights**, including in particular that of free movement (Article 21 TFEU). Member States are prohibited to treat EU citizens differently as a consequence of their provenance² and are – in particular – not entitled to challenge the nationality status of a person producing a valid passport or ID card issued in any of the OCTs.³ Against the legal background of European citizenship (see Articles 20 et seq. TFEU), it is indeed hardly convincing that the Commission is obviously (still) not willing to treat Member States' nationals residing in the OCTs unconditionally as 'workers of the Member States' within the meaning of applicable EU law.⁴ And in effect, relevant EU legislation, for instance Directive 2004/38 of 29 April 2004,⁵ knows of no differentiation between EU citizens by virtue of his or her place of residence. Tying in with their EU citizenship status, the free movement rights for residents from OCTs include entitlement to work within the territory of the Union under the general conditions provided for in EU law.⁶
- 2 However, the fact that although OCT residents, as a rule, fall *ratione personae* within the scope of the EU treaties and the territory of OCTs does not do so *ratione loci*, leads to a rather **peculiar unidirectional effect of EU citizens' free movement rights**: Whereas EU law grants the entry to Members States from OCTs, owing to the non-applicability of EU law to the territory of OCTs, the same does not apply in the other direction: Whether or not and under which conditions EU citizens may reside (and work) in the OCTs is

gory of products 'in free circulation but not-originating in OCTs' has been replaced by more flexible rules of origin for OCT goods exports to the Union (see the rather sophisticated concept of 'originating-products' in Annex VI and the 'sanctions regime' provided for in Annex VII (Temporary withdrawal of preferences) and Annex VIII (Safeguard and surveillance procedures).

¹ All nationals of Greenland and the French and Dutch OCTs also have the nationality of the related Member State automatically. As from 21 May 2002, the citizens of all the British OCTs are also British citizens, but they can renounce it in favor of remaining British overseas territories citizens only and are not obliged to have a passport describing them as a British citizen (COM(2008) 383 final, 6). On the intricacies of British citizenship under the 2002 British Overseas Territories Act, see *Hendry/Dickson*, British Overseas Territories Law (2001), 200 et seq.

² Cf. *Kochenov*, EU citizenship in the Overseas, in: *Kochenov* (2011), 212.

³ ECJ Case C-369/90 *Michellelt* [1992] ECR I-4239, mn. 14.

⁴ Green Paper. Future relations between the EU and the Overseas Countries and Territories COM (2008) 383 final, 6.

⁵ OJ 2004 L 229/35.

⁶ See *Kochenov*, 36 Legal Issues of Economic Integration 2009, 239.

therefore a matter solely of OCT law or may eventually – in order to equalize the two directions of free movement rights – be made subject of legislation under Article 202 TFEU.

**Article 203 [Implementing secondary legislation]
(ex Article 187 TEC)**

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

Article 203 TFEU provides the legal basis not only to guarantee the operability of the rather general and somehow rigid legal framework ('principles') of the treaty law's association regime (see Articles 198 et seq. TFEU), but also to make it become and remain a living instrument. This provision is in fact due to the efforts of all interested stakeholders (Union, Member States and OCTs) to adapt the regime in regular intervals in accordance with the specific social, economic and environmental needs of OCTs, which do indeed change over time. It was recognized in the early 1990s at the latest that strong parallelism hitherto prevailing in the relations of the EC/EU with ACP on the one hand and OCT countries on the other did no longer mirror realities in the field and Member States urged the EU institutions to subject the existing regime to a radical review procedure (see Declaration No 36 to the 1997 Amsterdam treaty¹). A first step in this direction was the adoption on 27 November 2001 of Decision 2001/822/EC.² In a technical sense, however, this so-called **Overseas Association Decision (OAD)** is rather a regulation (see Article 288 para. 2 TFEU) than a decision (see Article 288 para. 4 TFEU).

The Overseas Association Decision 2001/822 and the Greenland Decision³ both expired on 31 December 2013. With the publication on 25 June 2008 of a Green Paper on 'Future relations between the EU and the Overseas Countries and Territories'⁴, the Commission initiated a broad **debate on the further development and the future shaping of the legal framework**. Unanimity prevailed that the special relationship between the EU and the OCTs should move away from a classic development cooperation approach to a reciprocal partnership to support the OCTs' sustainable development and promote the EU's values and standards in the wider world. According to a further Commission Communication released in 2009⁵, the focus of the renewed OCT-EU partnership should be on three central objectives tailored to the OCTs' specificity: (1) Enhancing competitiveness, (2) strengthening resilience and (3) promoting cooperation. These objectives are, according to the Commission, to be pursued via five inter-linked principles

¹ OJ 1997 C 340.

² The decision's original date of expiry (31 December 2011) was extended to 31 December 2013 in order adjust to the term of the 10th EDF (Decision 2007/249). Article 23 of Decision 2001/822 provides the basis for further secondary legislation by the Commission (Regulation 2304/2002, amended Regulation 1424/2007). For the further development, see mn. 2.

³ See Article 203 mn. 3.

⁴ COM (2008) 383 final.

⁵ COM (2009) 623.

and axes of cooperation, which are: (a) to support the development of OCTs as centres of excellence, (b) to support the voluntary adoption by OCTs of EU rules and standards, (c) to cooperate with OCTs on environmental issues and disaster risk reduction, (d) to promote OCT accessibility, and (e) to ensure trade and economic cooperation. This approach was expressly approved by the Council⁶ and also found the support by stakeholders most directly affected, the OCTs and their four ‘associated’ Member States.⁷ In July 2012, the Commission finally transmitted a proposal for a post-2013 Overseas Association Council Decision to EU institutions (and national parliaments).⁸ A Commission Staff Working Document of 17 July 2012 accompanying this proposal⁹ provides most valuable insights into the *raison d’être* of the detailed rules and the procedure for the revised EU-OCT Association, the possible areas of cooperation between the EU and the OCTs, the trade regime that will govern the exchanges and the cooperation in that field between OCTs and the EU as well as the different financial instruments to which OCTs will be eligible to (in particular the 11th EDF,¹⁰ but also other, horizontal programs). This proposal, suffering only minor modifications during the legislative process, was finally adopted on 25 November 2013 as **Decision 2013/755/EU** on the association of the overseas countries and territories with the European Union (‘Overseas Association Decision’) and entered into force timely with effect as from 1 January 2014.¹¹

- 3 The Lisbon Treaty has considerably **strengthened the position** of both, Commission and Parliament in the legislative process in this specific policy area. Whereas until 2009 all what was needed in this respect was a (unanimous) Council decision, a proposal from the Commission is obligatory now as is the consultation of the Parliament. Since ideas and visions developed by the Commission (e.g. in its 2008 Green Paper mentioned in mn. 2) did not find the (immediate) approval by all Member States, from a policy perspective, this is indeed an important change.
- 4 Legislative acts under Article 203 TFEU have general application. They are binding in their entirety and **directly applicable** in all Member States as well as in the OCTs. If they are sufficiently defined and unconditional, they may also have direct effect¹²
- 5 It follows from the ECJ ruling in *Kaefer and Procacci*¹³ that OCT courts and tribunals may have access to make **preliminary references (Article 267 TFEU)** if problems of the interpretation of the Overseas Association Decision (or any other pertinent secondary legislation) arise. In accordance with the (controversial) reasoning of the Advocate General,¹⁴ the Court held that these judicial bodies may – under certain circumstances –

⁶ Document 16710/09 of 10 December 2009.

⁷ Joint Position Paper on the Future of Relations between the Overseas Countries and Territories and the European Union of 28 February 2011, handed to the EU Commissioner for Development at the EU/OCTs Forum on 1 March 2011 (http://ec.europa.eu/europeaid/where/octs_and_greenland/index_en.htm).

⁸ COM (2012) 362 final of 16 July 2012.

⁹ SWD (2012) 194 final of 16 July 2012.

¹⁰ See Commission Communication (COM (2011) 837) on Preparation of the multiannual financial framework regarding the financing of EU cooperation for African, Caribbean and Pacific States and Overseas Countries and Territories for the 2014–2020 period (11th European Development Fund). See also COM (2013) 306 on the provisional application of the Internal Agreement (before ratification by all Member States) in order to ensure a timely application of the 11th EDF.

¹¹ OJ 2013 L 344/1.

¹² See ECJ Cases 91/79 *Hansen* [1979] ECR 935; C-430/92 *Netherlands v Commission* [1994] ECR I-5216; C-110/97 *Netherlands v Council* [2001] ECR I-8807.

¹³ ECJ Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647 concerning the Administrative Court in French Polynesia.

¹⁴ Opinion of Advocate General Mischo [1990] ECR I-4647. See (with further references) *Broberg*, Access to the European Court of Justice by Courts in Overseas Countries and Territories, in: Kochenov (2011), 137 et seq.

qualify as courts or tribunals 'of a Member State' within the meaning of Article 267 TFEU.

**Article 204 [Application to Greenland]
(ex Article 188 TEC)**

The provisions of Articles 198 to 203 shall apply to Greenland, subject to the specific provisions for Greenland set out in the Protocol on special arrangements for Greenland, annexed to the Treaties.

Bibliography: *Albæk Jensen*, The position of Greenland and the Faroe Islands within the Danish realm, European public law 9 (2003), 170; *Göcke*, The 2008 referendum on Greenland's autonomy and what it means for Greenland's future, ZaöRV 69 (2009), 103; *Harhoff*, Greenland's Withdrawal from the European Communities, CMLRev 1983, 13; *Krämer*, Greenland's European Community (EC-) Referendum, Background and Consequences, GYIL 25 (1982), 273; *Weiss*, Greenland's Withdrawal from the European Communities, ELRev 1985, 173.

In 1973, as part of the Danish Realm, Greenland joined the European Communities. 1 After the granting of **far-reaching internal autonomy** (*Hjemmestyre* = 'Home Rule') and the holding of a referendum, in which a majority of 53 % of the Greenlandic population voted in favour of withdrawal, Greenland became the first and hitherto sole territorial entity ever to quit the Union.¹ At the time, tangible disputes over natural resources (notably fishing rights) and an overall wish to minimize the direct influence from outside of Greenland brought about this (rather narrow) majority voting.

Although Greenland is obviously continuing its road to (full) self-governance,² strong 2 legal as well as political and economic ties between Greenland and the Union have outlived the separation process: Given the persisting constitutional arrangements with Denmark, the 1984 Greenland Treaty (see mn. 1 above) inserted Article 204 TFEU (ex Article 188 TEC) and amended the Annex II listing accordingly, thus according to Greenland the status of an Overseas Country and Territory (OCT). The Overseas Association Decision 2001/822 (see Article 203 TFEU) applied to Greenland³, too, as does its successor regime, effective as from 1 January 2014).⁴ The application of the OCT regime to Greenland provided for in Articles 193–203 TFEU is subject only to the **Protocol on Special Arrangements for Greenland**,⁵ which makes the tariff free access of Greenlandic fisheries products to the EU conditional upon the existence of a satisfactory fisheries agreement between the two partners. Fisheries are in fact still at the very heart of the special EU-Greenland legal relationship and the respective agreements are thus almost all about the extent of access by EU fishing vessels to the Greenlandic Exclusive Economic Zone (EEZ) and the financial quid pro quo: Basic legal acts include the 2007 Fisheries Partnership Agreement⁶ and, based on scientific advice with the objective to promote sustainable and responsible fishing activities, the 2012 Protocol setting out the fishing opportunities and financial contribution,⁷ setting out for the three-year period 2013–2015, *inter alia*, detailed quotas, procedures and payment methods.

¹ Cf. Treaty amending, with regard to Greenland, the Treaties establishing the European Communities of 13 March 1984: (OJ 1985 L 29/1) effective as of 1 February 1985.

² On the successful 2008 Referendum on a new form of self-government (*Selvstyre*), see *Göcke*, 69 ZaöRV 2009, 103 et seq.

³ Cf. Article 1 para. 3 Overseas Association Decision.

⁴ Decision 2013/755, OJ 2013 L 344/1 (Article 2).

⁵ Protocol No 34 (OJ 1985 L 29/7).

⁶ OJ 2007 L 172/4.

⁷ OJ 2012 L 293/05.

- 3 **Outside fisheries**, EU financial assistance to Greenland (approx. € 25 Mio. per year) comes from the General EU-Budget, and not – as in the case of other OCT's – from the EDF.⁸ Financing Agreements are concluded annually. In recent years, there has been a clear tendency to extend the scope of (financial) cooperation from the traditional support for the Greenlandic education and training sector to new areas, such as environment, research and food safety.

PART FIVE

EXTERNAL ACTION BY THE UNION

TITLE I

GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 205 [Principles of action on the international scene]

The Union's action on the international scene, pursuant to this part, shall be guided by the principles of, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty of the European Union.

Bibliography: *Bungenberg*, Going Global? The EU Common Commercial Policy after Lisbon, EYIEL 1 (2010), 123; *Craig*, The Lisbon Treaty, 2010; *Cremona*, The Union as a Global Actor: Roles, Models and Identity, CMLRev. 41 (2004); *Eckhout*, EU External Relations Law, 2nd ed. 2011; *Koutrakos*, EU International Relations Law, 2006.

- 1 Part Five of the TFEU restructures the Union's **external powers besides the Common Foreign, Security and Defence Policy** (CFSP, CSDP, see Title V TEU). It encompasses the fields of Common Commercial Policy (Articles 206 et seq. TFEU), Development Cooperation (Articles 208 et seq. TFEU), Economic, Financial and Technical Cooperation with Third Countries (Articles 212 et seq. TFEU) and Humanitarian Aid (Articles 214 TFEU).
- 2 Beyond that, Part Five of the TFEU contains general provisions on the Union's external action that apply to the entire spectrum of external affairs, including both the CFSP and the CSDP. Specifically, those provisions pertain to restrictive measures for the implementation of sanctions (Article 215 TFEU), to the procedures of concluding international agreements (Articles 216 et seq. TFEU), as well as to the Union's relations with international organisations and third countries and Union delegations (Title VI, Articles 220 et seq. TFEU). The similarly included **solidarity clause** refers to internal solidarity vis-à-vis other Member States (Article 222 TFEU) and does not actually concern the external affairs of the Unions; it therefore appears **incongruous**.
- 3 Article 205 TFEU refers to the **general provisions on the Union's external action**. Its principles are to be found in Articles 21 and 22 TEU which apply to both TEU and TFEU (see there for details). Because of the henceforth unitary structure, these principles apply to the entire field of the Union's external affairs, thus including the Common Foreign, Security and Defence Policy pursuant to Chapter 2 of Title V of the TEU, as much as to

⁸ For the legal framework for cooperation outside fisheries see: Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other (OJ L 76/1), covering the period from 2014–2020.

the Union's external action on the basis of the TFEU, notably Common Commercial Policy, Development Cooperation, and Cooperation with third countries and humanitarian aid.

TITLE II COMMON COMMERCIAL POLICY

Bibliography: *Appella*, Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement, ICLQ 1996, 440; *Bartels*, The Trade and Development Policy of the European Union, 18 EJIL (2007), 715; *Bronckers*, The effect of the WTO in European Court litigation, 40 TexasILJ (2005), 443; *Bungenberg*, Going Global? The EU Common Commercial Policy after Lisbon, 1 EYIEL (2010), 123; *Bungenberg*, Going Global? The EU Common Commercial Policy After Lisbon, in: Hermann/Terhechte (eds) European Yearbook of International Economic Law, 2010, 123; *Cremona*, The Draft Constitutional Treaty: External Relations and External Action, CMLR 2003, 1347; *Eeckhout*, External Relations of the European Union, Oxford 2005, 53; *Griller/Weidel* (eds), External Economic Relations and Foreign Policy in the European Union, Wien 2002; *Koutrakos*, I need to hear you say it: revisiting the scope of the EC Common Commercial Policy, 22 YEL (2003), 407; *Koutrakos*, EU International Relations Law, 2006; *Krajewski*, External trade law and the Constitution Treaty, 42 CMLR (2005), 91; *Neframi*, La politique commerciale commune selon le Traité établissant une constitution pour l'Europe, 41 RTDE (2005), 473; *Thies*, Case C-93/02, Biret International SA v. Council, CMLR (41) 2004, 1661; *Woolcock*, The potential impact of the Lisbon Treaty on EU External Trade policy, SIEPS – European Policy Analysis 3/2008, 5; *Wouter/Coppens/De Meester*, External Relations after the Lisbon Treaty, in: Griller/Ziller (eds), The Lisbon Treaty, 2009, 143.

Article 206 [Objectives of the Union's common commercial policy] (ex-Article 133 TEC)

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

Article 206 TFEU is equivalent to the former Article 131 para. 1 TEC. Its wording was 1
adjusted in the course of the completion of the Customs Union. For the same reason, Article 131 para. 2 TEC was not taken over in the revised treaties – the abolition of all custom barriers vitiated the provision. Articles 132 and 134 TEC were equally obsolete, due to the completed standardisation of export aid, and Article 134 TEC especially because of its the practical irrelevance respectively. Consequently, Articles 131 para. 2, 132 and 134 TFEU are not reflected in the Union's new primary law.

Article 206 TFEU contains a **declaration of principles of the Union's common com-** 2
mercial policy towards third countries. Given the Union's exclusive competence (Article 3 para. 1 lit. a, e TFEU), the pursuit of commercial policy objectives falls to the Union.

The provision seeks to dispel doubts of **third countries** pertaining to protectionist im- 3
pacts of the internal market on the Union's foreign trade. Conversely, the primary law's *inter partes* effect precludes the ability of any third country to invoke Article 206 TFEU. Although the article represents a binding programme, Member States and Union enjoy wide political discretion in terms of its actual realisation.¹ Therefore individuals may not derive any rights from Article 206 TFEU.

¹ ECJ Cases 5–73 *Balkan* [1973] ECR 1091; C-150/94 *United Kingdom v Council* [1998] ECR I-7235, C-284/94 *Spain v Council* [1998] ECR I-7309.

- 4 The provision does not bar the Union from adopting any measures that may have a bearing on trade with third countries, 'where the adoption of such a measure is required (...) and (...) legally justified by the provisions of Community law [now: Union law]'.² In particular, the Union is **not obliged to liberalise** the import from third countries if such conduct runs counter to its own interests. The adoption of quotas on certain goods may therefore be allowed.³
- 5 Article 206 TFEU contains a commitment to a **liberal commercial policy**. The abolition of restrictions on trade and investment alongside the reduction of both tariff and non-tariff barriers shall intensify international trade. In that vein, the objectives of the Union are in accordance with those of the WTO, especially as those objectives stipulated in the GATT.

*Article 207 [Principles of the common commercial policy]
(ex-Article 131 TEC)*

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or more international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

² ECJ Case 112/80 *Dürbeck* [1981] ECR 1095 mn. 44.

³ ECJ Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235.

- (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
- (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

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I. General comments

1

Article 207 TFEU adopts the provision of the hitherto existing Article 133 TEC with partly considerable modifications. It regulates the content and the procedure of the common commercial policy, which is now incorporated in Part Five of the TFEU on the external action of the Union. Thereby, the common commercial policy is stronger oriented towards the Union's general foreign policy objectives (democracy, human rights, the rule of law).

'Common commercial policy' pertains to the **Union's external trade with third countries**. It forms the counterpart of internal trade occurring between Member States. A directive cannot be simultaneously based on the internal market competence and external trade competence.¹ The common commercial policy is shaped by the Union's uniform principles, whereas the principles of world trade friendliness arising from Article 206 TFEU and the general objectives of external action of the Union are to be considered (Article 207 para. 1 s. 2 TFEU, plus, in general for Part Five, Article 205 TFEU)

The Treaty of Lisbon extends the commercial policy competences of the Union through the amendments in Article 207 TFEU concerning foreign direct investment, trade in services, and intellectual property (para. 1), albeit with partial specifics in terms

¹ ECJ Case C-491/01 *British American Tobacco* [2002] ECR I-11453.

of the decision-making process (para. 4 subpara. 2). In some particularly sensitive sectors (cultural and audiovisual services, as well as in the field of social, education, and health services), the unanimity requirement in the Council supersedes the requirement of agreements jointly concluded by the Community (now: Union) and the Member States, which was applicable before under Article 133 para. 6 TEC, while the exclusive competence generally lies with the Union (para. 4). Furthermore, participation rights of the European Parliament in respect of the common commercial policy are strengthened (paras 2, 3 subpara. 3) and the delimitation of the Union's competences is defined more precisely (para. 6).

4

II. Scope of application of the common commercial policy

1. Subject-matter

Article 207 para. 1 TFEU compounds statements on the material scope of application (subject-matter) of the common commercial policy with an exemplary enumeration of trade measures to be possibly adopted by the Union (concerning the latter see mns 29 et seq. below). As the subject-matter of measures pursuant to Article 207 TFEU, there are **trade in goods and services**, the **commercial aspects of intellectual property**, and **foreign direct investment**. The provision likewise captures **monetary transactions** related to respective commercial operations. In contrast to the former Article 133 para. 1 TEC, Article 207 TFEU extends the Union's competence to foreign direct investments and the now comprehensively captured field of services (which the Community and the Member States had shared competence over pursuant to Article 133 para. 6 TEC previously; as for the persisting requirement of unanimity in these fields, see Article 207 para. 4 subpara. 3 TFEU, mn. 25 below).

5 **Trade in goods and services; intellectual property:** The Treaty of Lisbon conferred upon the Union the competence over the trade in services as well as intellectual property, thus, jointly concluded agreements between the Community and the Member States, *i.e.* within the framework of the **WTO (GATS/TRIPS)**², will be superseded by agreements exclusively concluded by the Union. The special interests of the Member States are accommodated by virtue of the retained unanimity requirement in Article 207 para. 4 TFEU. The concept of services in the context of commercial policy encompasses the **freedom of establishment**, which is deemed as a sub-category of service by GATS. The comprehensive expansion of the scope of application of the common commercial policy to the service sector renders obsolete the qualifications dispensed in the ECJ's Opinion 1/94³.

6 **Foreign direct investment:** This term captures foreign investors' **acquisition of control** over a company – by means of acquiring either the necessary majority of shares or the company as such – with the intention to exercise at least significant influence over it. Direct investments are to be distinguished from portfolio investments which are solely aimed at the increase in value or dividends yielded by the acquired shares. The inclusion of direct investments in the scope of application of the common commercial policy is accompanied by a transfer of the treaty-making competence for **bilateral investment treaties** from the Member States to the Union.

7 The trade in **agricultural products** is still subject to the special regime of Articles 40 and 43 TFEU. Article 207 TFEU may be applied as a supplementary provision thereto.

² Opinion 1/94 WTO [1994] ECR I-5267.

³ Opinion 1/94 WTO [1994] ECR I-5267.

Article 207 TFEU does not apply to the field of **transport**. Pursuant to Article 207 8 para. 5 TFEU, the field of transport is rather subject to Title VI of Part Three (Articles 90 et seq. TFEU) in conjunction with the general provisions on the conclusion of agreements laid down in Article 218 TFEU.

2. Dissociation from other contractual bases

The Union's primary law does not define the concept of commercial policy. It concerns the influence on trading volumes and trade flows of foreign trade, although the delimitation to other policy areas (development policy, economic policy, general foreign policy) appears dubious in particular cases. In terms of the delimitation to foreign policy, the Commission espoused the view that the specific nature of a measure as a typical instrument regulating international trade shall be taken into account (**'instrumental theory'**), whereas the Council only considered the political objective of the influence on trading volumes and trade flows (**'final theory'**); for both approaches see request for opinion 1/78⁴), hence exclusively drew on specific commercial policy motives. The ECJ⁵ referred to the 'subject and objective' of a measure without elaborating on the aforementioned divergence of views. Consequently, the prevailing contemporary view is based on both criteria.

Accordingly, a measure is to be qualified as a commercial policy measure pursuant to Article 207 TFEU if it serves **as a typical instrument to influence trading volumes and trade flows**. This is the case if measures are expressly enumerated in Article 207 TFEU, irrespective of further objectives (i.e. development policy, economic policy, fiscal policy, environmental protection policy) and if the predominant objective relates to the influence on trading volumes and trade flows.

To qualify a measure as commercial, it is decisive whether its **emphasis** resides within the subject areas explicated above. The regulation of other areas on the basis of commercial policy provisions is permissible as long as it remains ancillary thereto.⁶ If an agreement pursues inextricable objectives of commercial and environmental policy of equal value, it shall be adopted on a double legal basis.⁷

The field of commercial policy within the meaning of Article 207 TFEU is not confined to conventional instruments devised to merely liberalise trade but likewise encompasses **other measures** to regulate the world market for certain products. However, agreements on longer-term economic, industrial and technical cooperation ('Cooperation Agreements') are not affiliated to the common commercial policy. In fact, the Treaty of Nice introduced a special legal basis for these agreements, which is found in Article 212 TFEU today (ex-Article 181 lit. a TEC).

III. Exclusive Union competence

Article 3 para. 1 lit. e TFEU codifies the **exclusive competence of the Union** in the field of common commercial policy (see mns 4 et seq. above), in accordance to the case law of the ECJ.⁸ In particular, the exclusive competence is not confined to defining common principles (Article 207 para. 2 s. 1 half-sentence. 1 TFEU). This wording does not

⁴ Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871.

⁵ Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871.

⁶ Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871; Opinion 1/94 *WTO* [1994] ECR I-5267.

⁷ ECJ Case C-281/01 *Energy Star* [2002] ECR I-12049.

⁸ For the first time: ECJ Case 8-73 *Hauptzollamt Bremerhaven v Massey-Ferguson* [1973] ECR 897.

bar the Union from implementing **autonomous international law measures**. Parallel activities of Member States are impermissible.⁹

- 14 Due to the expansion of the scope of application of the common commercial policy by virtue of Article 207 para. 1 TFEU (and the therefore obsolete Article 133 paras 5, 6 TEC), the Union will be able to further conclude agreements in the future. Yet, it will still be necessary to revert to jointly concluded agreements of the Union and Member States if commercial contracts contain significant additional possibilities to regulate that remain within the Member States' competence. The extended competences of the Union, in respect of the CFSP/CSDP since the Treaty of Lisbon – notwithstanding the corresponding specific decision-making modalities (unanimity, dominant role of the Council, see Article 31 TEU, Article 218 paras 3, 6 subpara. 2 TFEU) – will give rise to new questions concerning jointly concluded agreements on the Union's supranational as well as intergovernmental (Article 37 TEU) policy areas ('inter-pillar-agreements').
- 15 In principle, the Union's competence encompasses trade in **military equipment** within the meaning of Article 346 para. 2 TFEU. The security provision of Article 346 para. 1 lit. b TFEU is of no prejudice in this regard. It rather grants Member States the right to adopt deviating rules in justified individual cases.¹⁰ Conversely, Article 346 TFEU does not capture so-called **dual use goods** (goods for not merely military but also civil use).¹¹ However, these goods may be subjected to an authorisation requirement on the basis of restrictions on the free movement of goods¹² for reasons of public security.¹³
- 16 **The limits of the Union's exclusive competence** are defined in **Article 207 para. 6 TFEU**, containing a specific reiteration of the general principle of conferred powers. Accordingly, the exercise of competence pursuant to Article 207 TFEU must neither alter the allocation of competences nor lead to harmonisation of Member States' domestic legal provisions insofar as such is prohibited. In the latter case in particular, Union measures may eventuate.¹⁴ Given the authorisation of Article 207 TFEU, the Union may negotiate the further development of the GATS of the global trade in services at the WTO level. Such services could well pertain to fields that, pursuant to the TFEU, remain within the scope of competences of the Member States (i.e. tourism, education, see Article 6 TFEU). In contrast to the general authorisation of Article 207 TFEU, its para. 6 prescribes the Union's obligation not to enter commitments in such areas, or to do so by means of jointly concluded agreements with the Member States.

17

IV. Procedure

1. Overview

Commercial measures of the Union comprise internal regulations ('autonomous' commercial policy) and internationally binding acts of the Union vis-à-vis third countries and in the framework of international organisations ('contractual' commercial policy).

⁹ Opinion 1/94 WTO [1994] I-5267.

¹⁰ Cf. *Eisenhut*, Europäische Rüstungskooperation, 2010, 122 et seq.

¹¹ ECJ Cases C-83/94 *Leifer* [1995] I-3231; C-70/94 *Werner* [1995] I-3189.

¹² ECJ Case C-70/94 *Werner* [1995] I-3189.

¹³ Article 8 Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

¹⁴ Cf. *Krenzler/Pitschas*, RIW 2005, 804.

2. Autonomous commercial policy

18

The subjects of autonomous commercial policy are legal acts that do not require the participation of other subjects of public international law. In practice, this refers to **intra-Union rules**, devised to influence external trade (specification of tariffs, export and import arrangements, anti-dumping safeguards) and to acts implementing international treaties. Individual measure cannot be based on Article 207 para. 2 TFEU.

Pursuant to **para. 2**, autonomous commercial policy is being realised *qua* regulations within the meaning of Article 288 subpara. 2 TFEU, which are adopted in accordance with the ordinary legislative procedure stipulated in Articles 289 and 294 TFEU. The application of the **ordinary legislative procedure**, corresponding to the hitherto existing codecision procedure, considerably strengthens the position of the European Parliament in the context of commercial policy.

19

3. Contractual commercial policy

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The Union realises its **contractual commercial policy** by means of internationally binding acts, in particular the conclusion of bi- or multilateral trade agreements. These are being negotiated by the Commission (para. 3) and concluded by the Council on behalf of the Union (para. 3 subpara. 1 in conjunction with Article 218 para. 2 TFEU).

a) Negotiations and conclusion (para. 3)

On recommendation of the Commission, the Council empowers the Commission to open contractual negotiations. Within this framework, the Commission conducts negotiations (based on its own rights) with third countries or international organisations until an authenticated wording of the agreement to be established becomes available. In the course of these negotiations, the Commission may be bound by directives issued by the Council (para. 3 subpara. 3 s. 1).

21

The Commission is being consulted by a special committee appointed by the Council (para. 3 subpara. 3). The committee comprises representatives of the Member States, accentuating the standpoints of both the Council and the Member States. As per para. 3 subpara. 3 s. 2 – newly incorporated since the Treaty revision of Lisbon – the Commission is obliged to regularly report to the special committee and to the European Parliament on the progress of negotiations.

22

The Treaty revision of Lisbon particularly strengthened the **role of the European Parliament**. However, unlike the special committee of the Council, the EP will not be able to influence the course of negotiations, since the obligation to consult with the committee under para. 3 subpara. 3 s. 1 does not apply to the EP, which is only referred to in para. 3 subpara. 3 s. 2.

23

b) Decision-making process in the Council (para. 4)

Pursuant to para. 4 subpara. 1, the Council generally decides by a qualified majority (Article 238 TFEU) in matters of negotiation (para. 3) and conclusion (Article 218 para. 2 TFEU) of trade agreements. In specific cases of para. 4 subparas 2 and 3, unanimity is required. For those fields of particular sensitivity, the previously shared competence prescribed by Article 133 para. 6 TEC was transformed into a unanimity requirement with the exclusive competence for the Union.

24

Para. 4 subpara. 2 requires unanimity in the fields of **trade in services, intellectual property**, and **foreign direct investment**. Despite the omission of Article 133 para. 5

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subpara. 3 TEC – which expressly required unanimity for those (horizontal) agreements affecting, *inter alia*, the aforementioned areas – cross-sectorial agreements containing aspects of services, IP, or direct investment will continuously require unanimity if the criteria in para. 4 subpara. 2 are met.¹⁵ The provision of para. 4 subpara. 2 is geared to the **principle of parallelism**, according to which the conclusion of an agreement by the Union with a third party requires unanimity whenever equivalent internal decisions of the Union would have done so, too. The Treaty of Lisbon further limited instances requiring unanimity in the three areas at issue. Trade in services (Article 59 TFEU) and intellectual property (Article 118 para. 2 TFEU) require unanimity only in exceptional cases. Internal regulations in the field of foreign direct investments are based upon the provisions on freedom of establishment and the free movement of capital, unanimity is only an exception, too (*i.e.* Article 64 para. 3 TFEU; although an international trade agreement may only eventuate in a retrogression of the liberalisation of the international free movement of capital in absolutely exceptional cases).

- 26 **Para. 4 subpara. 3** requires **unanimity** in the fields of **cultural and audiovisual services** if agreements risk prejudicing the Union's cultural and linguistic diversity (**lit. a**). The second half-sentence contains restriction on the previous legal situation (Article 133 para. 6 subpara. 2 TEC). Now, all Member States have to concur in the existence of a respective threat to the Union's cultural or linguistic diversity; otherwise a mere majority requirement remains in place.¹⁶ Moreover, the unanimity requirement applies to the fields of social, education and health services (**lit. b**), provided that respective agreements of the Union have a significant bearing on the organisation of those sectors *and* that Member States could be hindered in fulfilling their pertinent duties. Contrary to **lit. a**, the question of whether the conditions set out in **lit. b** are satisfied is to be assessed by each Member State itself.

c) Article 218 para. 3 subpara. 1 TFEU

- 27 **In all remaining cases**, the general provisions on the negotiation and conclusion of agreements codified in Article 218 para. 3 subpara. 1 TFEU apply. Notably, Article 218 para. 6 TFEU¹⁷ requires the EP's consent in matters of the conclusion of international agreements now.

28

V. Measures of commercial policy

The content of trade measures is undefined; the enumeration of **typical measures** in Article 207 para. 1 TFEU is not exhaustive ('particularly with regard to').

29

1. Changes in tariff rates

Article 207 TFEU forms the basis of the Union's competence over **contractual amendments** of custom tariffs agreed upon with third countries and over the autonomous fixing of custom tariffs pursuing commercial policy objectives. In all remaining cases of autonomous fixing of custom tariffs, Article 31 TFEU is the pertinent provision.

- 30 Since 1971, Council regulations have constantly renewed the **Generalised System Preferences** (GSP) for certain industrial and textile products to the advantage of certain developing countries, which is an example of such an autonomous custom measure pur-

¹⁵ Cf. Krenzler/Pitschas, RIW 2005, 806.

¹⁶ Cf. Krenzler/Pitschas, RIW 2005, 808.

¹⁷ See Article 218 TFEU mn. 11.

suant to Article 207 TFEU. The preference for agricultural goods is carried out in accordance with Article 43 TFEU.

2. Standardisation of liberalisation measures

31

So-called **non-tariff trade barriers** may comprise **prohibitions on imports and exports**, quantitative restrictions (**quotas**), requirements of import and export permissions (**licenses**), and measures of **import and export surveillance**. The Union is mandated to ensure the measures' uniform legislation with the aim of their abolition to the greatest possible extent.

As far as there is no provision in bilateral or multilateral agreements of the Union – in particular in the framework of the WTO –, those provision of the Union's 'autonomous' regulatory powers apply; and they also contain the required authorisations for Member States' measures.

Regulation 260/2009 on the **common rules for imports** implements the GATT 1994 (requirement of liberalisation, Article XI; requirement of transparency, Article X), including the WTO Safeguards Agreement. It contains general provisions on the Union's import policy. It applies to all goods originating from third countries with the exception of **textiles**, for which Regulation 1160/2010 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules holds a special regime. Imports from certain third countries are likewise exempted; see Regulation 625/2009 on common rules for imports from certain third countries holds a special regime in this regard. Special provisions on agricultural products are provided in Article 43 TFEU¹⁸.

Common rules for exports are established in Regulation 1061/2009. In general, the Union's export is liberalised (so-called principle of freedom of export). Exemptions (i.e. concerning oil) are provided in the negative list attached to this Regulation. Certain export goods are subject to special provision; for instance **cultural goods**¹⁹ and **waste**.²⁰

Arms, as exhaustively enumerated in Article 346 para. 2 TFEU, are subject to the special provision of Article 346 para. 1 lit. b TFEU, which allows Member States to deviate from existing Union rules on the basis of essential national security interests. Article 346 TFEU, as a derogation provision, is to be interpreted narrowly²¹. Another special Union export regime regulates **dual use goods** (see mn. 15 above) with its special stipulations contained in Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. Article 346 TFEU does not apply in this context.

3. Export policy (export promotion)

36

The promotion of exports by means of public funding (subsidies) represents a domain of the Union. It is only permissible within the boundaries of international agreements, particularly as concluded **within the WTO framework** for safeguards against subsidies (cf. Articles VI, XVI, XXIII GATT 1994 and the GATT Subsidies Code).

¹⁸ See Article 43 TEU mn. 4.

¹⁹ Regulation 116/2009 on the export of cultural goods and its Implementing Regulation 1081/2012; Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State.

²⁰ Regulation 135/2012 of 16 February 2012 on shipments of waste to include certain unclassified wastes in Annex IIIB thereto and Regulation 664/2011 on shipments of waste to include certain mixtures of wastes in Annex IIIA thereto; Directive 2006/117/EURATOM on the supervision and control of shipments of radioactive waste and spent fuel between Member States and into and out of the Union.

²¹ See Article 346 TFEU mn. 1.

- 37 The OECD Arrangement on Guidelines for Officially Supported Export Credits (**OECD Consensus**) has been concluded but it is of non-binding nature (gentlemen's agreement). The Union applies this agreement by virtue of a Council Decision (Decision 93/112).
- 38 Directive 98/29, as amended by Regulation 806/2003, contains rules on the harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover.

39 4. Commercial defence measures

- The Union's mandate in the field of commercial policy entails the protection against market disturbances inside the Union that emanate from the trade with third countries. Possible measures to that end are stipulated in the safeguard clauses of the import and export arrangements; their equivalents for the agricultural sector are to be found in the legislation on the agricultural market.
- 40 With respect to safeguards against so-called unfair trading practices, the Union can avail itself of special legal bases.
- 41 For aligning with the anti-dumping provisions of the GATT 1994 (Article XI as well as the implementing anti-dumping agreement), the Council adopted Regulation 1225/2009 on the **protection against dumped imports** from countries outside the Union. The same holds true for Regulation 597/2009 of the Council on the **protection against subsidised imports** from States outside the European Community. It transforms the agreement on subsidies and compensatory measures, concluded in addition to the GATT 1994, into Union law. Both provisions entitle the Union to impose anti-dumping duties on respective goods.²²
- 42 Anti-dumping or countervailing duties may be imposed if dumped or subsidised imports **cause** significant **damage** to an economic sector of the Union, risk to do so, or if they significantly protract the establishment of an economic sector of the Union and the interest of the Union necessitates its intervention.
- 43 **Dumping** is constituted when a company fixes the export price at a level below the average price of an equivalent good in the exporting country.
- 44 A **subsidy** manifests itself in a (publicly granted) benefit which was either directly or indirectly granted by the exporting country and facilitated the manufacture, production, export, or transportation of the respective good. Compensatory measures are only permissible against so-called **specific** subsidies (*i. e.* if access to subsidies is confined to certain companies only).
- 45 The **Commission** conducts the **anti-dumping and anti-subsidies-proceedings**. It can commence to do so in its own motion – for instance at a Member State's suggestion – or upon application of a natural or judicial person or associations without legal personality that act on behalf of an economic sector. The Commission can adopt provisional anti-dumping or countervailing duties during the investigative proceedings already. The proceedings will be terminated once the Commission has come to the conclusion that respective safeguards are not or no longer necessary. This may also be the case if the Union concludes an agreement with the respective exporter (State of origin or export) that removes the need for safeguards (so-called self-limitation). Conversely, if presumptions of detrimental dumping or subsidisation can be substantiated, the Council *qua* regulation

²² There is a 'Proposal for a new Regulation amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community': COM (2013) 192 final.

imposes definite anti-dumping or countervailing duties.²³ National customs authorities enforce customs by means of customs assessment notices towards the importer.

Regulation 1225/2009 and Regulation 597/2009 do not contain special provisions on the **legal protection** of affected companies. Therefore, the general provisions find application. In respect of custom assessment notices, respective domestic law provides such protection, too. Insofar, the procedure for preliminary rulings before the ECJ pursuant to Article 267 TFEU examining the validity of a regulation is available.²⁴ However, the person concerned may be precluded if annulment proceedings²⁵ were not institute in a timely manner.²⁶ Any natural or legal person²⁷ considering the direct action of annulment proceedings must appeal to the General Court of the European Union²⁸.

The imposition of provisional and definite anti-dumping and countervailing duties **directly and individually**²⁹ concerns those producing and exporting companies whose names are listed in the relevant regulation or that were affected by the preceding investigations.³⁰ Under the premise that proceedings have been completely or partially terminated, the same holds true for requesting parties or otherwise involved parties.³¹ The ECJ further upheld direct and individual concern of importers independent from the manufacturer or exporter. Yet, this qualification seems to have been abandoned.³²

In terms of decision on adoptions of protective measures, the Union enjoys a wide margin of discretion. Consequently, actions for damages under Article 340 TFEU appear promising only in exceptional circumstances.³³

Regulation 3286/94 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation, supplements the standards of protection against dumping and subsidisation. This '**Trade Barriers Regulation**' (TBR) enables the Union's economic sectors, individual companies, and Member States alike to prompt the Union to open formal proceedings aiming at the invocation of internationally granted rights vis-à-vis third countries, provided that respective infringements thereof harm the trade relations of EU-companies. In this way, the (otherwise unavailable) initiation of a dispute settlement procedure (i.e. of the WTO) or the imposition of countermeasures can be enforced.

Further commercial defence instruments are, for instance, import and export licenses pursuant to the common import and export system (see mns 33 et seq. above) and protection against counterfeit and pirated goods.³⁴

²³ ECJ Case C-216/91 *Rima* [1993] ECR I-6303.

²⁴ ECJ Case C-26/96 *Rotexchemie* [1997] ECR I-2817.

²⁵ See Article 263 TFEU.

²⁶ ECJ Case C-24/95 *Alcan* [1997] I-1591.

²⁷ See Article 263 para. 4 TFEU.

²⁸ See Article 256 para. 1 TFEU.

²⁹ See Article 263 para. 4 TFEU.

³⁰ ECJ Cases 264/82 *Timex* [1985] ECR 849; 53/83 *Allied Corporation* [1985] ECR 1621.

³¹ ECJ Case 191/82 *FEDIOL* [1983] ECR 2913.

³² ECJ Case C-358/89 *Extramet* [1991] I-2501.

³³ ECJ Case C-93/02 *Biret International SA v Council* [2003] I-10497; on this case: *Thies*, 41 CMLR (2004), 1661 et seq.

³⁴ Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights and Regulation 1891/2004 laying down provisions for the implementation of Regulation 1383/2003.

TITLE III
COOPERATION WITH THIRD COUNTRIES AND
HUMANITARIAN AID

CHAPTER 1
DEVELOPMENT COOPERATION

Bibliography: *Arts*, The European Union, Development Cooperation and Human Rights at a Crossroads, in: Benedek/Benoit-Rohmer/Karl/Nowak (eds), European Yearbook on Human Rights 2011, 283; *Dennison/Dworkin*, Towards an EU Human Rights Strategy for a Post-Western World, European Council on Foreign Relations, 2010; *Keijzer*, EU Policy Coherence for Development: from moving the goalposts to results-based management, Discussion Paper 101, European Center for Development Policy Management (ECDPM) 2010; *Neframi*, The Duty of Loyalty. Rethinking its Scope through its Application in the Field of EU External Relations, CMLR 47 (2010) 2, 323; *Ochieng*, The EU-ACP Economic Partnership Agreements and the 'Development Question', Journal of International Economic Law 10 (2007) 2, 363; *Seters and Klavert*, EU development cooperation after the Lisbon Treaty, Discussion Paper No. 123, European Centre for Development Policy Management (ecdpm), December 2011; *Smis/Kingah*, The utility of counter-terrorism and non-proliferation of WMD clauses under the EU-ACP revised Cotonou Agreement, ICLQ 57 (2008), 159.

Article 208 [Contribution of the Union; objectives]
(ex-Article 177 TEC)

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

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I. General comments

Article 208 TFEU states the main features and objectives of the Union's development cooperation that is now stipulated in Articles 208 to 210 TFEU. It is equivalent to draft-Article III-319 TECE and likewise largely draws on the previous Articles 177 and 178 TEC, whereas the Union's measures have evolved from mere supplementary measures into an independent policy field. In the field of development policy, the TEC initially contained concrete responsibilities in respect of the Member States' dependent Overseas

Countries and Territories only. Since the entering into force of the Maastricht Treaty, development cooperation pertains to the sphere of activities of the Union in regard to other States, too.

The field of development cooperation falls **under the shared competence** of the Union and the Member States¹, whereas **Article 4 para. 4 TFEU** stipulates that the Union's exercise of its competence shall not result in Member States being prevented from exercising theirs.² These coexisting competences presuppose special coordination of respective development policies³.

Several EU institutions and bodies provide humanitarian aid for the EU: the European Parliament (Committee on development and ACP-EU Joint Parliamentary Assembly); the Council of the European Union in the field of foreign affairs the European Commission; the Economic and Social Committee in its external relations section; the Committee of the Regions in the Commission for citizenship, governance, institutional affairs and external relations (CIVEX); the European Investment Bank. **At the organisation level of the Commission**, there were several changes to the former approach of EU development policy recently. Today, only one Directorate-General (DG), called 'Development and Cooperation – EuropeAid', is responsible for development cooperation. It defines the general EU development policies and delivers specific aid through programmes and projects around the world. In 2011, the Communication "An Agenda for change"⁴ introduced a new strategy to effectuate European aid, mainly by focussing the support and closely observing the results. In 2012, the Member States and European institutions together provided development aid to the total of 55,2 billion Euros. The agreed target for official development assistance is 0.7% of gross national income by 2015.

Previous **development cooperation with ACP countries** (African, Caribbean and Pacific countries, in particular former colonies of Member States) is not based on Articles 208 et seq. TFEU (ex-Articles 177 et seq., in particular Article 181 TEC). Rather, the Cotonou Agreement⁵, superseding the Lomé Agreement, as the now pertinent legal basis regulating the development cooperation, is based on Article 217 TFEU. Nonetheless, the main focus of this agreement lies on development cooperation.

II. Principles and objectives of the development cooperation (para. 1)

Article 208 para. 1 s. 1 TFEU lays down the principles and objectives of the Union's development cooperation. Contrary to the former Article 177 TEC – apart from the maintained central objective of eradicating poverty (para. 1 subpara. 2 s. 1) – the individual objectives are no longer itemised. The unified structure of the Union, with its unified legal personality, allowed for the **reference to the general principles and objectives** of the Union contained in Article 21 TEU. In this context, the objectives of sustainable development of developing countries (Article 21 para. 2 lit. d TEU) and of the integration of all countries into the world economy (lit. e) appear especially significant.

Article 208 para. 1 subpara 2. s. 2 TFEU adopts the **coherence requirement** of the previous Article 178 TEC, calling for the observance of the Union's development policy objectives in all other policy fields. On its basis, the Commission has reinforced its efforts

¹ See Articles 2 paras 2 and 4 TFEU.

² This particularity equally applies in the context of humanitarian aid, see Art. 214 TFEU mn. 2 and in general: Zimmermann, RIW 2004, 325.

³ See Article 208 para. 1 s. 2 TFEU as well as at Article 210 TFEU.

⁴ COM (2011) 637 final.

⁵ OJ 2000 L 317/3 et seq., now in its second revised version; see Art. 217 TFEU mn. 21.

to ensure a coherent development policy approach in all relevant fields, such as trade, energy, environment, agriculture, migration and research.⁶ The specific coherence requirement of Article 208 TFEU is supplemented by the general obligation of coherent external action stipulated in Article 21 para. 3 TEU.

- 7 The legal basis for the Union's obligation to consolidate and support democracy, the rule of law, human rights and the principles of international law shifted from Article 117 para. 2 TEC to Article 21 para. 2 lit. b TEU. However, its general validity persists. The Union fulfils this obligation through the adoption of **human rights and democracy clauses** in all of its cooperation, association, and free trade agreements with third countries since 1995. These clauses do not require further provisions relating to competences.⁷ In the event of an infringed obligation, actions envisaged by Article 60 Vienna Convention on the Law of Treaties (VCLT; i.e. suspension of the treaty by the Community) come into consideration.⁸ In a similar vein, the **ACP-EC Cotonou Partnership Agreement** (see mn. 4 above) allows for 'appropriate measures' in its Article 96.
- 8 In the **practice** of its development cooperation, the Union concluded bi- or multilateral agreements (for instance, with the ACP countries (see mn. 4 above), the Mediterranean countries in the context of the Barcelona Process, and Asian and Latin American countries), collaborates with international organisations and non-governmental organisations, or implements independent aid programmes.

9 **III. International agreements (para. 2)**

In Article 208 para. 2 TFEU (equalling the previous Article 177 para. 3 TEC), the TFEU transforms the Union's and the Member States' development policy commitments and objectives, dispensed in the framework of the United Nations (i.e. UNCTAD) or other international organisations (e.g. World Bank, OECD), into Union law. To the extent of their binding effect in international law, commitments **are to be observed in virtue of Union law**. Endorsed objectives of international organisations are at least to be 'accounted for', meaning they shall be considered as an important aspect in the decision-making process.

- 10 Special significance shall be drawn to Article 208 para. 2 TFEU in respect of **legally non-binding commitments** at the international level ('soft law'). It renders those commitments binding for Member States at the Union level. Because of the TFEU's *inter partes* effect, the failure to comply with a commitment cannot be invoked by third parties. Binding commitments of the aforementioned kind include the UN Millennium Goals.⁹

Article 209 [Multiannual cooperation programmes and programmes with a thematic approach; Contribution of the EIB]
(ex-Article 179 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual coopera-

⁶ See SWD (2013) 456 final: EU 2013 Report on Policy Coherence for Development.

⁷ ECJ Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

⁸ ECJ Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

⁹ For example: COM (2001) 231 final of 2 May 2001, p. 4, 10 and COM (2005) 132 final of 12 April 2005.

tion programmes with developing countries or programmes with a thematic approach.

2. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

3. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1.

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I. General comments

1

In essence, Article 209 TFEU combines the previous provisions of Articles 179 and 181 TEC. It largely corresponds to draft-Article III-317 TECE.

The article contains a **legal bases** for **internal** (para. 1) and **external** (para. 2) Union **action** in the field of development cooperation. Moreover, para. 3 refers to the significance of the European Investment Bank.

II. Implementing acts (para. 1)

3

Article 209 para. 1 TFEU expressly entitles the Union to adopt **legislative** measures in order to implement its development policy. Such measures are to be adopted in accordance with the ordinary legislative procedure pursuant to Articles 289 and 294 TFEU. The term 'measure' likewise encompasses all other Union actions in the field of development cooperation, i.e. resolutions or conclusions. The second half-sentence of para. 1 clarifies (in adherence to previous practice of the Commission) that, alongside multi-annual programmes enumerated in Article 179 para. 1 s. 2 TEC already, thematic programmes may be decreed, too. Conversely, the conclusion of international agreements exclusively falls under para. 2.

The implementation of the **ACP-EC Cooperation Agreements**, which was ascribed a special status in Article 179 para. 3 TEC¹, does not rest on the competence for implementation of Article 209 para. 1 TFEU. These mixed agreements² were previously based on Article 310 TEC (see mn. 8 below) and implemented by the Union through separate internal agreements of the Member States, requiring unanimity (by derogation from para. 1) and being funded by the European Development Fund (EDF) apart from the Union budget.

The omission of Article 179 para. 3 TEC in the TFEU does not allow for a continuous special status of the ACP-EU-cooperation.³ Henceforth, implementation resolutions in relation to the Cotonou Agreement will be decreed on the basis of para. 1, while the General Budget of the Union finances this cooperation.

¹ See Article 208 TFEU mn. 4.

² See Articles 216 et seq. TFEU.

³ Cf. Zimmermann, RIW 2004, 326.

- 6 As for the funding of the development cooperation, see Regulation 1905/2006 and Regulation 690/2009.

7 **III. International agreements (para. 2)**

Article 209 para. 2 TFEU holds the treaty-making competence of the Union in the field of development cooperation, previously contained in Article 181 TEC. Article 218 determines the procedure for the conclusion of respective agreements. Such agreements of the Union may include provisions on other areas (i.e. energy, tourism, culture, combat of drug abuse, intellectual property; as for democracy and human rights clauses see Article 208 TFEU mn. 7), as long as the focus of the agreement remains on the field development cooperation.⁴

- 8 Due to the omission of reference to other legal bases for the implementation of the development cooperation, which was explicitly stated in Article 179 para. 1 TEC, Article 209 TFEU represents the sole legal basis for the conclusion of all international agreements focused on this field. In particular, this applies to future ACP-EU Agreements that were previously based on Article 310 TEC.⁵ Consequently, the Treaty of Lisbon further yielded the omission of the non-affection clause of Article 179 para. 3 TEC.
- 9 The competence of the Union by virtue of para. 2 subpara. 1 exists **in parallel to the competence of the Member States**.⁶ This is clarified in para. 2 subpara. 2, although it already follows from Article 4 para. 4 TFEU, as well as from the ECJ jurisprudence.

10 **IV. European Investment Bank (para. 3)**

Article 209 para. 3 TFEU emphasises the development policy competence of the European Investment Bank (EIB; see Articles 308 and 309 TFEU). Whereas the EDF (see mn. 4 above) provides non-refundable grants, the EIB issues **loans on preferential terms**.

**Article 210 [Coordination]
(ex-Article 180 TEC)**

1. In order to promote the complementarity of efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.

2. The Commission may take any useful initiative to promote the coordination referred to in paragraph 1.

- 1 Article 210 TFEU contains the previous **coordination obligations** of Article 180 TEC. Notwithstanding the pre-existing coherence requirement, the practice of the coordination of the Union and Member States' development aid is often confronted with criticism alleging its deficiency.

⁴ ECJ Case C-268/94 *Portugal v Council* [1996] ECR I-6177 mn. 39.

⁵ For instance the Cotonou Agreement of 2000, see Article 208 TFEU mn. 4.

⁶ ECJ Cases C-316/91 *EP v Council* [1994] I-625; C-268/94 *Portugal v Council* [1996] I-6177.

As counterpart to the parallelism of their competences¹, Article 210 TFEU comprises the **imperative** for Member States and the Union to **organise development aid in a complementary manner**. It lays down a coordination obligation, entailing the coordination of aid programmes and extending to their actions in the frameworks of international organisations and international conferences. If necessary, Member States contribute to the implementation of Union aid programmes.

Joint action within the meaning of Article 210 para. 1 s. 2 TFEU may be taken either at a practical level (i.e. joint implementation of concrete projects) or by means of jointly concluded agreements between the Union and the Member States with third countries, upon which the ACP-EU-cooperation² is based on for instance.

Article 210 para. 1 s. 3 TFEU forms a specific expression of the general **duty of cooperation** obliging the Member States to contribute to the implementation of Union development projects. However, in terms of the exact nature and scope of contributions, the Member States enjoy a margin of discretion.

The **Commission** is in possession of a **right of initiative** to promote coordination (Article 210 para. 2 TFEU).

Article 211 [International cooperation] (ex-Article 181 TEC)

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.

Article 211 TFEU is equivalent to Article 181 subpara. 1 s. 1 TEC. Draft-Article III-318 TECE envisaged merging the provision with the coherence requirement of Article 180 TEC.

Article 211 TFEU obliges the Union and the Member States to an **effective coordination** of international actions to the greatest possible extent. The provision occurs as the specific supplement to the general obligation of the Union to establish all appropriate forms of cooperation with international organisations prescribed by Article 220 TFEU.

CHAPTER 2 ECONOMIC, FINANCIAL AND TECHNICAL COOPERATION WITH THIRD COUNTRIES

Bibliography: *Bartelt*, The legislative architecture of EU external assistance and development cooperation, in: *Bartelt/Dann* (eds), *Entwicklungszusammenarbeit im Recht der Europäischen Union*, *Europarecht Beiheft* 2/2008, 9; *Hoffmeister*, Inter-Pillar Coherence in the European Union's civilian crisis Management, in: *Blochmanns* (ed.), *The European Union and crisis Management, Legal and Policy Aspects*, 2008, 157.

Article 212 [Principles of cooperation with third countries] (ex-Article 181a TEC)

1. Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical coopera-

¹ See Article 208 TFEU mn. 2.

² See Article 208 TFEU mn. 4.

tion measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of paragraph 1.

3. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations. The arrangements for the Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The first subparagraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements.

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1
I. General comments

Article 212 TFEU (previously Article 181a TEC) was incorporated by the Treaty of Nice. It represents the **legal basis for cooperation agreements** that were previously based on Article 308 TEC (now Article 352 TFEU). By virtue of the Treaty of Lisbon, Chapter 2 was complemented with a provision on financial assistance for third countries (Article 213 TFEU).

2 Article 212 TFEU enables the Union to cooperate with third countries even **beyond the development policy**. Para. 1 s. 1 expressly stipulates the primacy of Articles 208 et seq. TFEU for the cooperation with developing countries. The Union also has to take into account the development policy when acting on the basis of Article 212 TFEU (para. 1 s. 2).

3 Contrary to the fields of development cooperation and humanitarian aid¹, there is no clarification as to the parallel competences of the Union and the Member States as pertains to the cooperation with third countries. Yet, given the normative context and the identical wording of Article 212 para. 1 s. 3, para. 3 subpara 2 TFEU and Articles 214 para. 1 s. 3, para. 4 subpara. 2 and 208 para. 1 s. 3, 209 para. 2 subpara. 2 TFEU, a **parallel competence of the Union and the Member States** is to be presumed, analogous to Article 4 para. 4 TFEU.²

4
II. Measures (para. 1)

The cooperation with third countries on the basis of Article 212 TFEU shall be carried out within the framework of the principles and objectives the Union's external action contained in Article 21 TEU (Article 212 para. 1 s. 2 TFEU). The Union is free to choose both the *nature* of the measure in question and *which* of those objectives are being pur-

¹ See Articles 4 para. 4 and 208 TFEU mn. 2.
² Similarly on the basis of the ECT, cf. Zimmermann, RIW 2004, 327.

sued. Conceivable measures comprise legal acts of the Union as well as other measures. The authorisation for the conclusion of international treaties to that end follows separately from para. 3 subpara. 1 s. 2.

Cooperation on the basis of Article 212 TFEU is currently carried out, among others, with West Balkan countries and the CIS States, particularly in the framework of the ‘**European Neighbourhood Policy**’³. Drawing on Article 212 TFEU instead of the provisions on development cooperation partly rests on political considerations not to qualify certain States as developing countries.

III. Decision making process and international cooperation (paras 2, 3) 6

The Union’s internal implementing measures are adopted in accordance with the **ordinary legislative procedure** stipulated in Articles 289 and 294 TFEU. Consequently, the position of the European Parliament is strengthened since it has to be consulted.

Article 212 para. 3 subpara. 1 s. 1 TFEU reiterates literally the provision of Article 211 TFEU on the relation between the Union and the Member States in respect of their relations to third countries and international organisations. Subpara. 1 s. 2 contains an authorisation of the Union for the conclusion of respective **international agreements**. Subpara. 2, concerning the work of international organisations and the conclusion of such agreements, clarifies that the respective competences of the Union shall be exercised without prejudice to the Member States’ (potentially simultaneously exercised) competences.

Article 213 [Financial assistance for third countries]

When the situation in a third country requires urgent financial assistance from the Union, the Council shall adopt the necessary decisions on a proposal from the Commission.

Henceforth, on the basis of Article 213 TFEU, urgent *ad hoc* financial assistance for third countries falls under the scope of application of Chapter 2 on economic, financial and technical cooperation with third countries. Such (in general) **balance of payments assistance** may be required in the event of disturbed external trade equilibriums. So far, respective measures lacked a legal basis in Union primary law (see Declaration No 10 to the Treaty of Nice) and, thus, were adopted on the basis of the flexibility clause of Article 308 TEC (now Article 352 TFEU).

By derogation from the ordinary legislative procedure – as also applied to Article 212 TFEU – the urgency of measures pursuant to Article 213 TFEU necessitates a **decision** (Article 288 subpara. 3 TFEU) **without the involvement of the European Parliament.**

CHAPTER 3 HUMANITARIAN AID

Article 214 [Operations; European Voluntary Humanitarian Aid Corps]

1. The Unions’ operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the

³ See http://eeas.europa.eu/enp/index_en.htm (29 May 2014).

Union. Such operations shall be intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.

2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

4. The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.

The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements.

5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for the operation of the Corps.

6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures.

7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system.

Bibliography: *Broberg*, Undue assistance? An analysis of the legal basis of Regulation 1257/96 concerning humanitarian aid, *European Law Review* 2009, 769; *Dalia*, The European Union's humanitarian aid and cooperation with partners: the framework partnerships agreements, in: Cosgrove-Sacks (eds) *Europe, diplomacy and development*, 2000, 166; *Versluys/Ashgate*, *European Union Humanitarian Aid: Lifesaver or Political Tool?* in: Orbie (ed.) *Europe's Global Role: External Policies of the European Union*, 2008, 91.

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1

I. General comments

Article 214 TFEU has **no equivalent in the previous primary law of the Union**. Until the Treaty of Lisbon, Article 177 TEC captured humanitarian aid as an aspect of development cooperation. Article 214 TFEU corresponds to draft-Article III-321 TECE, defining the principles of the Union's humanitarian aid and establishing this policy field as an independent area of the EU external relations in a separate chapter.

2 Article 21 para. 2 lit. g TEU sets out **assistance in the event of natural or man-made disasters** as one objective of the Union's external action. Its humanitarian aid pursuant to Article 4 para. 4 TFEU pursues this objective in the framework of shared competences,

with the particularity that a Member State's action cannot be substituted by the exercise of the Union's competence¹. Hence, if necessary, Member States and the Union act in parallel. The Union's disaster support is being performed by the Directorate-General for Humanitarian Aid (European Community Humanitarian Office – ECHO), whose performance is primarily based on Regulation 1257/96 concerning humanitarian aid.

In 2009, the Union's budget allocated 930 million Euro to humanitarian aid. ACP 3 countries were the biggest recipients, followed by the Middle East and Mediterranean countries. In 2012, a total of 1053 million Euro was spent on humanitarian aid by the EU.

II. Principles and objectives of humanitarian aid

4

Para. 1 outlines the spectrum of humanitarian aid of the Union (sentence 2), comprising *ad hoc* assistance, relief and protection for people in third countries in the event of both natural and man-made disasters. Regarding the assistance of EU Member States, Article 222 TFEU is the pertinent *lex specialis*. Humanitarian aid signifies a short-term instrument devised for duration of no more than six months. Nonetheless, the aid may entail reconstruction and prevention measures if it seems necessary, for instance in order to ensure the logistical access of people in need or to forecast future disasters in a timely manner.² The core of humanitarian aid though concerns the immediate saving of human lives (i.e. the unearthing of survivors), the supply of food and of medical aid.

The Union does not perform aid programmes itself but finances aid measures of third 5 parties. It cooperates with about 200 non-governmental organisations and international organisations such as the Red Cross, UNICEF, WHO and the UNHCR. The cooperation is based on **partnership agreements** with the respective organisations in keeping with para. 4, while those partnership agreements are based upon framework agreements in turn. These framework agreements exist in respect of the cooperation with organisations of the United Nations³, the cooperation with other international organisations and cooperation with non-governmental organisations.

The **distribution of resources** through the Commission does not adhere to a specific 6 scheme but is governed by the Commission's general competence pursuant to Article 317 TFEU.⁴ However, it must abide by the provision of Article 7 Regulation 1257/96 on humanitarian aid.

Para. 2 obliges the Union to comply with the principles of international law and with 7 the principles of impartiality, neutrality and non-discrimination whenever it operates in the area of humanitarian aid.

III. Secondary law; international cooperation; European Voluntary Humanitarian Aid Corps

8

Para. 3 represents the **legal basis** for future **secondary legislation** on the implementation of humanitarian aid of the Union, which – in accordance with the ordinary legisla-

¹ Cf. also Article 208 TFEU mn. 2.

² COM (2001) 153 final.

³ Financial and Administrative Framework Agreement, FAFA of 29 April 2003. An addendum was signed in February 2014. The consolidated version of the FAFA is to be found here:

http://ec.europa.eu/europeaid/work/procedures/financing/international_organisations/other_documents_related_united_nations/document/consolidated_version_of_the_fafa_2014_en.pdf (02 June 2014).

⁴ As to the legal protection of non-governmental organisations against rejection, see GC Case T-372/02 *Internationaler Hilfsfonds eV* [2003] II-4389.

tive procedure pursuant to Articles 289 and 294 TFEU – are either adopted instead of or in addition to Regulation 1257/96.

- 9 **Para. 4 subpara. 1** provides the legal basis for international agreements of the Union with third countries and international organisations in the field of humanitarian aid. This provision will be the future basis for framework and partnership agreements, regulating the relation between the Union and the organisations supported by it (see mn. 5 above). Its subpara. 2 re-emphasises Article 4 para. 4 TFEU and its stipulation of unprejudiced competences of Member States in respect of international legislation.
- 10 By virtue of **para. 5** and in accordance with the ordinary legislative procedure in accordance with Articles 289 and 294 TFEU, Union regulations may now define the legal status and the functioning of the future **European Voluntary Humanitarian Aid Corps**. The voluntary corps shall allow for joint contributions from young Europeans to the humanitarian aid operations of the Union. The reason why this voluntary corps shall only be deployed in the field of humanitarian aid but not equally in the field of development cooperation remains inexplicable.⁵
- 11 **Para. 6** has been devised to enable the Commission to ensure **coherent** humanitarian aid of the Union and the Member States. Given the parallel competence pursuant to Article 4 para. 4 TFEU, the coordination of measures is of particular importance. Inefficient parallel disaster management shall thereby be forestalled.
- 12 Furthermore, **para. 6** contains another coordination requirement in respect of the coherence of Union measures and measures of other (international or non-governmental) organisations. Here, framework agreements are in place, too.

TITLE IV RESTRICTIVE MEASURES

Article 215 (ex Article 301 TEC)

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

Bibliography: *Brown*, Kadi v. Council of the European Union and Commission of the European Communities, European Human Rights Law Review 2006, 456; *Cannizzaro*, Security Council Resolutions and EC Fundamental Rights, Yearbook of European Law 2010, 559; *Della Cananea*, Global Security and Procedural Due Process of Law between the United Nations and the European Union, The Columbia Journal of European Law, 15 (2009), 511; *Griller*, International Law, Human Rights and the European Commu-

⁵ Cf. also *Zimmermann*, ZIP 2004, 327.

nity's Autonomous Legal Order, *European Constitutional Law Review*, 4 (2008), 528; *Halberstam/Stein*, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order, 2009 *CMLRev* 13; *Hilpold*, EU Law and UN Law in Conflict, *Max Planck Yearbook of United Nations Law* 13 (2009), 141; *Klabbers*, Kadi: Justice at the Security Council?, *International Organizations Law Review* 4 (2007), 293; *Lavranos*, The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC, *Yearbook of European Law* 2010, 616; *Nettesheim*, U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance, 2007 *CMLRev* 567; *Pavoni*, Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgment, *Yearbook of European Law* 2010, 626; *Scheinin*, Is the ECJ Ruling in Kadi Incompatible with International Law?, *Yearbook of European Law* 2010, 637; *Tomuschat*, The Kadi Case, *Yearbook of European law* 2010, 654.

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I. Introduction

1

Title IV consists of a single Article concerning 'restrictive measures' in the field of external action of the EU. The Article provides procedural rules for economic or financial sanctions against third States ('retorsions', 'reprisals') like e.g. a trade embargo (paragraph 1) or sanctions directed against natural or legal persons, groups or non-state units, as they may come under consideration in the fight against terrorism (paragraph 2). A peculiar difficulty in handling these matters lies in the fact that in all of these cases measures of the economic or trade policy area are used for foreign policy objectives. In so far two very different areas forming a legal basis for such actions may be relevant at first sight: on the one hand such economic sanctions may be considered to be part of the intergovernmental policy coordinated within the framework of the CFSP, and on the other hand to belong to the supranationally organized legal areas of economic policies (trade policy, movement of capital).

The question, whether the former European Community was authorized to make use of its trade policy competence in cases determined by foreign and security policy, particularly whether it could impose a trade embargo on this basis, was for a long time disputed between the Council ('only intergovernmental measures')¹ and the Commission. In practice, however, the more and more prevailing opinion became that of a dual competence; this meant that a decision had to be adopted in the course of a mutual coordination of governments performed within the framework of the (at the time) European Political Cooperation, and implemented on the basis of the Community's trade law rules.²

The corresponding provisions inserted into the former European Community Treaty³ led to a first explicit solution of these questions concerning competences. It consisted of the two-levels procedure as it is presently also established in Article 215 TFEU: the coordination of the Member States takes place within the CFSP⁴; after this the implementing

¹ Comp. Rhodesia-embargo 1966; Iran-embargo 1980.

² Comp. Embargo against the Soviet Union concerning Afghanistan 1980 and Poland 1982, against Argentina in the Falkland islands conflict 1982 and against Iraq 1991.

³ ex-Article 301 TEC, ex-Article 60 TEC.

⁴ Articles 11 et seq. TEU.

decisions of the competent EU institutions are adopted according to the rules of the supranational area.

- 4 **Outside the CFSP area**, restrictive measures may be adopted according to Article 75 TFEU against natural or legal persons, groups or non-state units within the **European 'area of freedom, security and justice'**⁵ in order to limit the movement of capital for the purpose of fighting terrorism. And besides this, protective measures of the EU must be considered allowed without reference to the CFSP, if their motives exclusively arise within the areas of trade policy or capital movement, e.g. as a response to the **breach of a trade agreement** concluded with the EU.
- 5 The question of the competence of Union institutions according to Union law for restrictive measures against a third State must be separated from the problem whether or not they are legal under **public international law**. The rules of the GATT are not impeding (Article XXI GATT), but such measures which interfere with international obligations must meet the conditions of the international law on reprisals. The International Law Commission has proposed such rules in its draft Articles on the Responsibility of States for Internationally Wrongful Acts of 26 July 2001, particularly in its Articles 49–54.
- 6 A particular difficulty arises when a third State infringes a Member State and these infringements should be answered by the Union; in this case the Union must show that it is (also) **the Union which is legally affected**. Usually it will be possible to assume that breaching the legal rights of a Member State by a third State also infringes the Union as a particularly close community of mutual solidarity or at least justifies the Union's assisting measures.

7 **II. Restrictive measures against third countries**

1. Procedure in the framework of the CFSP

If economic sanctions are to be taken which pursue foreign policy objectives the procedure must be initiated within the CFSP (paragraph. 1). The relevant competence lies with the **Council**.⁶ The Council in its decision defines the aims, the extent, the means to be made available by the Union, their duration and the conditions of their implementation.⁷ In case of a substantial change of circumstances the Council will review its decision.⁸ In this phase the Council principally decides unanimously.⁹ The decision is binding for the Member States in their activities.¹⁰ As long as the Member States are not bound by a decision adopted within the CFSP they may safeguard their own political and security interests in specific cases according to Articles 346, 347 TFEU.

8 **2. Procedure for implementing the decision**

Article 215 TFEU authorizes and obligates the Council to implement the decision taken within the CFSP framework. Thereby the coherence of the foreign and security policy and the external economic activities of the Union must be guaranteed.

- 9 The implementing decision is taken by the Council by qualified majority upon a common proposal of the High Representative and the Commission. The European Parliament must be informed by the Council.¹¹

⁵ See Title IV, Articles 67 et seq. TFEU.

⁶ Article 28 para. 1 subpara. 1 s. 1 TEU.

⁷ Article 28 para. 1 subpara. 1 s. 2 TEU.

⁸ Article 28 para. 1 subpara. 2 TEU.

⁹ Article 31 para. 1 subpara. 1 TEU.

¹⁰ Article 28 para. 2 TEU.

¹¹ Article 215 para. 1 TFEU.

III. Restrictive measures against persons

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Restrictive measures against persons or groups of persons which are ordered within the framework of the CFSP are for the first time in Union law expressly mentioned in the new Article 215 TFEU. This article creates an **explicit legal basis** even for cases where the measures against persons are not connected with breaches of law by a (third) State, like in the case of terrorist groups acting independently.¹² The measures against persons or groups of persons also have to pass through the two-steps procedure which is provided for measures against third States (para. 2). For restrictions of the free movement of capital outside the CFSP comp. above mn. 4.

IV. Legal control

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Legal acts laying down restrictive measures must include **legal safeguards** by which they can be controlled (paragraph 3). For this purpose the competent institutions are obliged to expressly draw attention to the possibility of the general judicial protection against Union acts or to provide for further (possibly simplified) processes of judicial review.

Judicial review of a restrictive measure must be granted – according to the European Court of Justice – also where the EU implements a binding resolution of the **United Nations Security Council**.¹³

In *Kadi* a resolution of the Security Council ordered the UN Member States to ‘freeze’ the financial assets of certain private persons who were said to be associated with the Taliban. The Sanctions Committee of the UN Security Council had prepared a list of such persons and institutions. In order to give effect to the resolution of the Security Council within the – then – European Community the EU Council adopted a Common Position within the CFSP which was implemented by a regulation adopted by the EC Council. This regulation contained the list of persons drawn up by the Security Council Sanctions Committee and including the names of the plaintiffs.

The plaintiff’s action for annulment was granted. According to the ECJ the **regulation infringed the plaintiffs’ rights of the defence**, in particular the right to be heard and the right to effective judicial review of those rights, and thereby also Mr. Kadi’s **right to property**. The Court – in its own opinion – must ensure the review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, even if the Community measures in question were designed to give effect to resolutions adopted by the UN Security Council. Whereas the **Court of First Instance** in this case had limited its review to the rules of international *ius cogens* because in its opinion only these rules could override the higher rank¹⁴ of a binding Security Council resolution, and therefore had rejected the pleas in law, the **ECJ** held that the review by the Court of the validity of any Community measure in the light of fundamental rights was to be considered a constitutional guarantee stemming from the (then) EC Treaty as an autonomous legal system which may not be prejudiced by an international agreement. The Court, however, maintained the effects of the regulation for a short period of time in order to allow the Council to remedy the infringements. Regarding these remedies a complaint was brought before the General Court. This Court took a

¹² Comp. ECJ Case C-402/05 P *Kadi* [2008] ECR I-635.

¹³ ECJ Case C-402/05 P *Kadi* [2008] ECR I-635; Case C-550/09 *E and F* [2010] ECR I-6213.

¹⁴ Based on Article 103 UN-Charter.

decision in its 'Kadi II' judgment in favor of Kadi¹⁵, appeals dismissed by ECJ Joined Cases C-584/10P et al. The ECJ stated that none of the allegations presented against Mr Kadi in the summary provided by the UN Sanctions Committee were such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons was insufficient, or because information or evidence which might have substantiated the reason concerned, in the face of detailed rebuttals submitted by the party concerned, was lacking.¹⁶

- 15 In Case C-376/10 P *Pye Phyo Tay Za* Judgment of 13/03/2012, the Court of Justice held that restrictive measures targeted against third countries may also be directed to natural persons whose connection with the third country concerned is quite obvious, namely the leaders of third countries and the individuals associated with those leaders; they cannot, however, be applied to natural persons solely on the ground of their family connection with persons associated with the leaders of that country.
- 16 In its Judgment of 21/12/2011 (*France v. People's Mojahedin Organization of Iran*)¹⁷ the Court held that, in the case of an initial decision to freeze funds, the Council was not obliged to inform the person concerned beforehand, because it should be possible to take advantage of a surprise effect; however, the adoption of any subsequent decision to maintain the person concerned in the list must be preceded by notification and by allowing the person an opportunity of being heard.
- 17 In its judgment *Möllandorf*¹⁸ the ECJ ruled that in a case where Community law had frozen the economic resources of the buyer of immovable property, the final registration of transfer of ownership in the land register was prohibited, even if the contract of sale had been concluded before the buyer had been placed on the list annexed to the regulation and if he had already paid the sale price.
- 18 **A claim for damages** against the EC based on non-contractual liability as a result of a lawful or unlawful act was denied by the ECJ in a case where the German engineering bureau *Dorsch Consult*¹⁹ sought compensation for the damage allegedly caused by the refusal of Iraqi authorities to honour their debts to nationals of EC Member States as a reaction to an embargo on trade with Iraq, which had been adopted by the UN Security Council and implemented by EC Regulation no 2340/90. The Court held that claimant had not proved that he had suffered actual and certain damage.

TITLE V INTERNATIONAL AGREEMENTS

Article 216 [Treaty making powers]

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

¹⁵ GC Case T-85/09 *Kadi v Commission* [2010] ECR II-5177.

¹⁶ Cf. also ECJ Cases C-280/12 P, C-348/12 P *Council v Fulmen and Mahmoudian*.

¹⁷ ECJ Case C-27/09 P [2011] ECR I-13427.

¹⁸ ECJ Case C-117/06 *Möllandorf* [2007] ECR I-8361.

¹⁹ ECJ Case C-237/98 P *Dorsch Consult* [2000] ECR I-4549.

Bibliography: *Cardwell* (ed.), EU External Relations Law and Policy in the Post-Lisbon Era, 2011; *Cremona*, A constitutional basis for effective external action? An assessment of the provisions on EU external action in the Constitutional Treaty, EUI Working Paper Law No. 2006/30; *Cremona*, External relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law. EUI Working Paper Law No. 2006/22; *Dashwood/Maresceau* (eds) Law and Practice of EU External Relations: Salient Features of a Changing Landscape, 2008; *Eeckhout*, EU External Relations Law, 2011; *van Elsuwege*, EU external action after the collapse of the pillar structure, CMLRev 47 (2010), 987; *Gatti*, External representation of the European Union in the conclusion of international agreements, CMLRev 49 (2012), 1703; *Geiger*, Vertragsschlußkompetenzen der Europäischen Gemeinschaft und auswärtige Gewalt der Mitgliedstaaten, JZ 1995, 973; *Hillion/Koutrakos* (ed.) Mixed Agreements Revisited, 2010; *O'Keefe/Schermers* (eds), Mixed Agreements, 1995; *Koutrakos*, EU International Relations Law, 2006; *Rosas*, The status in EU law of international agreements concluded by EU member states, Fordham international law journal, 34 (2011), 1304; *Sari*, The Conclusion of International Agreements by the European Union in the Context of the ESDP, ICLQ 56 (2008), 53; *Verwey*, The European Community, the European Union and the International Law of Treaties, 2004; *Zielonka*, The EU as an international actor, European foreign affairs review 16 (2011), 281.

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I. General remarks

1

It is for the first time in the history of the EU that – introduced by the Lisbon Treaty in Title V TFEU – the rules on the **Union's treaty making powers and the relevant procedures** for concluding treaties are summarily presented by primary Union law. Previously, there were separate provisions for the area of the CFSP (ex Article 24 TEU), for the cooperation in the area of Home and Justice (ex Article 38 TEU) and for the competences on the basis of the former TEC (ex Article 300 TEC).

Article 216 para. 1 TFEU defines the **competences** of the Union for concluding international treaties without having any corresponding provision in the former Treaties. **Article 216 para. 2 TFEU** takes over the wording of the former Article 300 para. 7 TEC concerning the **binding effect** of the Union's international treaties upon the Union and the Member States.

Article 216 para. 1 TFEU enumerates **four instances in which the Union is competent** to conclude such agreements. It does not deal with the question whether the Union's external competences are exclusive or whether they co-exist in relation to respective competences of the Member States. This question is dealt with by Article 3 para. 2 TFEU. Both provisions codify the case law of the ECJ concerning the external competences of the Union, particularly the insofar central *ERTA* judgment of 1971¹.

Title V is concerned with **all of the Union's international treaties** and agreements, bilateral and multilateral, concluded with third States or with international organizations.

II. Treaty making powers (para. 1)

5

Article 216 para. 1 TFEU lays down under which circumstances a Union competence for concluding international treaties is being generated. Therefore it distinguishes **four**

¹ ECJ Case 22–70 *Commission v Council* [1971] ECR 263.

categories of competences. Whereas competences are granted expressly in the first category, the categories 2 to 4 deal with implicit external competences as they were developed in the case law of the ECJ (see mn. 9 below).

- 6 It was unclear for a long time whether the Union could have external treaty making competences in cases in which Treaty rules only provide competences for adopting legal acts within the internal sphere of the Union. The ECJ answered this question in the affirmative by its **ERTA judgment**², which was supplemented by its **Kramer judgment**³. According to these decisions, the Union had an implicit treaty making competence for attaining certain aims in cases in which the Union institutions were provided with competences to act in the internal sphere for reaching such aims. In 1993, the ECJ had clearly summarized this principle in its Opinion 2/91 concerning the *ILO Convention No 170*⁴.
- 7 However, a significant **restriction** of this rather simple rule was brought about by the ECJ's Opinion 1/94 – *WTO*⁵, which was confirmed by its Opinion 2/92 – *OECD*⁶. According to these opinions, an implicit external power of the Union was dependant not only on the existence of the respective internal competence but the Court required additionally that the Union had already **made use of this internal competence by adopting a legal act**. There were only **two exceptions** to this additional prerequisite that the previous adoption of a legal act was not necessary, (a) if entering the international agreement was an **indispensable precondition** for achieving the objectives of the internal competence⁷, and (b) if the Union acting on the basis of its internal legislative competence had **expressly empowered** its institutions to conclude treaties with third states.
- 8 This **case law of the ECJ** concerning external Union competences is now incorporated into primary Treaty law by **Article 216 para. 1 TFEU**:
- 9 **Category 1: the specific treaty making competence is provided for by the Treaties.** In effect, this rule has a declaratory function only; its statement is a matter of course. The following explicitly provided competences would exist even without the reference:
 Article 6 para. 2 TEU (accession to the European Convention on Human Rights),
 Article 37 TEU (agreements in the area covered by the CFSP),
 Article 165 para. 3 TFEU (vocational training),
 Article 167 para. 3 TFEU (sphere of culture),
 Article 168 para. 3 TFEU (public health policy),
 Article 207 TFEU (common commercial policy),
 Article 211 TFEU (cooperation in the area of development),
 Article 212 para. 3 TFEU (economic, financial and technical cooperation with third states),
 Article 214 para. 4 TFEU (humanitarian aid),
 Article 217 TFEU (association agreements),
 Article 219 TFEU (monetary or foreign exchange regimes).
- 10 **Category 2: the conclusion of an international agreement is necessary for attaining one of the objectives of internal Treaty competences**, as it has already been established case law of the ECJ⁸. The external competence of the Union codified for cases of this category is running parallel to the internal competence provided for in the Trea-

² ECJ Case 22–70 *Commission v Council* [1971] ECR 263.

³ ECJ Joined Cases 3–4, 6/76 *Kramer* [1976] ECR 1279.

⁴ Opinion 2/91 *ILO Convention No 170* [1993] ECR I-1061.

⁵ Opinion 1/94 *WTO* [1994] ECR I-5267.

⁶ Opinion 2/92 *OECD* [1995] ECR I-521.

⁷ ECJ Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

⁸ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

ties.⁹ Thus, if the legislative competence addresses only the status of Union citizens in the territory of the Union (for example by the rules governing the freedom of establishment according to Article 49 para. 2 TFEU), the Union may conclude an agreement with third states regulating the relevant rights and duties of non-Union citizens only if this is necessary for attaining the objectives of the internal competence.¹⁰

Category 3: the treaty making competence is provided for in a legislative act of the 11
Union; in this case this competence is a matter of secondary Union law.

Category 4: an implicit treaty making power of the Union exists also if Member 12
States agreements are likely to affect common rules or alter their scope. The wording of this variant in Article 216 para. 1 TFEU is unfortunate in this context and – if taken literally – must lead to the misunderstanding that the provision is dealing with *Union treaties* which may not affect common rules. But Article 216 para. 1 TFEU is leaning on the ECJ's Opinion 1/03 in which the Court, citing the *ERTA* judgment, referred to 'the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules. In such a case, the [Community] also has the exclusive competence to conclude international agreements'.¹¹

III. Binding effect for Union and Member States (para. 2)

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Treaties concluded by the Union with third parties do not bind the Member States in relation to these parties. Member States become legally bound in relation to third parties only in the case of 'mixed agreements' (see mns 17 et seq. below). The duty of Member States to implement the treaties of the Union, as laid down by Article 216 para. 2 TFEU, only refers to an **internal duty as part of the legal system of the Union**.

This duty applies to all kinds of treaties and agreements to which the Union is a party. Thus Article 216 para. 2 TFEU must be assessed as a general implementing order.

Union agreements are considered to form an **integral part of Union law**.¹² This effect 14
does not depend on the kind of procedure according to which the agreement was concluded, and particularly not in the way the Council has given its consent. It is only relevant that the agreement is binding on the Union. Breaching the agreement may lead to an infringement procedure initiated by the Commission.¹³

Treaties may create their own institutions or bodies for assisting their implementation. 15
In this way e.g. association treaties are guided by **association councils**.¹⁴ Decisions adopted by such councils form part of the Union legal order.¹⁵

For the direct effect of Union treaties in the internal sphere of the Union and the 16
Member States and their rank in the hierarchy of norms see Article 47 TEU mns 14 et seq.

IV. 'Mixed agreements'

17

Mixed agreements are agreements concluded with third states or international organizations to which **both the Union and the Member States** had to become parties because

⁹ Opinion 1/76 European laying-up fund for inland waterway vessels [1977] ECR 741.

¹⁰ Opinion 1/94 *WTO* [1994] ECR I-5267.

¹¹ Opinion 1/03 *Lugano Convention* [2006] ECR I-1145 mn. 116.

¹² ECJ Cases 181-73 *Haegeman* [1974] ECR 449; C-321/97 *Andersson* [1999] ECR I-3551.

¹³ ECJ Case C-13/00 *Commission v Ireland* [2002 9 ECR I-2955.

¹⁴ See commentary on Article 217 TFEU.

¹⁵ ECJ Case C-192/89 *Sevince* [1990] ECR I-3461.

the Union's treaty making power did not cover all issues of the agreement. In the case of a parallel competence (like in the field of development aid to third states) in which making use of the competence by the Union does not render that competence exclusive, the Member States are still entitled to enter into commitments themselves vis-à-vis non-Member States, either collectively or individually, or even jointly with the Union.¹⁶ Since its turnaround in the Opinion 1/94 – WTO¹⁷, the ECJ held that only an exclusive competence of the Union may keep the Member States from joining the agreement.

- 18 A mixed agreement creates a **legally binding effect towards both the Union and the Member States** in regard to all of its provisions, no matter whether there is a division of competences according to the Treaties.¹⁸ Invoking the distribution of competences between Union and Member States towards the third State is only possible if this was agreed upon between the parties of the agreement. A later change of the distribution in the course of the further development of Union law has no external effect; it remains an internal matter of the relationship between Union and Member States.¹⁹
- 19 The **implementation of the mixed agreement** is governed by the distribution of competences as provided by Union law.²⁰ The Union and the Member States are obliged, in relation to each other, to implement the agreement in a proper way (Article 4 para. 3 TEU). In order to regulate their cooperation, they sometimes conclude so-called internal agreements. The power to decide on questions of interpretation of mixed agreements provisions according to Article 267 TFEU in matters which are still in the area of Member States competence is exercised by the ECJ if these matters may in the future become relevant also for issues covered by Union law.²¹ In other respects it is the Member States that are responsible in areas for which Union law has not been set. In such cases it is the Member States' domestic law which decides on the direct effect of the agreement.²²

Article 217 [Association agreements] (ex Article 310 TEC)

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Bibliography: Bartelt, ACP-EU development cooperation at a crossroads?, European foreign affairs review, 17 (2012), 1; Fredriksen, Bridging the widening gap between the EU treaties and the Agreement on the European Economic Area, European law journal, 18 (2012), 868; Haquani, Les perspectives des relations entre l'Union européenne et les pays ACP, in: Lamblin-Gourdin/Mondielli (ed.), Un droit pour des hommes libres, 2008, 293; Hassan, L'accord de Cotonou. Revue du droit de l'Union européenne, 2013, 85; Krenzler, Der Europäische Wirtschaftsraum als Teil einer gesamteuropäischen Architektur, Integration, 1992, 61; Lenski, Turkey and the EU: On the Road to Nowhere?, ZaöRV 2003, 77; Magnússon, Judicial homogeneity in the European Economic Area and the authority of the EFTA Court, Nordic journal of international law, 80 (2011), 507; Piipponen/ Westman-Clément, The Agreement on the European Economic Area (EEA), 1994; Schwok, Switzerland's Approximation of Its Legislation to the EU Acquis: Specificities, Lessons and Paradoxes. European Journal of Law Reform, 2007, 449; Tezcan-Idriz, Free movement of persons between Turkey and the EU, CMLRev 46 (2009), 1621; Ugur/Canefe, Turkey and European Integration, 2004.

¹⁶ ECJ Case C-316/91 *EP v Council* [1994] ECR I-625.

¹⁷ Opinion 1/94 *WTO* [1994] ECR I-5267.

¹⁸ ECJ Case C-316/91 *EP v Council* [1994] ECR I-625.

¹⁹ Opinion 1/78 *UNCTAD* [1979] ECR 2871.

²⁰ ECJ Case C-316/91 *EP v Council* [1994] ECR I-625.

²¹ ECJ Case C-53/96 *Hermès* [1998] ECR I-3603.

²² ECJ Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior* [2000] ECR I-11 307.

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I. General remarks

1

Article 217 TFEU allows the Union to conclude international agreements establishing an association with third states or international organizations (**‘treaty association’**). This treaty association has to be distinguished from the **‘constitutional association’** according to Articles 198 et seq. TFEU, which refers to the association of certain ‘non-European overseas countries and territories (OCT)’ which form part of a Member State. The term ‘constitutional association’ makes clear that the OCT belong to Member States who have the treaty making power in their respect; it is therefore not necessary to conclude an agreement with these countries and territories in order to establish special Union rules regarding them.

The treaty making power arising from Article 217 TFEU constitutes a special part of the general competence of the Union to conclude treaties in the area of development co-operation according to Articles 208 et seq. TFEU.

The **content of a treaty association** is not specifically defined by the Union Treaties. In general, an association comprises the creation of particular and privileged relations with a third state or international organization.¹ Since 1995, the clause on the respect of human rights and democratic principles has constituted an essential element of the agreements. Contrary to the specific association concept which is generally used by international organizations, the treaty association provided for in Article 217 TFEU does not establish a membership status of a lower level (like e.g. an observer status). Only the substantive provisions of the Treaties may be the object of an association agreement but not a participation in the Union’s organizational structure or its legislative or administrative system.²

According to their political purpose, associations may be divided into three groups:

- associations preparing the **accession** of a third state to the Union,
- associations establishing closer **economic and political ties** (like free trade associations) and
- associations promoting a third state’s **development**.

In the more recent agreements based on Article 217 TFEU the parties have refrained from using the term ‘association’, apparently in order to avoid the image of a third state having a minor status or being dependent on the Union.

II. Treaty making power

6

Article 217 TFEU **authorizes Union institutions** to conclude agreements concerning all areas of substantive Union law.³ The scope of application of Union provisions in these

¹ ECJ Case C-12/86 *Demirel* [1987] ECR 3719.

² Opinion 1/91 *EEA II* [1991] ECR I-6079.

³ ECJ Case C-12/86 *Demirel* [1987] ECR 3719.

fields may be widened by the association agreement to cover relations to the third party and the status of its citizens. For example, the freedom of movement for workers, which in general is granted to Union citizens only, may be extended to the third party's citizens.⁴

- 7 The association agreements must provide **reciprocal rights and obligations** between the Union and the association partner. This does not mean, however, that reciprocity requires strictly identical rights and duties. Thus, in the case of development association, the partner state may be granted unilateral trade benefits. It is sufficient that the agreement takes account of the **reciprocal economic interests of both sides** in general.
- 8 Association agreements constitute frameworks intended for a long-term cooperation. Accordingly, they may provide **rules for common action and special procedures**, steering the progressive integration of the association by treaty institutions with equal numbers of representatives of both sides, e.g. by councils of ministers, parliamentary assemblies and arbitration tribunals. The judiciary system of the agreement, however, is not allowed to impair the autonomy of the Union's legal order.⁵
- 9 If the negotiations of an association agreement aim to include provisions **exceeding the Union's competence**, there are **two ways to remedy** this situation: by amending the primary law of the Treaties according to Article 218 para. 11 TFEU or by concluding a 'mixed agreement' in which the Member States are participating.⁶

10

III. Procedure

The procedure of concluding the treaty is laid down in Article 218 TFEU. The negotiations are led by the **Commission** authorized by the **Council**. According to Article 218 para. 6 subpara. 2 lit. a (i) TFEU, the **European Parliament** must give its consent to the agreement. It must be kept informed by the Council during the negotiations. The agreement is **ratified by the Council by a unanimous vote**.⁷

- 11 **If the participation of the Member States is necessary** – e.g. because of a lack of Union competences for some of the provisions of the agreement ('mixed agreement'⁸) – the final decision on the ratification is adopted by the Council only after all of the Member States have completed their ratification procedures.

12

IV. Implementation

The associations usually have an **association council**, in which representatives of the Union (Council, Commission), the partner States and – in the case of mixed agreements – the Member States each have a seat. In addition, the APC- and EEA-agreements provide a parliamentary representation consisting of representatives of the parliaments of all parties to the agreement (European Parliament and national parliaments). In spite of this institutional structure the associations do not enjoy a legal personality of their own.

- 13 Association treaties of the Union are **treaties of public international law**. Their interpretation follows principles of international law. Even if single terms of the agreement coincide in their wording with expressions of the Union Treaties, this does not necessar-

⁴ ECJ Case C-12/86 *Demirel* [1987] ECR 3719.

⁵ Opinion 1/91 *EEA II* [1991] ECR I-6079.

⁶ See Article 216 TFEU mn. 17–19.

⁷ See Article 218 para. 8 subpara. 2 TFEU.

⁸ See Article 216 TEU mn. 17.

ily mean that the results of their interpretation will be the same. This is particularly true for the issue of immediate applicability of a treaty provision (see mn. 15 below).

After the entering into force of association treaties, they are considered to be ‘**integral parts of Union law**’. It does not matter in which procedure they had been adopted. As part of Union law, they are ranking above the Member States’ law.⁹ This is also true for the decisions of an association council.¹⁰

The provisions of the agreement **may be directly applicable** if the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.¹¹ In interpreting such provisions, one must regard their wording and the purpose and nature of the agreement itself; this is also true for the decisions of an association council.¹²

V. Judicial control

In case of a dispute between the association partner on the one hand and the Union or – in case of a mixed agreement – the Member States on the other hand about the interpretation and application of the agreement, the **dispute settlement procedure** provided for in the agreement is applicable. The body deciding the dispute may be the ECJ or another court or an arbitral tribunal created by the parties ad hoc.

The ECJ decides about the validity and interpretation of the agreement in view of Union law according to the rules of Union law and – as the case may be – about public international law according to the procedure provided for in the TFEU; the same is true for disputes concerning the decisions of an association council.¹³ In the time before the conclusion of the association agreement a binding opinion of the ECJ can be brought about.¹⁴

VI. Association practice

Among the most important bilateral association agreements there are:

- the **Ankara Agreement** concluded with **Turkey** (1963; see mns 19 et seq. below);
- the **Stabilization and Association Agreements**, each concluded as a ‘mixed agreement’ with single **States of former Yugoslavia and Albania** (now in force with former Yugoslav Republic of Macedonia (2001), Albania (2006), Montenegro (2007), Bosnia and Herzegovina (2008), and Serbia (2013);
- the **Euro-Mediterranean Agreements** establishing an association agreement with single partners of the southern and eastern Mediterranean area, each concluded as a ‘mixed agreement’, now established within the framework of the European Neighbourhood Policy¹⁵.

Multilateral agreements are the **ACP-EC Partnership agreement** of Cotonou (see mn. 22 below) and the **EEA Agreement** with the former EFTA-States (see mn. 26 below).

⁹ See Article 4 TEU mns 24 et seq.

¹⁰ ECJ Cases C-192/89 *Sevince* [1990] ECR I-3461; C-237/91 *Kus* [1992] ECR I-6781.

¹¹ ECJ Cases 12/86 *Demirel* [1987] ECR 3719; 65–77 *Razamatsimba* [1977] ECR 2229; 87/75 *Bresciani* [1976] ECR 129; C-18/90 *ONEM* [1991] ECR 199; C-37/98 *Savas* [2000] ECR I-2927; C-63/99 *Głoszczuk* [2001] ECR I-6369; C-235/99 *Kondova* [2001] ECR I-6427; C-257/99 *Barkoci* [2001] ECR I-6557.

¹² ECJ Cases C-237/91 *Kus* [1992] ECR I-6781; C-1/97 *Birden* [1998] ECR I-7747; C-262/96 *Sema Sürül* [1999] ECR I-2685; C-329/97 *Sezgin Ergat* [2000] ECR I-1487; C-65/98 *Safet Eyüp* [2000] ECR I-4747; C-188/00 *Bülent Kurz* [2002] ECR I-10691; C-317/01 *Abatay* [2003] ECR I-12301.

¹³ ECJ Case C-192/89 *Sevince* [1990] ECR I-3461.

¹⁴ See Article 218 para. 11 TFEU.

¹⁵ For more information see Art. 8 TEU mn. 7.

19

VII. Ankara Agreement with Turkey

The **Association Agreement** concluded by the EEC (now: EU) with Turkey of 12 September 1963 aimed at promoting the trade and economic relations between the parties and to establish a customs union; it was also meant to assist in facilitating a possible accession of Turkey to the Community (now: Union).¹⁶

- 20 The Agreement is supplemented by the **Additional Protocol of 23 November 1970**. Its Article 41 prohibits the introduction of any new restrictions on the freedom of establishment and the freedom to provide services. In addition, Article 13 Association Council's Decision No 1/80 forbids introducing new restrictions on the access to employment applicable to workers and members of their families who are legally resident and employed in their respective territories. These provisions have direct effect in the sense of giving rise to rights which individuals may rely on before a court of a Member State.¹⁷ In a case regarding family reunification the ECJ¹⁸ decided that this 'standstill clause' precluded a German measure requiring the spouse of a Turkish national to prove the acquisition of a basic knowledge of the German language as a precondition for attaining a visa. New restrictions may be justified only by overriding reasons in the public interest, whereby account must be taken of the circumstances of the specific case.
- 21 A **customs union** was established by Decision 1/95 of the Association Council on the basis of the Association Agreement, applicable from 1 January 1996. The **procedure of negotiations on the accession** of Turkey to the European Union was launched on 3 October 2005. The end of these negotiations cannot be predicted currently.

22

VIII. EU-ACP-Agreement of Cotonou

The Partnership Agreement of Cotonou continues the policy of **associating the former colonies of EU Member States** (OCT, Articles 198 et seq. TFEU) to the EU. This policy began with the agreement of **Jaundé** (1964) and continued with the four agreements of **Lomé**, the last of which ended on 29 February 2000. 75 States situated in Africa, in the Caribbean and in the Pacific area (ACP-States) on the one hand and the EU and its Member States on the other hand are now members of the Agreement signed in **Cotonou** (Benin) on 23 June 2000. It was concluded for 20 years with the possibility to revise it every five years.¹⁹ Provisions of this Agreement may have direct effect in the Member States.²⁰

- 23 This Agreement is the most important project of the EU in the field of **development policy**. It should serve as a model for the cooperation between developed and developing countries with a view of a more just and well-balanced economic world order. Its main objects are reducing poverty and integrating the ACP-States into the world economy in accordance with the requirements of sustainable development.
- 24 This should be achieved by **cooperating in the fields of trade policy** (liberalizing trade, ending existing trade preferences (assisted by the European Development Fund,

¹⁶ See Article 28 Ankara Accession Agreement: 'As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.'

¹⁷ ECJ Case C-317/01 *Abatay* [2003] ECR I-12301.

¹⁸ ECJ Case C-138/13 *Dogan/Germany* Judgment of 10 July 2014.

¹⁹ The Agreement was revised in Luxembourg on 25 June 2005 and in Ouagadougou on 22 June 2010.

²⁰ ECJ Case C-469/93 *Chiquita* [1995] ECR I-4533.

EDF) and the **political dialogue** (observing human rights, the rule of law, responsible State management).

The politically leading joint institution established by the Agreement is the **Council of Ministers**. It is assisted by the **Committee of Ambassadors** and – as a consultative body – the **Joint Parliamentary Assembly**, which is composed of equal numbers of EU and ACP parliamentary representatives.

IX. EEA-Agreement with EFTA-States

26

The multilateral Agreement on the **European Economic Area (EEA)** establishes an association between the EU and its Member States on the one hand and the States of the **European Free Trade Association (EFTA)** on the other hand.²¹ Originally the parties of the agreement were the EC and its Member States on the one hand, and the EFTA-States Finland, Iceland, Norway, Austria, Sweden and Liechtenstein on the other hand. The agreement went into force on 1 January 1994. Its object is a continuous and balanced strengthening of trade and economic relations with equal conditions of competition, and respecting of the same rules, by creating conditions similar to an internal market, particularly the free movement of goods, persons, services, capital, the setting up of a system ensuring that competition is not distorted as well as closer cooperation in other fields, such as research and development, the environment, education and social policy. The EFTA States contribute to the cohesion fund of the EU. Since the accession of Finland, Sweden and Austria to the EU on 1 January 1995 only **Iceland, Norway and Liechtenstein** have remained as the associated partners.

The only EFTA State which has **not joined the EEA Agreement** is **Switzerland**. Switzerland is a partner to the EU in many bilateral and multilateral treaties. In particular, Switzerland concluded several bilateral agreements with the EU on 21 June 1999, which went into force on 1 June 2002. These agreements concern the free movement of persons, government procurement, mutual recognition of conformity assessment, air transport, carriage of goods and passengers by rail and road, trade in agricultural products, scientific and technological cooperation. However, on 20 December 2012 the Council of the EU stated that the approach taken by Switzerland to participate in EU policies and programmes through sectoral agreements in more and more areas and in the absence of any horizontal institutional framework, has reached its limits and needs to be reconsidered.²²

Article 218 [Negotiation and conclusion of agreements; opinion of the ECJ] (ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the

²¹ Opinions 1/91 *EEA I* [1991] ECR I-6079; Opinion 1/92 *EEA II* [1992] ECR I-2821.

²² 3213th Council meeting, press release 523 PR CO 76.

Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

- (i) association agreements;
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter.

In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

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

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I. General remarks

1

Article 218 TFEU contains **provisions on the procedure within the Union** for concluding international agreements, including the relevant competences of the Union institutions. Furthermore the Article provides rules on a preventive judicial control before entering into an agreement (Article 218 para. 11 TFEU).

Article 218 TFEU replaces the former Article 300 TEC and takes over the rules of procedure set out in this article with some amendments. In particular there is an important development in the participation of the **European Parliament**; its position in the course of negotiating and adopting the agreement is reinforced.

Before the reform by the Lisbon Treaty the procedures for concluding agreements in the different ‘pillars’ of the Union were dealt with separately in ex Article 24 TEU, ex Article 38 TEU and ex Article 300 TEC. Now, because of the unified structure of the Union, the treaty making procedure is prescribed by Article 218 TFEU for **all kinds of agreements**. However, the Article provides some special rules for agreements in the area of CFSP. Furthermore, a specific procedure is provided for trade agreements of the Union¹ and for agreements concerning monetary or foreign exchange regime matters².

The conclusion of international treaties between an international organization like the European Union and third States and another international organization is **governed by public international law**. A codification of such rules may be found in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).³

Article 218 TFEU deals with the competences of Union institutions and the internal procedure for entering an international agreement. In this context, **the term ‘agreement’ applies to any binding provision** entered into with subjects of public international law regardless of its form.⁴

Special rules apply to agreements in the area of the **common trade policy**; these provisions are laid down in Article 207 para. 4 TFEU.

¹ See Article 207 paras 3 and 4 TFEU in connection with Article 218 para. 1 TFEU.

² See Article 219 TFEU.

³ ECJ Case C-327/91 *France v Commission* [1994] ECR I-3641.

⁴ ECJ Case C-327/91 *France v Commission* [1994] ECR I-3641.

II. Procedure

1. Negotiation of the agreement (paras 2–4)

The **Council** takes the decision on opening the negotiations. It also adopts the negotiating directives and, when negotiations have come to an end, authorizes the signing and concluding of the agreements (para. 2).

- 8 However, the Council does not conduct the **negotiations** itself. Rather, according to para. 3, it authorizes the Commission or – depending on the object of the agreement – the High Representative for the CFSP to carry out the negotiations. It chooses the High Representative only if the agreement relates to CFSP matters exclusively or principally.
- 9 The **Commission** or, as the case may be, the **High Representative** submits recommendations to the Council on the opening of negotiations. The **Council then adopts a decision authorizing the start of negotiations** and nominating the negotiator – Commission or High Representative – or the head of the Union's negotiating team in a case in which the agreement envisaged includes both TFEU and CFSP issues.⁵
- 10 According to para. 3, the Council may address directives to the negotiator. It may also provide the negotiator with a special consultative committee in which, for example, the Member States can exert influence on the negotiations.
- 11 Since the Lisbon reform Treaty, the **European Parliament** is involved in the stage of negotiating the agreement already. According to **para. 10**, the European Parliament must be informed about the course of the negotiations from the very beginning. The details on the ways of informing members of the European Parliament and possibly granting them observer status during the negotiations are included in the **Framework Agreement on relations between the European Parliament and the Commission**, as revised on 20 October 2010, points 23–27.⁶

12 2. Signing and adoption of the agreement (paras 5–6, 8–9)

The **Council** decides on the signing (para. 5) and concluding (para. 6) of the agreement. In general, it adopts its decisions by **qualified majority** upon the proposal of the negotiator (para. 8 subpara. 1).

- 13 According to para. 8 subpara. 2, **unanimity** is necessary if internal legal acts of the EU in the field covered by the agreement must be adopted unanimously, or if the agreement is an association agreement (Article 217 TFEU), or a cooperation agreement (Article 212 TFEU) with candidates for accession to the EU. Unanimity is also required for the agreement on accession of the EU to the European Convention on Human Rights (Article 6 para. 2 TEU); this decision only entering into force after the EU Member States gave their approval according to their constitutional requirements.
- 14 The **role of the European Parliament** was strengthened by the Lisbon reform in regard to concluding agreements. Article 218 para. 6 subpara. 2 lit. a item V TFEU widens the range of cases for which the **consent of the European Parliament** is required by including all agreements for which the ordinary legislative procedure applies or – in case of the special legislative procedure – where consent by the European Parliament is required. The consent of the European Parliament is also necessary for the Union's accession to the European Convention on Human Rights now (lit a item II). As already before the Lisbon Treaty, a consent of the European Parliament is required for association agreements, for

⁵ Cf. Streinz/Mögele, Article 218 AEUV mn. 6.

⁶ OJ 2010 L 304/47.

agreements establishing a specific institutional framework by organising cooperation procedures, and for agreements with important budgetary implications for the Union (lit. a items I, III, IV).

In other cases, in which consent is not necessary, the European Parliament must at least be **consulted** (Article 218 para. 6 subpara. 2 lit. b TFEU). These cases have become rare exceptions because consent is required in all areas in which the ordinary legislative procedure applies. 15

The only agreements which are concluded **without any obligatory participation** of the European Parliament are those exclusively concerning the area of the CFSP (Article 218 para. 6 subpara. 2 TFEU). 16

3. Exceptional powers of the negotiator (para. 7)

17

The competence to conclude an agreement may be assigned to the negotiator in exceptional cases. Such cases are expressly provided in Article 220 para. 2 TFEU (concerning cooperation in relations to international organizations) or in Article 7 Protocol on Privileges and Immunities. Moreover, according to Article 218 para. 7 TFEU, the Council may authorise the negotiator to **approve modifications to the agreement** if the agreement provides for such modifications to be adopted **by a simplified procedure or by a body set up by the agreement**. A competence of the Commission to implement legal acts in the Union's internal sphere, however, does not enable it to conclude an agreement with third States on the same issue. An implementing competence does not restrict the division of powers provided for in the external sphere.⁷

4. Suspension of the agreement

18

The Council is competent to adopt a decision suspending the application of an agreement, provided a proposal to this effect has been submitted by the Commission or the High Representative (para. 9).

5. Decisions of treaty bodies

19

On a proposal of the Commission or the High Representative, the Council is also competent to establish the positions to be adopted on the Union's behalf in a body set up by an agreement when that body is called upon to adopt acts having legal effects. However, if these acts are aiming at supplementing or amending the institutional framework of the agreement, the procedure of concluding an appropriate agreement must be complied with (para. 9).

III. Judicial control

20

1. Preventive control

Article 218 para. 11 TFEU provides rules for controlling the compatibility of an agreement intended by the Union with the Union Treaties, including the competence of the Union or the powers of its institutions or its Member States.⁸ In particular, the autonomy of the legal order of the Union must not be impaired by a system of judicial control possibly provided for in the agreement.⁹ The Council, the Commission, the

⁷ ECJ Case C-327/91 *France v Commission* [1994] ECR I-3641.

⁸ Opinion 2/91 ILO [1993] ECR I-1061.

⁹ Opinion 1/00 *European Common Aviation Area* [2002] ECR I-3493.

European Parliament or a Member State may ask for an opinion of the Court to such issues.

- 21 Article 218 para. 11 TFEU applies generally to **all types of agreements, except for agreements concerning CFSP matters**. Article 24 para. 1 subpara. 2 TEU and Article 275 TFEU state clearly that on the one hand the ECJ does not have jurisdiction with respect to CFSP but on the other that there are **two (very narrow) exceptions**: monitoring compliance with Article 40 TEU and reviewing the legality of decisions providing for restrictive measures according to Article 263 para. 4 TFEU. The ECJ could be asked for an opinion regarding these exceptions.
- 22 The **request for the ECJ's opinion is admissible** when the conclusion of an agreement is being considered and its relevant content can be estimated with sufficient accuracy. It is not necessary that the negotiations have already begun, and even less that an authentic text of the agreement has already been drafted.¹⁰ If the Court comes to the conclusion that the agreement is not compatible with primary Union law, the agreement may only be concluded after having become amended or after the Treaties have become revised correspondingly (Article 218 para. 11 s. 2 TFEU).

23

2. Subsequent control

The possibility of a preventive control does not exclude the judicial control after the agreement's entering into force.¹¹ Forming part of the Union's legal order ranking below the primary law of the Treaties, the agreement in its internal effects is **subject to the general provisions of judicial control** concerning actions of the Union: action for annulment (Articles 263 et seq. TFEU)¹²; maintenance of the effects of the Council decision on ratification on reasonable grounds of legal certainty (Article 264 para. 2 TFEU)¹³; request for preliminary ruling (Article 267 TFEU)¹⁴.

- 24 However, the binding effect of the agreement based on public international law cannot be set aside by judgments of the ECJ. According to Articles 27 para. 2 and 46 para. 2 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), an international organization may not invoke a violation of its rules as invalidating an agreement except for a violation of rules regarding competence, and only if that violation was manifest and concerned a rule of fundamental importance.

Article 219 [Exchange-rate policy in relation to third States] (ex Article 111(1) to (3) and (5) TEC)

1. By way of derogation from Article 218, the Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament and in accordance with the procedure provided for in paragraph 3.

¹⁰ Opinion 1/75 *Local costs* [1975] ECR 1355; Opinion 2/94 *ECHR* [1996] ECR I-1759.

¹¹ ECJ Case C-25/94 *Commission v Council* [1996] ECR I-1469.

¹² ECJ Case C-122/95 *Germany v Council* [1998] ECR I-973.

¹³ ECJ Case C-360/93 *European Parliament v Council* [1996] ECR I-1195.

¹⁴ ECJ Case C-321/97 *Andersson* [1999] ECR I-3551.

The Council may, either on a recommendation from the European Central Bank or on a recommendation from the Commission, and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the euro central rates.

2. In the absence of an exchange-rate system in relation to one or more currencies of third States as referred to in paragraph 1, the Council, either on a recommendation from the Commission and after consulting the European Central Bank or on a recommendation from the European Central Bank, may formulate general orientations for exchange-rate policy in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability.

3. By way of derogation from Article 218, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations, the Council, on a recommendation from the Commission and after consulting the European Central Bank, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Union expresses a single position. The Commission shall be fully associated with the negotiations.

4. Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

Bibliography: *Herrmann*, Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice, EFARev. 7 (2002), 1; *Hornig*, The ECB's membership in the IMF: Legal approaches to constitutional challenges, ELJ 11 (2005), 802; *Zilioli/Selmayr*, The external relations of the euro area: Legal aspects, CMLRev. 36 (1999), 273.

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I. General observations

1

Article 219 TFEU builds on the external competence of the Union in the international monetary and exchange field as it is laid down in Article 138 TFEU. It stipulates **specific procedural rules** formulating exceptions to the general provisions on treaty making with third States and international organizations as contained in Article 218 TFEU.

The Article is constructed in a somewhat complicated way. The general principle regarding monetary and foreign exchange policy in general is spelled out in para. 3. Paras 1 and 2 are concerned with the peculiarities of exchange-rate policy. Para. 4 deals with the external competences left for the Member States.

3 II. Negotiation of agreements in the monetary and exchange field in general (para. 3)

Para. 3 implies that the Union has treaty making competence in the field of monetary policy. It **stipulates derogations from the general negotiating procedure** provided by Article 218 TFEU in relation to international agreements concerning monetary or foreign exchange regime matters.

4 Where such agreements need to be negotiated by the Union with States or international organisations, the **Council (not the ECB)** adopts a decision about the **institutional competence** and the **procedural arrangements** for the negotiation and for the **conclusion of such agreements**. These arrangements include the determination of the negotiator, like a member of the Council, the Commission or the ECB. The main purpose of these arrangements is to ensure that the Union, primarily controlled by the Council, expresses a **single position**. However, the Commission must be fully associated with the negotiations in any case.

5 The decision is taken on a **recommendation from the Commission** and after **consulting the European Central Bank**. It is adopted by qualified majority¹ and only representatives of Member States whose currency is the Euro take part in the vote.²

6 III. International exchange-rate system (para. 1)

More special rules are applicable if the Union wants to conclude international agreements on an **exchange-rate system for the Euro** in relation to third country currencies. In this case, the **Council** adopts the decision **unanimously** on a recommendation of the ECB or on a recommendation of the Commission; in the latter case, the ECB must be consulted (para. 1 s. 2). In any case, the Council must consult the **European Parliament** before taking the decision. The agreements are internally binding only for Member States whose currency is the Euro. The Council decides with only the representatives of these Member States voting.

7 The negotiations are conducted according to the modalities which the Council has adopted by a decision taken by qualified majority, again under participation of the ECB and the Commission but not of the European Parliament (para. 1 s. 1, para. 3). In this context it must be secured that the Union expresses a single position (para. 3 s. 2). The mandate to negotiate may also be given to the ECB accordingly. The Commission must in any case be fully associated with the negotiations (para. 3 s. 3). The agreements must pursue the **objective of price stability**.

8 According to para. 1 subpara. 2, the **Council**, acting by qualified majority, may **adopt, adjust or abandon the central rates of the euro within an exchange-rate system** adopted according to para. 1 subpara 1. Its decisions are taken by **qualified majority** upon a recommendation of the ECB or the Commission; in the latter case, the ECB must be consulted. The European Parliament is not participating but it is only informed after the decisions were taken.

¹ A qualified majority is defined in accordance with Article 238 para. 3 TFEU.

² See Article 138 para. 3 TFEU.

IV. General orientations (para. 2)

9

If there is no exchange-rate system in relation to a third state currency, the **Council** may establish **general orientations for the exchange-rate policy** in relation to this currency. These orientations function as guidelines for the intervention policy of the European System of Central Banks (ESCB). They must not impair the primary objective of the ESCB to maintain price stability. According to a resolution of the European Council (Luxemburg, 13 December 1997)³, general orientations should only be adopted in exceptional circumstances, e.g. in case of manifest exchange-rate misalignments.

The Council decides about the general orientations by qualified majority. The decision **10** is taken on a recommendation of the ECB or of the Commission; in the latter case the ECB must be consulted. Apparently no decision comprising a general orientation has been adopted until now.

V. Member States' competences (para. 4)

11

Para. 4 expressly states that Member States may negotiate in international bodies and conclude international agreements regarding the Economic and Monetary Union, although only beyond the existing Union competence and Union agreements. Above all, this concerns the area of **international economic policy**. In this area, the Member States are still widely competent to act on their own.

As regards **financial policy**, however, the Union has become the most relevant actor at **12** the international level. An important exception is formed by agreements and membership in international organizations entered into by Member States before the respective Union competences were established. The Member States' position in relation to these treaties and organizations still remains in force.⁴ This is particularly the case with the membership in the **International Monetary Fund (IMF)**, since only States are members of this international organization. The positions on issues of the Economic and Monetary Union are presented in the directorate of the IMF by the representative of the Member State at the time holding the presidency in the Euro-group. This member is assisted by a representative of the EU Commission.

At its meeting in Vienna in 1998, the European Council approved that the president of **13** the ECOFIN-Council or, if this person does not represent a Member State of the Euro-group, the president of this group, assisted by the Commission, takes part at the sessions of the **G 8 (Finances)**.

TITLE VI THE UNION'S RELATIONS WITH INTERNATIONAL ORGANISATIONS AND THIRD COUNTRIES AND UNION DELEGATIONS

Article 220 [Relations with international organisations] (ex Articles 302 to 304 TEC)

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organi-

³ OJ 1998 C 35/1.

⁴ See Article 351 TFEU.

sation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.

Bibliography: *Blavoukos/Bourantonis* (eds), *The EU Presence in International Organizations*, 2012; *Eeckhout*, *EU External Relations Law*, 2nd ed. 2011; *Fassbender*, *The better peoples of the United Nations? Europe's practice and the United Nations*, *EJIL* 15 (2004), 855; *Govaere/Capiau/Vermeersch*, *In-between seats: the participation of the European Union in international organizations*, *European Foreign Affairs Review* 9 (2004), 155; *Ham*, *EU-OSCE relations*, in: *Jørgensen* (ed.), *The European Union and international organizations*, 2009, 131; *Hoffmeister*, *Outsider or Frontrunner? Recent developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, *CMLR* 2007, 41; *Hymans*, *IO.C.D.E. et les Relations avec les Communautés Européennes*, *R.M.C.* 1970, 77; *Ouchterlony*, *The European Communities and the Council of Europe, Legal Issues of European Integration*, 1984.

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I. General remarks

In view of a progressively closer interdependence of the international community of States, also within the framework of international organizations, it is necessary and important for the EU to **participate in these modes of international cooperation**. This is all the more true since competences have been conferred on the EU to such an extent in some political areas that a representation of the Member States by the Union has become necessary in the international sphere.

2 Article 220 TFEU builds on the rules existing until the Lisbon reform in ex Articles 302–304 TEC, complemented by a clarification regarding the Union institutions that are responsible for managing the relationships in question.

3

II. Relationships with international organizations (para. 1)

1. Nature and extent

Article 220 TFEU is concerned with establishing **all forms of appropriate organisational relations and cooperation** with international organisations. This provision formulates a competence of the Union to create such relationships either informally or by formal legal acts (agreements). The **term ‘international organisation’ is defined very broadly**. It includes international organisation without legal personality (e.g. OSCE), as well as international non-governmental organisations and international conferences (e.g. the G-10).

4 The Article is **concerned only with organisational relations** with international organisations (such as an exchange of information, working contacts, establishing an observer status). Agreements on substantive issues within the cooperation framework are principally concluded according to Article 218 TFEU; they must be based on the particu-

lar treaty-making competence provided for by the Treaties,¹ as for instance within the framework of the common trade, environmental or fisheries policies, and on the basis of CFSP provisions.²

2. Individual organisations

5

The EEC was granted observer status by the General Assembly of the **United Nations** in 1974.³ In 2011, this status was enhanced with rights to e.g. participate in the general debate of the General Assembly and to present proposals and amendments agreed upon by the EU Member States.⁴ The EU entertains relations to other institutions and bodies of the UN, to its regional Economic Commissions and special programmes. The EU takes part in UN codification conferences (e.g. Conference on the law of the sea, UNCLOS III). It has observer status in UNCTAD, UNCITRAL, ILO, UNESCO, WHO and UNEP.

The cooperation between the EU and the **Council of Europe** is presently based on the *Memorandum of Understanding* between the two parties of 11/23 May 2007. This memorandum creates an institutional framework that is meant to reinforce the cooperation in areas of common interest such as democracy, human rights, the rule of law, culture, education and social cohesion. It envisages the possibility of consultation between the Council of Europe and the EU at an early stage in the elaboration of standards in one or the other institution.

The question whether an accession of the EU to the European Convention on Human Rights of the Council of Europe is admissible according to EU law is solved by Article 6 para. 2 TEU. Anyway, it could not have been based on Article 220 TFEU because it exceeds the merely organisational sphere.

The explicit reference to cooperation with the **Organization for Security and Cooperation in Europe (OSCE)** is newly included in EU primary law. The OSCE plays an important role in the area of security policy and the CFSP missions of the Union.

The cooperation of the EU with the **Organization for Economic Cooperation and Development (OECD)** is expressly dealt with in OECD provisions. According to Article 13 OECD Convention in connection with Supplementary Protocol No 1, the status of the (then) European Communities depends on the institutional provisions of the European Treaties. The Commission takes part in the work of the OECD. The position of the Union is consequently similar to that of an associated member.⁵ Again, regarding the conventions adopted within the OECD, a participation of the EU must be based on specific treaty making powers given by the Treaties; Article 220 TFEU is not meant for this purpose.⁶

The cooperation in the relations with **other international organizations** is based on Article 220 para. 1 s. 2 TFEU. These comprise also non-governmental organizations (NGO's), particularly in the range of development cooperation.⁷

¹ Opinion 1/78 International Agreement on Natural Rubber [1979] ECR 2871.

² See Article 218 TFEU.

³ RES GA 3208 (XXIX) of 11 October 1974.

⁴ Resolution GA 65/276 of 3 May 2011.

⁵ Cf. Hahn/Weber, Die OECD 1976, 203.

⁶ Opinion 1/75 *Local costs* [1975] ECR 1355; Opinion 2/92 *OECD* [1995] ECR I-521.

⁷ See Regulation (EU) No 233/2014 of the European Parliament and the Council of 11 March 2014 establishing a financing instrument for development cooperation, which expressly comprises the activities of non-governmental organizations.

11

III. Competences (para. 2)

According to para. 2, the cooperation with international organisations is implemented under the responsibility of the **High Representative of the CFSP or the Commission**, depending on the relevant policy area.

12

Thus Article 220 para. 2 TFEU takes account of the still relevant differentiation between CFSP (including CSDP) on the one hand and the other external competences of the EU on the other hand. Within the CFSP, the Commission is only playing an ancillary role. This is the reason why the High Representative alone is competent for cooperating with international organizations in the fields of the Union's external, security and defense policy on the basis of Articles 18 para. 2 and 27 para. 2 TEU. In all other policy areas, Article 17 para. 1 s. 6 TEU confers the responsibility for the external representation on the Commission.

Article 221 [Union delegations in third countries]

1. Union delegations in third countries and at international organisations shall represent the Union.

2. Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.

Bibliography: *European Commission* (ed.), Taking Europe to the world: 50 years of the European Commission's External Service, 2004.

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1

I. General remarks

Article 221 TFEU was newly included into the Union's primary law by the Treaty of Lisbon. It corresponds to the provision of draft-Article III-328 TECE.

2

The delegations to third states and international organisations so far entertained by the Commission, the Council and the European Parliament are now based on primary Union law and converted into **delegations of the Union**. According to Article 27 para. 3 TEU, they are part of the newly established **European External Action Service (EEAS)**.

3

II. Representation of the Union (para. 1)

Until the reform by the Treaty of Lisbon, the representation of the Union with third states and international organisations was established rather non-uniformly by Commission, Council and Parliament acting *ut singuli*. This practice lacking coherence is now substituted by a **global foreign policy service** of 3400 staff and 139 delegations, representing the EU in 163 third countries and international institutions. In more than 70

places where the EU has a delegation there are fewer than 10 Member States represented and 50 countries where there are fewer than 5 Member States represented.¹

The delegations are competent to represent the Union in all foreign policy issues in a so-called '**comprehensive approach**', meaning irrespective of whether the issue is a matter of the CFSP or of the supranationally organised TFEU policies. Consequently, they may represent the Union regarding all external policy matters in third states, in international organisations and in international conferences.

III. Direction of the delegations and cooperation with Member States missions

The Union delegations forming part of the EEAS are placed under the **authority of the High Representative** of the Union for Foreign Affairs and Security Policy (Article 221 para. 2 s. 1 TFEU). Thus para. 2 takes account of the uniform legal personality of the Union and the principle of coherence in its external representative functions under Article 18 para. 4 s. 2 and Article 21 para. 3 subpara. 2 s. 1 TEU.

According to Article 221 para. 2 s. 2 TFEU, the **delegations cooperate with the respective delegations of the Member States** to international organizations and to third states. This obligation is particularly emphasized in regard to the area of the CFSP in Articles 32 para. 3 and 35 para. 1 TEU. In practice, cooperation with Member States missions is based on procedures for regular (at least monthly) meetings at the levels of Head of Mission and numerous coordination meetings at other levels (like deputy heads of mission, political officers, trade experts, development specialists)². The EEAS Review Report 2013 points to possible new areas of activity in this respect, which might include consular protection³ and the further development of the network of security experts.

TITLE VII SOLIDARITY CLAUSE

Article 222

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) – prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

¹ Cf. EEAS Review Report 2013, 3 (http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf, 4 June 2014).

² Cf. EEAS Review Report 2013, 12 (http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf, 4 June 2014).

³ See Article 23 TFEU.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

Bibliography: *Coolsaet*, EU counterterrorism strategy: value added or chimera? *International Affairs* 2010, 857; *Drent*, The EU's comprehensive approach to security, *Studia diplomatica*, 64 (2011), 3; *Hatzigeorgopoulos*, The EU's mutual assistance and solidarity clauses, *European Security Review* 2012, 61; *Marias*, Solidarity as an objective of the European Union and the European Community, *LIEI* 1994, 85; *Reichard*, The Madrid Terrorist attacks: a midwife for EU mutual defence?, *ZEuS* 2004, 313.

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1

I. General remarks

Article 222 TFEU contains a **mutual pledge of solidarity of the Member States** in case they should become the object of terrorist attacks or victims of natural or man-made catastrophes. Such an obligation has been established in EU primary law by the Lisbon Treaty for the first time. The Article is supplemented by Declaration No 37 annexed to the Final Act of the Lisbon Conference.

- 2 Article 222 TFEU is a specific manifestation of the **general obligation** of solidarity owed by the Member States to one another, as it is laid down in numerous provisions of the Treaties.¹ It does not relate to a duty of assistance in an armed conflict. The principle of solidarity in such conflicts was specifically regulated in Article 42 para. 7 TEU.
- 3 It is not clear why Article 222 TFEU was inserted in Part V of the TFEU ('The Union's External Action'). The solidarity clause has its material and territorial scope of application in cases of emergencies within a Member State and consequently within the Union. The allocation to the Union's sphere of external action may possibly be explained by the

¹ See Article 3 para. 3 subpara. 3, Article 24 para. 3 subpara. 2, Article 31 para. 1 subpara. 1, Article 32 para. 1 TEU; Article 67 para. 2, Article 80, Article 122 para. 1, Article 194 para. 1 TFEU.

international implications of a terrorist attack executed within the Union. Assistance in case of natural or man-made catastrophes and the fight against terrorism outside of the Union territory belongs to the sphere of activities of the CFSP².

II. Assistance by Union and Member States (paras 1 and 2)

4

1. Obligation to assist

In its paras 1 and 2, Article 222 TFEU contains an obligation of solidarity by the Union towards its Member States as well as by the Member States between each other. Para. 1 s. 1 is directed to the Member States and also to the Union laying down a **duty of solidarity** in view of a threatening situation in one of these States. The provision does not, however, define the ways and means in which the assistance is to be given.

Whereas the **Union** itself is obliged to '**mobilise all the instruments at its disposal**' in para. 1 s. 2, the **Member States** are only called upon by para. 2 to '**assist**' the Member State in trouble. The determination of the scale and the intensity of the aid are left to the decision of each Member State. This is also made clear by Declaration No 37 Final Act of Lisbon regarding Article 222 TFEU. According to this Declaration, 'none of the provisions of Article 222 TFEU is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State.'

In contrast, the obligation of the Union to supply assistance is comprehensive. It comprises technical, personal and – in practice particularly important – financial help. For this latter case, a special **European Union Solidarity Fund** was established in 2002.³ Assistance by the Union may also comprise military resources (Article 222 para. 1 sentence 2 TFEU). These resources, however, must be made available by the Member States according to their own discretion.

2. Terrorist threat or attack

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According to para. 1 s. 1 and s. 2 lit. a, the Union and the Member States are obliged to mutual assistance in case of terrorist threats and attacks. As the rule on removing a terrorist threat shows, the principle of solidarity **also comprises a preventive element**.

There is **no general definition of terrorism** either at the European⁴ or at the international level. The term comprises acts of violence of non-governmental groups against public institutions or civilians committed in view of a political purpose. Besides the 'traditional' form of terrorism in Europe, with regional minorities fight against a central government – as for example conducted by the ETA in Spain or the IRA in the UK –, the international terrorism based on religious motives arrived in the EU by the attacks committed in Madrid on 11 March 2004 at the latest; this led to instituting the office of a **Counter-Terrorism Coordinator** within the Council.⁵

Apart from Article 222 TFEU, there is a further legal basis for the fight against terrorism within the framework of the Union in Article 43 para. 1 sentence 2 TEU. Combating terrorism by deploying **CSDP** missions has, above all, a generally preventive function. In

² See Article 21 para. 3 lit. g, Article 43 para. 1 s. 2 TEU.

³ Regulation 2012/2002 establishing the European Union Solidarity Fund.

⁴ See an extensive description of terrorist acts in Article 1 Council Framework Decision 2002/475/jha on combating terrorism.

⁵ Mr Gilles de KERCHOVE was appointed EU Counter-terrorism Coordinator on 19 September 2007, see <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator?lang=de> (30. 5. 2014).

contrast, Article 222 TFEU addresses mainly imminent threats and ongoing attacks. International terrorism may also be fought within the framework of **judicial cooperation in criminal matters** (Articles 82 et seq. TFEU), particularly based on Article 83 para. 1 subpara. 2 TFEU and on Council Framework Decision of 13 June 2002 on combating terrorism.⁶

- 10 Additionally, the **European Council** adopted a new **EU counter-terrorism strategy**⁷ in 2005. The commitment under the new strategy is ‘To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice’. This refers to the European Council as being responsible for the political oversight and assisted by the high-level political dialogue on counter-terrorism between Council, European Parliament and Commission, these institutions meeting once per presidency to ensure inter-institutional governance. This dialogue in turn relies on the monitoring of the strategy’s progress by the Committee of Permanent Representatives (COREPER)⁸ with regular follow-up and updates by the Counter-Terrorism Coordinator and the Commission.

11

3. Natural or man-made disaster

The obligation of the Union and Member States to render assistance also exists in the case of natural and man-made catastrophes in a Member State (Article 222 para. 1 s. 1 and s. 2 lit. b TFEU). Since natural and man-made disasters are equally comprised by the obligation established by Article 222 TFEU, there is no need for a precise delimitation of the different kinds of catastrophes. Natural disasters may consist of floods, forest fires, mud-slides, volcanic eruptions or earthquakes. Man-made disasters are, for instance, accidents in industrial plants (such as nuclear facilities), oil spills or traffic accidents. All of these disasters must cause **major damages** for being relevant as disasters according to this Article.

- 12 The regulation establishing the **European Union Solidarity Fund**⁹ explains in its preamble (ident 6) that a ‘major disaster’ within the meaning of this regulation should mean ‘any disaster, in at least one of the States concerned, resulting in important damage expressed in financial terms or as a percentage of the gross national income (GNI)’. However, this regulation permits interventions of the Fund also ‘in the case of disasters that, while important, do not reach the minimum scale required, ... under exceptional circumstances in case an eligible neighbouring country is affected by the same disaster, or whenever the major part of the population of a specific region is affected by a disaster with serious and lasting repercussions on living conditions.’
- 13 The **management of disaster prevention** and control is dealt with by **Article 196 TFEU**. In contrast to Article 222 TFEU, Article 196 TFEU rules on promoting collaboration among the Member States without imposing an obligation of assistance on them.

14

III. Decision of the Council (para. 3)

According to Article 222 para. 3 TFEU, the **details of implementing** the solidarity clause are laid down by a decision of the **Council**. This decision is adopted on the basis

⁶ Council Framework Decision 2002/475/jha on combating terrorism, as amended by Council Framework Decision 2008/919/jha.

⁷ Doc. 14469/4/05 REV 4 adopted by the European Council on 15–16 December 2005.

⁸ See Article 240 TFEU.

⁹ Regulation 2012/2002 establishing the European Union Solidarity Fund.

of a common proposal of the Commission and the High Representative for the CFSP. Thus the cross-policy approach of disaster assistance is taken into account.

Decisions according to Article 222 para. 3 TFEU may be concerned with specific crisis situations as well as with a general definition of Union action. In general, such decisions are adopted by **qualified majority**. However, if the decision has defence implications, the decision must, according to the peculiarities of the CFSP, be adopted by a **unanimous vote** (para. 3 in connection with Article 31 para. 1 TEU). In both cases, the **European Parliament is only entitled to be informed**. 15

According to Article 222 para. 3 subpara. 2 TFEU, the Council is assisted by two Committees: the **Political and Security Committee** (Article 38 TFEU), assisting the Council in the area of the CFSP, and the **Standing Committee on Internal Security** (Article 71 TFEU), set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. If necessary, these Committees submit joint opinions. The role of the **Committee of Permanent Representatives (COREPER)**¹⁰ remains unaffected. 16

IV. Assessments of threats

17

In order to be prepared in the case of future threats of disaster, Article 222 para. 4 TFEU lays down the **obligation of the Council** to regularly provide an **assessment of threats** facing the Union. Regarding future security challenges, such an analysis was first elaborated in the form of the **European Security Strategy** adopted by the European Council on 12 December 2003 ('A secure Europe in a better world'), followed by the Council's 'Report on the Implementation of the European Security Strategy: Providing Security in a Changing World' on 11 December 2008.¹¹

In regard to internal security matters, the Council adopted an '**Internal Security Strategy for the European Union: Towards a European Security Model**'¹² explaining that the concept of internal security must be understood as 'a wide and comprehensive concept which straddles multiple sectors in order to address these major threats and others which have a direct impact on the lives, safety, and well-being of citizens, including natural and man-made disasters such as forest fires, earthquakes, floods and storms.' 18

¹⁰ See Article 240 TFEU.

¹¹ Doc. S 407/08.

¹² Doc. 5842/2/10 REV 2.

PART SIX INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I INSTITUTIONAL PROVISIONS

CHAPTER 1 THE INSTITUTIONS

SECTION 1 THE EUROPEAN PARLIAMENT

Bibliography: *Corbett*, The European Parliament, 2000; *Dashwood/Johnston*, The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty, 41 CMLRev 2004, 1481; *Editorial Comment*, Back to basics – Why a European Parliament, 36 CMLRev 1999, 515; *Geiger*, Reformvorschlge zur Steigerung der Legitimationswirkung des Europischen Parlaments, in: id. (ed.), Neuere Probleme der parlamentarischen Legitimation im Bereich der auswrtigen Gewalt, 2003, 25 et seq.; *Katz/Wessels*, The European Parliament, the national Parliaments and European Integration, 1999; *Lasan*, How Far Can the European Parliament Correct the European Union's Democratic Deficit, Romanian J. Eur. Aff. 2008, 18; *Mohay*, The European Parliament as a Litigant before the European Court of Justice, PhD tanulmanyok 2006, 313; *Mohay*, The Locus Standi of the European Parliament in Annulment Proceedings, Studia Iuridica Auctoritate Universitatis Pecs Publicata 2009, 193; *Noticeboard*, A Competition about the European Parliament's Electoral Procedure, Eur. J.L. Reform 1999, 179; *Stamm*, Unity in diversity? The European Parliament and its elite after the 2004 enlargement, 2008; *Yigit*, Democracy in the European Union from the Perspective of Representative Democracy, Rev. Int'l L. & Pol. 2010, 119.

Article 223 [Uniform suffrage procedure; EP Members Statute] (ex Article 190(4) and (5) TEC)

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

2. The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure after seeking an opinion from the Commission and with the approval of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.

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I. Overview

1

The Lisbon Reform Treaty of 2007 closely follows up on the draft Constitutional Treaty at institutional level. Whereas Article 13 TEU outlines the whole institutional structure of the EU – mentioning the EP first in the row of its main institutions – and Article 14 TEU comprises fundamental rules specifically regarding the European Parliament, it is Articles 223 et seq. TFEU which lay down complementary provisions. These concern the procedure of elections (Article 223 TFEU), the European political parties (Article 224 TFEU), the right of initiative towards the Commission (Article 225 TFEU), the setting up of a Committee of Inquiry (Article 226 TFEU), the citizens' right of petition (Article 227 TFEU), the European Ombudsman (Article 228 TFEU), the annual session (Article 229 TFEU), the right of the Commission, the European Council and the Council to be heard by the Parliament (Article 230 TFEU), the principle of majority vote (Article 231 TFEU), the Rules of Procedure and the protocols of the sessions (Article 232 TFEU), the discussion of the Commission's annual general report (Article 233 TFEU) and the motion of censure on the activities of the Commission (Article 234 TFEU).

II. Procedure of election

2

According to Article 223 para. 1 TFEU, the procedure of election shall be regulated by **simplified Treaty amendment procedure**. The European Parliament may act on its own initiative; the Council decides unanimously after the EP's consent with the final draft (Union's phase). The Member States modify the Treaty by adopting the decision in accordance with their constitutional law (Member States' phase). The Lisbon Treaty added that the provisions do not enter into force without prior approval of all Member States.

Since no legislative act has been based on Article 223 para. 1 TFEU by 2014, it is still **3** the '**Direct Suffrage Act**' of 20 September 1976 annexed to Council Decision 76/787 (concerning the election of the Members of the European Parliament by direct universal suffrage), last amendment introduced by **Decision of the Council 2002/772/EC**, which has been relevant for the elections of the EP in 2014.

This Act regulates the introduction of the **system of proportional representation** (Article 1), the installation of constituencies or other subdivisions of the electoral area (Article 2), the definition of a minimum threshold of up to 5% for the allocation of seats (Article 3) as well as a maximum for candidates' campaign expenses (Article 4), the beginning and ending of the legislative period (Article 5), independence, privileges and immunities of the Members of Parliament (Article 6), incompatibility of office, especially with membership in national parliaments (Article 7), **the electoral procedure governed by each Member State's provisions**, e.g. refund on election campaign expenses¹ (Article 8), organization of election (Article 9–11), scrutiny (Article 12), occupancy of vacancies (Article 13), as well as the clause on language (Article 15). Despite all reforms and the long way from the Constitution Convention to the Treaty of Lisbon, no uniform elec-

¹ On this, see ECJ Case C-190/84 *Les Verts* [1988] ECR 1017.

toral law has been established in primary law. Although finally implemented by Great Britain in 1999, the system of proportional representation was the major obstacle. The question concerning the equality of election with an optimum balance between democratic equality and the sovereignty of States remains. The evolutionary clause of Article 223 para. 1 TFEU with its final objective of a uniform election procedure based on 'common European'² principles of election for all Member States has not been depleted yet.

- 4 According to Article 22 para. 2 TFEU, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides under the same conditions as nationals of that State (without prejudice to Article 223 para. 1 TFEU).

5 III. Legal status of the Members of the European Parliament

In contrast to previous versions, the new Article 223 para. 2 TFEU strongly emphasizes the independent position of the EP. For a long time, the legal status of Representatives had only rudimentarily been regulated in Union law. There had been several starting points in the 'Direct Suffrage Act' (see mn. 3 above) and its complementary national legislation, in the Rules of Procedure of the EP and in the Protocol on privileges and immunities.

- 6 The Treaty of Amsterdam introduced Article 190 para. 5 TEC, the former legal basis for a uniform Members' Statute. In 2003, the EP presented the first draft of a uniform Members' Statute on the basis of the report *Rothley*³. The EP adopted the draft in its session of 4 June 2003, based on Article 190 para. 5 TEC. The draft, however, did not achieve the necessary majority in the Council's meeting on 26 January 2004. Not before the summer of 2005, EP and Council could agree to a compromise. Having been formally adopted, the reform could enter into force with the beginning of the following legislative period in 2009⁴. The Members' Statute consolidates the previous provisions in one document, which led to an institutional strengthening of the EP. The effort of codification, particularly regarding parliamentary allowances, is a step forward towards transparency for the citizens of Europe.
- 14 The Members' Statute builds on previous standards: The Representatives are independent and not bound by any instructions (Article 6 para. 1 Direct Suffrage Act, Article 2 RoP EP; Article 2 para. 1 Members' Statute). They can only lose their mandate in case of incompatibility (Article 7 para. 1 Direct Suffrage Act), in case of withdrawal (Article 4 para. 1 RoP EP) or other reasons laid down in national law.
- 15 Their independence is protected by rules on immunity and indemnity (Articles 7–10 **Protocol on privileges and immunities** of the European Community of 8 April 1965), as well as supplementary national provisions.
- 16 The Members may form groups according to their political affinities (Article 30 RoP EP). The status of non-attached Members is dealt with in Article 33 RoP EP. The formation of 'mixed' parliamentary groups who openly negate any political character and political affinity is not permitted.
- 17 In parliamentary practice, transnational groups have been formed.

² For this term, in German 'gemeineuropäisch', see *Häberle*, *Gemeineuropäisches Verfassungsrecht*, EuGRZ 1991, 261 et seq.

³ Doc. EP A5–0193/2003.

⁴ Decision of the European Parliament on 28 September 2000, 2005/684/EG, Euratom, OJ L 262/1.

Parliamentary groups do not have legal standing towards third parties.⁵ However, they can assert their rights resulting from the Rules of Procedure. The issues of *locus standi* and entitlement to make a request are still left to be ruled by the ECJ.⁶

IV. Recent case law

Finally, the following decisions of the European Courts shall be highlighted: ECJ Case C-208/03 P *LePen* on the Election of Members of the European Parliament⁷; ECJ Case C-486/01 P *Front national v European Parliament* on building of fractions⁸; CFI Case T-146/04 *Koldo Gorostiaga Atxalandabaso v European Parliament* on Rules governing the payment of expenses and allowances to Members of the European Parliament and recovery of sums unduly paid⁹; ECJ Case C-470/00 P *European Parliament v Carlo Ripa Di Meana* on retirement pension scheme and the time-limit for submission of applications to join that scheme¹⁰; ECJ Case C-145/04 *Spain v United Kingdom* on the right to vote for Commonwealth citizens residing in Gibraltar and not having citizenship of the Union¹¹; ECJ Case C-300/04 *Eman, Sevinger v College van burgemeester en wethouders van Den Haag* on requirements of residence in the Netherlands for Netherlands citizens of Aruba for the right to vote and on citizenship of the Union¹².

Article 224 [Political parties] (ex Article 191, second subparagraph, TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at European level referred to in Article 10(4) of the Treaty on European Union and in particular the rules regarding their funding.

Bibliography: *Schütze*, European Constitutional Law, 2012, 91 et seq.; *Tsatsos*, Europäische politische Parteien? EuGRZ 1994, 45.

Political parties facilitate the **building up of political unity**. They become a mediator between organized statehood and actors of civil society in a representative democracy, which is one of the guiding principles for all constitutions of the Member States and which is explicitly mentioned in Article 10 para. 1 TEU as a model for the Union as well. Political parties enjoy a status of freedom, equality and publicity¹. Certainly, Europe discovered political parties relatively late, after the ‘spill over’ from economic to political integration. The Treaty of Maastricht implemented Article 191 para. 1 TEC in primary law, now mainly replaced by Article 10 para. 4 TEU. The role of political parties as a **factor of integration** in the Union has been underlined ever since. Together, Article 10

⁵ ECJ Case 78/85 *Group of the European Right v European Parliament* [1986] ECR 1753.

⁶ ECJ Case 78/85 *Group of the European Right v European Parliament* [1986] ECR 1753.

⁷ ECJ Case C-208/03 P *LePen* [2005] ECR I-06051.

⁸ ECJ Case C-486/01 P *Front national v European Parliament* [2004] ECR I-06289.

⁹ CFI Case T-146/04 *Koldo Gorostiaga Atxalandabaso v European Parliament* [2005] ECR II-59896048.

¹⁰ ECJ Case C-470/00 P *European Parliament v Carlo Ripa Di Meana* [2004] ECR I-4167.

¹¹ ECJ Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917.

¹² ECJ Case C-300/04 *Eman, Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.

¹ See *Hesse*, VVDStRL 17 (1959), 11 et seq.

para. 4 TEU and Article 224 TFEU, which replaces Article 191 subpara. 2 TEC, form the basis for an anchor in the Union's primary law. Thereby, no certain type of organisation is determined. It might be either an umbrella organisation that coordinates the political work of national parties at the European level or a stand-alone organisation based on membership of citizens of the Union².

- 2 The Treaty of Nice created a second (sub)paragraph to Article 191 TEC, now taken over by Article 224 TFEU. The European Parliament and the Council adopt the **provisions on political parties at European level** in accordance with the ordinary legislative procedure (Article 294 TFEU), more precisely by means of regulations which particularly contain provisions on financing. The Declaration No 11 of the Nice Conference repeats that no competences were hereby transferred to the European Union. The application of relevant national constitutional provisions shall not be affected. This means that no competence to define the legal situation of political parties *below* European level is transferred. The Declaration further explains that means for **financing** political parties from the EU budget must neither directly nor indirectly be used for their financing at the national level. The provisions on financing apply equally to any political force represented in the EP.
- 3 In this context, EP and Council adopted **Regulation (EC) No 2004/2003** on regulations governing political parties at European level and the rules regarding their funding, which provides some basic rules that allow sourcing from the EU's overall budget. It also deals with the procedure to be followed hereby. A **European political party** must have legal personality in the Member State in which its seat is located; it must have participated in European elections (or have expressed the intention to do so); must be represented in at least one quarter of the Member States by Members of the European Parliament or in national respectively regional Parliaments or assemblies or have gained at least 3 % of the votes in each of at least a quarter of the Member States in the previous European election. Further, it has to respect the principles mentioned in Article 6 TEU. Regulation 2004/2003 substantially entered into force on the date of the opening of the first session held after the European Parliament elections of June 2004, namely on 20 July 2004.
- 4 European law on political parties gives an indicator of integration. The more the Union appreciates itself as a political community with constitutional qualities, with an original political public and an orientation to the common welfare, the more important will be the political parties' contribution to the integration of the Union. They encounter an all the more greater responsibility of representing original European interests and play an ever more active role in a democratic fixation of the integration process. Article 12 para. 2 CFREU, dealing with the freedom of assembly and association, explicitly refers to the political parties' contribution to expressing the political will of the citizens of the Union. It thereby reminds of the **individual rights basis of the freedom of parties**.

Article 225 [Indirect proposals]
(ex Article 192, second subparagraph, TEC)

The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties.

² See Tsatsos, EUGRZ 1994, 47, 53.

If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.

Bibliography: *Bieber/Pantalís/Schoo*, Implications of the Single Act for the European Parliament, 23 CMLRev 1986, 767; *Nickel*, Das Europäische Parlament als Legislativorgan – zum neuen institutionellen Design nach der Europäischen Verfassung, Integration 2003, 504.

Article 225 TFEU has been developed from Article 192 TEC, which had been inserted 1 into the TEC by the Maastricht Treaty. By virtue of the Lisbon Treaty, para. 1 was removed and, by and large, has been substituted by Article 14 para. 1 TEU. The former **enumeration** of the EP's legislative rights in accordance with the particular competences is mainly obsolete: The cooperation procedure in Article 252 TEC has been repealed; the codecision procedure in Article 251 TEC has been replaced by the current standard procedure: the ordinary legislative procedure. The draft TECE provided a parallel structure in its Articles I-34 and III-396, though speaking of European 'laws' instead of regulations and of 'framework laws' instead of directives. The intergovernmental conference finally abandoned this supposedly State-related terminology.

Even the Lisbon Treaty acknowledges the Commission's exclusive right of initiative by 2 not giving a full right of initiative to the EP. Therefore, it is highly important for the legal suggestions from the midst of the EP to be heard. Apart from the Council (Article 241 TFEU), already Article 192 para. 2 TEC (now Article 225 s. 1 TFEU) granted the EP a right to request the Commission to submit proposals in order to launch a legislative procedure. This **indirect** right of initiative was adopted in order to leave the Commission's formal monopoly of initiative unaffected¹ because otherwise a right of initiative should have also been granted to the Council². The requirements for a request are laid down in Article 42 RoP EP.

Upon request, the Commission is generally obliged to deal with the topic addressed 3 and to pursue it, having a broad discretionary power. The newly appended Article 225 s. 2 TFEU constitutes the Commission's duty to state its reasons in case of its failure to act. The wording of sentence 2 has been adopted from draft-Article III-332 s. 2 TECE. It might be an expression of strengthening the EP's rights as well as a higher dimension of control towards the Commission³. Furthermore, the EP obtains the option to take legal action for failure to act⁴.

Article 226 [Committee on Inquiry] (ex Article 193 TEC)

In the course of its duties, the European Parliament may, at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.

The temporary Committee of Inquiry shall cease to exist on the submission of its report.

¹ See CR/Kluth, Article 225 AEUV mn. 2.

² On this, see VHvH/Epping, Article 225 AEUV mn. 1.

³ See Nickel, Integration 2003, 504.

⁴ ECJ Case 13/83 *European Parliament v Council* [1985] ECR I-1513.

The detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission.

Bibliography: *Neuhold*, The 'Legislative Backbone' keeping the Institution upright? The Role of European Parliament Committees in the EU Policy-Making Process, European Integration online Papers 2001, Vol. 4 No. 10; *Shackleton*, The European Parliament's New Committees of Inquiry: Tiger or Paper Tiger?, 36 JCMS 1998, 115.

- 1 The right of inquiry is one of the core competences of each parliament to ensure its control function. Due to the enhanced competences and the hereby enhanced responsibility of the EP, the setting up of an explicit right of inquiry for the democratically and directly legitimated representation of the peoples, meaning citizens of the Union, had become an ever more urgent issue. Such a right was adopted into the primary law (Article 193 TEC) by the Treaty of Maastricht. Since that time, this right was executed by a Committee of Inquiry, which formerly had its basis in the Rules of Procedures EP (now Article 186 RoP EP). Article 226 TFEU takes over the wording of Article 193 TEC with some editorial changes and one substantial realignment. The overall objective of the article remains the same but detailed rules governing the exercise of the right will be adopted by a Parliament regulation.
- 2 A Committee of Inquiry can be **set up** at the request of one quarter of the Members of the EP. Although such a provision usually touches a classical right of parliamentary minorities, Article 226 TFEU cannot actually be qualified as a classical right of inquiry of the minority¹. The background is the following: Since the EP lacks the dialectic of governing majority and opposition, the Committee of Inquiry cannot be qualified as a typical instrument of parliamentary minority in opposition. Committees of Inquiry are temporary committees. In accordance with the principle of discontinuity, all Committees of Inquiry expire with the end of each legislature period of the EP. The subject of inquiry is limited to the field of competences of the EP. The Committees of inquiry work on case-by-case-basis and have to be set up for a specific investigation mandate. This specific investigation mandate and the duration of the acting of each committee have to be fixed in the decision which creates these committees. The decision only has the formal object of creating the committee; it does not have any further legally binding effects and is not open to judicial review (in court)². The duration of a Committee of Inquiry should not exceed 12 months, but the EP may extend the duration twice, each time for 3 months³. The Committee of Inquiry ends with its closing report⁴.
- 3 The **purpose** of a Committee of Inquiry is to check on alleged contraventions (committed by the institutions of the Union, Member States or private persons) against Union law⁵ or on maladministration implementing it.
- 4 An inquiry may not be started if the matter has been brought before a court, as long as the court procedure is not terminated with legal effect (at the same time, this is an obligation arising already from the principle of mutual sincere cooperation between institutions, Article 13 para. 2 s. 2 TEU). The power of other institutions, especially the Commission, remains untouched.

¹ This is in dispute, see LB/*Kaufmann-Bühler*, Article 226 AEUV mn. 8 (seeing a minority right) and GHN/Hölscheidt, Article 226 AEUV mn. 9 with dissenting opinions (saying that Article 226 does not give an actual minority right).

² ECJ Case 78/85 *Goupr of the European Right v European Parliament* [1986] ECR 1753.

³ Article 2 para. 4 Decision 95/167 (see mn. 5 below).

⁴ Article 4 Decision 95/167 (see mn. 5 below).

⁵ Law means primary and secondary law, see CR/*Kluth*, Article 226 AEUV mn. 3.

The **details** of the exercise of the right of inquiry as one element of parliamentary control have been determined by an interinstitutional agreement between EP, Council and Commission included in Decision 95/167⁶. In the future, this agreement shall be replaced by a Parliament Regulation initiated by the EP itself, after Council and Commission having given their consent. Similar to Article 223 para. 2 TFEU, this again clearly displays the strengthening of the position of the EP.

One **example** from the parliamentary practice is Decision 2006/469 of the EP of 18 January 2006 on setting up a Committee of Inquiry into the crisis of the Equitable Life Assurance Society⁷. In particular, it was about alleged consistent failures by the United Kingdom's regulators to protect policy holders by exercising rigorous supervision of accounting and provisioning practices of Equitable Life, thereby contravening Community law.

Article 227 [Right to petition] (ex Article 194 TEC)

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.

Bibliography: *Magnette*, La Citoyenneté Européenne. Droit, Politiques, Institutions, 1999; *Marias*, The Right to Petition the European Parliament after Maastricht, 19 ELR 1994, 169.

The right of petition was inserted into the TEC by the Treaty of Maastricht (Article 194 TEC; before this time already in Article 48 para. 2 ECSC Treaty) and has been adopted in Article 227 TFEU without any amendments. Here, the ideal of the European 'citoyen', actively participating in public matters, finds its specification in primary law. Article 24 TFEU and the corresponding Article 44 CFREU also display a personal right to petition in public law and a European 'status activus politicus'¹. In addition to formal legal actions, European citizens may appeal to their elected representatives. This means of communication creates closeness to the citizens and decreases democratic deficits even in case of a the failure of a petition. Concerning the contents, petitions (pleas and complaints) have to the Union's relate to **fields of activity**.

Each citizen of the Union is **entitled to petition** (Articles 20, 24 TFEU), as well as any natural or legal person with (statutory) residence in one of the Member States. The petitioner has to be **directly affected** by the issue but not necessarily in individual rights. In case those requirements are fulfilled, the petitioner is legally entitled to inform the European Parliament which has to deal with the matter.²

The right of petition can either be exercised solely (**individual petition**) or together with other citizens or persons (**collective petition**). This does not affect the petitioner's right to contact the European Ombudsman, Article 228 TFEU³.

Article 201–203 RoP EP deal with the **petition process**. The President of the EP allocates the petition to the petitions committee, which at first verifies its permissibility. Af-

⁶ OJ 1995 L 113/2.

⁷ OJ 2006 L 186/58–59.

¹ See *Häberle*, Europäische Verfassungslehre, 355.

² See *VHvH/Epping*, Article 227 AEUV mns 4, 5.

³ See *CR/Kluth*, Article 227 AEUV mn. 5.

terwards, the committee can either decide to prepare a report or to make any other kind of statement. It can forward the petition to the Ombudsman (Article 228 TFEU). After a comprehensive examination, either the committee itself makes a statement or may submit a proposal for a resolution to the Parliament. The committee's statement may be communicated to the Commission or to the Council. The author of the petition receives a notice on the respective decision and its grounds.

**Article 228 [European Ombudsman]
(ex Article 195 TEC)**

1. A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. The Ombudsman shall be elected after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any Government, institution, body, office or entity. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

4. The European Parliament acting by means of regulations on its own initiative in accordance with a special legislative procedure shall, after seeking an opinion from the Commission and with the approval of the Council, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

Bibliography: *Bonner*, The European Ombudsman: A Novel Rule-source in Community Law, 2001; *Cadeddu*, The Proceedings of the European Ombudsman, 68 Law & Contemp. Probs. (2004–2005), 161; *Harden*, When Europeans Complain – The Work of the European Ombudsman, 3 Cambridge Y.B. Eur. Legal Stud. (2000–2001), 199; *Heede*, The Europeans Ombudsman: Redress and Control at Union Level, 2000; *Peters*, The European Ombudsman and the European Constitution, 42 CMLRev 2005, 697; *Pierucci*, Le médiateur européen, RMC 1993, 818; *Tsadiras*, Unravelling Ariadne's Thread: The European Ombudsman's Investigative Powers, 45 CMLRev 2008, 757.

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I. Task

1

The institution of an Ombudsman is well-known in numerous Member States of the EU. At European level, it was created by the Maastricht Treaty. The Ombudsman is an independent subsidiary body of the Union, headquartered at the European Parliament¹. In accordance with the principles of transparency and closeness to the citizens², the Ombudsman's task is to **investigate maladministration** in the EU institutions. The Ombudsman may conduct those inquiries on his own initiative or based on complaints submitted to him directly or by an MEP. His work is highly relevant, especially in the area of fundamental rights. Because of this important role of the Ombudsman, Article 228 TFEU, although taking up its predecessor Article 195 TEC, strengthens and clarifies the Ombudsman's position in several ways. According to the new rules, the Ombudsman is elected, thereby emphasizing the democratic legitimization. Additionally, the Ombudsman gains responsibility, especially a duty to investigate and to report in accordance with Article 228 para. 1 subpara. 1 s. 1 TFEU. Following draft-Article III-335 para. 2 s. 2 TECE, Article 228 para. 3 TFEU specifies the independence clause.

In case of suspicion of maladministration, the Ombudsman requests a **statement** of 2 the respective institution, body, office or agency concerned within a period of three months.

Subsequently, the Ombudsman submits a **report** on the issue to the EP and the institu- 3 tion concerned, as explicitly and obligatorily required in Article 228 para. 1 subpara. 1 s. 3 TFEU.

Once a year, the Ombudsman submits an **annual report** on the outcome of his inquiries 4 to the EP. By this means, the results become accessible to the EP as well as to the political public in Europe.

Each citizen of the Union and any natural or legal person residing or having its regis- 5 tered office in a Member State is entitled to conduct a **complaint** on maladministration to the European Ombudsman (address: 1 avenue du Président Robert Schuman, CS 30 403, F-67 001 Strasbourg, France; Cedex or electronical form via 'http://www.ombudsman.europa.eu/en/home.faces'). If the Ombudsman starts an inquiry, the complainant will be informed about the results of the inquiry.

II. Election

6

By way of derogation from Article 195 TEC which referred to an appointment, Article 228 TFEU states an election of the Ombudsman by the **EP**. This does not have any virtual consequence but only clarifies the allocation of this provision within the section of the TFEU³. However, the symbolical character of such a democratic act of legitimacy shall not be underestimated. The election takes place after each election of the EP for the

¹ See VHVH/*Epping*, Article 228 AEUV mn. 11.

² See CR/*Kluth*, Article 228 AEUV mn. 1.

³ See VHVH/*Epping*, Article 228 AEUV mn. 3.

duration of the legislative period. Re-election is admissible. The Ombudsman holds his office **independently**. The specific independence clause in para. 3 has been adapted from draft-Article III-335 para. 3 s. 2 TECE. During his term of office, the Ombudsman is not allowed to be engaged in any other occupation (whether or not remunerated). A **dismissal** can only be run by the ECJ at request of the European Parliament, in case the Ombudsman no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. Details about election, dismissal and principles of the Ombudsman's position are regulated in Articles 204–206 RoP EP.

7

III. Implementing provisions

As now explicitly mentioned in Article 228 para. 4 TFEU, the details of the Ombudsman's work are determined on the initiative of the European Parliament, after seeking an opinion from the Commission and with the approval (qualified majority) of the Council, see Decision 262/94 on the regulations and general conditions governing the performance of the Ombudsman's duties⁴. In addition, the case *European Ombudsman v Lamberts*⁵ concerning the action for damages founded on the alleged misconduct of the Ombudsman in dealing with a complaint is to be highlighted.

Article 229 [Ordinary and extraordinary sessions]
(ex Article 196 TEC)

The European Parliament shall hold an annual session. It shall meet, without requiring to be convened, on the second Tuesday in March.

The European Parliament may meet in extraordinary part-session at the request of a majority of its component Members or at the request of the Council or of the Commission.

Bibliography: See bibliography on Article 14 TEU.

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1

I. General remarks

Article 229 TFEU – just like its textually identical predecessor Article 196 TEC – distinguishes between the European Parliament's ordinary annual sessions and the extraordinary sessions. With respect to the initial intention of Article 229 TFEU, the importance of these provisions has changed as the Rules of Procedure of the EP arrange a session covering the whole year. In fact, the contractual concept of a temporary session is reversed into a permanent session with the possibility of interruption. Thus, Article 229 subpara. 2 TFEU is ultimately redundant. A more felicitous solution would have been to

⁴ OJ 1994 L 113/15.

⁵ ECJ C-234/02 P *European Ombudsman v Lamberts* [2004] ECR I-2803.

include extraordinary sessions for potential longer breaks in primary law.¹ Unfortunately, the Lisbon Treaty did not follow this approach.

II. Session

2

The European Parliament's session starts on the second Tuesday in March (Article 229 subpara. 1 s. 2 TFEU) and lasts one year (Article 133 para. 2 RoP EP). Apart from that, the **part-sessions** take place each month, subdivided into **daily sittings** (Article 133 para. 3 RoP EP).

The meeting at the beginning of the session – as well as the inaugural meeting for each newly elected Parliament (on the first Tuesday after one month from the end of the election date, Article 11 para. 3 Elections Act) – does not require a separate convention. The EP itself determines the duration of adjournments of the session (Article 134 para. 1 RoP EP). For seat and venue, see Article 341 TFEU.

III. Extraordinary sessions

4

Due to the above-mentioned setting of session, there will not be a need for extraordinary sessions. Article 229 subpara. 2 TFEU is to be understood in a way that a majority of the EP's Members, the Council or the Commission may request an extraordinary session of the EP. In agreement with the Conference of Presidents (President of Parliament plus the chairmen of the political groups, Article 24 para. 1 RoP EP), the convention may occur at request of one third of the EP's Members.

Article 230 [Right of Commission, European Council and Council to be heard] (ex Article 197, second, third and fourth paragraph, TEC)

The Commission may attend all the meetings and shall, at its request, be heard.

The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members.

The European Council and the Council shall be heard by the European Parliament in accordance with the conditions laid down in the Rules of Procedure of the European Council and those of the Council.

Bibliography: *Ertl*, Toward an Understanding of Europe: A Political Economic Précis of Continental Integration, 2008, 165 et seq.; *Schermers/Blokker*, International Institutional Law: Unity Within Diversity, 5th ed. 2011, § 579.

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¹ See VHvH/*Epping*, Article 229 AUEV mn. 2.

1

I. General remarks

The organisation of the EP is only rudimentarily regulated in the Treaties. Basically, it is ceded to its right of self-organisation within the framework of the Rules of Procedure EP (Article 232 TFEU). Article 230 TFEU contains the basic relations between the EP and the European Council, the Council and the Commission. Further details can be found in interinstitutional agreements which are now rooted in the primary law on the basis of the obligation to mutual sincere collaboration (Article 13 para. 2 s. 2 TEU). The EP and the Commission concluded a Framework Agreement on relations between the European Parliament and the European Commission, Annex XIV, RoP EP. The relation is also characterized by the principle of institutional balance¹. Essentially, Article 230 TFEU is a modified version of its predecessor Article 197 TEC. Article 197 para. 1 TEC, concerning the election of the President, is replaced by Article 14 para. 4 TEU. Para. 2 receives the wording of draft-Article III-337 para. 1 s. 1 TECE. Corresponding to the constitutional role model, the Council as well as the European Council are to be heard by the European Parliament at any time.

2

II. Right of attendance of the Commission

According to Article 230 para. 1 TFEU, the Commission's Members may attend and speak within the meetings of the EP. This right of attendance respectively right to speak also extends to the committees². The EP's right to demand the Commission's presence as a whole or by single members (sometimes qualified as 'minus' to the right of interpellation, as further explained in mn. 4 below), can also be found in para. 1.

3

Already because of its monopoly right of initiative in legislative proceedings, the Commission is politically accountable to the EP.

4

III. The right of the EP and its members to put questions

As part of the EP's power of control (Article 14 para. 1 TEU: 'functions of political control and consultation'), the **Commission** has to answer questions put by Parliament or its members ('right of interpellation').

5

There is no such (explicit) general right of the EP to put questions to the **Council** in primary law. However, the Council agreed to this procedure by self-commitment in 1973³ and it is now applicable via Article 110 RoP EP. This right may also be based on the institutions' duty of sincere cooperation. A right to put questions in the field of Common Foreign and Security Policy as well as police and judicial cooperation in criminal matters is explicitly regulated by Article 36 subpara. 2 TEU. Regrettably, the Reform Treaty missed to fix a general explicit right to put questions in primary law.

6

The modalities of the right to put questions are laid down in Articles 115 et seq. RoP EP. Questions put to the European Central Bank are allowed under Article 118 RoP EP. Again, an obligation to cooperate also results from the principle of sincere cooperation.

¹ See CR/Kluth, Article 230 AEUV mn. 2.

² See VHVH/Epping, Article 230 AEUV mn. 3.

³ See VHVH/Epping, Article 230 AEUV mn. 3.

IV. Right of the European Council and the Council to be heard

7

Article 230 para. 3 TFEU defines the details for the hearing by the Parliament of the European Council and the Council in accordance with their respective Rules of Procedure.

Article 231 [Voting; quorum]
(ex Article 198 TEC)

Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast.

The Rules of Procedure shall determine the quorum.

Bibliography: *Maurer*, The European Parliament between Policy-Making and Control, in: Kohler-Koch et al. (ed.), *Debating the Democratic Legitimacy of the EU*, 2007; *Rittberg*, *Building Europe's Parliament*, 2005.

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I. Rule of majority

1

Article 231 TFEU takes up the former Article 198 TEC with one essential modification. As before, the European Parliament regularly decides by **majority of the votes cast**. In this case, a decision is achieved with the accumulation of more than one half of the actual votes (without abstentions, see rules on equality of votes). However, the requirement laid down in Article 198 TEC of an **absolute majority** (already deleted by draft-Article III-338 TECE) has been dropped. In practice, though, the meaning of the provision has not changed: Even the earlier version implied the majority of the votes cast and not the majority of the EP's component Members¹. The new version has an explanatory function only.

Stricter rules of majority are applied in certain special procedures. The (qualified) majority of the Members of the EP set by the TEU is required for the adoption of the Rules of Procedure of the EP (Article 232 TFEU); for the procedure of codecision (Article 294 para. 7 lit. b and lit. c TFEU – 'majority of its component Members'); for the budgetary procedure (Article 314 para. 7 lit. c TFEU); as well as for the assent procedure in case of a Member State's accession (Article 49 TEU). A double qualified majority, meaning the majority of the component Members plus two thirds of the votes cast, is needed in case of a motion of censure from the EP towards the Commission under Article 234 subpara. 2 TFEU and in case of suspension of membership rights under Article 354 subpara. 4 TFEU.

¹ See VHVH/*Epping*, Article 231 AEUV mn. 1.

3

II. Quorum

The European Parliament is quorate if one third of its component members is present in the Chamber (Article 155 para. 2 RoP EP). The quorum is assumed to be valid unless the President, on request of at least 40 Members, establishes the quorum not being present (Article 155 para. 3 RoP EP). In case of less than 40 Members being present, the President may ex officio rule that there is no quorum (Article 155 para. 5 RoP EP).

4

III. Public

The debates of the EP are public (Article 103 para. 2 RoP EP). Parliamentary public itself is an essential part of the democratic public². The discussion of the annual general report submitted by the Commission is held in open session (Article 233 TFEU). The Parliament's proceedings are published, see Article 232 subpara. 2 TFEU.

5 Parliamentary committees usually meet in public. However, until the adoption of the agenda for a meeting, they can decide to treat specific items in camera (Article 103 para. 3 RoP EP).

6

IV. Voting

In general, parliamentary votes are made openly by means of a hand signal (Article 165 para. 1 RoP EP). A secret ballot is provided for appointments (Article 169 para. 1 RoP EP) or by request of one fifth of the EP's component Members (Article 169 para. 2 RoP EP).

Article 232 [Rules of Procedure; publication of proceedings] (ex Article 199 TEC)

The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members.

The proceedings of the European Parliament shall be published in the manner laid down in the Treaties and in its Rules of Procedure.

1 Article 232 subpara. 1 TFEU – just like the previous Article 199 TEC – constitutes the **autonomy of adopting Rules of Procedure** in accordance with parliamentary tradition. Hence, the EP is empowered to self-organisation within the TFEU framework.¹ Adoption and amendments of the Rules of Procedure request an act by majority of the EP's component members.

2 On 25 November 2009, the EP released its **new Rules of Procedure EP^{2*}**. The Rules of Procedure EP are published periodically in booklet form and in the Official Journal of the European Union. However, in case of any amendment, the version in force is avail-

² See Häberle, Europäische Verfassungslehre, 164 et seq.

¹ For limits, see the judgments of the ECJ on the determination of the EP's place of work: Joined Cases C-213/88 and C-39/89 *Luxembourg v European Parliament* [1991] ECR I-5643; Case C-345/95 *France v European Parliament* [1997] ECR I-5215; see also Article 341 TFEU.

^{2*} 2009/2062/REG.

able on the EP's website (<http://www.europarl.europa.eu>). The last modifications took account of the expanded competences of the EP. By means of the Lisbon Treaty, the EP became an equal legislator along with the Council in most policy areas (ordinary legislative procedure, Article 294 TFEU). Even the budgetary rules were amended because the EP now decides equally together with the Council. Furthermore, the procedure of appointment of the Commission's President had to be adapted. The EP had also gained influence in this field. Other amendments are related to the now binding CFREU, the EP's right to propose amendments of the Treaties and (finally) the national Parliaments' obtained powers. Overall, the Rules of Procedure determine the European Parliament's internal organisation and procedure.

The Parliament's relations to other institutions are determined by both the Rules of Procedure (Article 105 et seq. RoP EP) and **interinstitutional agreements** of the EP and the Council or the Commission.

Such interinstitutional agreements are the 'framework agreement on the relations between the EP and the Commission' (RoP EP annex XIV) as well as inter alia the following agreements³: interinstitutional declaration of democracy, transparency and subsidiarity; interinstitutional agreement on the procedure of the application of the principle of subsidiarity; decision (annex XI) on the regulations and general conditions governing the performance of the Ombudsman's duties in accordance with Article 195 para. 4 TEC, now Article 228 TFEU; modalities on work of the Conciliation Committee under Article 294 TFEU; furthermore, the interinstitutional agreement on budgetary discipline and the amelioration of the budgetary procedure⁴ and the interinstitutional agreement on the editorial quality of the Union's legislation⁵. Non-compliance with these agreements may lead to deficient legal acts (see Article 263 TFEU).

A separate section of the Rules of Procedure provides for the **transparency of the EP's work** (Articles 103 et seq. RoP EP). For purposes of public control, the proceedings of the EP become published immediately after the vote (Article 180 RoP EP). The minutes of meetings containing the speakers' names and the Parliament's decisions are published in part C of the Official Journal; a debate record is published in an annex of the Official Journal (see Articles 148 et seq. RoP EP).

Article 233 [Annual general report] (ex Article 200 TEC)

The European Parliament shall discuss in open session the annual general report submitted to it by the Commission.

The Commission releases a general report ('balance') on the activities of the Union (Article 249 para. 2 TFEU) once a year, at the beginning of February. Although there is no guideline for its content, the report shall contain a separate chapter on social developments within the Union (Article 161 subpara. 1 TFEU). In addition, the Commission prepares annual reports on special policy areas, e.g. competition report or agriculture report.

The discussion of the general report in open session had already been required under Article 200 TEC. It serves the parliamentary control in accordance with Article 14 para. 1

³ OJ 1994 C 329/133 et seq.

⁴ OJ 1999 C 172/1.

⁵ OJ 1999 C 73/1.

s. 2 TEU, as well as the transparency of the activities of the institutions¹. The simultaneous discussion of the Commission’s annual work programme, submitted to the EP by respective agreement with the Commission since 1973, seems to be politically even more important².

**Article 234 [Motion of censure against the Commission]
(ex Article 201 TEC)**

If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from duties that he or she carries out in the Commission. They shall remain in office and continue to deal with current business until they are replaced in accordance with Article 17 of the Treaty on European Union. In this case, the term of office of the members of the Commission appointed to replace them shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired.

Bibliography: *Dinan*, Governance and Institutions 1999: Resignation, Reform and Renewal, JCMS, Annual Review September 2000, 25.

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1

I. General overview

Article 234 TFEU, dealing with a motion of censure towards the European Parliament, corresponds to a large extent to Article 201 TEC respectively draft-Article III-340 TECE. However, there was a need for clarification due to the introduction of the ‘High Representative’ of the Union for Foreign Affairs and Security Policy: It is pointed out that, regarding the High Representative, a motion of censure may only refer to the High Representative’s duties carried out in the Commission.

The motion of censure is the European Parliament’s most extensive **instrument of control** towards the Commission. It is designed destructively and affects the Commission as a whole^{1*}. Originally, the possibility of a motion of censure should more or less compensate the lack of participation in the nomination of the Commission by the Member States’ governments. The introduction of the EP’s right of assent to the appointment of the Commission by the Maastricht Treaty (now Article 17 TEU) may have weakened the importance of the instrument; yet it is not redundant.

¹ See VHvH/*Epping*, Article 233 AEUV mn. 1.

² See http://europa.eu/institutions/inst/parliament/index_de.htm.

^{1*} See VHvH/*Epping*, Article 234 AEUV mns 1, 2.

II. Motion of censure**2**

The (written only) motion of censure can be made by at least one tenth of the component Members of Parliament (Article 107 para. 1 RoP EP).

The debate of the motion of censure may take place at the earliest 24 hours after the receipt of a motion of censure is announced to the Members by the Parliament's President. The decision about the motion of censure may be made only 48 hours after the beginning of the debate, also by roll call. The motion is adopted on the basis of a two-thirds majority of the votes cast, at the same time representing a majority of the component Members of Parliament.

III. Legal consequences**4**

Altogether, the motion of censure is aimed at the work of the Commission in general. Therefore, it obliges the Commission's Members to **resign** as a whole. In this case, the High Representative of the Union for Foreign Affairs and Security Policy also resigns, but only regarding his functions carried out in the Commission. The Commissioners **provisionally** continue with the current business for the rest of the period of office until they are replaced.

The question of whether a reappointment of all Commissioners (for the rest of the term, Article 234 para. 2 s. 2 and 3 TFEU) by the Council is permissible or not has lost its importance as a new appointment under the TFEU requires a vote of consent by the EP (Article 17 TEU). There are no legal objections against the new appointment of single Members of the Commission.

A motion of censure against single Members of the Commission would not be inadmissible but of no binding consequence to resign². Such motions must be distinguished from the (not politically but legally motivated) procedure of compulsory retirement according to Article 247 TFEU, in which the EP is not involved.

SECTION 2

THE EUROPEAN COUNCIL

Bibliography: *Bergstrom*, Comitology: Delegation of Powers in the European Union and the Committee System, 2005; *Heyes-Renshaw/Wallace* (eds), The Council of the Ministers, 2006; *Piris*, The Constitution for Europe. A Legal Analysis, 2006; *Weiler*, The constitution of Europae, 1999; *Werts*, The European Council, 1992; *Westlake/Galloway*, The Council of the European Union, 3rd ed. 2004.

Article 235 [Voting; Rules of Procedure; General Secretariat]

1. Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member.

Article 16(4) of the Treaty on European Union and Article 238(2) of this Treaty shall apply to the European Council when it is acting by a qualified majority. Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote.

² See GHN/Hölscheidt, Article 234 AEUV mn. 8.

- Abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity.
2. The President of the European Parliament may be invited to be heard by the European Council.
3. The European Council shall act by a simple majority for procedural questions and for the adoption of its Rules of Procedure.
4. The European Council shall be assisted by the General Secretariat of the Council.

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1 I. Subject

The European Council is established by Article 15 TEU. Article 235 TFEU, adopting the text of draft-Article III-341 TECE, contains different provisions on the European Council's procedures and organisation.

2 II. Transfer and abstention of votes

Article 235 para. 1 TFEU contains some special rules on the European Council's decision-making (Article 15 TEU). Its subparagraph 1 is identical with Article 239 TFEU, dealing with the transfer of votes in the Council of Ministers. By permitting a **transfer of votes** in case of single Member's absence, the European Council's operability (as decisions usually are taken by consensus) is preserved. Acting on behalf of another Member is limited to not more than one other Member. This prevents a further accumulation of votes in the person of just one Member¹.

- 3 To what extent a substitute member is bound by instructions is a practically rather irrelevant question².
- 4 According to Article 235 para. 1 subpara. 2 s. 1 TFEU, when acting by a qualified majority, Article 16 para. 4 TEU is applicable – and thus a majority of at least 55% of the European Council's component members comprising at least 15 of them and representing Member States comprising at least 65% of the population of the Union. Article 235 para. 1 subpara. 2 s. 2 TFEU, systematically mislocated, does not only relate to decisions made by qualified majority but to all decisions³.
- 5 Article 235 para. 1 subpara. 3 TFEU deals with the **constructive abstention**. In its content, it complies with Article 238 para. 4 TFEU.

6 III. Hearing of the President of the EP

According to Article 235 para. 2 TFEU, the EP's President may be heard by the European Council. As the term 'invitation' implies, a duty is not established.

¹ See VHVH/*Epping*, Article 235 AEUV mn. 2.
² See VHVH/*Epping*, Article 235 AEUV mn. 3.
³ See *Fischer*, Der Vertrag von Lissabon, 390.

IV. Procedural questions and Rules of Procedure

7

Article 235 para. 3 TFEU is a result of the right of self-organisation including the autonomy of adopting Rules of Procedure. The provision differs from the basic concept of consensus by allowing acts by simple majority. The assent of the absolute majority of the European Council's members is necessary; abstentions are regarded as votes against⁴. In December 2009, the European Council has adopted new Rules of Procedure complying with the reforms of the Lisbon Treaty (2009/882/EU).⁵

V. General Secretariat

8

By means of Article 235 para. 4 TFEU, the valorisation of the President of the European Council ('superpresident') shall be prevented⁶.

Article 236 [Configurations of Council and Presidency]

The European Council shall adopt by a qualified majority:

- (a) **a decision establishing the list of Council configurations, other than those of the General Affairs Council and of the Foreign Affairs Council, in accordance with Article 16(6) of the Treaty on European Union;**
- (b) **a decision on the Presidency of Council configurations, other than that of Foreign Affairs, in accordance with Article 16(9) of the Treaty on European Union.**

Having no predecessor in primary law or even in the draft TECE, Article 236 TFEU 1 establishes the competences for decisions by qualified majority of the European Council regarding different configurations within the Council. According to Article 235 para. 1 subpara. 2 TFEU, the qualified majority within the European Council is defined by referral to the qualified majority of the Council, as it is laid down in Article 16 para. 4 TEU, operating in conjunction with Article 235 para. 1 TFEU. For the case of a decision which is not taken upon a proposal of the Commission or the High Representative, Article 235 para. 1 subpara. 2 TFEU eventually refers to Article 238 para. 2 TFEU.

The decision according to **lit. a** establishes the various configurations in which the 2 Council meets except the ones for 'General Affairs' and 'Foreign Affairs' as laid down in Article 16 para. 6 TEU. The configurations 'General Affairs' and 'Foreign Affairs' are established by primary Union law (Article 16 para. 6 subparas 2 and 3 TEU).

The decision according to **lit. b** constitutes the Presidency of the respective Council 3 configuration except for the 'Foreign Affairs' configuration. This rule corresponds to Article 16 para. 9 TEU, where a system of equal rotation is laid down. A decision on Presidency for the Council of 'Foreign Affairs' is neither necessary nor possible as the High Representative of the Union for Foreign Affairs and Security Policy permanently presides over it, see Article 18 para. 3 TEU and Article 27 para. 1 TEU.

⁴ See VHvH/*Epping*, Article 235 AEUV mn. 8.

⁵ OJ 2009 L 315/51.

⁶ See VHvH/*Epping*, Article 235 AEUV mn. 10 with further reference.

SECTION 3 THE COUNCIL

Bibliography: *Goebel*, The European Council after the Treaty of Lisbon, Fordham Int'l L. J. 2010–2011, 1251; *Hayes-Renshaw/Wallace*, The Council of Ministers, 2nd ed., 2006; *Westlake/Galloway*, The Council of the European Union, 3rd ed. 2004.

Article 237 [Convening by the President] (ex Article 204 TEC)

The Council shall meet when convened by its President on his own initiative or at the request of one of its Members or of the Commission.

- 1 This provision defines the **task of the Council's President** of convening the Council (usually at his own discretion). This right becomes a duty if either one of the Members of the Council or of the Commission requests the convention.
- 2 Whereas the Council's legal **seat** is Brussels¹, its regular **venues** are both Brussels and Luxembourg. The Council may also meet elsewhere, in particular in case of international negotiations.
- 3 **Planning of meetings**, agenda, procedure and meeting transcript are recorded in the Council's Rules of Procedure².

Article 238 [Voting modalities] (ex Article 205(1) and (2), TEC)

1. Where it is required to act by a simple majority, the Council shall act by a majority of its component members.

2. By way of derogation from Article 16(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.

3. As from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, in cases where, under the Treaties, not all the members of the Council participate in voting, a qualified majority shall be defined as follows:

- (a) A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. A blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained;
- (b) By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at

¹ Cf. Article 341 TFEU mn. 4.

² Decision 2009/937/EU.

least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

4. Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

Bibliography: *Moberg*, Is the double majority really double? The second round in the debate of the voting rules in the EU Constitutional Treaty, WP 23/2007, Real Instituto Elcano, Madrid; *Pukelsheim*, Putting Citizens First: Representation and Power in the European Union, Institut für Mathematik der Universität Augsburg, Preprint Nr. 040/2007, 23 November 2007; *Slomczynski/Zyczkowski*, Jagiellonian Compromise: An alternative voting system for the Council of the European Union, published under <http://chaos.if.uj.edu.pl/~karol/pdf/JagCom07.pdf>; *van den Bogaert*, Qualified Majority Voting in the Council, 15 MJ 2008, 97.

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I. Purpose of the Article

1

The purpose of Article 238 TFEU is to provide additional rules supplementing the general rules on the Council's voting procedures laid down in Article 16 paras 3–5 TEU.

II. Simple majority (para. 1)

2

In general, the decisions of the Council are taken by a qualified majority, except where the Treaties provide otherwise (Article 16 para. 3 TEU). One possibility of a different voting procedure consists in taking decisions by simple majority. Such cases are e.g. decisions on the organisation of the General Secretariat (Article 240 para. 2 subpara. 2 TFEU); on the adoption of the Council's Rules of Procedure (Article 240 para. 3 TFEU); on requesting the Commission to undertake certain studies and to submit appropriate proposals (Article 241 s. 1 TFEU); or on determining the rules governing committees provided for in the Treaties (Article 242 TFEU).

With respect to its wording, the simple majority is an absolute one, meaning majority of its component members. In view of 28 Member States, it is achieved by approval of at least 15 representatives. Abstention of votes and non-attendance are treated as dissenting votes.

III. Additional rules on qualified majority (paras 2 and 3)

3

The procedure governing the Council's decision-making is in general provided for in Article 16 paras 3 and 4 TEU. These provisions distinguish decisions taken until 31 October 2014 (in accordance with the system created by the Treaty of Nice) and decisions taken from 1 November 2014 (the Lisbon system of double majority); they also refer to possible exceptions until 31 March 2017 in Article 3 of the relevant Protocol on transitional provisions.

In this context, Article 238 para. 2 TFEU lays down a rule regarding a qualified majority decision taken from 1 November 2014 as a double majority vote **where the Council**

4

does not act on a proposal from the Commission or from the High Representative. In this case the majority requirements are increased to at least 72 % of the Members of the Council, representing Member States comprising at least 65 % of the population of the Union.

- 5 Article 238 para. 3 lit. a TFEU is concerned with decisions taken from 1 November 2014, where, under the Treaties, in a double majority vote **not all the Members of the Council participate** in voting. Article 238 para. 3 lit. b TFEU deals with the case in which, under otherwise the same circumstances, the Council does not act on a proposal from the Commission or from the High Representative.

6 **IV. Rules on unanimity**

A **unanimous** decision requires the presence or representation of all government representatives in Council. The abstention of votes, however, does not affect the decision as it is not treated as a dissenting vote (Article 238 para. 4 TFEU), so-called **constructive abstention of votes**. A ‘unanimous’ decision could be reached by only one vote and 27 abstentions in extreme cases.

***Article 239 [Transfer of voting right]
(ex Article 206 TEC)***

Where a vote is taken, any Member of the Council may also act on behalf of not more than one other member.

- 1 In line with former Article 206 TEC, Article 239 TFEU supports the Council’s operability in cases of absence of Members. The Council may only take decisions at ministerial level (Article 16 paras 2 and 9 TEU). Only for debates, not for the vote may a Member of the Council be represented by a national civil servant of his Member State (e.g. his Permanent Representative, Article 240 TFEU). This is affirmed by Article 239 TFEU, which alternatively allows the transfer of the right to vote by one Member to another **State’s Council Member**. There are no special requirements regarding the form of the transfer.
- 2 Any Member of the Council may act on behalf of not more than one other Member. This avoids a further concentration and accumulation of votes. The Member is obliged to follow the instructions of the other Member State’s government¹. A parallel regulation for the European Council is to be found in Article 235 para. 1 TFEU.

***Article 240 [Committee of Permanent Representatives; General Secretariat;
Rules of Procedure]
(ex Article 207 TEC)***

1. A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council’s Rules of Procedure.

¹ This is debated controversially but of no practical relevance, see Schwarze/Hix, Article 239 AEUV mn. 3.

2. The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary-General appointed by the Council.

The Council shall decide on the organisation of the General Secretariat by a simple majority.

3. The Council shall act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure.

Bibliography: *Beach*, The Unseen Hand in Treaty Reform Negotiations: The Role and Impact of the council Secretariat, JEPP 2004, 408; *Bostock*, Coreper Revisited, JCMS 2002, 215; *Dijkstra*, The Council Secretariat's Role in the Common Foreign and Security Policy, European Foreign Affairs Review 2008, 149; *Driessen*, The council of the European Union and access to documents, ELR 2005, 275; *Gstohl*, EU Diplomacy after Lisbon: More Effective Multilateralism?, Brown J. World Aff. 2010–2011, 181; *Lewis*, The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure, JEPP 2000, 261.

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I. Overview

1

Article 240 TFEU follows the former Article 207 TEC. It is concerned with the organisational structure of the Council. Article 240 para. 1 TFEU deals more closely with the functions of the Committee of Permanent Representatives which is established by Article 16 para. 7 TEU. Article 240 para. 2 TFEU forms the basis for the Council's General Secretariat with a Secretary-General. The Council shall decide on organisational issues by simple majority. The same modus applies to the adoption of the Rules of Procedure (RoP) as well as the decision on procedural matters which are dealt with in Article 240 para. 3 TFEU.

II. Committee of Permanent Representatives

2

The Committee of Permanent Representatives, often abbreviated as **COREPER** (derived from **Comité des représentants permanents**) is an internal subsidiary body of the Council. It consists of Permanent Representatives of the Governments of the Member States with an ambassador's status. The Committee meets in two formations: as a staff of the Permanent Representatives (COREPER II) or of the respective deputies (COREPER I in politically less important matters). The Special Committee on Agriculture (CSA = Comité speciale de l'Agriculture) is also a formation of COREPER but only with preparing and supporting function. The Committee is chaired by the representative of the respective Member State holding the presidential power (Article 19 para. 4 RoP Council). A Commission's representative participates in its meetings unless the Council decides otherwise. For preparing its own work, the Committee forms working groups consisting of national civil servants.

The Committee prepares the meetings of the Council and carries out the tasks assigned by it. The new wording that the Committee for this purpose 'shall be responsible' has no practical consequence¹. The Council may not assign other than preparing tasks.

¹ See *Fischer*, Der Vertrag von Lissabon, 395.

In particular, the Committee is not authorized to take part in the legislation process in the place of the Council. It may only take procedural decisions as provided for by the RoP Council.

- 4 In practice, the Committee has gained eminent significance for pre-settling political issues with the Commission by adjusting national and European positions in the lead-up to the Council's decision. A particular role is played by the feedback evoked by its function as a mediator between national administrations and the Union's authorities. This is especially true for the preliminary review of Commission proposals that may be altered accordingly². Projects of legislation which reach agreement within the Committee may be adopted by the Council as so-called A-points without further debate.

5 **II. Secretary-General**

Within the framework of the Maastricht Treaty, the text of para. 2 originally had been incorporated in Article 207 TEC in order to enhance the political status of the Secretary-General of the Council. In addition, the Amsterdam Treaty provided the Secretary-General with the position of the High Representative for the Common Foreign and Security Policy. Emphasizing his political mission in supporting the Council's work ('Mr GASP') and relieving him from administrative tasks, a Deputy Secretary-General, at the time responsible for running the General Secretariat, was put to his side. The Lisbon Treaty changed the General Secretariat's structure. The High Representative's function was redefined and established as a position of its own by Article 18 TEU. Consequently, it is no longer referred to in the context of Article 240 para. 2 TFEU. As a practical effect, the Council is again equipped with a Secretary-General with an undivided responsibility for General Secretariat matters. The Council decides on the General Secretariat's internal structure by simple majority³.

6 **III. Rules of Procedure**

The setting of procedural matters as well as of internal Rules of Procedure (RoP) also occurs by simple majority vote. The explicit reference to a vote by simple majority is necessary since the regular voting procedure in the Council requires a qualified majority (see Article 16 para. 3 TEU). So far the Council has adopted and updated its RoP (Council Decision of 1 December 2009 (2009/937/EU), last amendment by Council Decision of 10 December 2013 (2013/746/EU)). As typical for Rules of Procedure, the RoP Council define e.g. the details of the Council's convening, agenda, meetings, formal legislative procedure and openness, tasks of the COREPER and the General Secretariat plus the Council's representation in certain cases.

- 7 Meetings of the Council are public when it deliberates and votes on a draft legislative act (Article 5 para. 1 RoP Council). In other cases, meetings of the Council shall not be public except in specific cases referred to in Article 8 RoP Council.
- 8 General rules on the principle of transparency ('openness'), particularly the citizens' access to documents, were adopted by the Treaty of Lisbon in Article 16 para. 8 TEU and Article 15 para. 3 TFEU. Article 10 and annex II of the RoP Council still contain corresponding provisions.

² See Streinz/Hummer/Oberwexer, Article 240 AEUV mns 9, 16 et seq.

³ See Schwarze/Hix, Article 240 AEUV mns 10 et seq.

**Article 241 [Request for Commission's proposal]
(ex Article 208 TEC)**

The Council acting by a simple majority may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons.

As laid down by the Lisbon Reform Treaty, the former Article 208 TEC became Article 241 TFEU. The simple majority is mentioned explicitly as mode of vote; otherwise Article 16 para. 3 TEU would apply. The duty of the Commission to give reasons in cases in which – despite a respective request of the Council – it does not submit a proposal has been added.

According to the distribution of tasks between Council and Commission, in general the latter directly initiates a legislative project (Commission's right of proposal and monopoly of initiative). The Council may, however, by indirect initiative request the Commission to submit a **proposal**. Furthermore, the Council may request appropriate studies which it considers desirable for the attainment of the common objectives. According to Article 241 s. 1 TFEU, the Council decides by simple majority (see mn. 1 above).

The Council's request is **binding**. Otherwise Article 241 TFEU would be redundant as the Council is also able to make non-binding suggestions without special authorization. Only relying on the basis of Article 241 TFEU, however, it is not possible for the Council to establish a binding commitment of the Commission in regard to the substance of a proposal. As a rule, legal actions of single persons against the Council due to its refraining from making use of its indirect right of initiative are inadmissible already because also the Council has political discretion in this respect¹.

If the Commission does not meet the request, it is obliged to state reasons (Article 241 s. 2 TFEU, similar to Article 225 s. 2 TFEU). Otherwise an **action for failure to act** according to Article 265 TFEU could be considered.

**Article 242 [Rules governing committees]
(ex Article 209 TEC)**

The Council, acting by a simple majority shall, after consulting the Commission, determine the rules governing the committees provided for in the Treaties.

The slightly modified Article 242 TFEU corresponds to the former Article 209 TEC. Where formerly the Commission's statement of its opinion was required, it is now sufficient that the Council addresses the Commission for the purpose of consultation. Consequently the Commission is not obliged to formulate an opinion any more but it may allow the period set for the answer to elapse. The voting method by simple majority is explicitly added since otherwise Article 16 para. 3 TEU would apply.

The article allows the Council to determine the rules governing the committees provided for in the Treaties (e.g. Article 99 TFEU: Transport Committee; Article 134 para. 2 TFEU: Economic and Financial Committee; Article 207 para. 3 subpara. 3 TFEU: Common Commercial Policy Committee; Article 163 subpara. 2 TFEU: European Social Fund Committee; Article 240 para. 1 TFEU: Committee of Permanent Representatives).

¹ CFI Case T-167/95 *Kuchlenz-Winter v Council* [1996] ECR II-1607.

- 3 The establishment of committees not explicitly provided for in the Treaties is made in accordance with Article 352 TFEU. However, this must be distinguished from the installation of internal advisory committees without any external impact; such internal committees may be based on the power to organize the respective EU institutions, particularly in their Rules of Procedure.

Article 243 [Remunerations and payments]
(ex Article 210 TEC)

The Council shall determine the salaries, allowances and pensions of the President of the European Council, the President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, the Members of the Commission, the Presidents, Members and Registrars of the Court of Justice of the European Union, and the Secretary-General of the Council. It shall also determine any payment to be made instead of remuneration.

- 1 Extending to the new functions, the provision establishes the Council's competence of determining the official remuneration of the office holders of Union institutions as listed in the Article. The Council acts by qualified majority in accordance with Article 16 para. 3 TEU in conjunction with Article 238 TFEU.
- 2 The determination of the remuneration of the Union's officials and other civil servants is based on Article 336 TFEU.

SECTION 4
THE COMMISSION

Bibliography: *Bauer*, Reforming the European Commission, 2009; *Christiansen*, The European Commission: The European Executive between Continuity and Change, in: Richardson (ed.), *European Union, Power and Policy-Making*, 3rd ed., 2006, chapter 5; *Craig*, The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organization, 6 *ELJ* 2000, 98; *Hooghe*, The European Commission and the Integration of Europe: Images of Governance, 2001; *Rhinard/Vaccari*, The Study of the European Commission, *JEPP* 2005, 387.

Article 244 [System of equal rotation]

In accordance with Article 17(5) of the Treaty on European Union, the Members of the Commission shall be chosen on the basis of a system of rotation established unanimously by the European Council and on the basis of the following principles:

- (a) **Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;**
- (b) **subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States.**

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I. General overview

1

The **basic provisions on the Commission** are laid down in Articles 17 and 18 para. 4 TEU, in parallel with the fundamental rules establishing the EP, the European Council and the Council. These Articles of the TEU deal with the institutional architecture of the Union. In contrast, Articles 244 et seq. TFEU contain the provisions complementing them. The main innovations that have derived from the Lisbon Reform Treaty deal with the composition of a (smaller) Commission and a system of rotation of the Member States in regard to its membership.

Article 244 TFEU largely reproduces the provisions of draft-Article I-26 para. 6 TECE. 2 It correlates with Article 17 paras 4 and 5 TEU. Since 1 November 2008, the body consists of one national of each Member State (currently 28 Commission Members). From 1 November 2014 onwards, the number of members is to be reduced to two thirds of the number of Member States – unless the European Council unanimously decides otherwise. The purpose of this provision is to guarantee the Commission's working ability facing potential future EU enlargements. On 12 December 2008, however, the European Council decided to continue with the unabridged size of the Commission.¹

II. System of equal rotation

3

A system of rotation, with the important objective of ensuring the equality of Member States and therefore based on **demographic** and **geographic representation**, is developed for the purpose of equal and fair allocation. These principles are identical to the ones developed in the Nice Treaty (Article 4 No 3 Protocol on the enlargement of the European Union)². They take demographic and geographic aspects into account. The aim is to fairly balance the interests of larger and smaller Member States. The idea of balance is particularly expressed in lit. a: The difference between the total number of mandates of two of any Member States may (respectively must) be never more than one.

To some extent, this provision is a **compromise solution** in favour of the smaller 4 Member States which fear losing influence. The principle of sovereign equality of States under international law (see Article 2 No 1 UN-Charter) is echoed herein. However, a damaged reputation of the institution and the danger of political conflicts due to a Member State's nonrepresentation in the body remain possible consequences³. As a means of last resort, the European Council may decide to stay with the current system ('one Commissioner per Member State') by unanimous vote.

According to Declaration No 10 of the Final Act of the Lisbon Conference, the 5 Commission is requested to consult and inform all Member States even in case of the body's reduction. This duty also arises from the principle of mutual sincere cooperation between the Union and the Member States as well as among the Member States themselves.

¹ Cf. Article 17 TEU mn. 14.

² OJ 2001 C 80/49 [53].

³ See VHVH/*Epping*, Article 244 AEUV mn. 13.

*Article 245 [Duties of Commission Members; consequences
of breach of obligations]
(ex Article 213 TEC)*

The Members of the Commission shall refrain from any action incompatible with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks.

The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits in its stead.

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1 I. General overview

Article 245 TFEU takes up the former Article 213 para. 2 TEC and adopts the compact wording of draft-Article III-347 TECE without changes in its content. The provision lays down the basic duties of Commission Members and the consequences of a breach of their elementary duties.

2 II. Official duties

The Members are (exclusively) committed to the **Union’s welfare**¹. The performance of this duty requires complete **independence** of the Members guaranteed by special conditions (see Article 17 para. 3 TEU). On the one hand, it is forbidden to seek or take instructions from any government or other authority. Member States may not strive for influence to Commissioners in fulfilling their tasks. On the other hand, during terms of office, Members may not engage in other occupations, whether for consideration or gratuitously. The duty to behave with integrity and discretion in accepting certain appointments or benefits after terms of office shall maintain the Commission’s good reputation. In September 1999, the Commission adopted a self-binding ‘**Code of conduct for Commissioners**’ which was revised in 2011². In this context, the Code of good administrative behaviour in relations with the public as Annex of the Rules of Procedure is to be mentioned. Furthermore, the citizen’s right to a good administration within the Union has been codified in Article 41 CFREU.

¹ See *Häberle*, Gibt es ein europäisches Gemeinwohl, in: FS Steinberger, 2002, 1153 et seq.

² COM (2011) 2904.

In the event of a breach of duty, the **Court of Justice** may rule, on application by the Council acting by simple majority or the Commission, the Member's retirement (see Article 247 TFEU) or deprivation of pensions or other benefits. A possible motion of censure of the European Parliament does not lead to a compulsory withdrawal of the respective Commissioner (see Article 234 TFEU).

In the **Case Cresson**³, the Court of Justice specified the duties deriving from Article 245 TFEU: Facing the Commissioner's high responsibility, strict guidelines have to apply. Especially Members of the Commission have to prioritize the Union's welfare instead of personal or Member States' interests. The ECJ emphasizes that only a breach of duty of certain weight (and not any deviation from the canon of duties) can justify a removal from office.

Article 246 [Appointment of successors] (ex Article 215 TEC)

Apart from normal replacement, or death, the duties of a Member of the Commission shall end when he resigns or is compulsorily retired.

A vacancy caused by resignation, compulsory retirement or death shall be filled for the remainder of the Member's term of office by a new Member of the same nationality appointed by the Council, by common accord with the President of the Commission, after consulting the European Parliament and in accordance with the criteria set out in the second subparagraph of Article 17(3) of the Treaty on European Union.

The Council may, acting unanimously on a proposal from the President of the Commission, decide that such a vacancy need not be filled, in particular when the remainder of the Member's term of office is short.

In the event of resignation, compulsory retirement or death, the President shall be replaced for the remainder of his term of office. The procedure laid down in the first subparagraph of Article 17(7) of the Treaty on European Union shall be applicable for the replacement of the President.

In the event of resignation, compulsory retirement or death, the High Representative of the Union for Foreign Affairs and Security Policy shall be replaced, for the remainder of his or her term of office, in accordance with Article 18(1) of the Treaty on European Union.

In the case of the resignation of all the Members of the Commission, they shall remain in office and continue to deal with current business until they have been replaced, for the remainder of their term of office, in accordance with Article 17 of the Treaty on European Union.

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I. Genesis of the norm

1

Article 246 TFEU traces back to former Article 215 TEC but introduces two modifications. The new para. 2 takes up draft-Article III-348 para. 2 subpara. 1 TECE. It is clari-

³ ECJ Case C-432/04 *Cresson* [2006] ECR I-6387.

fied that the new Member to be appointed has to be of the same nationality as the one to be replaced. The new para. 3 takes up draft-Article III-348 para. 2 subpara. 2 TECE and allows not to refill a vacancy, particularly when the remainder of the office term is short. Para. 4 is only changed editorially. Para. 5 takes over the provision of draft-Article III-348 para. 4 TECE on the replacement of the High Representative. This was necessary due to the new status of the High Representative (see Article 18 TEU). Eventually the new para. 6 ties up to draft-Article III-348 para. 5 TECE and secures the temporary working capacity of the Commission in case of resignation of all of its members.

2

II. Termination of office

Termination of office may be caused by death; in this case, para. 2 as a matter of course orders ordinary replacement. Vacancies for legal reasons may result from the following:

- 3 – replacement after expiry of the regular mandate, after resignation of a Member as well as of the whole Commission in case of a motion of censure of the European Parliament (Article 234 TFEU);
- 4 – effectiveness of compulsory retirement in accordance with Article 247 TFEU.

5

III. Appointment of successors

The Council, acting by qualified majority in accordance to para. 2, appoints a successor for the remainder of the term of office of the retiring Member. Except for the President's office, the Council may decide unanimously not to fill a vacancy (see Article 238 para. 4 TFEU). It takes a proposal from the President of the Commission as otherwise his competence of distributing responsibilities within the Commission would be indirectly affected¹. Members are retired *ex nunc*; there is no obligation to continue business as provided for in para. 6.

- 6 Concerning the appointment of the successor of the President, the procedure of Article 17 para. 7 TEU is to be applied. The approval of the European Parliament is necessary already for reasons of democratic accountability and control.
- 7 Taking into account the exposed position of the High Representative, Article 18 para. 1 TEU applies for his succession.
- 8 Only the Commission that resigned (voluntarily or according to Article 234 para. 2 s. 2 TFEU) as a whole body continues the ongoing business. The successors are appointed for the remaining time of the current term of office (Article 234 para. 2 s. 3 TFEU). The resignation of the *Santer* Commission in spring 1999 set precedence. The Council explicitly stated that the Commission should continue its duties according to the Treaties until a new Commission would be appointed as soon as possible.

Article 247 [Compulsory retirement] (ex Article 216 TEC)

If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, compulsorily retire him.

¹ See VHVH/*Epping*, Article 246 AEUV mn. 4.

Bibliography: *van Gerven*, Ethical and political responsibility of the EU Commission, 37 CMLRev 2000, 1.

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I. Rulings of the ECJ 1

Article 247 TFEU takes over the content of former Article 216 TEC. Since the simple majority is no longer the regular procedure, this provision had to be expressly indicated. A Member of the Commission may be retired by the Court of Justice. The Council and the Commission – both acting by simple majority – are entitled to initiate proceedings. The judgement of the Court has *ex nunc* effect. It is also competent to apply interim measures¹.

II. Reasons 2

Reasons for retirement are:

- the omission of the conditions required for the performance of duties, e.g. loss of citizenship of a Member State or severe, not just temporary disease;
- a serious misconduct of which the Member of the Commission is guilty; for less serious misconducts, see Article 245 TFEU. 3

The only case applying this rule was the retirement of the Commissioner for Competition *Borschette*, due to irreversible unconsciousness in 1976. Commissioner *Bangemann* pre-empted his imminent retirement with a corresponding request. There was no retirement procedure in the case *Cresson*².

Article 248 [Structuring and allocating of responsibilities by the President] (ex Article 217(2) TEC)

Without prejudice to Article 18(4) of the Treaty on European Union, the responsibilities incumbent upon the Commission shall be structured and allocated among its members by its President, in accordance with Article 17(6) of that Treaty. The President may reshuffle the allocation of those responsibilities during the Commission's term of office. The Members of the Commission shall carry out the duties devolved upon them by the President under his authority.

In contrast to the model of former Article 217 TEC, the new Article 248 TFEU contains one single paragraph based mostly on draft-Article III-350 TECE. Until the Treaty of Amsterdam, the legal powers of the **President of the Commission** were purely organisational. He only gained a more highlighted position through his right to representation and his membership in the European Council (Article 15 para. 2 s. 1 TEU). With the help of the Amsterdam Treaty, even if in a limited way, he stepped out of the position as *primus inter pares*. The Nice Treaty yielded an alteration, providing him with the necessary instruments for a political leading role. Today, modified again by the Lisbon Treaty, the 1

¹ See Article 279 TFEU.

² ECJ Case C-432/04 *Cresson* [2006] ECR I-6387; see Article 245 mn. 8.

provision directly ties to the President’s position as mentioned in Article 17 para. 6 TEU. For the **High Representative** automatically being a **Vice-President** of the Commission (see Article 18 para. 4 TEU), a separate provision is redundant. The appointment of the other Vice-Presidents is the President’s duty (see Article 17 para. 6 lit. c TEU).

- 2 According to Article 17 para. 6 TEU, the President is responsible for the **political leadership** of the Commission. Consequently, Article 248 TFEU does not emphasize his impulse-providing character any longer – but Article 17 para. 6 TEU does so. The President decides on the internal organisation ensuring coherent and efficient actions based on collegiality (Article 17 para. 6 lit. b TEU). After approval of the Commission, the President appoints further Vice-Presidents from among its Members (see above mn. 1). The Vice-Presidents tasks are not explicitly mentioned in the Treaties. They result from the Rules of Procedure.
- 3 The Commission’s responsibilities are structured by its President who also carries out and – during terms of office – reshuffles the **allocation of duties** among the Members. Thus, he may withdraw and assign parts of Members’ portfolios (see Article 17 para. 6 TEU). Furthermore, the President adopts the agenda¹.
- 4 The Commissioners exercise their tasks under the direction of the President. In case of losing the President’s **confidence**, the latter may, with the approval of the whole body, request the Member’s resignation. As now fixed in Article 17 para. 6 TEU, the Member concerned has to meet this request. A special procedure applies for the High Representative.

Article 249 [Rules of Procedure; general report]
(ex Articles 218 (2) and 212 TEC)

1. The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these Rules are published.
2. The Commission shall publish annually, not later than one month before the opening of the session of the European Parliament, a general report on the activities of the Union.

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1 **I. Rules of Procedure**

Article 249 TFEU ties to Article 218 TEC whose para. 1 (on the cooperation of Council and Commission) has been deleted. Other modifications are of editorial nature only. In order to ensure its proper work flow, the Commission has the right to self-organisation. The Commission has adopted Rules of Procedure, which have been already frequently modified (Decision C (2000) 3614, most recently amended by Decision 2011/737, Euratom of 9 November 2011). The most recent version of the Rules of Procedure consolidated by the Publications Office is available via EUR-Lex.

- 2 The Rules of Procedure contain the Commission’s decision-making procedure^{1*} including preparation and implementation of decisions. It also contains provisions on the Commission’s departments and its substitution rules.

¹ See Article 6 para. 1 RoP Commission.
^{1*} See Article 250 TFEU.

The legal relations of officials and other servants were fixed by Council Regulation 259/68 until repealed by Regulation 1023/2013 of 22 October 2013 on Staff regulations of officials and Conditions of employment of other servants of the Union (see Article 336 TFEU).

II. General report

4

Once a year, the Commission prepares a general report on the activities of the Union ('statement of accounts') for reasons of transparency, to be submitted to the Parliament because of its controlling function (see Article 233 TFEU). Apart from that, the Commission develops several other reports on special subject areas. The internet presence (inter alia) serves the demand of the Union's citizens for information and, as a result, ensures a minimum of a European public².

Article 250 [Decision-making procedures] (ex Article 219 TEC)

**The Commission shall act by a majority of its Members.
Its Rules of Procedure shall determine the quorum.**

Bibliography: *Mehde*, Responsibility and accountability in the European Commission, 40 CMLRev 40 2003, 423.

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I. College of Commissioners

1

Article 250 TFEU is derived from the former Article 219 TEC. Without consequences regarding its content, Article 219 para. 2 TEC is replaced by the wording of draft-Article III-351 s. 2 TECE. The Commission is designed as a **college of Commissioners** (see Article 1 RoP (RoP Com)). It takes decisions collectively as a collegial body.¹ In particular, legal acts are adopted by the Commission as a whole. Since the President's position has been strengthened even more by the Lisbon reform, it was eventually a presidential regime limiting the principle of collective responsibility that was implemented. However, the President on his side may come under pressure by the High Representative as an automatic Vice President (Article 18 para. 4 s. 1 TEU). In post-Lisbon practice, the '**intra-institutional balance**' within the Commission needs to be newly rebalanced.

² See *Häberle*, Europäische Verfassungslehre, 163 et seq.

¹ ECJ Case C-137/92 P *BASF* [1994] ECR I-2555; Case C-191/95 *Commission v Germany* [1998] ECR I-5449.

2

II. Decision-making

In order to constitute a quorum, the presence (participation) of a majority of the Commission's currently 28 Members is required (Article 7 RoP Com). The same applies for constituting a majority in decision-making (Article 8 para. 3 RoP Com). Thus, 15 Members have to agree with the final proposal, which ultimately must be presented in all official languages.² Substitution of a Member by another Member or an official is not possible. Decisions are formally authenticated by the signatures of the President and the Secretary-General (Article 8 paras 4 and 11 RoP Com). The authentication of the document must necessarily precede its publication.³

3

III. Procedures

Four decision-making procedures are to be distinguished (Article 4 RoP Com).

4 Within the **ordinary (oral) procedure**, the Commission decides at its (usually weekly) meetings (Article 4 et seq. RoP Com) convened by the President. Additional meetings are held if necessary (Article 5 RoP Com). The meetings of the Commission are not public; discussions are confidential (Article 9 RoP Com). Languages of the deliberations are French, English and German.

5 Decisions may also be taken by **written procedure** if the departments directly involved agree with the draft text and Legal Service approves it (Article 12 RoP Com). The written procedure starts with one (or more) Member's proposal in agreement with the other Members. It is cancelled as soon as a Member requests to treat the proposal in a meeting.

6 A decision is adopted when the draft text has been circulated in writing and no reservations are made within the set deadline. Approved proposals are fixed in a note to which reference is made in the next meeting's minutes (Article 6 RoP Com).

7 The necessity to pass numerous decisions in non-political issues has led to decision-taking by **empowerment procedure** in 1963 (former Article 27 RoP Com and – since 2000 – Article 13 RoP Com). In particular the empowerment procedure is exercised regarding management or administrative measures (agricultural, competition and trade policy). Special provisions apply for financial and personnel administration affairs.

8 Ensuring the principle of the collective responsibility, the Commission may entitle one or more of its Members to take executive and administrative measures on behalf of the Commission within defined limits. Sub-delegation of powers to Directors-General and Heads of Department is permissible unless it is expressly prohibited by the empowering decision.

9 The Commission may also, **by means of delegation**, transfer equal competences to Directors-General and Heads of Department under the same conditions (Article 14 RoP Com).

10 This practice approaches the **department principle** which stands in contrast to the **principle of collegiality**. However, the respective measure is still regarded as a decision of the Commission. The effect of the rule laid down in the relevant articles of the RoP that 'the principle of collective responsibility must be fully respected' might seem to be of a rather theoretical quality. The ECJ⁴, however, considers this to be a mere transfer of

² ECJ Case C-137/92 P *BASF* [1994] ECR I-2555.

³ ECJ Case C-286/95 P *Commission v Imperial Chemical Industries* [2000] ECR I-2341.

⁴ ECJ Case 5/85 *AKZO Chemie v Commission* [1986] ECR 2585.

signatory power at the management and administrative level which is unobjectionable, since on the one hand the Commission is still fully responsible for such decisions and on the other hand such delegation and subdelegation are necessary for enabling the Commission to perform its duties in view of the number of decisions which the Commission is required to adopt.

SECTION 5

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Bibliography: *Alter*, The European Court's Political Power: Selected Essays, Oxford University Press, 2009; *Arnulf*, The European Union and its Court of Justice, 2nd ed. 2006; *Bast*, Legal Instruments and Judicial Protection, in: v. Bogdandy/Bast (eds), Principles of European Constitutional Law, 2011, 345 et seq.; *Classen*, Rechtsschutz, in: Schulze/Zuleeg/Kadelbach (eds), Europarecht. Handbuch für die deutsche Rechtspraxis, 2nd ed. 2010, § 4; *Craig*, The ECJ and Ultra Vires Action: A conceptual Analysis, 48 CMLRev 2011, 395; *Dashwood/Johnston* (eds), The Future of the Judicial System of the European Union, 2001; *Denning*, Introduction to the European Court of Justice: Judges or Policy Makers?, 1990; *Fisher*, Constitutional Dialogues: Interpretation as Political Process, 1988; *Häberle*, Europäische Verfassungslehre, 7th ed. 2011, 460 et seq.; *Mayer*, Multilevel Constitutional Jurisdiction, in: v. Bogdandy/Bast (eds), Principles of European Constitutional Law, 2011, 399 et seq.; *Payandeh*, Constitutional Review of EU after Honeywell: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice, 48 CMLRev 2011, 9; *Pernice/Kokott/Saunders* (eds), The Future of The European Judicial System in a Comparative Perspective, 6 European Constitutional Network Series 2006, 19; *Stone Sweet*, The Judicial Construction of Europe, 2005; *Tizzano*, The Rule of the ECJ in the Protection of Fundamental Rights, in: Arnulf/Eeckhout/Tridimas (eds), Continuity and Change in the EU Law: Essays in Honour of Sir Francis Jacobs, 2008, 126; *Vofsiukhle*, Multilevel Cooperation of the European Constitutional Courts, 6 EuConst 2010, 175.

Article 251 [Panels of the Court of Justice] (ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

Bibliography: *Arnulf*, Judicial architecture or judicial folly? The challenge facing the European Union, 24 ELR 1999, 516; *Douglas Scott*, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Aquis, 43 CMLRev 2006, 629; *Edward*, Reform of Article 234 Procedure, in: O'Keeffe/Bavasso (eds), Judicial Review in European Union Law (Liber Amicorum in Honour of Lord Slynn of Hadley (Vol 1), Den Haag 2000, 119 et seq.; *Koopmans*, The Future of the Court of Justice of the European Communities, 11 YEL 1991, 15; *Martins*, Size and Composition of Highest Courts Selection of Judges, in: Pernice/Kokott/Saunders (eds), The Future of the European Judicial System in a Comparative Perspective, 2006, 203 et seq.; *Schiemann*, The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court, in: Arnulf/Eeckhout/Tridimas (eds), Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs, 2008, 3 et seq.; *Shuibhne*, Editorial: A court within a court: is it time to rebuild the Court of Justice?, 34 ELRev 2009, 173; *van Gerven*, The Role and Structure of the European Judiciary now and in the future, 21 ELR 1996, 211.

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1

I. Introduction and general overview

The basic provisions on the Court of Justice of the European Union, basically a **Constitutional Court of the Union** in the context of the Constitutional Courts of the Member States ('Verfassungsverbund')¹, can be found in Article 19 TEU, laying down the constitutional fundamentals of the Union – whereas Articles 251 et seq. TFEU contain specific provisions on the courts of the Union. Despite the questionable terminology of the Treaty ('functioning') and the failure of an actual Constitutional Treaty, the TFEU holds the quality of a constitution, which has been formed by the process of integration in practice already. Concerning the system of judicial review, the Reform Treaty introduces only a few innovations. In the areas of Police and Judicial Cooperation (PJC) and Common Foreign and Security Policy (CFSP), the Court's jurisdiction is restricted further on. Single structural amendments and procedural modifications appear.

2 The former Article 220 TEC has basically been transferred into Article 19 TEU. Article 19 para. 1 TEU contains a **new terminology**: The Court of Justice of the European Union comprises of the Court of Justice, the General Court (no longer Court of First Instance) as well as specialised courts. In addition to Article 19 TEU, Articles 251 et seq. TFEU have to be considered. Article 251, which now opens the section concerning the Court of Justice of the Union, takes up Article 221 TEC. The previous Article 221 para. 1 TEC on the composition of the Court (one Judge per Member State with the controversial question of whether the Judge has to be a national of the respective Member State) is transferred to Article 19 para. 2 TEU. The former Article 221 paras 2 and 3 TEC make up the new Article 251 TFEU without substantial changes. As a consequence of the Union's enlargement, the number of Judges has increased from 7 to 28 at last. For the General Court, now see Article 19 TEU and Article 254 TFEU. For the specialised courts, see Article 19 TEU and Article 257 TFEU.

3 The Court of Justice as an **institution** needs to be distinguished from the one as a **Chamber**. The Judges (now Article 19 para. 2 TEU and Articles 253 et seq. TFEU) as well as the Advocates-General (now Article 19 para. 2 TEU and Article 252 TFEU) belong to the Court as an institution, whereas the Chamber consists of the Judges only.

4

II. Plenum

The standard jurisdiction of the Plenum was removed by the Nice Treaty already. Now the Court only meets in plenary session when provided by its Statute and otherwise meets in Chambers. Sittings as a full Court (meaning in plenary) take place when dealing with disciplinary actions or if removal from office of the Ombudsman according to Article 228 para. 2 TFEU, a Member of the Commission according to Articles 245 para. 2, 247 TFEU or a Member of the Court of Auditors according to Article 286 para. 6 TFEU have to be decided (Article 16 para. 4 Statute ECJ). A Chamber may also refer a case to the full Court after hearing the Advocate-General when it considers a case to be exceptionally important (Article 16 para. 5 Statute ECJ).

5 The Plenum may constitute a quorum if 17 Judges are present (Article 17 para. 4 Statute ECJ). As decisions of the Court are only valid with an uneven number of Judges (Article 17 para. 1 Statute ECJ), the Judge with the least seniority in office shall abstain from taking part in the deliberations (Article 33 s. 1 RoP ECJ).

¹ See *Häberle*, Europäische Verfassungslehre, 460 et seq.

III. Chambers

6

The Court generally meets in Chambers of 3 and 5 Judges (Article 16 para. 1 s. 1 Statute ECJ). Decisions of Chambers consisting of 5 Judges are also valid if only taken by 3 Judges (Article 17 para. 2 Statute ECJ).

The choice of the Judge-Rapporteur as well as the allocation of a case to a certain Chamber raises the (constitutional) issue of the legally competent Judge. The assignment of cases is highly important, especially considering the significance of Chamber decisions. The current allocation of cases by the President for reasons of usefulness (workload, knowledge of national legal system, language or factual connection) rather than in an abstract and general manner has been frequently criticized. The strict requirements of the Bundesverfassungsgericht (BVerfG; German Federal Constitutional Court) for the allocation of cases in German courts cannot apply as a common European standard under the aspect of an evaluated view of comparative law. The publication of the plan distributing the cases in advance is essential from a legal point of view (higher predictability, less danger of abuse, early rejection for grounds of bias)².

IV. Grand Chamber

8

The Court sits in Grand Chamber when the Member State or institution being party to the proceedings requests so (Article 16 para. 3 Statute ECJ). This does not apply to natural or legal persons.

The Grand Chamber consists of 15 Judges (Article 16 para. 2 Statute ECJ, Article 27 para. 1 s. 1 RoP ECJ). The President of the Court, the Presidents of the Chambers of five Judges and other Judges appointed in accordance with the Rules of Procedure (especially Article 27 RoP ECJ) are part of the Grand Chamber (Article 16 para. 2 3 Statute ECJ).

Note: The relevant consolidated versions of the Rules of Procedure of the European Court of Justice as well as its Statute are available via the homepage of the Court³.

Article 252 [Advocates-General] (ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Bibliography: *Burrows/Greaves*, The advocate general and EC law, 2007; *Dashwood*, The Advocate General in the Court of Justice of the European Communities, Legal Studies 1982, 202; *Jacobs*, Advocates General and Judges in the European Court of Justice: Some Personal Reflections, in: O'Keefe/Bavasso (eds), Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley,

² For the discussion which is mainly inspired by the strict German rules on the distribution of cases, see CR/Wegener, Article 251 AEUV mns 4 et seq.

³ http://curia.europa.eu/jcms/jcms/Jo2_7031/.

2000, 29; Pavlopoulos, The Advocate general's Office and its Contribution to the Development of the Law and the judicial Machinery of the European Communities, 1986; Tridimas, The Role of the Advocate General in the Development of Community Law, 34 CMLRev 1997, 1349.

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1 I. General overview

Article 252 TFEU adopts the former Article 222 TEC without substantial changes. In addition, Declaration No 38 of the intergovernmental conference on Article 222 TEC (now Article 252 TFEU)¹ is to be emphasized, specifying the increase to eleven Advocates-General by unanimous act of the Council in case the Court of Justice requests so. The Intergovernmental Conference also agreed on a permanent Advocate General from Poland (as already one from each Germany, France, Italy, Spain and the UK). The system of rotation of the non-permanent Advocates-General will therefore involve five instead of three.

- 2 The model of the Advocate-General is the *commissaire du gouvernement* in the French Conseil d'Etat². An Advocate-General acts as independent **representative of the Community's interest** (even after the overcome of the EU's architecture of three pillars it remains a **common interest** of the States and people of Europe despite the more applicable term '**Union's interest**').
- 3 Advocates-General do not belong to the formation of the Court but to its institution³. Qualification, appointment procedure and terms of office of Advocates-General comply with those of a Judge (Article 253 TFEU). An Advocate-General has the same legal status (independence, Article 252 para. 2 TFEU; immunity and indemnity, Article 21 Protocol on privileges and immunities) and equal protocol rank (Article 7 RoP ECJ) as a Judge.
- 4 The number of Advocates-General has increased from two to nine respectively eleven due to the accession of several Member States (see mn. 9 below). For a period of one year, the Court of Justice designates the First Advocate-General (Article 147 para. 1 RoP ECJ) who decides on the assignment of cases to the Advocates-General (Article 16 para. 1 RoP ECJ). The First Advocate-General may also apply legal remedies against decisions of the General Court in preliminary rulings as well as the General Court's appeals against decisions of specialised courts within the meaning of Article 257 TFEU.

5 II. Duties

According to Article 252 para. 2 TFEU and Article 59 RoP ECJ as well as Article 20 para. 4 Statute ECJ, the **main duty** of the Advocate-General in any procedure before the Court of Justice is to make **reasoned submissions** at the end of the oral proceedings of the Court's cases (usually on a separate date), the so-called 'Opinions'. The Court may, after hearing the Opinion of an Advocate-General, decide to determine a case without

¹ DS 866/07 of 18 October 2007.
² See Tridimas, 34 CMLRev 1997, 1349 (1350).
³ See Article 251 TFEU mn. 3.

submission if it considers that a case does not raise new points of law (Article 20 para. 5 Statute ECJ).

The purpose of an Opinion is to support the Court in its task to observe the interpretation and application of the Treaties (Article 19 TEU). For this reason, the Opinions are completely impartial and independent. The rules on conflicts of interest apply (Article 18 Statute ECJ). As Opinions are deeply reasoned (with comprehensive comments on controversial questions), the Advocate-General provides a non-binding but extensive **pre-examination** of the issue. They supplement the understanding of the usually rather apodictic decisions of the Court. The Opinions are published along with the decisions in the European Court Report (ECR). Along with their publicity, the Opinions become a relevant source of recognition in the further development of Union law.

The Rules of Procedure stipulate the **hearing** of the Advocate-General in several cases of interlocutory procedures.

Advocates-General take part and have a **vote** in the Court's **deliberations** concerning questions of its own administration (Article 25 s. 1 RoP ECJ).

III. Increase of the number of Advocates-General

The Council may temporarily or permanently increase the number of Advocates-General by means of procedure according to Article 252 para. 1 s. 2 TFEU. Hereto, see Declaration No 38 to Article 222 TEC (see mn. 1 above). It did so after a request by the Court of Justice through Decision 2013/336/EU of 23 June 2013, increasing the number of Advocates-General of the Court of Justice of the European Union to nine with effect from 1 July 2014 and eleven with effect from 7 October 2015 (on the occasion of the partial replacement of the Members of the Court).

Article 253 [Appointment of Judges, Advocates-General and Registrar; Term of office; Rules of Procedure] (ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Bibliography: *Alter*, Establishing the Supremacy of European Law: The Making of an International Rule of Law, 2001; *Barents*, The Court of Justice in the Draft Constitution, MJ 2004, 121; *Epstein/Segal*,

Advice and Consent. The Politics of Judicial Appointments, 2005; *Mattli/Slaughter*, Revisiting the European Court of Justice, 52 *International Organization* 1998, 177; *Rasmussen*, On Law and Policy in the European Court of Justice, 1986.

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1

I. Judges and Advocates-General

1. Qualification

Article 253 TFEU takes over its predecessor Article 223 TEC without substantial amendments – except for its para. 1, relating to the appointment procedure of Judges and Advocates-General. Judges and Advocates-Generals are appointed as follows now: They are consulted by a newly invented evaluation panel under Article 255 TFEU before being appointed by common accord of the governments of the Member States.

2

Despite these changes in the appointment procedure, Article 253 TFEU keeps the **uniform** technical and ethical **requirements for qualification** for a Judge’s or Advocate-General’s office at the European Court of Justice in place. Only persons with ‘independence beyond any doubt’ are to be considered. This corresponds to the interdiction of holding an administrative or political office during their membership of the Court. Without explicit exemption by the Council, they must not engage in any occupation, whether paid or gratuitous. During and even after their term of office, they are explicitly bound to behave with discretion and integrity accepting certain appointments and benefits (Article 8 in conjunction with Article 4 Statute ECJ). Their independence is also provided by the rules of immunity (Article 8 in conjunction with Article 3 Statute ECJ, also see Article 21 Protocol on privileges and immunities).

3

They shall meet the qualifications required for appointment to the highest judicial offices in their respective countries or shall be jurisconsults of recognised competence. Special knowledge on the law of the European Union is not expected.

4

The Treaties do not contain rules on the nationality of Judges and Advocates-General.¹ In practice, each Member State designates its own citizens for the Judge’s respectively Advocate General’s office.

5

2. Appointment

The Judges and Advocates-General are appointed by common accord of the Member States, meaning a common decision of the governments rather than a Council decision (so-called **improper Council decision**²). The term of office is six years. Reappointment is permissible and common rule. Terms of office prematurely end after normal replacement, death and with resignation of the respective member of the Court (Articles 5 and 8 Statute ECJ) or removal from office by unanimous decision of the Judges or Advocates

¹ See Article 251 TFEU mn. 2.
² See Article 288 TFEU mn. 27.

General left (Articles 6 and 8 Statute ECJ). The office is to be filled for the remainder of the predecessor's term (Articles 7 and 8 Statute ECJ).

The obligatory hearing of the panel according to Article 255 TFEU within the appointment procedure for Judges and Advocates-General is a new invention in Article 253 para. 1 TFEU. 'Public hearing' in the manner of the American Supreme Court shall eliminate deficits in transparency.

The term of office starts with the date mentioned in the instrument of appointment or alternatively on the date of the publication of the instrument in the Official Journal of the European Union (Article 2 RoP ECJ). The oath of Judges and Advocates-General, that has to be taken before taking up of duties, is stated in Article 4 para. 1 RoP ECJ.

Ensuring the continuity of the Court's jurisdiction, offices are staffed alternately. The partial replacement takes place every three years. Specific provisions are contained in the Rules of Procedure ECJ.

3. President of the Court

The President of the Court is elected by means of secret ballot for three years by the Judges from among their number (Article 253 para. 3 TFEU; Article 8 para. 1 RoP ECJ). Re-election is permissible.

The responsibilities of the President of the Court are dealt with in Article 9 RoP ECJ: The President directs the jurisdiction and administration of the Court. He chairs the sittings and debates of the plenary as well as the Grand Chamber. Apart from the independent Judges, he is the **supervisor** of all employees of the Court. Among the Judges, he acts as **primus inter pares**.

II. Registrar

The Registrar has a particularly important position, comparable to the one of Judges and Advocates-General³. He is appointed for six years in accordance with the procedure provided for the President (Article 18 para. 3 RoP ECJ). The Registrar also shall take the oath, Article 18 para. 5, Article 4 RoP ECJ. He may be removed from office (by decision of the Court) only when he no longer complies with the necessary requirements or no longer fulfils his duties.

The Registrar directs the **Court's registry** in accordance with the instructions and is responsible for the organisational prerequisites (Article 20 et seq. RoP ECJ). Under the authority of the President of the Court, the Registrar observes the general administration of the Court including finances and accounting (Article 20 para. 4 RoP ECJ). Under the authority of the President, officials and other servants shall be responsible to the Registrar (Article 12 s. 2 Statute ECJ).

III. Rules of Procedure

According to Article 245 para. 3 TEC, the Court already had established common Rules of Procedure for all three Communities (Annex No 3) with unanimous approval of the Council, which may have been amended by the Court in a respective procedure. Now, under Article 253 TFEU, the Council decides by qualified majority (Article 253 para. 6 TFEU, Article 16 para. 3 TEU). The Rules of Procedure – most recently amended

³ See Schwarze/Schwarze, Article 253 AEUV mn. 9.

on 25 September 2013 – contain complementary rules on the judiciary constitution, special procedures and remedies. For the relevant consolidated version of the Rules of Procedure via internet, see Article 251 TFEU mn. 10. For Rules of Procedure of the General Court, see Article 254 para. 4 TFEU. The Rules of Procedure as a **legal act sui generis** are secondary law and therefore suitable for judicial review⁴.

- 14 The additional **Supplementary Rules**, done at Luxembourg on 4 December 1974⁵ as last amended in 2014⁶ deal with letters rogaty (Chapter I), legal aid (Chapter II) and reports of perjury by a witness or expert (Chapter III).
- 15 ‘Practice directions relating to direct actions and appeals’⁷ were issued in order to give practical advice for applicants and their lawyers.
- 16 When reference to the **Statute** of the Court of Justice of the European Union is made, this reference is based on the consolidated version of Protocol No 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 and by Article 9 of the act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community.

17

IV. Instructions to the Registrar

Further rules are contained in the Instructions to the Registrar of the Court of Justice.⁸

Article 254 [General Court] (ex Article 223 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

⁴ See GSN/Karpenstein, Article 253 AEUV mn. 33.

⁵ OJ 1974 L 350/29.

⁶ OJ 2014 L 32/28.

⁷ See http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/ins_prat2_2009-02-09_16-15-31_502.pdf.

⁸ OJ 1974 L 350/33 in the version of OJ 1982 C 39/1. The current version of this document and more procedural rules can be found in the internet (http://curia.europa.eu/jcms/jcms/Jo2_7031/).

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Bibliography: *de Búrca/Weiler* (eds), *The European Court of Justice*, 2001; *Dué*, *The Court of First Instance*, 8 YEL 1988, 1; *Forwood*, *The Court of First Instance, its Development, and Future Role in the Legal Architecture of the European Union*, in: Arnulf/Eeckhout/Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, 2008, 34; *Maduro*, *We the Court: The European Court of Justice and the Economic Constitution*, 1998; *Millett*, *The Court of First Instance of the European Communities*, London 1990; *Pernice/Kokott/Saunders* (eds), *The Future of the European Judicial System in a Comparative Perspective*, 2006; *Stone Sweet*, *The Judicial Construction of Europe*, 2004.

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I. General comments

1

Through the Lisbon Treaty, para. 1 of the former Article 224 TEC was transferred to Article 19 para. 2 subpara. 2 TEU, which itself is an element of the basic principles concerning the European institutions. The former paras 2 to 6 constitute the foundation for the revised Article 254 TFEU. While this does not significantly alter the content as such, it has, however, changed the terminology: The ‘Court of First Instance’ (CFI) is now referred to as the ‘General Court’ (GC).

Over the years, the status of the ‘General Court’ has been upgraded significantly. This 2 historical development reflects the permanently increasing challenges the EU case law is confronted with in course of the ongoing integration process. As of 1 July 1987, the former Article 168a EEC Treaty, which had been implemented by the SEA, legitimated the establishment of a Court of First Instance (CFI). The Court was established in particular in order to unburden the ECJ in respect of actions requiring close examination of complex facts, and also with regard to frequent actions filed by staff members against the Communities (now the Union). With regard to the request from the Court of Justice, the Council made use of this empowerment (Council Decision 88/591). The provision was firstly amended by the Maastricht Treaty and was then again considerably charged by the Treaty of Nice. The provisions concerning the establishment of the General Court can now be found in Article 254 TFEU, while those provisions regulating the General Court’s jurisdiction, structure and its proceedings are stipulated in Article 256 TFEU. All these provisions are furthermore supplemented by Title IV (Articles 47–62) of the Statute for the Court of Justice.

II. Composition

3

The General Court is an independent and impartial panel. It shall include at least one Judge per Member State (Article 19 para. 2 subpara. 2 TEU; according to Article 48 Statute ECJ explicitly 28 Judges). The Judges are appointed for six years by common accord of the governments of the Member States (with special Council decision, see Article 288 TFEU). In general, the rules applying to the General Court and in particular those concerning its independence are the same as those applying to the Judges of the Court of Justice. The composition of the General Court is partially modified every three years

(Article 47 para. 1 in conjunction with Article 9 Statute ECJ). The members of the General Court elect the president from among their number (Article 47 para. 1 in conjunction with Article 9a Statute ECJ).

4 **III. Organisation**

In general, the General Court sits in chambers of three or five judges (Article 50 para. 1 s. 1 Statute ECJ). In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or delegate a case to a single Judge (Article 50 para. 2 Statute ECJ). Under the specific conditions, cases may be decided by the Grand Chamber (Article 50 para. 3 Statute ECJ).

- 5 The task of an Advocate-General is performed by those members of the General Court who have been called upon to perform this task; this particular member may then not take part in the judgment of the case (Article 49 Statute ECJ). However, due to the limited number of available judges, this option is only rarely made use of (if, for example, the merits of the case are factually rather complex).¹
- 6 The General Court appoints its **Registrar** and lays down the rules governing her or his service. The General Court establishes its **Rules of Procedure** in agreement with the Court of Justice. Those Rules require the approval of the Council. Furthermore, the General Court enacts ‘Practice Directions to Parties’ to facilitate the hearings.

Article 255 [Suitability test]

A panel shall be set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel’s operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Bibliography: *de Witte*, The European Judiciary after Lisbon, 15 MJ 2008, 43; *Schiemann*, The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court, in: Arnulf/Eeckhout/Tridimas (eds), Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs, 2008, 3.

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1 **I. Introduction and general comments**

Article 255 TFEU does not have a predecessor (or exact blueprint) in the hitherto existing Community law but is based on draft-Article III-357 TECE. Like its constitutional

¹ Cf. Schwarze/Schwarze, Article 254 AEUV mn. 7.

predecessor, which the new provision adopts with almost the same wording, the rule concerns the rationalisation and objectification of the appointment of Judges and Advocate-Generals. It shall be devoid of irrelevant considerations, in particular not be based on demands of political parties or regional policy interests.¹ Thereby, Article 255 TFEU meets aspects that had long been criticised, namely that the appointment of the Judges was said to be an act of **intransparent national interest-driven politics** which the requirement of common accord had not been able to counterbalance, little more than a formality.² The lack of transparency has been remedied by a 'public hearing' following the example of the appointment of US Supreme Court judges or a prior consultation of the European Parliament.³ The now established '**suitability test panel**' follows this approach.

It does not rely on the 'major consultation' but rather on assessments provided by a **small panel** that stands for **high ethical standards, factual independence** and **professional expertise**. The European Parliament and therefore essentially the parliamentary represented democratic public is entitled to suggest the appointment of a particular member.

Moreover, the new procedure is based on a model following the already existing practice within the Union. When the seven judges were appointed to the European Union Civil Service Tribunal (EUCST) in 2005, they had been nominated for election by an election committee comprising of former members of the ECJ, the CFI and lawyers of recognized and undisputed high competence.⁴

II. Duty, determination of the operating rules

Prior to the appointment of the Judges and Advocate-Generals of the Court of Justice or the General Court (however, not prior to the appointment at the specialised courts), the panel gives an **opinion** on the suitability of the candidates. The wording is unclear as far as it does not indicate whether an opinion, and especially a disapproving opinion, is binding or not. In Article 255 para. 3 TFEU, this matter seems to be conferred upon the Council's decision (by qualified majority) on the establishment of the panel's operating rules. However, a non-binding opinion would not provide an effective mechanism of control. Thus, a binding opinion seems to be more appropriate considering the spirit and purpose of the appointment procedure; in this respect the Council decision is therefore predetermined by the Union's primary law.⁵ The fact that the panel is not provided with any means of remedy to challenge potentially occurring infringements of its right remains a deficit.

III. Composition

The composition mirrors precisely the degree of **cooperation** which should, ideally, determine the high-court (constitutional) jurisprudence within the European multilevel-constitutionalism: it involves former judges of the ECJ and the CFI as well as active or former judges of national supreme courts in equal measure. The fact that furthermore

¹ Cf. VHVH/*Pache*, Article 253 AEUV mn. 1.

² Cf. VHVH/*Pache*, Article 255 AEUV mn. 1.

³ As already publicly requested in the 1990ies by *Dausen*, Gutachten D, Verhandlung des 60. Deutschen Juristen Tages 1994, D 160.

⁴ See *Hakenberg*, Das Gericht für den öffentlichen Dienst der EU, EuZW 2006, 391 et seq.

⁵ See VHVH/*Pache*, Article 255 AEUV mn. 4.

‘lawyers of recognised competence’ may be appointed as members is criticised for being too indefinite.⁶ However, at the same time this lack of unambiguousness entails an extended scope of discretion which proves beneficial in particular to the Parliament’s proposal. A distinguished and well-proven politician focus on legal topics could, for example, enrich the panel’s competence to the same extent as an excellent jurist or practitioner.

- 6 The members of the panel are appointed by a Council decision. The Council thereby acts on the initiative of the President. Its decisions are adopted by qualified majority, which is the regularly required majority.

**Article 256 [Jurisdiction of the General Court; legal review]
(ex Article 225 TEC)**

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Bibliography: Arnall, Refurbishing the Judicial Architecture of the European Community, 43 ICLQ 1994, 296; *Barbier de la Serre*, Expert Evidence before the EC Courts, 45 CMLRev 2008, 941; *Due*, The Court of First Instance, 8 YEL 1988, 1; *Lenaerts*, The European Court of First Instance: Ten Years of Interaction with the Court of Justice, in: O’Keeffe/Bavasso (eds), *Judicial Review in European Union Law* (Liber Amicorum in Honour of Lord Slynn of Hadley (Vol 1), 2000, 97.

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⁶ See *VHvH/Pache*, Article 255 AEUV mn. 5.

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I. Jurisdiction

1

1. Regular jurisdiction for actions brought against EU institutions

Article 256 TFEU comprehensively governs the jurisdiction of the General Court, changing only the terminology ('General Court' rather than 'Court of First Instance'; 'specialised courts' rather than 'judicial panel') but leaving the content of its predecessor Article 225 TEC as such unmodified. At first instance, the General Court has jurisdiction for actions against institutions of the Union except when subject to a reservation or an additional clause in the Statute for the Court of Justice (Article 281 TFEU) or when the jurisdiction is assigned to a specialised court (Article 257 TFEU). The actions concerned are enumerated in Article 256 para. 1 subpara. 1 TFEU: **action for annulment** (Article 263 TFEU), **action for failure to act** (Article 265 TFEU), **actions for liability for acts of public authority** (Article 268 TFEU), **disputes between the European Union and its servants** (Article 270 TFEU) and **actions regarding arbitration clauses** (Article 272 TFEU).

Article 51 Statute ECJ establishes a **limitation**: Jurisdiction is reserved to the Court of Justice in actions for annulment and for failure to act when they are brought by an institution of the Union or the European Central Bank. The same applies to actions for annulment and for failure to act when they are brought by a Member State against the Commission according to Article 331 para. 2 TFEU (enhanced cooperation between Member States). Equally, it generally applies to actions brought against the European Parliament and/or the Council except for actions brought against State aid decisions of the Council pursuant to Article 108 para. 2 subpara. 3 TFEU, acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 TFEU, and against acts of the Council by which it exercises implementing powers in accordance with Article 291 para. 2 TFEU.

A further exception as to the general jurisdiction is made by the assignment of the jurisdiction to the specialised courts, that are attached to the General Court according to Article 257 TFEU. Article 256 TFEU establishes the erection of a three-staged jurisdiction (Court of Justice, General Court, specialised courts) within the Union, corresponding to Article 19 TEU. The idea to establish such a three-staged jurisdiction can be traced back to the Treaty Conference of Nice. It had proposed such an assignment for disputes between the (then) Community and its servants pursuant to Article 236 TEC (now Article 270 TFEU). Eventually, by Council Decision 2004/752/EC of 2 November 2004, the European Union Civil Service Tribunal was established. It has jurisdiction to adjudicate disputes between the Union and its civil servants and disputes between all bodies or agencies and their civil servants.

2. Jurisdiction for specific preliminary rulings

4

To unburden the ECJ, the General Court can be entrusted with preliminary rulings under Article 267 TFEU in specific areas. According to Article 267 para. 3 TFEU, the

Statute of the ECJ¹ shall determine the respective areas. However, even the Reform Treaty has not availed itself of the possibility to implement this option yet.

5

3. Jurisdiction as an appellate court

The General Court serves as an appellate court for the decisions given by specialised courts that are set up pursuant to Article 257 para. 2 TFEU. It depends on the respective provision establishing the specialised court, especially Article 257 para. 3 TFEU, whether the right to appeal is limited to a review of points of law only or whether it can also cover an examination of matters of fact.²

6

II. Procedure

The General Court's procedure is essentially similar to that of the ECJ. Beyond that, according to Article 254 para. 5 TFEU, the General Court's Rules of Procedure apply.

7

Article 254 para. 6 TFEU states that, unless the Council has stipulated otherwise, the provisions of the Treaties relating to the Court of Justice and especially its Statute shall also apply to the General Court. The 'Instructions to the Registrar' and the 'Practice Directions to Parties', today applicable in a consolidated version³, contain rules governing the practical aspects of the procedure. The General Court's judgments are published in Part II of the Official Journal.

8

III. Legal remedies

1. Against decisions given by the General Court in first instance

Under the conditions and within the limits laid down by the Statute of the ECJ, decisions given by the General Court may be subject to a **right of appeal to the Court of Justice** on points of law only (Article 256 para. 1 subpara. 2; Article 56 Statute ECJ). Article 58 para. 1 Statute ECJ names the three possible rights of appeal: 'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of [a.] lack of competence of the General Court, [b.] a breach of procedure before it which adversely affects the interests of the appellant as well as [c.] the infringement of Union law by the General Court.'

9

The General Court's decisions (including decisions only partly disposing of the substantive issues as well as final decisions) and decisions disposing of a procedural issue concerning a plea of lack of competence or inadmissibility are **subject to appeal**. An appeal may be brought within two months of the notification of the decision appealed against. A notification which is effected by registered letter with postal acknowledgment of receipt is admissible.⁴

10

An appeal may be brought by any party or intervener which has been unsuccessful. Member States and the Union's institutions are always entitled to a right of appeal, even if

¹ See Article 281 para.2 TFEU.

² For a distinction between matters of fact and points of law see ECJ Case C-328/05 *SGL Carbon v Commission* [2007] ECR I-3921; for the consideration of evidence which generally constitutes a matter of fact rather than a question arising on points of law, see, for example, ECJ Case C-167/04 *JCB Service v Commission* [2006] ECR I-8935.

³ The applicable version was adopted by the General Court on 5 July 2007 (OJ 2007 L 232/7) and the amendments adopted on 16 June 2009 (OJ 2009 L 184/8), 17 May 2010 (OJ 2010 L 170/49) and 8 June 2011 (OJ 2011 L 180/52).

⁴ ECJ Case C-195/91 P *Bayer* [1994] ECR I-5619.

they have not intervened in the case. This does not apply to disputes between the European Union and its servants.

The appeal may be based only on the grounds **on lack of competence** of the General Court, a **breach of procedure** before it which adversely affects the interests of the appellant as well as on a (causal)⁵ **infringement of Union law** by the General Court (see Article 58 para. 1 Statute ECJ as well as mn. 8 above). The grounds for the appeal must be indicated individually.⁶ An appeal which merely reiterates the pleas in law and arguments put forward at first instance is inadmissible.⁷ Where the General Court has, in the exercise of its unlimited jurisdiction, decided on the amount of a fine⁸, the particular grounds of fairness taken into account in that appraisal are no cause for a revision of the decision.⁹ However, the Court of Justice does examine whether all aspects have been taken into account.¹⁰ The appraisal of facts by the General Court cannot be challenged before the Court of Justice.¹¹ Provided that the evidence has been properly obtained and the general principles of law and the Rules of Procedure relating to the burden of proof and the taking of evidence have been observed, it is for the General Court **alone** to assess the value to be attached to the evidence produced. Save where evidence has been distorted, such an appraisal does not constitute a point of law which is subject, as such, to review by the Court of Justice.¹² An appeal only regarding the amount of the costs or the party ordered to pay is not admissible (Article 58 para. 2 Statute ECJ). The European Court of Justice constitutes an example for an appeal relying on the residual clause 'infringement of Union law' in the case *R. J. Reynolds Tobacco v Commission*¹³.

An appeal does not have suspensory effect. However, measures of the Court of Justice to provide interim relief pursuant to Articles 278, 279 TFEU remain admissible.¹⁴

Decisions of the General Court nullifying regulations take effect after the decision becomes final (**res judicata**).

If the appeal is well founded, the Court of Justice may give a final judgment itself if the state of the proceedings permits so. It may also refer the case back to the General Court.

2. Against preliminary rulings pursuant to Article 263 TFEU

Decisions given by the General Court on questions referred for a preliminary ruling (see mn. 4 above) may be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute of the ECJ. This requires a serious risk of the unity or consistency of Union law being affected.¹⁵ According to Article 62 Statute ECJ, only the First Advocate-General of the Court of Justice is entitled to this right of appeal ('proposal') which must be made within one month of delivery of the decision.

⁵ ECJ Case C-320/92 P *Finsider v Commission* [1994] ECR I-5697.

⁶ ECJ Case C-153/96 P *de Rijk* [1997] ECR I-2901; see as an example: ECJ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVMK* [2002] ECR I-8618.

⁷ ECJ Case C-161/97 P *Kernkraftwerke Lippe-Ems* [1999] ECR I-2116.

⁸ See Article 229 TFEU.

⁹ ECJ Case C-320/92 P *Finsider v Commission* [1994] ECR I-5697.

¹⁰ For example, the excessive length of proceedings, ECJ Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417.

¹¹ ECJ Case C-53/92 P *Hilti v Commission* [1994] ECR I-693.

¹² ECJ Joined Cases C-24/01 and C-25/01 *Glencore Grain* [2002] ECR I-10138.

¹³ ECJ Case C-131/03 *R. J. Reynolds Tobacco v Commission* [2006] ECR I-7795.

¹⁴ CFI Case T-147/00 *Commission v Les Laboratoires Servier* [2003] ECR II-85.

¹⁵ See Article 256 para. 3 subpara. 3 TFEU.

16 3. Against appeal judgments on decisions of the specialised courts

According to Article 256 para. 2 TFEU, the First Advocate-General has the right to propose the review of the General Court’s appeal judgments on decisions of the specialised courts under the same conditions as in the case of preliminary rulings.

Article 257 [Specialised courts]
(ex Article 225a TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Bibliography: *Forwood*, The Court of First Instance, its Development, and Future Role in the Legal Architecture of the European Union, in: Arnulf/Eeckhout/Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, 2008, 34; *Millett*, Staff Cases in the Judicial Architecture of the Future, in: O’Keeffe/Bavasso (eds), *Judicial Review in European Union Law* (Liber Amicorum in Honour of Lord Slynn of Hadley (Vol 1) 2000, 221.

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1 I. General comments

Article 225 lit. a TEC, inserted by the Treaty of Nice, established the possibility to set up ‘judicial panels’. Just like in 1987, when the Court of First Instance was established, the reason for including an option to establish these panels was to ensure the **effective accomplishment** of a multitude of politically less relevant legal disputes, particularly

meaning cases arising between the Community and its servants (Article 236 TEC – now Article 270 TFEU; cf. the Declaration No 16 on Article 225 lit. a TEC, adopted in Nice). Article 257 TFEU implements alterations of the content and wording of its primary law model Article 225 lit. a TEC and draft-Article III-359 para. 1 TECE. As to the wording, the provision no longer refers to ‘judicial panels’ but implies a three-staged jurisdiction with a reference to ‘specialised courts’. As to the content, the legislative procedure itself has been modified: The establishment of the specialised courts (by means of regulations) is now effected pursuant to the ordinary legislative procedure (Article 294 TFEU) with the Court of Justice maintaining a right of initiative (Article 257 subpara. 1 s. 2 TFEU).

II. Status of the specialised courts

2

The specialised courts form an independent level within the hierarchy of the three-staged jurisdiction of the Union, ranking below the General Court. The independence of the court as institution is supported by the independently appointed members of the specialised courts (Article 257 subpara. 4 TFEU).

Until now, the European Union Civil Service Tribunal is the only specialised court that has been established¹. However, other specialised courts are under consideration, namely a specialised court for European Trademark and Patent Law² and a specialised court for European Service and Enforcement Law.

III. Jurisdiction and procedure

4

The regulation establishing the specialised court shall lay down the rules on the organisation of the court and the extent of the **jurisdiction** conferred upon it (Article 257 subpara. 2 TFEU). In addition, the provision shall determine whether decisions given by the specialised court are subject to a right of appeal before the General Court on points of law only or (if and insofar the provision establishing the specialised court explicitly says so) also on matters of fact (Article 257 subpara. 3 TFEU). In general, appeals are limited to points of law.

The **procedure** of the specialised courts is carried out in accordance with their Rules of Procedure which are established in agreement with the Court of Justice (Article 257 subpara. 5 TFEU). Those Rules require the approval of the Council (only). Unless stated otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply additionally to the specialised courts (Article 257 subpara. 6 TFEU).

Article 258 [Infringement proceedings] (ex Article 226 TEC)

If the Commission considers 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 laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

¹ Council Decision 2004/752/EC establishing the European Union Civil Service Tribunal (EUCST).

² See the proposal of the Commission establishing a Community Patent Court, COM (2003) 828 final.

Bibliography: *Andersen*, Procedural Overview and Substantive Comments on Articles 226–226 EC, 27 YEL 2008, 121; *Chaltiel*, Nouvelles précisions sur la responsabilité de l'État en droit communautaire, RMCUE 2006, 609; *Harlow/Rawlings*, Accountability and Law Enforcement: The Centralized EU Infringement Procedure, 31 ELRev 2006, 447; *Kilbey*, Financial Penalties under Article 228(2) EC: Excessive Complexity?, 44 CMLRev 2007, 743; *Mertens de Wilmars/Verougstroeete*, Proceedings against Member States for failure to fulfil their obligations, 7 CMLRev 1970, 385; *Munor*, The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate, Jean Monnet Working Paper 04/2006; *Smith*, Enforcement Legitimacy and Good Governance in the EU, 2010.

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1

I. General comments

1. Overview of the infringement procedures

The infringement procedure pursuant to Article 258 TFEU provides the Commission (as the 'guardian of the Union' under Article 17 para. 1 TEU) with the possibility of giving the decision on an action for a declaratory relief to the ECJ if it holds that a Member State has infringed EU law. As a result of its '**guardian role**', the Commission is obliged to intervene in cases in which an objective violation of EU law has happened¹, irrespective whether the breach of EU law was minor². This obligation has always been important to ensure the equal and effective implementation of EU law throughout the Union. Therefore, the Reform Treaty of Lisbon did not entail any essential amendments regarding the infringement procedure, but adopted Article 258 TFEU with nearly the same wording as the old Article 226 TEC. Substantive changes in this context were made with respect to the sanction procedure of Article 260 TFEU only.

2 In addition to the Commission, the **Member States** are bound to monitor the compliance of national legislation with EU law, too, due to the principle of loyalty and loyal co-operation – let alone that very often also the Member States' very own interests are at stake. Therefore both the Commission and the Member States are entitled to bring an action under Article 259 TFEU. For the purpose of ensuring the uniformity of the jurisdictional order laid down in the Treaties and the autonomy of the Union's legal system, the Member States are not allowed to submit cases within the scope of application of Union law to other international or national courts or tribunals.³ In general, both alterna-

¹ ECJ Case C-333/99 *Commission v France* [2001] ECR I-1025, mns 23 et seq.

² ECJ Case C-43/97 *Commission v Italy* [1997] ECR I-4671.

³ ECJ Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

tives require that a specific preliminary procedure has been carried out before the Commission. Article 260 TFEU deals with nature and impact of successful judgments. In the case of complaints concerning violations of the EIB Statute, the Board of Directors of the Bank supersedes the Commission (Article 271 TFEU).

2. Remedies available to individuals

3

Natural and legal persons are not entitled to bring an action against a Member State. The infringement procedure is merely meant to objectively guarantee the adherence to and respect for Union law. However, this does not mean that no remedies are available to individuals: Legal protection must be granted in any legal action brought before courts of the Member States when a conflict between the applicable national and Union law has emerged. The case then has to be decided in accordance with the principle of supremacy of EU law. It is also possible to bring an action based on the liability of public officials against a Member State before a national court when a State officer fails to comply with Union law and thereby violates an official duty incumbent upon him in respect of an individual. Overall, the infringement procedure does not serve the purpose of providing subjective legal protection, but fulfils an (purely) objective law-enforcing function. This is, generally speaking, the function of maintaining the EU legal order as such.⁴

II. Failure of a Member State to fulfil obligations

4

1. Term

Any infringement of a Union law rule constitutes a failure of a Member State to fulfil its obligations and can be subject of an action (see Article 19 TEU). This includes secondary legislation and the failing to implement secondary legislation⁵. The admissibility of an infringement of EU law does not depend on the aspect of fault⁶ or whether it was caused by an 'excusable error' of the Member State concerned⁷.

2. Attributable conduct of organs

5

Any conduct of each of its organs is attributable to the respective Member State. Whether or not the administration may influence the actions of the very organ is irrelevant. Insofar the Member State cannot invoke the separation of powers-principle as enshrined in their constitutions. This also applies to the actions or omissions of its legislative bodies⁸, to measures taken by the authorities of its federal States and to its self-regulatory bodies.⁹ The decisions of its courts are also attributable to the Member State. Furthermore, the Member State violates the Treaty when its court of last instance fails to fulfil its obligation to make a preliminary reference pursuant to Article 267 TFEU or disregards decisions adopted by the ECJ in this process. However, the Commission is generally reluctant to initiate a procedure for infringement of Union law that challenges national court decisions but only considers initiating an infringement procedure when the Union law has been **neglected intentionally**, respecting the specific judicial function of independent courts and the idea of an integration policy that avoids confrontations be-

⁴ Cf. *Craig/de Búrca*, EU Law, 410.

⁵ ECJ Case C-275/08 *Commission v Germany* [2009] ECR I-168.

⁶ ECJ Case 301/81 *Commission v Belgium* [1983] ECR 477, mn. 8.

⁷ ECJ Case C-385/02 *Commission v Italy* [2004] ECR I-8121, mn. 40.

⁸ ECJ Case 8/70 *Commission v Italy* [1970] ECR 966.

⁹ ECJ Case 103/88 *Costanzo v Comune di Milano* [1989] ECR 1839.

tween the ECJ and the highest courts of a Member State. Reference should be made to the idea of a 'Kooperationsverhältnis'¹⁰, a **cooperative relationship** between the ECJ and domestic courts.

6

III. Preliminary procedure – the initial pre-contentious stage

1. Purpose

The opening of an infringement procedure against a Member State before the ECJ is initiated by an **informal** ('pre-contentious stage'¹¹, meaning informal bilateral discussions with the relevant services between the Commission and the ministries of the Member States) and then another **formal** preliminary procedure conducted by the Commission (starting with the letter of formal notice). The informal preliminary procedure (or pre-contentious stage) has a manifold purpose. It is intended both to serve a removal of the alleged infringement and thus the avoidance of a legal dispute. It determines the **subject-matter** in the event that the dispute is subsequently carried out before the ECJ.¹² Furthermore the Member States have the opportunity to explain their positions and to reach an accommodation with the Commission.¹³

7

2. Exceptional rules

The regular preliminary procedure is replaced by a special arrangement in specific cases (see Article 108 TFEU: aid scheme and Article 114 TFEU: retention or implementation of a protection enhancing provision). The preliminary procedure may also be omitted without any replacement (see Article 348 TFEU). In the cases of Article 96 TFEU (transport policy) and Article 106 TFEU, it is left to the Commission's discretion whether to initiate a general preliminary procedure or to enunciate its objection within a decision, which can be challenged by the respective defendant by means of an action for annulment. According to Article 35 para. 6 Statute ESCB, special rules apply when the ECB brings an action against a national central bank. In the context of the free movement of goods, it is debated whether the time limits should be curtailed significantly.¹⁴

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3. The Commission's discretion to initiate a procedure

Although the Commission has a certain **margin of discretion** as to whether it should take action against a specific infringement¹⁵, the Commission will generally have the duty to initiate an infringement procedure when it becomes aware of an act of a Member State that infringes the Treaties. This follows from the Commission's often-quoted status as a 'guardian of the Treaties'. The given margin of discretion (whether an infringement procedure shall be initiated) is determined by the interests of the Union because it serves the Union's interests rather than the interests of the persons concerned (see mn. 9 below). In case of a minor infringement that was not committed systematically, infringements of the Treaty by Member State courts and in the case of highly political disputes only leading to a possible Pyrrhic victory without an actual result, the Commission does not im-

¹⁰ BVerfGE 89, 155 – *Maastricht*.

¹¹ Cf. *Craig/de Búrca*, EU Law, 413.

¹² ECJ Case C-177/04 *Commission v France* [2006] I-2461, mn. 20.

¹³ Cf. *Craig/de Búrca*, EU Law, 413.

¹⁴ Cf. *Schorkopf*, EuZW 1998, 237 et seq.

¹⁵ CFI Case T-47/96 *SDDDA v Commission* [1996] ECR II-1559, mn. 42.

mediately breach its obligations as a supervisory body if it refrains from initiating a formal procedure at the pre-contentious stage (or the subsequent legal proceedings).¹⁶

Individual persons do not have the right to request supervisory measures adopted by the Commission because the infringement procedure serves the **objective surveillance** of the law rather than individual legal protection. Therefore, potential actions for annulment or for failure to act brought by individuals against the Commission are inadmissible.¹⁷ The same applies to claims for damages brought pursuant to Articles 268, 340 TFEU (former Articles 235, 288 subpara. 2 TEC).¹⁸

However, the initiation of an infringement procedure by the Commission is not excluded just because the person affected has the possibility to take action against the infringement of EU law at the national level.¹⁹

4. Procedure

If the preliminary procedure (pre-contentious stage) does not lead to an accommodation with the Commission, a letter of formal notice is sent to the Member State by the Commission. Within this letter, the Commission informs the Member State of the alleged breach of Union law and the initiation of proceedings and provides them with the opportunity to reply within specified time. The letter of formal notice must clearly outline the underlying facts of the case and the supposedly violated Union law.²⁰ A supplementary letter of formal notice would be required for the modification or extension of the relevant facts or legal issues.

The letter of formal notice shall be addressed to the Government or the Foreign Minister of the respective Member State; in practice, the letter is communicated by the Permanent Representation of the government of that Member State to the European Union.²¹

Through the letter of formal notice, the Commission provides the Member State concerned with the **right to be heard**. When the Commission is convinced that the allegations laid out in the letter of formal notice are true, it submits a '**reasoned opinion**'. In other cases – meaning when the allegations are not or no longer held to be true – it closes the proceedings.

The **reasoned opinion** indicates the factual and legal elements of infringement which the Commission reproaches the Member State for. The grounds provided in the opinion must specify which particular provisions of Union law the subject-matter relates to. It may not contain factual or legal complaints which had not already been mentioned in the letter of formal notice.²² The reasoned opinion must determine a certain period of time within which the Member State is called upon to end the infringement. After the deadline has expired, the Commission may bring an action before the ECJ.

The reasoned opinion is indeed a prerequisite for taking any legal action at the final contentious stage. However, the reasoned opinion is not binding for the Member State (Article 288 TFEU). It thus cannot be challenged by an action for annulment (Article 263 TFEU).

¹⁶ Cf. also CR/Cremer, Article 258 AEUV mns 40 et seq.

¹⁷ ECJ Case 48/65 *Lütticke* [1966] ECR 27; Case C-107/95 P *Bilanzbuchhalter* [1997] ECR I-947.

¹⁸ ECJ Case C-87/89 *Sonito et al. v Commission* [1990] ECR I-1981.

¹⁹ ECJ Case 26/63 *van Gend & Loos* [1964] ECR 341.

²⁰ ECJ Case 192/84 *Commission v Greece* [1985] ECR 3967, mn. 20.

²¹ Cf. GHN/Karpenstein, Article 258 AEUV, mn. 32.

²² ECJ Case C-145/01 *Commission v Italy* [2003] ECR I-5581.

16

IV. The principal proceedings

1. Nature of the procedure

The infringement procedure ends with a declaratory judgment²³, meaning that the claim can only request the finding that the defendant Member State has violated its obligation under the TEU or TFEU but it cannot be directed at sentencing the Member State to terminate certain actions or to take certain measures. As far as the Commission regards a refusal to take reparation measures as breach of the Treaties, this particular circumstance may also be the subject-matter of a request for a declaratory judgment (only).

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2. Admissibility of the action

The Rules of Procedure regulate the formal requirements for an application.²⁴

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The claim must remain within the legal and factual **context determined by the subject-matter of the preliminary procedure**, meaning within the framework of the reasoned opinion²⁵ which again may not exceed the subject-matter of the letter of formal notice that initiated the proceeding.²⁶ An alternative claim, which has not already been put forward in the preliminary procedure, is inadmissible.²⁷ However, it is admissible to elaborate those reasons that were already mentioned in the reasoned opinion and the letter of formal notice. It is also admissible to constrain the reasons given by limiting it to certain claims.²⁸

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The infringement action is inadmissible, too, if the claimant lacks the necessary legitimate interest in legal action. However, the Commission is not obliged to demonstrate that it has a particular interest in bringing proceedings; it is sufficient that it initiates an action against a Member State based on the fact that this Member State has failed to end the behaviour which had been found to be in breach of Union law in the reasoned opinion within the determined deadline – and by this shows its general interest to effectuate EU law.²⁹

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However, doubts may arise if the defendant Member State refrains from its Treaty infringing actions after the deadline (see mn. 19 above) has expired. According to the wording of Article 258 TFEU, this would be irrelevant.³⁰ But the Court has generally required the verification of an ongoing legal interest.³¹ This can be taken for granted at least when the Member State's behaviour suggests that there is a danger of repetition, in cases in which claims for compensation can be expected or when the point of law at issue is fundamental.³² It does not matter if the relevant national laws have changed after

²³ See Article 260 TFEU mn. 3.

²⁴ For the Court's newly adopted Rules of Procedure, see Official Journal of the European Union L 265/1 of 29 September 2012.

²⁵ ECJ Case 166/82 *Commission v Italy* [1984] ECR 459, mn. 16; Case C-234/91 *Commission v Denmark* [1993] ECR I-6273, mn. 16; and Case C-296/92 *Commission v Italy* [1994] ECR I-1, mn. 11.

²⁶ ECJ Case 35/96 *Commission v Italy* [1996] ECR I-3851, mn. 31.

²⁷ ECJ Case C-40/92 *Commission v United Kingdom* [1994] ECR I-989, mns 37 et seq.

²⁸ ECJ Case C-191/95 *Commission v Germany* [1998] ECR I-5449.

²⁹ ECJ Joined Cases C-418/00 and C-419/00 *Commission v France* [2002] ECR I-3969, mn. 29.

³⁰ ECJ Case C-362/90 *Commission v Italy* [1992] ECR I-2369, mns 8 et seq.; Case C-105/91 *Commission v Greece* [1992] ECR I-5871, mn. 21; for the belated transposition of a Directive, see ECJ Case C-316/96, *Commission v Italy* [1997] ECR I-7231.

³¹ ECJ Case 69/77 *Commission v Italy* [1978] ECR 1756, mns 6 et seq.

³² ECJ Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069.

the preliminary procedure, as long as the regulatory scheme as a whole has not been changed.³³

The Commission's right to bring an action cannot be 'forfeited' merely because it raises the action only after it had tolerated the infringement for a prolonged time.³⁴ The guardian function of the Commission (Article 17 para. 1 TEU) serves the interests of the Union as a whole and is based on the public interest as such; it is not a legal status the Commission could renounce.³⁵ In particular, the Commission does not have to adhere to any particular time limit.³⁶ The Commission may, however, fail to comply with its obligations under Union law when an unusual duration of the proceedings adversely affects the rights of defense.³⁷

3. Justification of the action

The action is successful on the merits when the alleged failure of the Member State to fulfil an obligation under the Treaties is **legally conclusive and factually verified**. Accordingly, the affected Member State can only defend itself by either challenging the legal argumentation brought forward by the Commission or by contesting the facts underlying the dispute (the latter is very rare). An infringement of Union law is not excluded by the fact that the legal situation in the Member State formally complies with Union law while the practical application does not³⁸ or if indeed the administration meets Union law requirements while the differently formulated laws formally persist.³⁹ An objection, that a conflicting national law is inapplicable anyway because of the supremacy of Union law, is insignificant because even the existence of such laws – seemingly implying their applicability – endangers the compliance with Union law.⁴⁰ The declaration as an infringement does not require a damage to be caused.⁴¹

Since the evaluation depends on the infringing behaviour of the Member State as such, **internal political obstacles** (e.g. threat of strikes or difficulties with ensuring compliance with the constitutionally required process) do not justify the infringement.⁴² A Member State which encounters unforeseen and unforeseeable difficulties must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the measure at issue in order to overcome the difficulties invoked.⁴³ A Member State may also not refer to the infringing **behaviour of other Member States** to unilaterally adopt, on its own authority, measures which are not foreseen in the Treaty.⁴⁴ TEU and TFEU provide a 'closed system'; the self-help rules of public international law only apply if the system itself is in question. Finally, the defendant Member State cannot invoke that **Union institutions failed to act**, or the unlawfulness of a Decision or Directive that build the basis of the infringement procedure from the point of view of the

³³ ECJ Case C-375/95 *Commission v Greece* [1997] ECR I-5981, mn. 38.

³⁴ ECJ Case C-422/92 *Commission v Germany* [1995] ECR I-1097, mns 15 et seq.

³⁵ ECJ Case 1/76 *Commission v France* [1971] ECR 1017; Case C-56/90 *Commission v United Kingdom* [1993] ECR I-4109.

³⁶ ECJ Case C-422/92 *Commission v Germany* [1995] ECR I-1097, mn. 16.

³⁷ ECJ Case C-237/99 *Commission v France* [2001] ECR I-961.

³⁸ ECJ Case 21/84 *Commission v France* [1985] ECR 1355.

³⁹ ECJ Case 41/76 *Donckerwolcke* [1976] ECR 1921.

⁴⁰ ECJ Case 168/85 *Commission v Italy* [1986] ECR 2960.

⁴¹ ECJ Case C-263/96 *Commission v Belgium* [1997] ECR 7453-I.

⁴² ECJ Case 52/75 *Commission v Italy* [1976] ECR 277 (government crisis); Case 42/80 *Commission v Italy* [1980] ECR 3635 ('political and parliament events'); Case C-52/95 *Commission v France* [1995] ECR I-4443 ('deficiencies in the statistical system in operation'), for a case in which absolute impossibility was invoked see ECJ Case C-74/91 *Commission v Germany* [1992] ECR I-5437.

⁴³ ECJ Case C-183/91 *Commission v Greece* [1993] ECR I-3131.

⁴⁴ ECJ Case 232/78 *Commission v France* [1979] ECR 2729.

Commission; the Member State could have challenged this by using the means available under Union law only.⁴⁵

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4. Procedure

The procedure is governed by the Statute and the Rules of Procedure. The parties to the legal dispute cannot dispose of the subject-matter of the dispute. It is only possible to narrow down the dispute or to withdraw it. It is not possible to seek a court settlement which in fact perpetuates the infringing behaviour.

- 25
- There can be an issue concerning the speed of the procedure and the contentious question whether interim measures can reduce the danger of an excessive duration of the procedure⁴⁶.

Article 259 [Infringement procedure; bringing of action by a Member State]
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Bibliography: *Andersen*, Procedural Overview and Substantive Comments on Articles 226–226 EC, 27 YEL 2008, 121; *Prete/Smulders*, The Coming into Age of Infringement Proceedings, 47 CMLRev 2010, 47.

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1

I. General comments

Article 259 TFEU adopts the regulatory content of Article 227 TEU without any substantial amendments. As far as the proceedings before the ECJ are concerned, neither the

⁴⁵ ECJ Joined Cases 90 and 91/63 *Commission v Luxembourg, Belgium* [1964] ECR 625.

⁴⁶ E.g. ECJ Case 61/77 R *Commission v Ireland* [1977] ECR 937.

failed Constitutional Treaty nor the Reform Treaty of Lisbon wanted to alter the continuity of the proceedings. Article 259 TFEU gives each Member State the opportunity to reprimand the infringement of Union law through another Member State by bringing an action to the ECJ. The Member State then takes over a separate **'co-guardian function'** (not an own responsibility) which is certainly driven by its own interests. In so far Article 259 TFEU resembles arbitration clauses found in international treaties to regulate an obligatory dispute resolution. However, exclusivity is an important difference between Article 259 TFEU and these clauses: Member States may not submit a dispute concerning the interpretation or application of the TFEU under any method of settlement other than that provided for in Article 259 TFEU or to any court but the ECJ.¹

The process is completely **independent** of the infringement proceedings initiated by the Commission pursuant to Article 258 TFEU; this also applies to the preliminary proceedings (pre-contentious stage) before the Commission. The Commission is entitled to initiate its own infringement proceeding under Article 258 TFEU even when a Member State has already challenged the alleged infringement. The Member State does also not have to accept being reduced to merely intervene in the infringement proceeding initiated by the Commission, which is possible according to Article 40 Statute ECJ.

II. Aim of the action

Member State may object to the Treaty infringing behaviours of another Member State by initiating an infringement procedure, in order to regulate the Treaty infringements.²

III. Preliminary procedure

1. Purpose

In general, the action before the ECJ has to be preceded by a preliminary proceeding taking place before the Commission (so-called pre-contentious stage).³ The purpose of the preliminary procedure is to allow the (pre-contentious) termination of the infringement prior to the court proceedings with the assistance of the Commission.

2. Execution

The procedure begins when the Commission receives a **complaint objecting a Treaty infringement** and has to deal with it. This complaint has to sufficiently substantiate the alleged breach in terms of points of law and regarding the particular facts of the case. This is necessary in order to determine precisely the subject-matter of the dispute. There are no rules governing the required formalities of a referral to the Commission.

In the following two-stage contradictory consultation procedure, the Commission gives the Member State the opportunity to submit written and (subsequently) oral statements. This procedure can also take place before an official who has been authorized by the Commission. It is limited by the Member State's statements determining the relevant legal and factual aspects. The Commission is not entitled to newly introduce legal or factual elements into the procedure if these had not been raised by the Member State pursuing the procedure.

¹ An example from the case law of the ECJ: Case C-459/03 *Commission v Ireland* [2006] ECR I-4635. See also Article 273 TFEU.

² The statements made in Article 258 TFEU mns 3 and 4 apply accordingly.

³ For exceptions, cf. Article 258 TFEU mn. 7.

7

3. Termination

The preliminary procedure ends with a **reasoned opinion** in which the Commission comments on the statements. The comment is given in the form of an expert opinion given in order to explain whether the allegation is well-founded or entirely or partially unfounded. In contrast to the reasoned opinion submitted in the infringement procedure under Article 258 TFEU, this opinion does not function as a means to define the **subject-matter** of the dispute (which is defined by the complaint put forward by the Member State only).

8

IV. Procedure

1. Nature of the procedure

The infringement procedure is a **declaratory procedure**.⁴

9

2. Admissibility of the action

The action is admissible when the preliminary procedure ends with the submission of a reasoned opinion by the Commission, or – when the Commission fails to deliver a reasoned opinion – within a period of three months from the referral to the Commission. The reasons for such a failure to submit a reasoned opinion within the deadline are insignificant.

10 The applicant Member State is not obliged to provide reasons establishing a **special interest** in legal protection. In fact, the complaint is admissible even if the infringement does not involve any disadvantages affecting the applicant Member State; the claiming of an Treaty infringement alone is sufficient. In so far each Member State acts in the **common interest** of the Union.

11 However, if the defendant Member State remedied the charges put forward against him after the submission of the Commission's opinion, the general legitimate interest can be affirmed only if there is a **danger of repetition**. This can be the case if the dispute is about fundamental issues of legality or in case of an ongoing infringement.

12 The claim must respect the **legal and factual parameters** of the preliminary procedure. For that matter, the Commission's opinion is not significant, which might be missing in case it has not been issued within the given time limit; but the accusation of the Member State which pursues the procedure is decisive only.

13

3. Justification of the action

The action is justified if the claim made by the applicant Member State is true as regards the facts provided and the points of law raised therein.⁵

14 The procedure is governed by the Statute (see Article 281 TFEU) and the Rules of Procedure (see Article 253 subpara. 6 TFEU) of the ECJ. It is noteworthy that the parties cannot dispose of the dispute (e.g. by reaching a court settlement). However, the applicant Member State is entitled to withdraw the complaint in whole or in part.

15 Since Member States frequently try to **resolve** arising conflicts amongst each other via diplomatic channels, and since they are objectively not obliged to uphold Union law,

⁴ As far as the structure of the procedure is concerned, the details provided in Article 258 TFEU mns 16 et seq. apply accordingly.

⁵ In so far the commentary of Article 258 TFEU mn. 22 applies here, too.

their own initiation of an infringement procedure has less relevance in practice than procedures initiated by the Commission.⁶

**Article 260 [Effects and enforcement of a judgement; penalty payment]
(ex Article 228 TEC)**

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Bibliography: *Bonnie*, Commission Discretion under Article 171(2) EC, 23 ELRev 1998, 537; *Kilbey*, Financial Penalties under Article 228 (2) EC: Excessive Complexity?, 44 CMLRev 2007, 743; *Kilbey*, The Interpretation of Article 260 TFEU (ex 228 EC), 35 ELRev 2010, 370.

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I. General comments

1

Article 260 TFEU adopts elements of its primary law model Article 228 TEC and of draft-Article III-362 TECE. The amendments made by the Treaty of Lisbon aim to make the effective enforcement of the Union law even more efficient – and faster. Therefore, Article 260 para. 2 subpara. 1 TFEU takes over the wording of draft-Article III-362 para. 1 subpara. 1 TECE, which in turn goes back to an emphatic request of the Commission. If the Member State concerned has not taken the necessary measures to comply

⁶ Cf. *Craig/de Búrca*, EU Law, 433.

with the judgment of the ECJ, the Commission may bring the case before the Court again after giving the Member State concerned the opportunity to submit its observations. The Commission shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned. The previous two-stage order for payment procedure is obsolete and the intermediate step requiring the Commission to deliver a reasoned opinion is omitted. A further strengthening of the process is achieved through the inclusion of a new para. 3 which governs the procedure dealing with the failure to transpose a legislatively enacted directive – this has always been a particularly problematic issue in the context of the *effet utile* of Union law.¹

- 2 The provision deals with the content and consequences of a judgment given in an infringement procedure initiated by the Commission (Article 258 TFEU) or a Member State (Article 259 TFEU). In view of the failure to fulfil an obligation under the Treaties, the judgment can only deliver a declaratory statement. Therefore the claim can only be aimed at obtaining precisely such a declarative statement (**declaratory judgment**). Moreover, Article 260 TFEU regulates the obligation of the defendant Member State to take the necessary measures to comply with the judgment of the ECJ. The possibility to initiate sanction proceedings (Article 260 para. 2 TFEU) had already been entered into primary law by the Maastricht Treaty and is now tightened significantly (see Article 260 paras 2 and 3 TFEU).

3 **II. Declaratory judgment**

As far as the ECJ allows the complaint, it **declares** that the objected behaviour of the defendant Member State has infringed certain provisions of Union law. Otherwise the ECJ dismisses the action.

- 4 Since the delivered judgment has a **declaratory nature** only, the ECJ may **not** sentence the Member State to take specific **measures** or interfere with the Member State's legal order in any other way (e.g. by nullifying a measure taken by a national institution in breach of Union law). As far as the reasoning of the judgment comments on measures that the Member State would have to take in order to comply with the judgment, this is to be understood as non-binding notes rather than obligatory orders.²
- 5 Nonetheless, the declaratory judgment can closely resemble judgments granting performance in the end, for instance in cases in which the Member State had been charged for failing to fulfil the obligations under the Treaties by taking a particular measure or by the omission of a particular act (e.g. failing to reclaim State aid from a beneficiary that had received State aid in breach of Union law). In these cases, the only difference to judgments actually requesting a specific performance is that the declaratory judgment does not explicitly order such measures on the Member State.
- 6 The **declaratory effect** of the judgment is limited to the claim specifically determined in the judgment. It does not cover legal consequences of the failure to fulfil Treaty obligations arising from acts of secondary legislation (e.g. an obligation to eliminate the consequences of an infringement). However, the failure to eliminate the effects of an infringement can be the subject-matter of a (second, subsequent) infringement procedure itself, which again ends with a declaratory judgment.³

¹ Cf. *Craig/de Búrca*, EU law 433-438 with numerous references to decisions of the ECJ.

² Cf. *GHN/Karpenstein*, Article 260 AEUV mn. 6.

³ ECJ Case 70/72 *Commission v Germany* [1973] ECR 813.

III. Consequences

7

The judgment provides the parties with a final and legally binding decision as to whether the Member State has infringed Union law through the contested behaviour.

In addition, Article 260 TFEU equips the declaratory judgment with a Union law obligation. This obligation requires the Member States ‘to **take the necessary measures** to comply with the judgment of the Court’. Since it is a declaratory decision, this can only mean that a Member State is obliged to terminate precisely this Treaty infringement which the judgment has established. The Member State is obliged to implement the obligation **immediately**, meaning it must be completed within the shortest possible time.⁴

The duty stipulated in Article 260 TFEU does not apply only to the Member State as such but also to those **institutions** to which the infringement is attributable or which are in a position to remedy it.

If the judgment declares that certain **national laws** are contrary to the Treaty, the authorities exercising legislative power have the duty to amend the provisions in question in order to bring them in conformity with the requirements of Union law.⁵ Also national **courts** are obliged to consider all necessary consequences of the judgment of the ECJ, irrespective of the fact that the applicable law has not actually been amended by the declaratory judgment. Insofar the judgment contains a mere reminder calling on the courts to interpret and apply Union law in the light of the judgments of the ECJ. ‘However, it should be understood that where the Court has found that a Member State has failed to comply with a provision of Union law having direct effect in the internal legal order, the rights accruing to individuals derive not from the judgment finding that that State has failed to fulfil its obligations but from the actual provisions of Union law’⁶.

The obligation to stop the infringement of the Treaties is independent of Article 260 TFEU. The duty referred to in Article 260 TFEU, emphasising the declaratory nature of the judgment in an infringement procedure, re-emphasises this obligation.

The duty stipulated in Article 260 TFEU, to take the necessary measures, is established only in terms of the **actual** infringement which has been determined by the judgment of the ECJ. Other potentially existing duties regarding the reparation or the elimination of effects that arise from the Union law or the law of the Member State do not affect the obligation enshrined in Article 260 TFEU. Some authors discuss the question of the scope of the remedial obligation deriving from Article 260 TFEU in terms of whether the declaratory judgment has effect ‘**ex nunc**’ or ‘**ex tunc**’.⁷ There is no generic answer to this question because the concrete finding of the judgment is decisive when it comes to determining which behaviour is considered to constitute a failure to fulfil the obligations under the Treaties and shall be terminated pursuant to Article 260 TFEU. In any event, it has to be ensured that the defendant Member State does not have the opportunity to retain the advantages that resulted from the – in some cases long lasting – failure to fulfil its obligations. Therefore, one can say that there is a **tendency to support an ex tunc solution**.⁸

⁴ ECJ Case C-334/94 *Commission v France* [1996] ECR I-1307, mn. 31; Case 169/87 *Commission v France* [1988] ECR 4093, mn. 14.

⁵ ECJ Joined Cases 314/81, 315/81, 316/81 and 83/82 *Waterkeyn* [1982] ECR 4337, mn. 14.

⁶ ECJ Joined Cases 314/81, 315/81, 316/81 and 83/82 *Waterkeyn* [1982] ECR 4337, mn. 15.

⁷ For details see already *Karpenstein* DVBl 1977, 54 et seq.

⁸ Cf. *Schwarze/Schwarze*, Article 260 AEUV mn. 7.

IV. Sanctions

The declaratory judgment is, by its nature, **unenforceable**. The Member State has to end the infringement on its own initiative. If the Member State fails to comply with its duty under Article 260 TFEU by not taking the necessary measures, a **new (second)** infringement procedure can be initiated, claiming an infringement of Article 260 TFEU.⁹

- 14 Regarding this new procedure, Article 260 para. 2 TFEU provides the possibility of imposing **sanctions on the defaulting Member State** if the procedure is initiated by the Commission.
- 15 Before the Treaty of Lisbon had entered into force, the Commission first had to deliver a letter of formal notice to the defaulting Member State and give it the opportunity to submit its observations. Subsequently, the Commission had to issue a reasoned opinion in which it described all the specific points according to which the Member State failed to comply with the judgment of the ECJ. Finally, the Commission had to set a deadline for remedial measures. However, this two-stage dunning procedure turned out to be both **cumbersome** and **time-consuming**. In fact, the convicted Member State could sometimes benefit even more from its failure to fulfil its obligations under Union law. The **streamlined sanction procedure** introduced by the new Article 260 para. 2 subpara. 1 TFEU solves this situation as follows: When the Commission considers that the Member State concerned has not taken the necessary measures in order to comply with the judgment of the ECJ, the Commission is, after giving the Member State concerned the opportunity to submit its observations, entitled to bring the case before the Court again. The Commission does not have to deliver another letter of formal notice or a reasoned opinion (see mn. 1 above). However, the Member State has to be given the opportunity to submit a statement.
- 16 The Commission has to give information on the nature of the sanctions (**lump sum** or **penalty payment**) and must specify the amount it considers appropriate (principle of proportionality). Criteria for this estimation can be found in the respective Commission's Communication¹⁰ and the supplementary statement on the method of calculating the penalty payments¹¹. The Commission assumes that a penalty payment is the most appropriate means for securing compliance as soon as possible. The penalty to be paid by the Member State is the sum of the amounts due in respect of each day's delay in implementing a judgment of the ECJ, beginning from the day on which the second judgment of the ECJ was brought to the attention of the Member State concerned and ending when the latter finally complies with the judgment. The amount of the penalty has to be proportionate to the gravity of the infringement as well as its duration and should also consider a sufficiently deterrent effect, preventing the recurrence of the infringement in all probability. Regarding the latter criterion, the Member States are weighted by their ability to pay. This again depends on their gross domestic product as well as the number of votes in the Council. The possibility to pay a lump sum is provided in order to compensate minor offenses especially, such as late implementation of a judgement but before the initiating the sanction procedure. However, according to a Communication of the Commission of 2005, the Commission will generally determine a standard lump sum for infringement procedures which would be calculated by multiplying a uniform flat-rate amount with a coefficient reflecting the gravity of the infringement and a special country factor¹².

⁹ ECJ Case C-328/90 *Commission v Greece* [1992] ECR I-434.

¹⁰ OJ 1996 C242/07.

¹¹ OJ 1997 C 63/02.

¹² SEC (2005) 1658.

If the ECJ finds that there is an infringement of duty by the Member State under Article 260 TFEU, it may impose a lump sum or penalty payment on the Member State concerned. In doing so, the Commission's suggestions cannot bind the Court and does merely constitute a useful point of reference. In exercising its **discretion**, it is for the Court to fix the lump sum or penalty payment that is appropriate to the circumstances and proportionate, both to the breach that has been found and to the ability to pay of the Member State concerned¹³.

According to the ECJ's case *Francovich*¹⁴, the requirement to **pay damages** for a breach of Union law remains unaffected.¹⁵

V. Specific infringement procedure based on the failure to implement a Directive

The Reform Treaty finally introduced a new scheme for infringement procedures based on the failure of the Member State concerned to fulfil its obligation to notify measures transposing a directive into national law. In this case the Commission is entitled to seek the imposition of a penalty payment or lump sum **in the first infringement procedure already**, while the ECJ is entitled to impose such a sanction. The new procedure also contributes to the streamlining and strengthening of the infringement procedure and at the same time also strengthens the effectiveness of regulatory elements of the directive. While in theory the provision is meant to constitute an exceptional *lex specialis*, it might actually regulate most cases of infringement procedures in practice.¹⁶

Article 261 [Jurisdiction with regard to the penalties] (ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

Bibliography: *Oliver*, Limitation of Actions before the European Court, 3 ELRev 1978, 3; *Tallberg*, European Governance and Supranational Institutions: Making States Comply, 2003.

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I. General comments

Article 261 TFEU, which adopts Article 229 TEC without amending its content, regulates the jurisdiction with regard to penalties imposed by an institution of the Union on a

¹³ ECJ Case C-278/01 *Commission v Spain* [2003] ECR I-14141.

¹⁴ ECJ Joined Cases C-6/90 und C-9/90 *Francovich* [1991] ECR I-05357, for details on this decision, see the comments on Article 4 TEU.

¹⁵ Examples from the recent case law of the Court since the initial judgment on Article 228 para. 2 TEC can be found in *CR/Cremer*, Article 228 mn. 17; for the cumulative imposition of a lump sum and a penalty payment, see ECJ Case C-304/02 *Commission v France* [2005] ECR I-6263.

¹⁶ Cf. *VHvH/Pache*, Article 260 AEUV mn. 19.

natural or legal person for the purpose of enforcing the law of the Union. This concerns fines imposed in order to provide a retribution for past infringements of Union law as well as penalty payments to enforce certain acts but also the imposition of other disadvantages (see Articles 103, 144 TFEU). The TFEU itself does not provide the Commission with the competence to impose such penalties¹ but penalty measures pursuant to Council Regulations provided for in the TFEU. The ECJ has a broadened jurisdiction with regard to the review of such measures.²

- 2 Article 261 TFEU establishes that regulations adopted by the Council or jointly by the European Parliament and the Council (Article 294 TFEU) can govern the **jurisdiction** of the Court of Justice with regard to the penalties provided for in these regulations. In this respect, the regulation may also prescribe a special action before the ECJ which allows the nullification and modification as well as the imposition of penalties. Furthermore, the jurisdiction of the ECJ covers consequences resulting from unlawfully imposed penalties (repayment of levied fines, compensation for damages). It is, however, in dispute how this 'special type' of action is to be understood. The wording of Article 261 TFEU is unclear as far as it does not indicate whether it intends to establish an independent type of procedure or in fact merely **broadens** the density of control as compared to the scope of review provided for in an action for annulment (Article 263 TFEU). The legislative purpose of the provision and the case law of the ECJ seem to suggest the latter.³
- 3 Until now, the Council has made use of the authorisation provided by Article 261 TFEU in the areas of transport and competition policy only.⁴ These regulations provide for the imposition of fines and penalties by the Commission. However, the regulatory competence has not been exhausted in these regulations; in particular, the Council **has not created a new type of procedure** (see mn. 2 above). In fact, the stipulated rules require the admissibility of an action for annulment (Articles 263, 264 TFEU) challenging the decision on the imposition of the penalty, but – in derogation from Article 263 subpara. 1 TFEU – give the ECJ the power of unlimited jurisdiction.⁵

4 II. Unlimited jurisdiction

The unlimited jurisdiction allows the Court to assess not only the limits of legality control (misuse of powers) but also the appropriateness and fairness of the penalties imposed, meaning that the Court's **own discretion** replaces the Commission's discretion.

- 5 The **criteria** for the amount of an imposed penalty are determined either by aspects relating to the offender or the infringement. Within this appraisal, the gravity and duration of the infringement, its economic impact, the economic power of the undertaking concerned, the advantages resulting from the infringement, any efforts to eliminate the unjust consequences and the willingness to participate in the review procedure are to be taken into account.⁶
- 6 The review of the penalties is carried out in form of an action for annulment (Article 263 subpara. 2 TFEU), possibly leading to a nullification or reduction of the penalty

¹ However, see Article 132 TFEU for the ECB.

² Cf. Schwarze/Schwarze, Article 261 AEUV mns 6 et seq.

³ See CR/Cremer, Article 261 AEUV mn. 1.

⁴ Details concerning the respective secondary legislation can be found in GHN/Booß, Article 261 AEUV mn. 2.

⁵ For details on the ECJ's review in appeal procedures, see commentary on Article 256 TFEU mn. 8.

⁶ ECJ Case 27/76 *United Brands v Commission* [1978] ECR 309; Case C-86/82 *Hasselblad v Commission* [1984] ECR 911; CFI Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689. Elf Aquitaine has brought an appeal based on Article 261 TFEU in the (CFI) Case T-174/05 *Elf Aquitaine v Commission* [2009] ECR II-183, to the ECJ under C-521/09 P.

by the ECJ. It is, however, disputed whether the Court of Justice is also entitled to increase the amount of the imposed fine if it discloses that the infringement weighs much heavier than the Commission had assumed.⁷ The wording of Article 261 TFEU and the implementing regulations do **not exclude a *reformatio in peius***, meaning the increasing of the penalty.⁸

III. Compensation for damage and suspension of enforcement

It is possible to combine the action for annulment with an action requesting compensation for damages (Articles 268, 340 para. 2 TFEU) in order to receive a refund of previously imposed penalties and the respective interest rate.⁹

See Article 299 TFEU for suspension of the enforcement of penalties.

Article 262 [Disputes in the field of intellectual property rights] (ex Article 229a TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Bibliography: *Luginbuehl*, A Stone's Throw Away from a European Patent Court: The European Patent Litigation Agreement, *European Intellectual Property Review*, 2003, 256; *Luginbuehl*, *European Patent Law. Towards a Uniform Interpretation*, 2011.

The provision was inserted into the TEC by the Treaty of Nice. The Reform Treaty primarily modified formalities. Compared to Article 229a TEC, its predecessor in primary law, Article 262 TFEU eliminates the Commission's exclusive right to confer jurisdiction to the ECJ. Now, the Union's jurisdiction does not only cover the 'industrial property rights' but also the 'intellectual property rights' (i.e. copyright law, patent law and ancillary property laws), which are extremely relevant in practice. With regard to the sovereignty of the Member States, the provisions conferring jurisdiction require prior approval by the Member States in accordance with their respective constitutional requirements.

Article 262 TFEU constitutes a special provision that allows the stipulation of the Union's jurisdiction in disputes concerning European intellectual property rights. This opportunity is relevant for the future Union Patent and the development of the law by judges. The scope is no longer limited to industrial property rights but deliberately extends also to **intellectual property rights**. Whereas the Council suggested conferring jurisdiction in disputes relating to the 'Community patent' only, it now includes 'Union Patent cases'.¹ A further step towards the Union Patent has been made by Regulation

⁷ Cf. GHN/*Boof*, Article 261 AEUV mns 16 et seq.

⁸ Cf. Streinz/*Ehricke*, Article 261 AEUV mns 8 with further references.

⁹ ECJ Joined Cases 75 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509.

¹ COM (2003) 87.

(EU) No 1257/2012 implementing enhanced co-operation in the area of the creation of unitary patent protection; also see Regulation 1260/2012 implementing enhanced co-operation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

- 3 The **amendment procedure** is divided into two phases. In a first (Union) step, the Council acts under a special legislative procedure and unanimously adopts the text of the provisions conferring jurisdiction. Thereby the Council acts on proposal of the Commission and after consulting the European Parliament. In the second (Member State) phase, the Member States ratify the provisions in accordance with their respective constitutional requirements. The reference to the Member States' respective constitutional requirements – which is, ultimately, a matter of course – intends to emphasize that this requirement applies not only to the classical transfer of sovereignty rights but also to the procedure at issue. Within the **scope of the constitutions of the Member States**, the guiding principle for any (legislative) action of the Union is to respect the substance of the national constitutions.
- 4 Article 262 TFEU does not prejudge the choice of the judicial framework (see, expressly, Declaration No 17 adopted by Treaty Conference in Nice).

**Article 263 [Action for annulment]
(ex Article 230 TEC)**

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

It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

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

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

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

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

Bibliography: *Albors Llorens*, The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat, 62 CLJ 2003, 72; *Arnulf*, Private applicants and the action for annulment since *Cordoniu*, 38 CMLRev 2001, 7; *Balthasar*, Locus Standi Rules for Challenges to Regula-

tory Acts by Private Applicants: The New Article 263 (4) TFEU, 35 ELRev 2010, 542; *Barents*, The Court of Justice after the Treaty of Lisbon, 47 CMLRev 2010, 709; *Brown/Morijn*, Case C-263/02 P, Commission v. Jégo-Quéré & Cie SA, judgement of the Sixth Chamber, 1 April 2004, 41 CMLRev 2004, 1639; *Craig*, Standing, Rights and the Structure of Legal Argument, 9 EPL 2003, 493; *Harpaz*, The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy, 46 CML Rev 2009, 105; *Kokott/Dervisopoulos/Henze*, Aktuelle Fragen des effektiven Rechtsschutzes durch die Gemeinschaftsgerichte, EuGRZ 2008, 10; *Manuel/Martin*, Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads, 11 Maastricht Journal 2004, 233; *Türk*, Judicial Review in EU Law, 2009; *Vogt*, Indirect Judicial Protection in EC Law: The Case of the Plea of Illegality, 31 ELRev 2006, 364; *Ward*, Judicial Review and the Rights of Private Parties in EU Law, 2nd ed. 2007.

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I. The provision's genesis; general comments

1

The function of the Union's courts – ensuring the lawful interpretation and application of the Treaties (Article 19 TEU) – does not only cover the right to control the fulfilment of obligations by the Member States (Articles 258–260 TFEU) but also the right to assess that the **Union institutions** act lawfully. The ECJ with its function as 'Constitutional Court of the Union' is responsible for the surveillance of actions of the Member States and measures taken by the Union's actors. Especially because the Union is, first and foremost, a **legal community** that upholds the rule of law as one of its guiding values (Article 2 TEU), it is indispensable to ensure the **effective legal protection** in view of all legally relevant actions of the Union's institutions. Therefore, Article 263 TFEU provides the possibility of bringing an action for annulment against these acts. As a counterpart, Article 265 TFEU establishes the right to request a declaratory judgment when Union institutions fail to act and thereby infringe the Treaties. Articles 264 and 266 TFEU regulate the effects of the respective ECJ judgments. Furthermore, a party having suffered damage caused by the Union's institutions or by its servants in the performance of their duties has the right to bring an action for compensation of damage under Articles 268 and 340 TFEU. However, according to Article 263 TFEU, the ECJ is not entitled to judge on the legitimacy of State actions.¹

Article 263 TFEU resembles its predecessor Article 230 TEC going even beyond its 2 scope. Article 263 para. 1 TFEU makes a precise reference to 'legislative acts' as regards the cooperation between the Council and European Parliament. Due to the merger of the pillars, acts of the European Council may now be subject to an action for annulment, too. Furthermore, the range of admissible subject-matters extends to other bodies, offices and agencies of the Union in so far as they are intended to produce legal effects vis-à-vis

¹ ECJ Case C-97/91 *Borelli* [1992] ECR I-6313.

third parties. According to Article 263 para. 3 TFEU, the Committee of the Regions has the capacity to bring an action and has become a partially privileged applicant; this was already envisaged in draft-Article III-365 para. 3 TECE. Article 263 para. 4 TFEU has been revised in view of actions brought by natural or legal persons. They are now entitled to institute proceedings not only against an act addressed to that person or an act which is of direct and individual concern to them, but also against a regulatory act which is of direct concern to them and does not entail implementing measures. This highly disputed amendment partly entails a renouncement of the requirement of individual concern, being the very extension which the ECJ had refused to grant on account of the wording of the old provision in its *UPA* decision². The newly adopted Article 263 para. 5 TFEU is *lex specialis* to its para. 1. It clarifies that acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought against acts of these bodies, offices or agencies by natural or legal persons. This puts the capacity of an individual to bring an action into perspective.

- 3 Special rules still apply to the area of the EIB (Article 271 TFEU) and also in view of actions brought by an official or another servant of the Union against the appointing authority (Article 91 Staff Regulations).
- 4 The Treaties do not provide for an action for performance, granting the right to request the adoption of a legal act. This absence is partly adjusted by the fact that under certain circumstances the notification that rejects the imposition of a proposed action can be challenged with an action for annulment (see mn. 10 below). Upon a successful appeal against the notice of rejection, the respectively concerned organ is obliged to take follow-up measures resulting from the judgment.³ However, it is not possible to sentence an institution to pay a certain amount of money in the context of an action for annulment.⁴
- 5 The action for annulment is **admissible** if the general requirements for a procedure before the ECJ are met (see Articles 19, 21 Statute ECJ); the application deadline is met (Article 263 para. 6 TFEU) and the applicant who has the capacity to bring an action alleged that the defendant organ's act at issue violates Union law on the grounds stipulated in Article 263 para. 2 TFEU. The action for annulment is **well-founded** if the alleged infringement took place as described.
- 6 The action for annulment is a standard procedure in terms of providing **objective legal protection**. At least as far as the privileged plaintiffs are concerned, it is insignificant whether an individual ('subjective') right has been infringed. The limitation to the protection of individual rights that is enshrined in Article 263 para. 2 TFEU does not intend to question the additional objective protection in general; it merely wants to counter an '**actio popularis**', meaning a claim of anyone that might even not have been affected. The fact that the scope of the action is restricted to the infringement of specific rights of the Union's institutions in Article 263 para. 3 TFEU, emphasizes that the Union institutions mentioned therein do not have a general 'guardian function'.⁵

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II. The defendant Union institutions

According to the redrafted wording of Article 263 para. 1 TFEU, making the norm more precise, legislative acts (Article 294 TFEU), acts of the Council, the Commission as

² ECJ Case C-50/00 *UPA v Council* [2002] ECR I-6677.

³ CFI Case T-104/02 *Gondrand Frères v Commission* [2004] ECR II-3211.

⁴ ECJ Case C-199/91 *Foyer Culturel* [1993] ECR I-2689.

⁵ Cf. Streinz/*Ehrliche*, Article 263 AEUV mn. 1.

well as acts of bodies, offices or agencies of the Union can constitute the subject-matter of an action for annulment, provided that these acts intend to produce legal effects vis-à-vis third parties. This rule expressly covers acts of the agencies of the Union. The explicit extension of judicial competences was enacted by the Reform Treaty; however, this amendment finally incorporated aspects into Union law which judges of the ECJ had already pre-shaped in their case law. Even the former Community law provided the possibility to review actions of the agencies, at least by applying Article 230 para. 4 TEC by analogy.⁶ In any event the legal protection granted in procedures before the ECJ against actions of agencies is always subsidiary to the respective agency's internal complaint and redress mechanisms under Article 263 para. 5 TFEU. Finally, the acts of the ECB may be subject-matter of an action for annulment, too.

Since the revision of the provision by the Treaty of Maastricht, even acts of the European Parliament can be challenged in an action for annulment if they produce legal effects vis-à-vis third parties. This corresponds to the previously expressed view of the ECJ that an action for annulment against acts of the European Parliament is permissible given the fact that the Parliament has a broad scope of competences.⁷ Previously, acts of the European Parliament were subject to an action of annulment only in so far as the Parliament had acted (inseparably) also on the basis of the ECSC Treaty and under the condition that the action was based on a lack of competence or an infringement of an essential procedural requirement.⁸

After the merger of the pillars, the European Council has become an ordinary Union institution. As a result, its acts must be subject to a review by the ECJ now – in so far as they produce legal effects vis-à-vis third parties (see mn. 7 above).

The act must be **attributable** to the respective organ. In the case of individual members of the institution or agencies of the Union (officials), this can be affirmed as soon as there is at least no manifest lack of power of attorney, authorisation or delegation of authority. However, acts adopted by representatives of the Member States acting not in their capacity as Members of the Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the ECJ. Nonetheless, the Member State's act at issue is deemed to be a decision of the Council if the latter was in fact responsible for the decision.⁹

III. Challengeable acts

All **acts that produce binding legal effects vis-à-vis third parties** can be the subject-matter of an action for annulment.¹⁰ Undoubtedly directives, regulations and decisions mentioned in the catalogue of Article 288 TFEU constitute such acts. In contrast, recommendations and opinions are expressly excluded (due to their lack of binding force). However, whether the act itself explicitly aligns with one of these categories is less significant than the effects produced by it.¹¹ It is irrelevant if an act is claimed to constitute an 'opinion'. It is sufficient that there is an act of an institution which is intended to produce

⁶ CFI Case T-411/06 *Sogelma v EAR* [2008] ECR II-2271.

⁷ ECJ Case 294/83 *Les Verts* [1986] ECR 1339; Case 78/85 *Group of the European Right* [1986] ECR 1753; Case 34/86 *Haushaltsverfahren* [1986] ECR 2155; Joined Cases 358/85 and 51/86 *France v EP* [1988] ECR 4821; Case C-314/91 *Weber v EP* [1993] ECR I-1107.

⁸ ECJ Case 230/81 *Luxembourg v EP* [1983] 255.

⁹ ECJ Joined Cases C-181/91 and C-248/91 *Parliament/Council* [1993] ECR I-3713.

¹⁰ ECJ Case C-316/91 *Parliament v Council* [1994] ECR I-653.

¹¹ ECJ Case C-131/03 P *Reynolds Tobacco v Commission* [2006] ECR I-7795.

legal effects.¹² Internal Commission guidelines only produce effects within the internal administrative area and do not establish rights or obligations of third parties.¹³ A mere code of conduct of a Union institution cannot be annulled.¹⁴ Acts will be regarded as legally non-existent only in very exceptional cases; this is the case when acts are vitiated by an irregularity with such an obvious gravity that it cannot even provisionally be tolerated by the legal order of the Union.¹⁵ Provisional measures taken in administrative proceedings of the Commission may only be subject of an independent action for annulment if their nature does not suggest that they have a purely preparatory character. For that reason, the initiation of an antitrust proceeding¹⁶, State aid control proceedings¹⁷ or a statement of objections by the Commission or an agreement adopted between organs (code of conduct) as a framework for future decisions¹⁸ cannot be the subject-matters of an action for annulment. In contrast, the refusal of the Commission to give the permission to an official who is called to give evidence before a national court as witness is challengeable in an action for annulment.¹⁹ A communication from the Commission informing about its intent to 'close the file' on a complaint in a competition matter cannot be described as preliminary or preparatory and can thus be challenged with an action for annulment.²⁰ The denial of access to specific documents can be challenged, too.²¹ An act by which the Commission, in the context of a tendering procedure, informs a tendering undertaking that it is rejecting its tender because the tender does not satisfy the conditions for obtaining funding from the Union in itself can also be the subject of an action for annulment.²² However, the mere announcement of an act which in itself does not have binding legal effects cannot be contested.

- 12 An action for annulment of a **subsequent** decision which merely confirms a previous decision without having definitive legal effects on the applicant is inadmissible.²³
- 13 A **rejection decision** of the Commission must be analysed in the light of the nature of the request in question. In particular, the refusal of a Union institution to take back or amend an act can only be reviewed pursuant to Article 263 TFEU if the measure that the respective Union institution has rejected to withdraw or to change could be qualified as the subject of an action for annulment under this provision.²⁴ An action for annulment may also be directed against a refusal of the Commission to initiate proceedings under Article 113 para. 2 TFEU.²⁵
- 14 The conclusion of an **international agreement** by the competent institution of the Union is also a challengeable act. However, the action for annulment can usually only eliminate the effects occurring within the Union, while it does not affect the international legal effects (vis-à-vis the treaty party as a third party).

¹² For example a 'communication' submitted by the Commission to the Member States with the purpose of creating its own legal effects: ECJ Case C-325/91 *France v Commission* [1993] ECR I-3303; Case C-57/95 *France v Commission* [1997] ECR I-1640.

¹³ ECJ Case C-443/97 *Spain v Commission* [2000] ECR I-2429.

¹⁴ ECJ Case C-159/96 *Portugal v Commission* [1998] ECR I-7403.

¹⁵ ECJ Case C-137/92 P *BASF* [1994] ECR I-2629.

¹⁶ ECJ Case 60/81 *IBM* [1981] ECR 2639.

¹⁷ ECJ Case C-312/90 *Spain v Commission* [1992] ECR I-4117.

¹⁸ ECJ Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

¹⁹ ECJ Case C-54/90 *Weddel* [1992] ECR I-871.

²⁰ ECJ Case C-39/93 *SFEI* [1994] ECR I-2681, Case C-19/93 P *Rendo* [1995] ECR I-3319.

²¹ ECJ Case 53/85 *AKZO* [1986] ECR 1965.

²² ECJ Case C-395/95 P *Geotronics* [1997] ECR I-2271.

²³ ECJ Joined Cases 166/86 and 220/86 *Irish Cement* [1988] ECR 6473; Case C-480/93 P *Zunis* [1996] ECR I-1.

²⁴ ECJ Joined Cases C-15/91 and 108/91 *Buckl* [1992] ECR I-6061.

²⁵ ECJ Case C-313/90 *CIRFS* [1993] ECR I-1125.

IV. Legal standing to bring an action

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Concerning legal standing, meaning the capacity to bring an action before the ECJ, Article 263 TFEU differentiates between privileged and non-privileged applicants. The latter are distinguished according to the requirements of the position of the specific institution (Article 263 para. 2 TFEU) respectively the individual's legal position (Article 263 para. 4 TFEU). Applicants acting under Article 263 para. 3 TFEU are referred to as **partially privileged** applicants.

1. Privileged applicants

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Privileged applicants are the **Member States**, the **Council**, the **Commission** and (since the Treaty of Nice) the **European Parliament**. Their legal standing is evidently given under Article 263 para. 2 TFEU. It is presumed irrebuttably that these possible applicants in any case have an **objective interest** in ensuring that EU law is observed when acts of the Union's institutions are adopted. Their behaviour prior to the adoption of the act is insignificant. A Member State has the right to challenge an act without the exercise of this right being conditional upon the positions taken by the representative of this Member State in the Council when the act in question was adopted.²⁶ The Commission is entitled to bring an action if the Council followed its proposal or adopted the Commission's view that a proposal is not necessary²⁷. The European Council is listed in Article 263 para. 1 TFEU, but not explicitly in its para. 2.

The **ECB**, the **Court of Auditors** and the **Committee of the Regions** are entitled to bring an action only if an infringement of the body's respective competence, i.e. a breach of their prerogatives, is in question (Article 263 para. 3 TFEU).²⁸ Before the Treaty of Nice entered into force, the European Parliament was amongst these partially privileged applicants. The respective judgments of the ECJ may still be relevant for the Court of Auditors, the ECB and the Committee of the Regions. The ECJ held that the EP had no legal standing when it claimed that a regulation should have been based on Article 207 TEC while the actually chosen provision stipulated the requirement of a consultation.²⁹ In contrast, the ECJ decided that the EP had the standing to bring an action for annulment when it claimed that the contested measure should have been based also on Article 114 TEC (at that time: procedure involving cooperation) rather than on Article 207 TEC only.³⁰ The rights of the Committee of the Regions, especially the right to be consulted, have been **strengthened significantly** by including them in the group of 'partially privileged applicants'.

2. Non-privileged applicants

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Non-privileged applicants are entitled to bring an action for annulment only under the conditions set out in Article 263 para. 4 TFEU; further restrictions stipulated in Article 263 para. 5 TFEU apply. Nonetheless, if the conditions in para. 4 are not met or restrictions pursuant to para. 5 apply, the non-privileged applicant is still able to plead be-

²⁶ ECJ Case 166/78 *Italy v Council* [1979] ECR 2596.

²⁷ ECJ Case 22/70 *AETR* [1971] ECR 278.

²⁸ E.g. in the case of improper consultation, see already ECJ Case C-70/88 *EP v Council* [1990] ECR I-2041; Case C-316/91 *EP v Council* [1994] ECR I-625.

²⁹ ECJ Case C-187/93 *EP v Council* [1994] ECR I-2857.

³⁰ ECJ Case C-360/93 *EP v Council* [1996] ECR I-1195.

fore a national court to **indirectly** bring about a decision of the ECJ pursuant to Article 267 TFEU.³¹

- 19 The non-privileged applicants are **natural** or **legal persons** under the relevant national law. When determining the legal standing, the respective nationality or residence (of individuals) respectively place of founding or location of the registered office (of legal persons) is of no significance³². The provision also covers legal persons governed by public law, meaning subdivisions of a Member State with legal capacity (federal States, regions, municipalities and other legal entities governed by public law, and also non-Member States).³³
- 20 Non-privileged applicants may institute proceedings against an act addressed to the respective applicant or against an act affecting this person directly and individually. They may also institute proceedings against a regulatory act with direct concern to them that does not entail implementing measures.
- 21 First of all, these acts cover **decisions** addressed to the non-privileged applicants. The decision does not have to be designated as such. It is sufficient that it is an act which is specifically addressed to the applicant and intends to produce legal effects in relation to him. If the affected body is a parent company or a subsidiary, the respective other (mother or sister) company is entitled to institute proceedings, too. Associations of common interest like associations of undertakings or professional associations have the capacity to bring an action on the condition that Union law provides them with procedural rights and they represent persons (companies) who themselves have legal standing.³⁴
- 22 If the action is directed against the **rejection** of a request in order to adopt an act, the applicant is only entitled to bring an action if the law of the Union expressly provides him with a legal right to request such an adoption (see mn. 10 above). The required substantiation of a claim like this is necessarily the same as in the case of an action for failure to act (Article 265 TFEU).
- 23 A notification informing the applicant that his **request** for Commission intervention against a **third party** has been **rejected** can also constitute a challengeable decision. The right to request a decision on the initiation or continuation of an administrative procedure against the third party can derive from an alleged antitrust infringement committed by the third party, in the case of alleged dumping practices of companies from non-EU Member States³⁵ and where State aid is unlawfully granted to competitors on the basis of Article 108 para. 2 TFEU. In these cases, the rejection of a request for intervention by the Commission constitutes a decision addressed to the applicant if Union law provides the applicant with the right to request an action that is free of any error of assessment. A right like this can be stipulated in Union law provisions governing the respective administrative procedure (antitrust procedures, anti-dumping procedures, State aid procedures).³⁶
- 24 A person can also have the right to institute proceedings against a **decision** that is in fact delivered to **another person**. This is the case if the decision is of direct and individual concern to the applicant. This concerns two groups of cases:

³¹ ECJ Case C-70/97 P *Kruivvat v Commission* [1998] ECR I-7183.

³² ECJ Case C-135/92 *Fiskano* [1994] ECR I-2885.

³³ ECJ Case C-222/83 *Differdange* [1984] ECR 2889; Joined Cases 62/87 and 72/87 *Wallonia v Commission* [1988] ECR 1573 and Case C-298/89 *Government of Gibraltar v Council* [1993] ECR I-3605; CFI Case T-288/97 *Friaul v Commission* [1999] ECR II-1871; ECJ Case C-142/00 P *Commission v The Netherlands Antilles* [2003] ECR I-3483.

³⁴ ECJ Case C-191/82 *FEDIOL v Commission* [1983] ECR 2913; CFI Case T-122/96 *Federolio v Commission* [1997] ECR II-1559; Case T-447/93 *AITEC and Others v Commission* [1995] ECR II-1971.

³⁵ ECJ Case C-76/01 *Eurocoton* [2003] ECR I-10091.

³⁶ ECJ Case 210/81 *Demo-Studio Schmidt* [1983] ECR 3063.

Firstly, if a decision was issued to a Member State (or a third State³⁷), the applicant will regularly not be directly affected if the final decision is given by the administration of a Member State. However, this may be different if the respective national administration does not have any discretionary powers, for example if the Commission forbids giving a certain State aid, even though the applicant would fulfil the national conditions under which claims can be raised³⁸.

When a decision is delivered to a Member State to inform about the exemption from a ban or that a case against it is set aside³⁹, the applicant is entitled to institute proceedings if the notification of that decision constituted a challengeable decision.

Secondly, the decision might be delivered to any natural or legal person (e.g. to a competitor) and gives this person, for example, an exemption from the prohibition on restrictive practices, a request for release for free circulation or the approval of aid. In this case an applicant is directly affected if the law of the Union recognizes that he has a legitimate interest in the adoption of a decision that is free of any error of assessment and where his position on the market is affected. A decision is of individual concern if procedural rights were conferred on the applicant who participated in the procedure resulting in the adoption of the contested decision (or who was unable to intervene due to a lack of sufficient information).⁴⁰ An undertaking cannot rely solely on its status as a competitor. It must additionally show that it is individually addressed. To do so, account has to be taken of the extent of the undertaking's possible participation in the procedure. Furthermore, it has to be evaluated to what extent an interference with the undertaking's unhindered competitive position on the market is likely.⁴¹

Finally, also a decision that was rendered as **regulation** provides the right to institute proceedings.

In general, there is very little room for action against normative acts of the Union's institutions by natural or legal persons. An exception was already made under **Article 230 TEC** when a regulation was of direct and individual concern to a person, meaning cases in which the choice of the form of a normative act obscured the true nature of the action as a decision or rather several decisions (cf. the French text: 'sous l'apparence d'un règlement').⁴² Under recourse to an analogous application of Article 230 para. 4 TEC, a directive could constitute a contestable decision if its true nature was a body of decisions.⁴³ In this context, the regulatory content of the directive has always been of greater significance than the fact that every directive may be understood as a decision addressed to the Member States. Accordingly, the ECJ held that provisions of directives with 'general application' constitute normative acts with regard to natural and legal persons; in the context of this term, the Court took account of the matters covered by the directive rather than its personal scope (covering the Member States).⁴⁴

In the context of such a jurisdictional approach the criterion of **direct concern** was not problematic as far as regulations were concerned because they have, by definition, direct effect: In the absence of an explicit provision to the contrary, especially in the regulation itself, no further implementing measures are required. In contrast, the criterion of **individual concern** was more difficult to grasp. According to a controversial formula previ-

³⁷ ECJ Case C-135/92 *Fiskano* [1994] ECR I-2885.

³⁸ ECJ Case C-291/89 *Interhotel* [1991] ECR I-2257.

³⁹ ECJ Case C-169/84 *CdF v Commission* [1990] ECR I-3083.

⁴⁰ ECJ Case 169/84 *Cofaz* [1986] ECR 391; Case C-49/88 *SAMAD* [1991] ECR I-3187; Case C-386/96 *P Dreyfus v Commission* [1998] ECR I-2309.

⁴¹ ECJ Case C-106/98 *P Comité d'entreprise* [2000] ECR I-3680.

⁴² ECJ Case C-87/95 *P CNPAAP* [1996] ECR I-2003.

⁴³ ECJ Case C-10/95 *P Asocarne* [1997] ECR I-4149.

⁴⁴ ECJ Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605.

ously used by the ECJ, natural or legal persons may only have claimed that a contested provision is of individual concern to them **if it affects them 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 person addressed.**⁴⁵ Since the landmark decision from 1963, this differentiating factor has been referred to as the ‘*Plaumann* formula’. However, in practice it has not been particularly helpful. Therefore, the Court of Justice has used another formula for clarification purposes, which reads as follows: A measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom they apply at any given time **as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measures in relation to their purpose.**⁴⁶ With an express reference to the wording of Article 230 para. 4 TEC, the ECJ refused to accept the CFI’s attempt⁴⁷ to replace the requirement of individual concern with the right to effective judicial protection (and to thereby expand the individual right to institute proceedings). The Court held that although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in Article 230 para. 4 TEC, without going beyond the jurisdiction conferred by the Treaty on the Union Courts (‘principle of conferred powers’). On the basis of this restrictive approach, the ECJ explicitly and emphatically reactivated its *Plaumann* formula⁴⁸ and thereby provoked severe criticism and an intense debate.⁴⁹ The argument that the duty of cooperation (cf. Article 4 TEU) obliges the Member States in any event to establish a system of legal remedies and procedures within their own legal system in order to guarantee the right to effective judicial protection, failed to satisfy many critics.

- 31 The **enduring discussion** accompanied the consultations regarding the Constitutional Treaty. Some scholars were in favour of an expansion of individual actions while others wanted to incorporate the mentioned obligation of Member States into primary law. Draft-Article 29 para. 1 subpara. 1 TECE was in favour of the second alternative, and Article 19 TEU adopted the following: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. However, also the first alternative provoked a reaction. After prolonged controversies and an initially different approach, it is now absorbed in Article 263 para. 4 TFEU. First of all, the more general term ‘acts’ has replaced the cumbersome references formerly made to a regulation or a decision addressed to another person. Furthermore, disputes addressing a regulatory act, which is of direct concern to the applicant and does not entail implementing measures, do not require any form of individual concern any longer. Thereby the Reform Treaty has deprived the ECJ’s textual argumentation in ‘*Unión de Pequeños Agricultores*’ (see mn. 30 above) of its basis and paved the way for exactly those approaches that Advocate-General Jacobs and the ECJ had already initiated in order to **enhance the legal protection of individuals**. However, since the new Union law only allows actions brought against regulatory acts that do not entail implementing measures, the interpretation of that condition will be decided on the basis of a more or less restrictive application of Ar-

⁴⁵ ECJ Case 25/62 *Plaumann* [1963] ECR 238; Case C-250/96 *RAR v Council and Commission* [1989] ECR 2045; Case C-309/89 *Codorniu v Council* [1994] I-1879.

⁴⁶ For example: ECJ Case C-307/81 *Alusuisse* [1982] ECR 3463; Case C-26/86 *Deutz* [1987] ECR 941.

⁴⁷ CFI Case T-177/01 *Jégo-Quéré* [2002] ECR II-2365.

⁴⁸ ECJ Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6719.

⁴⁹ For details see *Craig/de Búrca*, EU law, 502 et seq.

ticle 263 para. 4 TFEU.⁵⁰ In a recent order⁵¹, the General Court followed the so far well-established restrictive line and did not see significant post-Lisbon changes: 'It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person (...) and also (...) it must be held that the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.' The subsequent appeal filed by the applicant was dismissed, partly because of inadmissibility and – for the main question – as unfounded because the ECJ held that the GC was right to hold that the concept of 'regulatory act' does not encompass legislative acts.⁵²

The **results attained so far** by the ECJ case law can be summarized as a **point of reference** for the expected realignment (or at least modification) as follows: With its 'combination of formulas', the Court intended to point out the following: A regulation is of individual concern if it is possible to **definitely** determine the identity of the persons to whom it applies at the time the regulation was adopted because the matters covered therein have already been finalised at the time of its adoption which means that, for legal reasons, further people are no longer able to meet the conditions laid down in the regulation. Due to their content and function, regulatory acts (so-called **false regulations**) have in fact always been decisions or bodies of decisions. Under the new Union law after the Lisbon Reform treaty, these regulatory acts will certainly continue to be contestable.

However, where the **further realisation of the facts** was legally possible, it could be assumed that the measure constituted a regulation rather than a false regulation (and not a decision either), when it in fact applied only to certain people in the first place. An exception was made for **Janus-faced regulations**, namely in so far as a natural or legal person had been entitled to participate in the procedure implementing the regulation and actually participated in it.⁵³ The right to participate implies a legitimate interest recognized by Union law; it is as such affected by the adoption of the regulation. At the same time a decision on the regulation constitutes a decision on a measure negatively affecting the participating person – similar to a decision rejecting a request. The ECJ has expressly ruled that such a conclusion applies to regulations imposing anti-dumping duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders.⁵⁴ Since the criterion of 'individual concern' has been removed, the Court of Justice does not have to narrow down its approach to Janus-faced regulations any longer. In this respect, the revised version of para. 4 has at least the potential to bring about enduring effects.

V. Pleas in law

The applicant has to give reasons that can be attributed to one of the reasons for an action enumerated in Article 263 para. 2 TFEU. The list of admissible pleas follows French administrative law and covers complaints based on procedural grounds (lack of compe-

⁵⁰ Cf. Schwarze/Schwarze, Article 263 AEUV mn. 54.

⁵¹ GC Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-5599.

⁵² ECJ Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, not yet officially published, especially mn. 112.

⁵³ ECJ Case C-49/88 *SAMAD* [1991] ECR I-3187.

⁵⁴ ECJ Case C-239/99 *Nachi Europe* [2001] ECR I-1197; Case C-76/01 P *Eurocoton* [2003] ECR I-10091.

tence, infringement of essential procedural requirements) as well as claims stating that the impugned act has infringed substantive law (infringement of the Treaties or of any rule of law relating to their application, or misuse of powers). In any event the fault must **exist at the time of the adoption** of the act concerned. In a sphere which involves an appraisal of **complex economic situations** judicial review must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. This is particularly true if the act concerned is of general application. In addition, the discretion of the Council when assessing a complex economic situation can be exercised not only in relation to the nature and scope of the provisions which are to be adopted but also, to a certain extent, to the findings as to the basic facts, especially in the sense that the Council is free to base its assessment, if necessary, on findings of a general nature.⁵⁵

35

1. Procedural pleas

A plea based on the **lack of competence** may concern the ‘collective powers’ of the Union, the ‘institutional powers’ of its organs or the general capacity to act (in particular compliance with the principle of conferred powers, Article 7 TFEU).⁵⁶

36 A complaint alleging an infringement of **essential procedural requirements** covers all other procedural rules that had to be complied with during the implementation of the act concerned. The justification of a plea is determined in accordance with its effects in the individual case. More precisely, one should refer to a **considerable infringement** of essential procedural requirements. An infringement is considerable if it was capable of **influencing the content of the act concerned**, for example by constraining consultation or participation rights, by neglecting requirements of the decision-making process (choice of the wrong legal basis, quora, requirement of written form etc.) or by a breach of the obligation to state reasons.⁵⁷ In any case, the infringement of essential procedural requirements requires an ex officio examination.⁵⁸

37 In detail: concerning the provisions on the participation and consultation of the Member States⁵⁹ or other EU institutions⁶⁰; the obligation to consult a committee of experts in the context of the requirement of comprehensive fact-finding⁶¹; the obligation to respect the right to be heard before a decision addressing the parties involved is adopted; the provisions on decision-making, the reasons of the decision (Article 296 TFEU). The absence of a formal authentication of an act adopted by the Commission is an infringement of essential procedural requirements. Acts adopted by the Commission are authenticated by the signatures of the President and the Executive Secretary and, as may be required, by a notification by the President⁶². The texts of such acts shall be annexed to the protocol in which their adoption is recorded, the authentication must precede the notification.⁶³ A violation of the provisions on the official language to be used does not constitute a considerable infringement of essential procedural rules when the person concerned none-

⁵⁵ ECJ Case C-150/94 *United Kingdom v Council* [1998] I-7278.

⁵⁶ See CR/Cremer, Article 263 AEUV mn. 83.

⁵⁷ Cf. CR/Cremer, Article 263 AEUV mns 85 et seq.

⁵⁸ ECJ Case C-367/95 P *Sytraval* [1998] ECR I-1752.

⁵⁹ ECJ Case C-199/91 *Foyer Culturel* [1993] ECR I-2689.

⁶⁰ E.g. the European Parliament: ECJ Case 138/79 *Roquette Frères* [1980] ECR 3333, unless the European Parliament has violated the duty of sincere cooperation with the Council, ECJ Case C-65/93 *EP v Council* [1995] ECR I-660.

⁶¹ ECJ Case C-212/91 *Angelopharm* [1994] ECR I-200.

⁶² ECJ Case C-286/95 P *Commission v Imperial Chemical Industries* [2000] ECR I-2341.

⁶³ ECJ Case C-107/99 *Italy v Commission* [2002] ECR I-1091.

theless understood the content. Procedural errors in the notification or publication (Article 297 TFEU) can be remedied *ex nunc*.⁶⁴

2. Material complaints

38

A complaint alleging an infringement of the Treaties, or of any provision implementing it, can extend to the entire scope of **higher ranking provisions of Union law**, meaning the entire primary Union law (also if unwritten⁶⁵). Secondary law can potentially constitute a yardstick for the assessment as to whether there has been an infringement in an individual case if it supersedes the contested act. Enabling norms take preference if they were adopted by the same body that had adopted the impugned act.⁶⁶ The judge may only review material complaints when they were expressly made by the applicant.⁶⁷

The ECJ interprets complaints based on an alleged **misuse of powers** in accordance 39 with the French legal practice. This tradition does not distinguish between the margin of discretion accorded during the decision-making procedure and discretionary powers which are accorded in view of the decision on legal consequences.⁶⁸ The claim that there has been a misuse of powers is justified if the act was adopted for grounds differing from the purpose specified in that act.⁶⁹ Other cases of misuse or incorrect use of powers are covered by the grounds for an action in no.1 lit. b or no. 2 lit. a of the structure of each judgment.

VI. The restriction from para. 5

40

The newly inserted Article 263 para. 5 TFEU includes a *lex specialis* reservation as regards Article 263 para. 1 TFEU. Acts setting up bodies, offices and agencies of the Union may lay down specific – probably stricter – conditions and arrangements concerning actions against acts of these bodies, offices or agencies brought by natural or legal persons intended to produce legal effects in relation to them. The purpose of this provision is to give consideration to the particular character and mandate of such newly created bodies. The scope of this restriction is, however, determined by the **principle of effective judicial protection**. Effective legal protection being a general legal principle of the Union, a minimum degree of legal protection must be ensured at all times.

VI. Time limit (para. 6)

41

Observing the limitation period is a condition of admissibility, which the Court assesses *ex officio*. The time limit is **two months**; furthermore, there is a uniform ten-day extension, the so-called time-limit on account of distance (Article 51 RoP ECJ). Periods shall not be suspended during the judicial vacations (Article 49 para. 1 lit. e RoP ECJ).

At the earliest, the period begins:

42

In case of a **publication** (whether required or not) of the act, the period begins from 43 the end of the 14th day after its publication in the Official Journal (Article 50 RoP ECJ).

⁶⁴ See also Schwarze/Schwarze, Article 263 AEUV mn. 68.

⁶⁵ Cf. CR/Cremer, Article 263 AEUV mn. 91.

⁶⁶ ECJ Case 38/70 *Tradax* [1971] ECR 155.

⁶⁷ ECJ Case C-367/95 P *Sytraval* [1998] ECR I-1752.

⁶⁸ Cf. *Pache*, DVBl 1998, 384.

⁶⁹ ECJ Case C-339/09 *Lux* [1984] ECR 2465; Case C-156/93 *EP v Commission* [1995] ECR I-2019.

There is a rebuttable presumption that the Official Journal was actually published on the date indicated therein.

- 44 In case of a **notification** to the applicant (Article 297 TFEU), the period begins on the day following such notification.
- 45 In all other cases the time limit begins on the day following the actual **acquisition of knowledge**. When the person concerned has not acquired precise knowledge of the content of the decision, the period for bringing an action begins to run only from the very moment in which that person could have taken reasonable measures to acquire precise knowledge.⁷⁰
- 46 The two month period **ends** with the expiry of whichever day in the month is the same day as the day during which the event or action took place; if the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month (e.g. notification of the decision on 10 March, period ends on 10 May at 24h, notification of the decision on 31 July, period ends on 30 September at 24h). The time-limit on account of distance (Article 51 RoP ECJ) extends this period by ten days. If the period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day (Article 49 para. 2 RoP ECJ). A list of official holidays is published in the Appendix to Rules of Procedure.
- 47 The time limit is **met** if the action is lodged at the Registry of the ECJ within the scheduled period (see Article 21 RoP ECJ). The same applies to the General Court. An extension may be allowed under the conditions stipulated in Article 52 RoP ECJ.
- 48 The applicant can lodge an application for *restitutio in integrum* in order to be exempted from the finding that an action is time-barred; the applicant must then demonstrate that he was, by reason of the existence of unforeseeable circumstances or of *force majeure*, unable to meet the deadline (Article 45 para. 2 Statute ECJ).⁷¹
- 49 The Rules of Procedure of the General Court contain equivalent provisions.

*Article 264 [Action for annulment; effect of the decision of the ECJ]
(ex Article 231 TEC)*

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Bibliography: *Toth*, The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects, 4 YBEL 1984, 49; *Türk*, Judicial Review in EU Law, 2009.

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⁷⁰ ECJ Case C-309/95 *Commission v Council* [1998] ECR I-655; Case C-48/96 P *Windpark* [1998] ECR I-2873.

⁷¹ E.g. ECJ Case C-195/91 P *Bayer* [1994] ECR I-5619; Case C-193/01 P *Pitsiorlas* [2003] ECR I-4837.

I. The annulment judgment (para. 1)

1

When the Reform Treaty came into force, Article 264 TFEU replaced Article 231 TEC with a substantial change. In Article 264 para. 2 TFEU, the term ‘regulation’ has been replaced by the more general concept of an ‘action’. The replacement **reflects and re-emphasises the continuity** of the established case law of the ECJ which is now enshrined in a primary law provision. In order to attain legal certainty and to promote the respect for rights of third parties, the ECJ, by means of an analogous application of Article 231 para. 2 TEC, applied the rationale of this paragraph also to other acts¹.

According to Article 263 TFEU, the Court of Justice declares the act concerned to be void if the action is well-founded. The ruling is therefore a **judgment in rem**. The act in question loses its binding force only after the final judgment. The act has to be followed until a judgment is given unless the Court of Justice orders that application of the contested act is suspended (Article 278 TFEU).

The annulment produces effects **erga omnes** rather than only towards the applicant (inter partes), meaning that even uninvolved persons and institutions can no longer rely on the effectiveness of the act concerned.²

The annulment takes effect **ex tunc**. Actions which had initially been authorized by the annulled act forfeit their legal basis from the outset. An exception can be made, however, under the conditions set out in Article 264 para. 2 TFEU (see mn. 7 below).

An act may also be annulled **partially** if the annulled part is separable from the act as a whole (e. g. one single provision of a whole regulation); otherwise the ECJ must annul the entire measure even if the claim requested a partial annulment only.³

The necessary measures that must be taken by the institution whose act has been declared void in order to eliminate the negative consequences of its illegal act are regulated in Article 266 TFEU.

II. Limitation of the effects of a judgment (para. 2)

7

Where the ECJ declares an act to be void, it may exceptionally⁴ **limit the effects** of this judgment. The reduction of the provision’s applicability to regulations has been repealed explicitly (see mn. 1 above). An exception as provided for by Article 264 para. 2 TFEU can be made for reasons of legal certainty⁵ or, in extreme cases, also for practical reasons. The Court of Justice can submit a declaration of invalidity applicable only to the future (**effect ex nunc**), a limitation that, however, does usually not concern the applicant himself (right to **effective judicial protection**).⁶ The ECJ may also order the provisional continued validity of the annulled act if the reason for the annulment was that the act concerned did not go far enough.⁷ Furthermore, an exception pursuant to Article 264 para. 2 TFEU may be made for reasons of legitimate expectations of the persons affected, important public interests or in order to protect acquired rights of third parties.⁸

¹ Cf. Forsthoff, DSStR 2005,1844.

² Cf. CR/Cremer, Article 264 AEUV mn. 2.

³ ECJ Case 37/71 *Jamet* [1972] ECR 483.

⁴ ECJ Case C-367/93 *Rodgers* [1995] ECR I-2229.

⁵ ECJ Case C-163/90 *Legros* [1992] ECR I-4625.

⁶ ECJ Case C-228/92 *Roquette Frères* [1994] ECR I-1465.

⁷ E.g. in case of the annulment of an anti-dumping duty that had been understated, see ECJ Case C-264/82 *Timex* [1985] ECR 849.

⁸ Cf. Schwarze/Schwarze, Article 231 mn. 8.

8 As indicated above (see mn. 1 above), the ECJ relied on an **analogous application** of para. 2 even before the revision when annulling a directive⁹, Council Decision on the conclusion of an international agreement¹⁰ or other decisions¹¹. Furthermore, it applied the rationale of para. 2 in procedures pursuant to Article 267 TFEU when ruling on the validity of a regulation¹² or when dealing with a request for interpretation¹³. After the amendment through the Treaty of Lisbon, para. 2 can be applied directly.

9

III. Impact of a dismissal

A dismissal is mandatory only with respect to the parties in question and it is binding only in so far as it has found that the contested act is not to be declared void for those reasons actually addressed by the ECJ.¹⁴

Article 265 [Action for failure to act]
(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Bibliography: *Arnulf*, General Principles of EEC Law and the Individual, 1990; *Due*, Legal remedies for the failure of European Community institutions to act in conformity with EEC treaty provisions, 14 *Fordham ILJ* 1991, 341; *Hartley*, The Foundations of European Union Law, 7th ed. 2010, 396 et seq.; *Toth*, The law as it stands on the appeal for failure to act, 2 *LIEI* 1975, 65; *Türk*, Judicial Review in EU Law, 2009, 325 et seq.

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⁹ ECJ Case C-21/94 *EP v Council* [1995] ECR I-1827.

¹⁰ ECJ Case C-360/93 *EP v Council* [1996] ECR I-1195.

¹¹ ECJ Case C-22/96 *EP v Council* [1998] ECR I- 3231.

¹² ECJ Case C-228/92 *Roquette Frères* [1994] ECR I-1465.

¹³ ECJ Case C-61/79 *Denkavit* [1980] ECR 1205; Case C-367/93 *Rodders* [1995] ECR I-2229; Case C-197/94 *Bautiaa* [1996] ECR I-505.

¹⁴ Cf. *Schwarze/Schwarze*, Article 264 AEUV mn. 5.

I. General comments

1

The action for failure to act – the counter image to an action for annulment¹ – complements the legal protection provided against Treaty infringing acts of the institutions of the Union. While the action for annulment contests acts that are contrary to European Union law, the action for failure to act is directed at an unlawful failure to act, i.e. an **omission in breach of duty**. While this was formerly governed by Article 232 TEC, Article 265 TFEU has now adopted the general content, albeit in a modified manner, taking into account the changes within the Union's organisational structure. Para. 4 has been omitted; the new version of para. 1 now also refers to the European Council and the ECB explicitly. In line with Article 263 para. 1 TFEU, paras 1 and 2 now extend the scope of application of the provision on the failure to act also to **bodies, offices and agencies** of the Union (see already draft-Article III-367 para. 1 TECE).

The action for failure to act aims at a declaratory judgment finding that the defendant Union organ's failure to act has infringed the Treaties.² However, the Court of Justice and the General Court are not authorised to connect the finding of a failure to act with a ruling obliging the body in question to take particular measures, Article 266 TFEU.³

II. Subject-matter

3

The subject-matter of an action for failure to act is the omission of taking a decision on a sufficiently determinable act.⁴ The concept of an 'act' is interpreted broadly and does not necessarily have to constitute a legally binding measure.

Cases in which the institution adopted a negative decision rejecting the particular request do not fall within the scope of actions for failure to act. In these cases, legal protection has to be sought by bringing an **action for annulment**. However, the claim that the institution has failed to act may be raised if the institution refused to adopt any decision concerning the respective matter at all ('interim reply').

The objected failure to act constitutes an infringement if the Union law establishes an obligation to act.⁵

III. Defendant institutions

6

The action can be brought against the **Council**, the **Commission**, the **European Council** and the **European Parliament** (Article 264 para. 1 TFEU). The **ECB** and (since the Reform Treaty) also **bodies, offices and agencies of the Union** which fail to act (Article 264 para. 1 s. 3 TFEU) are capable of being sued.

IV. Capacity to bring an action

7

Like Article 263 TFEU (action for annulment), Article 265 TFEU distinguishes privileged and non-privileged applicants.

¹ See ECJ Case C-68/95 *Port* [1996] ECR I-6065 on the interrelationship between action for annulment and action for failure to act.

² For details concerning jurisdiction, see Article 256 TFEU mn. 2.

³ E.g. CFI Case T-264/03 *Schmoldt and Others v Commission* [2004] II-1515; Case T-104/02 *Gondrand Frères v Commission* [2004] ECR II-3211.

⁴ ECJ Case 13/83 *Transport Policy* [1985] ECR 1513.

⁵ ECJ Case C-170/02 P *Schlüsseler Verlag* [2003] ECR I-9889.

- 8 **Privileged applicants** are each Member State ‘and the other institutions of the Union’, i.e. the Council, the Commission, the European Parliament⁶, the Court of Auditors, the ECB, as well as bodies, offices and agencies of the Union. The action for failure to act constitutes an objective procedure; the right to bring an action is conferred independently of any specific entitlement of the applicant to request the adoption of the act in question.⁷
- 9 Natural or legal persons are **non-privileged applicants**.⁸ Their right to bring an action is limited.
- 10 The non-privileged applicant can only assert that the defendant institution or the bodies, offices and agencies of the Union failed to address a positive or negative but in any way binding decision that should have been issued (not: a recommendation or opinion) to this person (**the legal act addressing an individual**).⁹ It is disputed whether the scope of the provision covers acts which, while not directly addressed to the applicant, are of direct and individual concern to that person (see Article 263 para. 4 TFEU). In order to ensure comprehensive legal protection, the answer to that question should be in the affirmative. The ECJ has taken this view, too.¹⁰ Accordingly, the right to bring an action extends to the complaint of failure to address an act to a third party if the act concerns the applicant **directly and individually**.¹¹
- 11 As far as the right to bring an action is concerned, the applicant must substantiate the claim that she or he is entitled to a (positive) decision or, at least, to request a decision that is free of any errors of assessment. Because the Commission has **discretionary power** as to whether it commences proceedings against a Member State, a private individual does not have a right to require the adoption of a specific position.¹²

12

V. Request and time limit

Furthermore, the action is only admissible when the applicant has unsuccessfully called upon the institution, body, office or agency concerned to act (preliminary proceeding) and subsequently met the period prescribed for bringing an action.

- 13 First of all, the institution, body, office or agency concerned must be called upon to act. This requires a written request (see Article 21 para. 2 Statute ECJ).
- 14 It is required that the institution, body, office or agency of the Union has **not ‘defined its position’** within two months after being called upon to do so. In this context, a definition of a position is any act that could be the subject of an action for annulment of the applicant or – according to the ECJ¹³ – a further procedural act that constitutes a precondition for the adoption of the challengeable act. By contrast, a mere **holding letter** is not a definition of a position in the sense that it leads to the inadmissibility of the action for failure to act. It would create a **gap in the legal protection system** if the applicant could be ‘held back’ indefinitely. Therefore, the goal of the action must be a (positive or

⁶ See already ECJ Case 13/83 *Transport Policy* [1985] ECR 1513.

⁷ Cf. *Craig/de Búrca*, EU law, 514 et seq. with reference to ECJ Case C-107/91 *ENU v Commission* [1993] ECR I-599 and more.

⁸ See Article 263 mns 18 et seq.

⁹ ECJ Case C-257/90 *Italsolar* [1993] ECR I-9.

¹⁰ ECJ Case C-68/95 *Port* [1996] ECR I-6065.

¹¹ See Article 263 TFEU mns 24 et seq.

¹² ECJ Case 247/87 *Star Fruit Co* [1989] ECR 298; Case C-72/90 *Asia Motor France* [1992] ECR I-2181.

¹³ ECJ Case C-282/95 P *Guérin Automobiles* [1997] ECR I-1503; CFI Joined Cases T-344/00 and T-345/00, *CEVA and Others v Commission* [2003] ECR II-229.

negative) decision or a procedural act that is a necessary precondition for the adoption of such a decision.

The time limit must be met. The period is two months, starting from the expiry of the two-month period prescribed for the submission of a defined position and is extended by the so-called time-limit on account of distance.¹⁴ If the specific decision regarding which the failure to act had been objected is adopted during these two months and before the person concerned has brought an action, the applying person loses his legitimate interest in bringing an action for failure to act.¹⁵ If the act is implemented after the action has been brought but before the judgment is given, the ECJ will find that there is no need to adjudicate.¹⁶

VI. Justification of the action

16

The action is justified if the legal claim of the applicant is correct in so far as the objected failure to act violated EU law. In case of an action in which the defendant institution, body, office or agency of the Union has a margin of discretion, the action is only well-founded if this discretionary power has been misused.¹⁷ The GC (former CFI) decided in similar cases.¹⁸

Article 266 [Obligation resulting from the judgement]
(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Bibliography: *Schockweiler*, L'exécution des arrêts de la Cour, in: FS Pescatore, 1987, 613.

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I. General comments

1

Article 266 TFEU essentially adopts rules that were stipulated in Article 233 TEC. Article 233 para. 3 TEC is omitted – which takes account of the modified structure of the EU institutions, i.e. as far as the ECB is concerned. In addition, the provision takes account of the limited effects of declaratory judgments and judgments in rem. The effects of a judgment given upon an action for annulment (Article 264 TFEU: judgment in rem) and a declaratory judgment given in an action for failure to act (Article 265 TFEU: de-

¹⁴ See Article 263 TFEU mn. 41.
¹⁵ ECJ Case 5/62 *San Michele* [1962] ECR 919; Case C-25/91 *Echebastar* [1993] ECR I-1719.
¹⁶ ECJ Joined Cases C-15/91 and C-108/91 *Buckl* [1992] ECR I-6061.
¹⁷ See also CR/*Cremer*, Article 265 AEUV mn. 15.
¹⁸ CFI Case T-167/04 *Asklepios Kliniken* [2007] ECR II-2379.

claratory effect) do not suffice as far as the establishment of a legal protection system with Union law standards is concerned. The Court of Justice is, however, not entitled to give a judgment that obliges the defendant to take specifically defined measures. Article 266 TFEU has the intention of closing this gap, similar to the rationale of Article 260 TFEU in the context of infringement procedures brought against a Member State. The defendant institution shall therefore be required to take the necessary measures to comply with the judgment of the Court of Justice.

2

II. Elimination of effects

In the case of a judgment given upon an **action for failure to act** (Article 265 TFEU), the defendant institution has to **take the respective measure** as a mirror of the unlawful failure to act.¹ Essentially, the obligation stipulated in Article 266 para. 1 TFEU complements the duty to comply with the infringing provision of Union law.

3

A judgment given upon an **action for annulment** requires that measures are taken to close the gap arising after the contested act has been annulled, meaning that the legal or actual **consequences** resulting from the annulled act must be eliminated. Thus, the Commission is obliged to reimburse fines whose legal bases have ceased to exist. The limiting effect of the annulment judgment might be an issue for the Court. However, if the contested act is annulled because of formal illegalities, the annulled act can be re-implemented with the same content.

4

The duty to eliminate the consequences is not precluded by a liability to pay damages according to the principles of public liability (Article 340 para. 2 TFEU).

5

The provision does also not affect the duty of other institutions and the Member States to participate in the elimination of the unlawful conditions pursuant to the respective applicable laws and Articles 4, 13, 19 TEU.

6

III. Consequences of an infringement

If the duty arising from Article 266 TFEU is not complied with, another action based on this **separate infringement** can be brought. Depending on the nature of the new infringement, such a new action can either be an action for annulment or an action for failure to act.

Article 267 [Preliminary rulings] (ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

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

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

¹ ECJ Case 13/83 *Transport Policy* [1985] ECR 1513.

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

Bibliography: *Anderson/Demitriou*, References to the European Court, 2002; *Barnard/Sharpston*, The Changing Face of Article 177 References, 34 CMLRev 1997, 1113; *Bobek*, Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice, 45 CMLRev 2008, 1611; *Johnston*, Judicial reform and the treaty of Nice, 38 CMLRev 2001, 499; *Rasmussen*, Remediating the Crumbling EC Judicial System, 37 CMLRev 2000, 1071; *de la Mare/Donnelly*, Preliminary Rulings and EU Legal Integration: Evolution and Stasis, in: Craig/de Búrca (eds), *The Evolution of EU Law*, 2nd ed. 2011, 13; *Tridimas*, Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in The Preliminary Ruling Procedure, 40 CMLRev 2003, 9; *Tridimas*, Constitutional Review of Member States Action: The Virtues and Vices of an Incomplete Jurisdiction, 9 International Journal of Constitutional Law 2011, 737; *Weiler*, Eurocracy and Distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities, 61 WLRv 1986, 1103.

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I. General comments

1

Article 267 TFEU is one of the most significant provisions of the TFEU in view of ensuring **legal unity** within the Union. Its practical significance cannot be overestimated: More than half of the procedures pending before the ECJ are based on preliminary rulings.¹ The preliminary ruling interlocks national and European courts through the possibility or rather the obligation to make a reference, and thus **links the European constitutions**². The preliminary ruling requires cooperative behaviour between the courts concerned. The controversial Lisbon decision of the Bundesverfassungsgericht (German Federal Constitutional Court)³ has initiated a debate as to whether the Constitutional Court should be subject to a **legally binding obligation** to make a reference to the ECJ.

¹ Cf. Oppermann/Classen/Nettesheim, § 13 mn. 68.

² *Vosskuhle*, President of the Bundesverfassungsgericht (German Federal Constitutional Court), speaks of a 'Verfassungsgerichtsverbund'.

³ BVerfGE 123, 267 – *Lissabon*.

- 2 Since the early years of the European Communities, the preliminary ruling procedure has assumed the **integrating function of the judiciary** described above (see mn. 1 above). The content and rationale of the currently applicable Article 267 TFEU was previously enshrined in Article 234 TEC (see also Article 150 Euratom Treaty). The regulatory content was subject to minor modifications but especially the functional character of the rule has remained unchanged. Because the ECB gained official status of an EU institution when the Reform Treaty entered into force, the words ‘and of the ECB’ in Article 267 para. 1 lit. b TFEU had to be omitted. After becoming obsolete, lit. c was deleted entirely. The number of reviewable acts has been extended and now also covers acts by the institutions, bodies, offices or agencies of the Union. An important innovation results from Article 267 para. 3 TFEU: It adopts the wording of draft-Article III-369 para. 4 TECE and takes into account that the ECJ has jurisdiction within the former ‘third pillar’ (relating to justice and home affairs) now. If a question submitted for a preliminary ruling is raised in a (main) proceeding pending before a court or tribunal of a Member State with regard to a person in custody, the ECJ shall act as soon as possible.
- 3 The general legislative purpose of Article 267 TFEU and its integrative function can be summarized as follows: The provision intends to ensure uniform interpretation (and thus, indirectly, the uniform application) of the nationally relevant, primarily applicable Union law by establishing a **collaboration of the ECJ with the courts of the Member States** (‘Dialogue of Judges’). The same can be said about uniform rulings given on the validity of acts of the Union. By regulating the preliminary ruling, the provision establishes the procedurally most relevant link between Union law and the laws of the Member States. The particular effectiveness of the provision results from the fact that on the one hand it consolidates the ECJ’s jurisdiction to assess all Union law provisions (comparable to the concrete judicial review under Article 100 para. 1 Grundgesetz (German constitution)), and on the other hand that only those bodies that are compelled to meet legal rather than politically motivated standards are entrusted with making a reference to the ECJ. The Treaty of Amsterdam had established several special provisions to address the area ‘visas, asylum, immigration and other policies related to free movement of persons’ (Articles 61–69 TEC), including the controversial, now repealed Article 68 TEC. The Lisbon Treaty abdicated this regime of special provisions. However, there are exceptions, for example that the ECJ ‘shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’ (Article 276 TFEU).
- 4 For the jurisdiction of the General Court in preliminary ruling procedures, see Article 256 TFEU.

5 II. Subject of the preliminary ruling

Potential subject-matters of a preliminary ruling are the interpretation of the Treaties and the validity and interpretation of acts of the institutions of the Union. The latter include the ECB which now has the official status of an EU institution. The subject of a preliminary ruling can also include acts of the institutions, bodies, offices or agencies of the Union after the enlargement of the scope of the preliminary rulings. A finding of a failure of an institution to act can, however, not be the subject of a preliminary ruling.⁴

⁴ ECJ Case C-68/95 *Port* [1996] ECR I-6065.

1. The question of interpretation

6

The wording of Article 267 TFEU (still) refers to the interpretation ‘of the Treaties’. This includes the entire primary law related to the TFEU (Annexes, Protocols, Treaties amending or supplementing the TFEU, Accession Treaties). Nevertheless, the legal principles laid down by the case law of the ECJ and the fundamental rights of the European Union were included even before. According to its **constitutional mandate** (Article 19 s. 2 TEU: ‘ensure that in the interpretation and application of the Treaties the law is observed’), the Court of Justice must have the jurisdiction to interpret the entire primary law, including the CFREU in the context of preliminary rulings unless an explicit exception is applicable (see mn. 3 above as well as Article 276 TFEU).

Interpretation means to determine the **content of a provision** by taking account of the respective merits of a case. The competence of the ECJ concerns the formation of a ‘major premise’ as a prerequisite for the subsumption of the merits under a particular provision. In its assessment, the ECJ comprises all Union law provisions which are of relevance to the question posed, although they do not have to be explicitly mentioned in the reference by the Member State.⁵ However, Article 267 TFEU does not provide the ECJ with the jurisdiction to apply Union law to the particular case. The Court is also not entitled to interpret or apply national laws – not even if the law of a Member State has the function of transforming or implementing Union law. In this regard, the strict division of tasks between the ECJ and the national courts continues to constitute **the determinant of their principle of cooperation**. Where a national court (accidentally) makes a reference for a preliminary ruling on a question such as whether specific national provisions are compatible with Union law or concerning the relevance of certain matters in view of European Union law, the ECJ would, in theory, have to refuse to give a preliminary ruling. However, the ECJ usually succeeds in **reformulating** the question so as to turn it into a question on the interpretation of Union law.⁶

The request for a ruling on a question of interpretation can concern the entire **primary law** of the Union (see mn. 6 above) as well as the entire **secondary Union law**, no matter what EU institution acted. Also **non-binding acts of the Union**⁷ can be the subjects of the question of interpretation (see Article 288 TFEU). International agreements of the Union with third countries or international organizations fall within the scope of ‘acts of the institutions of the Union’ in Article 267 para. 1 lit. b TFEU.⁸ The same applies indirectly to international agreements if a regulation is to be interpreted in the light of the agreement.⁹

The former lit. c, which gave the Court of Justice jurisdiction to interpret the statutes of bodies established by an act of the Council, became obsolete and was therefore repealed.

2. The question of validity

10

The ECJ shall have jurisdiction to give preliminary rulings on the **validity of acts of Union institutions** (Article 267 para. 1 lit. b TFEU) and the bodies, offices or agencies of the Union, such as the EIB, the Court of Auditors, the EESC, the Committee of the Re-

⁵ ECJ Case C-280/91 *Viessmann* [1993] ECR I-971.

⁶ ECJ Case C-346/97 *Braathens Sverige* [1999] ECR I-3419.

⁷ For example recommendations, opinions; ECJ Case 113/75 *Frescati* [1976] ECR 983.

⁸ ECJ Case 181/73 *Haegemann* [1974] ECR 499; Case 87/75 *Bresciani* [1976] ECR 129; Case C-104/81 *Kupferberg* [1982] ECR 3641; Case C-192/89 *Sevince* [1990] ECR I-3461; Case C-321/97 *Andersson* [1999] ECR I-3551.

⁹ ECJ Case C-510/99 *Tridon* [2001] ECR I-7777.

gions, the agencies of the Union. Validity means the same as legality (see Article 263 para. 1 TFEU). Benchmark for the review of the act is the higher-ranking Union law. This is, to begin with, the entire primary Union law, possibly also overriding secondary EU law (e.g. basic regulation above implementing decree, secondary competence provision above individual acts based on the provision). The criteria determining the admissibility of an action for annulment (Article 263 TFEU) brought against the act in question are irrelevant.¹⁰ However, the definite nature of a decision of a Union institution which has not been challenged by its addressee within the prescribed time limit cannot be called into question by a national court.¹¹ The same applies accordingly if a beneficiary of State aid failed to challenge (Article 263 TFEU) a request by the Commission ordering the Member State to recover the aid.¹² The **principle of legal certainty** requires that a Member State cannot invoke the illegality of a decision if the State failed to bring an action for annulment within the time limit.¹³ According to the ECJ, international agreements are of relevance for the assessment of the validity only in so far as they are directly applicable.¹⁴ The legality of a measure must be assessed on the basis of the factual and legal situation which existed at the time of its adoption.¹⁵

- 11 The question of validity may not refer to **primary law** as it forms the **constitutional basis** for all acts of the Union and has no inherent hierarchy governing its provisions (unlike, for example, Article 79 para. 3 Grundgesetz (German constitution)). If, however, exactly these fundamental principles or fundamental provisions that are indispensable for acts of the Union (such as those resulting from Article 2 TEU) were subject to a further development of the law in the sense that it subordinated these rules to an **unwritten eternity clause**, the remaining provisions could also be the subject of a question of validity in the future.

12 **III. Capacity to initiate a procedure (para. 2)**

The procedure is available to all **courts or tribunals of the Member States**. The term ‘court or tribunal of a Member State’ is defined by Union law only. It requires a permanent, independent body that is established by law to rule on legal disputes¹⁶, even if judgments can be given according to what appears **fair and reasonable**¹⁷. Both its activities and its designation as a court are of no significance. If national courts act as administrative authorities (district court as court of registration) they may not make a reference to the ECJ because proceedings concerned did not intend to lead to a decision of a judicial nature.¹⁸ This applies even more to a ‘Committee on Taxation’ which does not review the decision of a public authority but adopts the decision on tax matters itself¹⁹ as well as to a board of appeals of an Austrian finance authority that is not independent²⁰.

¹⁰ ECJ Case C-408/95 *Eurotunnel* [1997] ECR I-6315, concerning the validity of a directive.

¹¹ ECJ Case C-178/95 *Wiljo* [1997] ECR I-585.

¹² ECJ Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833.

¹³ ECJ Case C-241/01 *National Farmers' Union* [2002] ECR I-9108.

¹⁴ ECJ Case 21/72 *International Fruit* [1972] ECR 1219; Case 266/81 *SIOT* [1983] ECR 731.

¹⁵ ECJ Case C-248/95 *SAM* [1997] ECR I-4475.

¹⁶ ECJ Case C-24/92 *Corbiau* [1993] ECR I-1277; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961; Case C-92/00 *HI* [2002] ECR I-5574; Case C-258/97 *Landeskrankenanstalten* [1999] ECR I-1405; Case C-92/00 *Hospital Ingenieure Krankenhaus-Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-5553.

¹⁷ ECJ Case C-393/92 *Almelo* [1994] ECR I-1508.

¹⁸ ECJ Case C-111/94 *Job Centre* [1995] ECR I-3361; Case C-447/00 *Holto* [2002] ECR I-737.

¹⁹ ECJ Case C-134/97 *Victoria Film* [1998] I-7023.

²⁰ ECJ Case C-516/99 *Walter Schmid* [2002] ECR I-4573, mns 34 et seq.

‘Courts of a Member State’ may also be dispute settling authorities that do not as such 13
 fall under the State jurisdiction (for example, an arbitration panel for the sickness fund of
 the mining industry²¹ or an appeals committee (court of professional conduct) for gen-
 eral medicine²²). In contrast, **private arbitration panels** do not constitute national courts
 within the meaning of Article 267 TFEU; in these cases, there is no sufficiently close
 link to the State organisation of the settlement of legal disputes since the parties are un-
 der no obligation to refer their dispute to arbitration and the public authorities in the
 Member State concerned are not involved in the decision to opt for arbitration and are
 not called upon to intervene automatically in the proceedings before the arbitrator.²³
 Also sports courts such as courts of professional sports federations (for example the
 sports court of the German Football Federation) are generally not entitled to make a ref-
 erence due to the lack of participation of public authorities.²⁴ However, courts that have
 jurisdiction to review arbitral awards are entitled to make a reference to the ECJ for a
 preliminary ruling on the interpretation of questions that came up during the arbitration
 procedure.²⁵

The court has to be concerned **with questions of interpretation or validity**, deciding 14
 ex officio **and regardless of the legal views of the parties** whether to pose such a ques-
 tion. A question of interpretation may also concern a provision of a directive that the
 Member State has broadened to purely internal cases although these are not covered by
 the directive.²⁶

It is for the national court to decide whether the questions of interpretation or validity 15
 raised by the case are **relevant**.²⁷ Hypothetical questions cannot be submitted.²⁸ A
 court is entitled to make a reference for a preliminary ruling on a question which
 depends on a preliminary question that necessitates difficult investigations.²⁹ The inter-
 pretation may also be necessary if a national law allows its own nationals to enjoy the
 same rights like nationals of other Member States in the same situation under Union
 law.³⁰

The question must be raised in a **genuine dispute**. The parties to the dispute shall not 16
 obviously purport that there is a legal dispute **only** for the purpose of receiving an answer
 to specific legal questions.³¹ The fact that the case in question is a ‘test case’ does not nec-
 essarily preclude the possibility that it constitutes a genuine case.³²

IV. Obligation to make a reference

17

1. Basic principle

The obligation to make a reference has the purpose of ensuring the uniform interpre-
 tation and application of Union law. The court or tribunal is obliged to bring the matter

²¹ ECJ Case 61/65 *Vaassen-Göbbels* [1966] ECR 378.

²² ECJ Case 246/80 *Broekmeulen* [1981] ECR 2311.

²³ ECJ Case 102/81 *Nordsee* [1982] ECR 1095; Case C-125/04 *Denuit and Others v Transorient-Mosaïque Voyages* [2005] ECR I-923.

²⁴ See *Frenz*, Handbuch Europarecht, Volume 5, mn. 3284.

²⁵ ECJ Case C-126/97 *Eco Swiss* [1999] ECR I-3079.

²⁶ ECJ Case C-28/95 *Leur Bloem* [1997] ECR I-4161.

²⁷ ECJ Case C-348/89 *Mecanarte* [1991] ECR I-3277.

²⁸ ECJ Case C-83/91 *Meilicke* [1992] ECR I-4871; Case C-422/93 *Erasun* [1995] ECR I-1567.

²⁹ ECJ Case C-127/92 *Enderby* [1993] ECR I-5535.

³⁰ ECJ Case C-515/99 *Reisch* [2002] ECR I-2192.

³¹ ECJ Case 104/79 *Foglia v Novello I* [1980] ECR 745; Case 244/80 *Foglia v Novello II* [1981] ECR 3045.

³² ECJ Case 112/80 *Dürbeck* [1981] ECR 1095.

before the ECJ when interpretation or validity questions are raised in a case pending before a court or tribunal of a Member State if there is **no judicial remedy** under national law against the decision. It is debated whether the obligation is only given if there is an option for judicial remedy against the decision in the concrete main proceeding (**concrete theory**)³³, even though the wording of paragraph 3 can be interpreted in a way that only courts of last instance as such are obliged to make a reference (**abstract theory**). The ECJ implicitly follows the **concrete theory**.³⁴ This approach suits best as far as **effective legal protection** is concerned.

- 18 If the admissibility of an appeal depends on a special authorisation by the respective court, the court is not obliged to make a reference if it allows the appeal. A remaining possibility to pursue an extraordinary remedy (e.g. constitutional complaint) does not exempt from the obligation to make a reference. For the discussion about implementing a legislative obligation of the Bundesverfassungsgericht (German Federal Constitutional Court) to make a reference, see mn. 1 above.

19

2. Question of interpretation

A court is obliged to make a reference if a question of interpretation is raised in a legal dispute pending before it. The fact that the court itself assumes that the answer to this question is obvious does not affect the obligation. The principle ‘**in actis claris non fit interpretatio**’ is out-dated by modern hermeneutics. However, a question of interpretation does not arise if (a) the relevant EU law provision has been interpreted by the ECJ already or (b) the correct interpretation of EU law is so obvious that there is no room for any reasonable doubt; whether this the case has to be determined under due consideration of the peculiarities of European Union law, the particular difficulties involving its interpretation and the risk of divergent judicial decisions within the European Union.³⁵ In principle, the law of the Union does not require a reference to the ECJ in case that merely deals with the question whether Union law is applicable to a case at all and the court concerned assumes that this is the case. A different **administrative practice** within a Member States does not necessarily object the assumption that the correct interpretation of Union law is manifest.³⁶

20

3. Question of validity

If a **question of validity** is raised in a legal dispute pending before a court and the court intends to negate the validity of an act of institutions, bodies, offices or agencies of the Union, **any court** is obliged to make a reference – regardless of the fact that the wording of Article 267 TFEU suggests that only courts of last instance are subject to this obligation. It is for the ECJ to find the invalidity; this view has been established in a **landmark decision**³⁷ and reasoned by making reference to the **coherence of the legal system**, the **unity of the EU legal order** and the **requirement of legal certainty**. Objective doubts in view of validity which the court does not support do not lead to an obligation to make a reference.

³³ This is probably the prevailing opinion amongst scholars, see Schwarze/Schwarze, Article 267 AEUV mn. 43 with further references.

³⁴ ECJ Case 6/64 *Costa v ENEL* [1964] ECR 1253; Case 35/82 *Morson* [1982] ECR 3723; Case C-99/00 *Lyckeskog* [2002] ECR I-4839.

³⁵ ECJ Case 77/83 *CILFIT* [1984] ECR 1257.

³⁶ ECJ Case C-495/03 *Intermodal Transports v Staatssecretarissen van Financiën* [2005] ECR I-8151.

³⁷ ECJ Case 314/85 *Foto-Frost* [1987] ECR 4199.

However, all courts (including courts of lower instance) are obliged to make a reference to the ECJ if they intend to treat an act as valid although the ECJ has, in a further preliminary procedure, found that it is invalid.³⁸

4. Interim measures

Courts are under no obligation to make a reference if an **interpretation question** is raised in an interim procedure (meaning urgent cases) that is potentially followed by a proceeding in the main action which can review the interim decision.³⁹ However, an obligation to make a reference arises if the national court does not intend to apply a regulation which it considers to be **invalid**. In such cases the court is entitled to grant such a suspension only if it entertains serious doubts as to the validity of the regulation, if the suspension of enforcement retains the character of an interim measure until the ECJ has delivered a ruling on the question of validity, and if the conditions for the adoption of interim measures by the ECJ⁴⁰ are satisfied.⁴¹ Such an approach is indispensable as far as ensuring the *effet utile* principle is concerned. It remains possible to review the decision of the national court in the national appeal procedure.⁴²

V. The revised special rule in para. 4

Due to the expansion of the jurisdiction of the ECJ in the field of justice and home affairs (the area of freedom, security and justice), Article 267 para. 4 TFEU has been introduced in order to regulate a special regime. As an intermediate procedure relating to matters concerning a person in custody, it is particularly important to expedite the preliminary ruling procedure. This follows from the great impact detention measures have in view of **fundamental rights**. Neither the wording nor the statutory system indicates whether Article 267 para. 4 TFEU constitutes a case of mandatory application of the procedure under Article 105 RoP ECJ (expedited procedure) or under Article 107 RoP ECJ or whether the ECJ might introduce a further expedited procedure.

VI. Preliminary ruling procedure

1. Referring court

The national court initiates the preliminary ruling by its **order to make a reference**, formulating the question of interpretation or validity submitted to the ECJ. It requires a (short) substantiation in order to explain the question in view of the crucial merits of the dispute. This is not stipulated expressly, but follows from the need to provide other Union institutions and Member States with the possibility to submit an opinion and enabling the ECJ to deliver a reasonable answer to the question.⁴³ If necessary, the Court may have to reformulate the questions referred to it (principle of cooperation between courts).⁴⁴ Therefore it is recommended to submit the case files.

³⁸ ECJ Case 66/80 *International Chemical Corporation* [1981] ECR I191.

³⁹ ECJ Case 107/76 *Hoffmann-La Roche* [1977] ECR 957.

⁴⁰ See Article 279 TFEU.

⁴¹ ECJ Joined Cases C-143/88 and C-92/89 *Süderdithmarschen* [1991] ECR I-415.

⁴² ECJ Case C-465/93 *Atlanta* [1995] ECR I-3761; Case 466/93 *Atlanta* [1995] ECR I-3799; Case C-334/95 *Kruger* [1997] ECR I-4517.

⁴³ ECJ Case C-320/90 *Circostel* [1993] ECR I-939.

⁴⁴ ECJ Case C-62/00 *Marks & Spencer* [2002] ECR I-6348.

- 25 The submission of the request for a preliminary ruling is not subject to any particular formalities and can be addressed directly to the ECJ (Article 23 Statute ECJ).
- 26 If the national law allows an appeal against its decision to make a reference, the appellate court can only annul the respective decision without a violation of Article 267 para. 2 TFEU on the condition that the decision procedure had suffered formal errors or that the posed question of interpretation or validity was not relevant for the decision; procedural rules that limit the right of courts of lower instance to make a reference are inapplicable.⁴⁵

27 **2. Procedure before the ECJ**

- The procedure before the ECJ is an objective (non-adversarial) **intermediate proceeding**⁴⁶, serving the interest in uniform interpretation and giving review of validity of European Union law. The parties to the main dispute are entitled to make proposals in this proceeding but they have no right of motion. If the claims of an applicant in the main proceedings have been satisfied in full or if it has no purpose any longer for other reasons, the proceeding before the ECJ became devoid of purpose for the national court.⁴⁷
- 28 The proceedings consist of a **written** and an **oral** part (Article 20 Statute ECJ). The language of the case is the official language of the national court (Article 37 para. 3 RoP ECJ).
 - 29 The decision of the national court or tribunal shall be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, to the ECB or the Council and the European Parliament, and to the institution, body, office or agency of the Union if the validity or interpretation of an act of the Council, the ECB or a joint act of the Council and the European Parliament or an act of an institution, body, office or agency of the Union is in dispute; all parties may lodge written observations within two months (Article 23 para. 3 Statute ECJ).
 - 30 As an exception to the general obligation to be represented by a lawyer (Article 19 Statute ECJ), the ECJ shall, as regards the representation and attendance of the parties to the main proceedings in the preliminary ruling procedure, take account of the rules of procedure of the national court or tribunal which made the reference. The Court may grant, by way of legal aid, assistance for the purpose of facilitating the representation or attendance of a party under extraordinary circumstances.
 - 31 The oral hearing ends with the submissions (during a separate session) of the Advocate-General⁴⁸.
 - 32 The ECJ delivers its **judgment** in another appointment, which shall be binding from the date of its delivery. The parties shall be served with certified copies of the judgment.
 - 33 The judgment does not contain a decision on the costs. The costs of the preliminary procedure constitute a part of the costs of the main proceeding; it shall be for the national court to decide as to the costs of the reference (Article 102 RoP ECJ).⁴⁹
 - 34 The proceedings before the ECJ shall, in general, be free of charge (Article 143 RoP). The costs of the Member States and the EU institutions which have participated in the proceedings are not recoverable. The conditions for the eligibility of any necessary ex-

⁴⁵ ECJ Case 166/73 *Rheinmühlen I* [1974] ECR 33; Case 146/73 *Rheinmühlen II* [1974] ECR 139.

⁴⁶ ECJ Case C-422/93 *Erasun* [1995] ECR I-1567.

⁴⁷ ECJ Case C-314/96 *Djabali* [1998] ECR I-1149.

⁴⁸ See Article 252 TFEU.

⁴⁹ ECJ Case C-472/99 *Clean Car* [2001] ECR I-9699.

penditure are determined in accordance with the relevant national law (Article 143 RoP is not applicable).

In average, a preliminary ruling before the ECJ takes 15.7 months; urgent preliminary ruling procedure take 1.9 months (according to statistics from 2012⁵⁰).

Based on the Rules of Procedure ECJ, the President of the ECJ may, on the condition that the Judge-Rapporteur has made a respective proposal and the Advocate-General has been heard, order an expedited preliminary ruling (Articles 105 et seq. RoP ECJ). Since March 2008, there is also the possibility to decide upon the request of a national court or exceptionally by its own motion if the area of freedom, security and justice is concerned.⁵¹

VII. Effect of the judgment

The effect of a judgment of the ECJ delivered in a preliminary ruling procedure is not specifically regulated. However, according to the purpose of Article 267 TFEU, the judgment is binding at least on the referring court and all other courts which have to decide in the same dispute.⁵² If the national court takes the view that the question has not been answered sufficiently, it may make another reference.⁵³

Apart from the above-mentioned effect (see mn. 37 above), there is no binding effect in a formal sense. However, if the same question of interpretation or validity is raised in a different legal dispute, the court is not obliged to make a reference if it decides to comply with the judgment delivered by the ECJ.⁵⁴ Unless it makes its own reference, it is not entitled to treat an act as valid that the ECJ has found to be invalid and may not interpret a provision of Union law contrary to the ruling delivered by the ECJ.⁵⁵

Union institutions and governmental entities are entitled to rely on the invalidity of the act that has been found to be invalid.⁵⁶ The institution of the Union which adopted the act in question is obliged to take the necessary measures.

Under certain circumstances, the ECJ has the right to limit the retroactive effects of the interpretation or validity (analogy to Article 264 para. 2 TFEU).⁵⁷ However, this does not include the right to limit the effects as far as the applicant of the main proceeding is concerned (right to effective judicial protection).⁵⁸ Nonetheless, even in the event of a ruling that is as such not in favour of the Member State, the Member State continues to have the right to invoke the fact that national time limits have not been met.⁵⁹

VIII. Enforcement of the obligation to make a reference

1. Union law

A breach by the Member State's court of its obligation to make a reference constitutes an infringement of the Treaties by the Member State. Accordingly, the Council and Commis-

⁵⁰ Annual report of the Court of Justice of 2012, 104 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf).

⁵¹ OJ 2008 L 24/39 and 24/42.

⁵² ECJ Case 52/76 *Benedetti* [1977] ECR 163.

⁵³ ECJ Case 29/68 *Milch-, Fett- und Eierkontor* [1969] ECR 178.

⁵⁴ ECJ Case 66/80 *International Chemical Corporation* [1981] ECR 1191.

⁵⁵ ECJ Case C-62/93 *BP v Greece* [1995] ECR I-1883.

⁵⁶ ECJ Case 23/75 *Rey Soda* [1975] ECR 1279.

⁵⁷ ECJ Case 43/75 *Defrenne II* [1976] ECR 455; Case 309/95 *Barra* [1988] ECR 355; Case C-262/88 *Barber* [1990] ECR I-1889; Case C-367/93 *Rodgers* [1995] ECR I-2229; Case C-184/99 *Grzelczyk* [2001] ECR I-6229.

⁵⁸ ECJ Case C-228/92 *Roquette Frères* [1994] ECR I-1465.

⁵⁹ ECJ Case C-231/96 *Edis* [1998] ECR I-4951.

sion as well as other Member States are entitled to initiate **infringement proceedings** with the aim of establishing the infringement of the Treaties (Articles 258, 259 TFEU). However, this does not eliminate the judgment of the Member State. In case of manifest and considerable infringements of the obligation to make a reference to the ECJ, the parties concerned have the right to initiate proceedings based on **State liability**. These proceedings are to be pursued before the competent national court. In the case *Köbler*⁶⁰, the ECJ found that such liability for judicial mistakes is given in the event of ‘manifest errors’, even though such a right is not even recognized in all legal systems of the Member States.

42

2. National law

The following paragraphs show German law as an example for applicable national law. According to **German constitutional law**, a constitutional complaint may be admissible. Under certain circumstances, the complainant may claim that the judgment of a German court violated one of his fundamental rights.⁶¹

43 Moreover, the failure to consult the ECJ can constitute a breach of the **right to one’s lawful judge** (Article 101 para. 1 s. 2 Grundgesetz (German constitution)).⁶² The ECJ has been found to be a lawful judge within the meaning of Article 101 para. 1 s. 2 Grundgesetz.⁶³ However, this provision is only violated if the failure to make a reference to the ECJ is based on **arbitrariness**. According to the more restrictive view of the Bundesverfassungsgericht (German Federal Constitutional Court)⁶⁴, this can be assumed in the following constellations:

44 – Despite the fact that the question relating to Union law is of relevance to the main proceeding, the national court does **not even consider** making a reference to the ECJ although the national court itself is unsure about the correct answer to the question;

45 – the national court **deliberately** deviates from the ECJ’s case law on the relevant issue in question;

46 – in other cases, arbitrariness can only be assumed if the court of last instance has unwarrantedly exceeded its margin of discretion; this is especially true if **opposing views** are **clearly preferable** to the opinion held by the national court.

47 Hence, a violation of the obligation to make a reference can be sanctioned in very few cases only.⁶⁵ An additional separate issue is whether constitutional courts of the Member States should be subject to an obligation to make a reference. The Bundesverfassungsgericht (German Federal Constitutional Court) has not yet availed itself of this possibility. The same can be said, however, regarding other constitutional courts of the Member States. For that reason, it is debated in Germany whether to implement a law obliging the Bundesverfassungsgericht (German Federal Constitutional Court) to make a reference (see mn. 1 above).

Article 268 [Dispute relating to compensation for damages] (ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

⁶⁰ ECJ Case C-224/01 *Köbler* [2003] ECR I-10239.

⁶¹ See BVerfG NJW 1988, 1458 et seq.

⁶² BVerfG NJW 2007, 1521.

⁶³ See already BVerfGE 73, 339 – *Solange II*.

⁶⁴ BVerfGE 82, 159, NJW 1988, 1457, BVerfGE 75, 223, NJW 2007, 1521.

⁶⁵ Cf. CR/Wegener, Article 234 mn. 33.

Bibliography: *Fuß*, La responsabilité des Communautés Européennes pour le comportement illégal de leurs organes, R. T. D. E. 1981, 1; *Heukels/McDonnell* (eds), The Action for Damages in Community Law, 1997; *Tridimas*, Liability for the Breach of Community Law: Growing Up and Mellowing Down?, 38 CML-Rev 2001, 301.

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I. General remarks

1

Article 268 TFEU essentially picks up its predecessor norm Article 235 TEC. It is new, however, as the reference to Article 340 para. 3 TFEU shows, that the ECB (and not the EU for the ECB) is liable for potential damages itself within the framework of public liability. Both in former and current legislation, the legal protection against the activities of EU institutions has covered, beside the actions for annulment (Article 263 TFEU) and the action for failure to act (Article 265 TFEU), the independently existing¹ claim for damages based on the non-contractual liability of the European Communities (now Union), today in accordance with Article 340 para. 2 TFEU. However, the claim for damages is inadmissible if it rather seeks to annul an enforceable individual decision in fact.² The claim for damages is a legal action to demand performance. Article 268 TFEU therefore gives jurisdiction to the ECJ only. This exclusivity applies to procedures for the safeguarding of means of proof.³ As to the jurisdiction of the GC, see Article 256 TFEU.

II. Admissibility of the application

2

The action is brought against the EU that is represented by the institution which is responsible for the damage causing act (broadly interpreted; e.g. also the EIB⁴). An exception is made for the self-liability of the ECB. Every party who suffered damage has legal standing to bring proceedings.

The claimant has to assert to have suffered damages caused by an unlawful administrative act of an EU institution. This requires that the damage claimed is imputable to an action of the Union. This imputability has to be answered in the affirmative at least if the Union was acting without involving a Member State authority. In contrast, when Member State authorities have caused the damage when implementing Union law, a claim for compensation against the Union is generally inappropriate. It corresponds to the **general division of responsibilities** between the Union and the Member States that the claimant in that case should seek legal protection on the basis of the national public liability laws in front of the Member State's courts. An exception is considered, however, if the Union law did not give a margin of discretion to the Member State's authorities (e.g. if the Member State authority has to deny the claimant's application for performance due to an (unlawful) Union regulation the national authority had to comply with⁵ or if the Com-

¹ ECJ Case 5/71 *Schöppenstedt* [1971] ECR 975.

² CFI Case T-485/93 *Dreyfus* [1996] ECR II-1101.

³ ECJ Case C-275/00 *First NV* [2002] ECR I-10943.

⁴ ECJ Case C-370/89 *SGEEM* [1993] ECR I-2583.

⁵ ECJ Case 64/76 *Dumortier Frères* [1979] ECR 3113.

mission issued an according instruction⁶). Even if it is unacceptable to initiate a national legal action, the ECJ affirmed the admissibility of a claim for damages; for instance if the national legal remedies or possibilities of proceeding do not ensure effective legal protection for the individual.⁷

- 4 The application must state the subject-matter of the proceedings and it must provide a short description of the circumstances giving rise to urgency as well as the claimant's request.
- 5 The application does not have to claim for a specific sum of payments if the very nature and extent of the damages are clear enough under the relevant circumstances.
- 6 If the extent of the damage is not yet calculable but foreseeable with a reasonable degree of certainty, an application for declaratory relief (only stating that compensations have to be paid without exactly determining their extent) is regularly admissible.⁸
- 7 The claim must not be time-barred. It is inadmissible if the period of limitation of five years since the event giving rise to the liability (Article 46 Statute ECJ) has already expired at the time the action is filed. However, the ECJ does not examine the period of limitation **ex officio** but only due to a **rebuttal of the defendant**.⁹ The period of time begins to run only with the fulfilment of all prerequisites for the claim (including the occurrence of the damage)¹⁰. The period is interrupted when an application is made to the relevant institution of the Union. In the further proceedings the relevant time periods of limitation for actions for annulment (Article 263 TFEU) and the action for failure to act (Article 265 TFEU) apply.

8 **III. Substance of the application**

The action is well-founded if the claimant's statement is factually and legally correct. In any case, a liability of the Union for '**normative injustice**' (infringements by the legislative branches of government) is covered.¹¹

9 **IV. Judgement of the ECJ**

The decision granting the application of the ECJ is a **performance judgement** or in some cases (see mn. 6 above) a **declaratory judgement**. The performance judgement is enforceable according to Article 280 and Article 299 TFEU.

Article 269 [Limited jurisdiction to suspension of rights of membership]

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

⁶ ECJ Case 174/84 *Krohn* [1986] ECR 768.

⁷ ECJ Case 12/79 *Wagner* [1979] ECR 3671; Case C-20/88 *Roquette Frères* [1989] ECR 1553.

⁸ ECJ Case 56/74 *Kampffmeyer II* [1976] ECR 747; Case 281/84 *Bedburg* [1987] ECR 88.

⁹ ECJ Case 20/88 *Roquette Frères* [1989] ECR 1553.

¹⁰ ECJ Case 51/81 *de Franceschi* [1982] ECR 117.

¹¹ Cf. Schwarze/Schwarze, Article 268 AEUV mn. 4.

Article 269 TFEU, systematically relocated to this part of the Treaties, takes up the 1 regulatory content of draft-Article III-371 TECE with editorial amendments. Draft-Article III-371 TECE in turn had its role model of primary law in the old version of Article 46 lit. e TEU. The *ratio legis* is to limit the jurisdiction of the ECJ in case of political actions under Article 7 TEU.¹ Article 46 lit. d TEU was introduced by the Treaty of Nice in order to exercise judicial control over the sanctioning mechanism of Article 7 TEU at least in purely procedural provisions. Article 7 TEU deals with the sanctioning mechanism of the Union in case of a risk of a serious breach of the Unions principles from Article 2 TEU (**early warning procedure**²). As to contents, the decision stays non-justiciable as it is a political decision (implicit idea of a **political-question-doctrine** that wants to withdraw the power from the judiciary to decide in legally determined questions which are politically questions in their very nature with special considerations to the aspect of separation of powers). However, it should be ensured that the procedural provisions are met, including the consultation rights stated in Article 7 TEU in particular.

The capacity to apply is given to the Member State which is affected by the measures 2 laid down in Article 7 TEU.

Article 269 para. 2 TFEU establishes a narrow timeframe of one month only regarding 3 both the period for filing an action and the period for delivering a judgement. The restrictive period bond shall serve legal certainty and shall prevent intentionally extended trials. Therefore a decision has to be taken at least two months after the application. This particularly narrow timeframe is compatible with the principle of the rule of law since the ECJ does not conduct a long and extensive content review of the conditions laid down in Article 7 TEU.

Article 269 TFEU does not establish a new or separate type of action. Therefore the ac- 4 tion for annulment, the action for injunction as well as the infringement proceedings apply since decisions made under Article 7 TEU are to be qualified as acts of an institution after the merger of the different pillars. Article 269 TFEU limits the ECJ's extent of examination within these admissible types of action. It is (correctly) criticised that a complete exclusion of the matter in substance and therefore a limitation to the merely procedural part is not compatible with the function of the ECJ as a constitutional court.³

Article 270 [Civil service disputes] (ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Bibliography: *Curral*, Handling Cases in the Civil Service Tribunal – procedural particularities, Colloque à l'occasion du 5e anniversaire du Tribunal de la fonction publique, EuGH 2010, 31; *Millett*, Staff Cases in the Judicial Architecture of the Future, in: O'Keeffe/Bavasso (eds), *Judicial Review in European Union Law (Liber Amicorum in Honour of Lord Slynn of Hadley (Vol 1), 2000, 221 et seq.*

Article 270 TFEU takes up Article 236 TEC. According to this provision, the ECJ has 1 exclusive jurisdiction in matters concerning its officials respective labour law-related

¹ Cf. VHVH/*Pache*, Article 269 AEUV mn. 1.

² See Schwarze/*Becker*, Article 7 EUV mn. 4.

³ Cf. VHVH/*Pache*, Article 269 AEUV mn. 5.

disputes between the Union and its officials as well as other servants of the Union with the exception of the so-called local staff. The European Union Civil Service Tribunal established according to Council Decision 2004/752/EC, Euratom¹ is the functionally competent court of first instance.

- 2 The decisive rule is contained in **Article 90 Staff Regulations of Officials**², which is applicable by analogy for other servants (Articles 46, 73, 83, 97 Conditions of Employment of other servants of the Union). National courts of the respective place of employment remain to have jurisdiction on matters concerning local staff.
- 3 The large number of cases³ essentially influenced the decision to expand the Court of the European Union and to establish the 'General Court' (formerly the Court of First Instance, CFI) and (since the Treaty of Nice) to establish a specialised court (European Union Civil Service Tribunal). The ECJ particularly specified general constitutional principles (equal treatment, protection of legitimate expectation, principle of acquired rights, employer's duty of care, procedural rights) in its extensive jurisdiction on staff cases.
- 4 The decisions of the GC and the European Union Civil Service Tribunal have been published in the Reports of European Union Staff Cases since 1 January 1994.

***Article 271 [Jurisdiction in disputes concerning the EIB and ECB]
(ex Article 237 TEC)***

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

- (a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;
- (b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;
- (c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;
- (d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Bibliography: *Dunnett*, The European Investment Bank: Autonomous Instrument of Common Policy? 31 CMLRev 1994, 721; *Käser*, The European Investment Bank: Its Role and Place within the European Community System, 4 YEL 1984, 303; *Lewenhak*, The Role of the European Investment Bank, 1982; *Smits*, The European Central Bank: Institutional Aspects, 45 ICLQ 1996, 319.

¹ OJ 2004 No L 333/7; see also Article 257 TFEU.

² ECJ Case C-246/95 *Coen* [1997] ECR I-403.

³ Cf. *VHvH/Pache*, Article 270 AEUV mn. 2.

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I. General remarks 1

Article 271 lit. a to lit. c TFEU regulate the jurisdiction of the ECJ for all cases concerning the European Investment Bank (EIB); Article 271 lit. d TFEU concerns cases that contain obligations of national central banks according to EU law and therefore affect the authority of the European System of Central Banks (ESCB) respectively the European Central Bank (ECB) to issue instructions to national central banks. Its predecessor Article 237 TEC was taken over to a great extent. Article 271 lit. d s. 2 TFEU contains a linguistic clarification: The provision speaks of the Governing Council of the ECB now (instead of the Council of the ECB). The Treaty of Lisbon acknowledges the ECB as an institution of the Union (Article 13 TEU); therefore the former qualification as an ‘institution sui generis’ is superfluous.

In detail: As well as Article 237 TEC, Article 271 TFEU contains a rule establishing the jurisdiction of the ECJ in actions against a Member State concerning the infringement of obligations under the EIB Statute (Article 308 para. 3 TFEU) as well as in actions for annulment against measures by the Board of Governors and the Board of Directors of the EIB. It was already supplemented by the provision of lit. d through the Treaty of Maasricht (actions against a national central bank concerning the non-fulfilment of obligations within the Economic and Monetary Union as well as the ESCB Statute). The Treaty of Lisbon newly adopted the reference to the Statute of the ECB.

II. Jurisdiction of the ECJ 3

1. Actions against Member States concerning an infringement of the EIB Statute

The procedure of Article 258 TFEU is to apply, with the difference that the **Board of Directors** of the EIB takes the place of the Commission.

Article 259 TFEU is to apply analogously under the same conditions concerning actions of **Member States**.¹

2. Action for annulment against (binding) measures of the Board of Governors 5

The procedure of Article 263 para. 1 TFEU is to apply provided that every **Member State**, the **Commission** as well as the **Board of Directors** have legal standing.

3. Action for annulment against measures of the Board of Directors 6

The procedure of Article 263 para. 1 TFEU is to apply provided that every **Member State** as well as the **Commission** have legal standing. The action may only be based

¹ See GHN/Karpenstein, Article 271 AEUV mn. 5.

on the infringement of formal requirements in the context of granting loans and guarantees.

7 4. Actions against a national central bank

The procedure of Article 258 TFEU is to apply provided that the **Board of Governors of the European Central Bank** necessarily substitutes the Commission. As *lex specialis*, Article 271 TFEU excludes the right of action of a Member State under Article 259 TFEU; likewise Article 260 para. 2 TFEU does not apply in the case of a failure to comply with a judgement, different from the procedure according to Article 271 lit. a TFEU.

8 III. Other jurisdictions of the ECJ

A right of action of **natural** or **legal** persons against the EIB corresponding to Article 253 para. 4 TFEU is not provided for, even if they are individually and directly affected.² Concerning disputes between the bank on the one hand and its creditors, debtors or third parties on the other hand, the ECJ decides only if a respective arbitration clause is in place (Article 27 para. 1 s. 2 Statute EIB). In all other cases, the competent national courts decide (Article 27 para. 1 s. 1 Statute EIB), which have to apply Article 267 TFEU and the EIB Statute is treated as part of the Treaties (Article 258 para. 3 TFEU, see also Article 51 TEU)³, meaning that it can be interpreted by the ECJ only ('interpretation monopoly of the ECJ').⁴

*Article 272 [Jurisdiction pursuant to an arbitration clause]
(ex Article 238 TEC)*

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Bibliography: *Gavalda*, Arbitration in EC Law, 3 ARIA 1993, 232; *Kuyper*, The European Communities and Arbitration, in: Soons (ed.), International Arbitration: Past and Prospects, 1990, 181 et seq.; *Schmitthoff*, Arbitration and EEC Law, 24 CMLRev 1987, 143; *van Houtte*, Dispute Settlement of Contracts Financed by the European Development Fund, 19 CMLRev 1982, 591.

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1 I. General remarks

The wording of Article 272 TFEU is nearly identical to Article 238 TEC and the provision was also left unchanged as regards content. The meaning of the provision results from the limited competences of the Court of Justice. According to the principle of con-

² CFI Case T-460/93 *Tête v EIB* [1993] ECR II-1257.
³ See also Article 308 TFEU mn. 3.
⁴ For legal actions for public liability claims see Article 268 TFEU mn. 2 as well as Article 340 TFEU.

ferral of powers (see Article 7 TFEU), the ECJ is only entitled to decide cases in which the Treaties explicitly lay down its competences. **Additional competences** may be created by contractual prorogations according to Articles 272 and 273 TFEU. However, the ECJ does not decide as an arbitral tribunal in the traditional sense in these cases because the parties of the arbitral agreement are bound to the Court's structure and procedure. The ECJ still acts as an institution of the Union¹. Only the jurisdiction of the Court may be agreed upon.

II. Disputes of the Union

2

The **prorogation** according to Article 272 TFEU is admissible for decisions of disputes referring to contracts (governed by public or private law) with the Union as one party of the contract.

The **Union** has to be **party to the contract**. Contracts of independent institutions of the Union, which act on their own behalf but operate for the Union's budget, are treated equally. For the (legally responsible) European Investment Bank, see Article 27 Statute EIB.

Any legal entity may be contracting party of the Union: Member States, third countries, legal entities and individuals under national law².

Subject-matter of the arbitral agreement may be contractual claims for performance³ and also other claims connected with the contract, such as compensation (see Article 246 TFEU) or unjust enrichment⁴.

Article 272 TFEU does not prevent the Union from agreeing upon another court (arbitral tribunal) instead of the ECJ.

III. Arbitration agreement

7

The arbitration agreement may be part of the contract whose interpretation or application is contested or it may be agreed upon in a separate arbitration agreement. The agreement may also be concluded for settling an already existent difference. The arbitration agreement has to be **made in writing**, as a copy has to be attached to the complaint (Article 122 para. 2 RoP ECJ). Jurisdiction according to the arbitration agreement must be construed narrowly⁵. The **validity** of the arbitral clause is examined ex officio on the basis of the law applicable to the contract. In contracts between the Union and countries it may be international law, in other cases it may be national law, determined by the conflict of laws⁶. The authority of the Union follows from EU law (Article 272 TFEU) with respect to the priority of the exclusive types of actions.

IV. Judgment of the ECJ

8

A judgment granting specific performance may be issued against the Union. Different from the legal actions explicitly provided for by the Treaties, the performance is not limited to damage compensation.

¹ Cf. Schwarze/Schwarze, Article 272 AEUV mn. 3.

² Cf. Schwarze/Schwarze, Article 272 AEUV mn. 9.

³ Pecuniary claim: ECJ Case C-142/91 *Cebag* [1993] ECR I-553.

⁴ ECJ Case 426/85 *Zoubek* [1986] ECR 4057; Case C-209/90 *Feilhauer* [1992] ECR I-2613; Case C-42/94 *Heidemij Advies* [1995] ECR I-1417; Case C-323/02 *Hydrowatt* [2003] ECR I-9071.

⁵ ECJ Case C-114/94 *IDE v Commission* [1997] ECR I-803.

⁶ ECJ Case 109/81 *Porta v Commission* [1982] ECR 2469; Case C-114/94 *IDE v Commission* [1997] ECR I-803.

9 Judgments may be enforced according to Articles 280, 299 TFEU. However, the general view is that Article 299 para. 1 TFEU does not apply to arbitral awards⁷. Any measures of constraint directed against the Union have to be approved by the ECJ⁸.

**Article 273 [Jurisdiction in dispute between Member States
under a special agreement]
(ex Article 239 EC)**

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

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1 I. General remarks

In contrast to Article 272 TFEU (arbitral agreement involving the Union), Article 273 TFEU refers to arbitral agreements between the Member States among each other. The provision is based on the almost equally worded Article 239 TEC.

2 II. Arbitral agreement

Possible subject-matters of the arbitral agreement are disputes between the Member States arising out of contracts which are related to the subject-matter (objectives, tasks) of the Treaties. Similar to Article 272 TFEU, the ECJ does not decide as an actual arbitral tribunal but rather as an institution of the Union¹. The arguments must not concern the interpretation and application of the Treaties themselves because then infringement proceedings pursuant to Article 259 TFEU may be initiated. Even if the conditions of Article 273 TFEU are met, the Member States are not obliged to refer the dispute to the ECJ. They may agree upon the jurisdiction of another court (arbitral tribunal).

3 The validity of the arbitral agreement is to be determined in accordance with international law. The applicable (substantive) law is international law, especially the disputed international agreement itself, whose content is to be determined by applying the general rules on the interpretation of international law. In addition, national or European law may be applicable incidentally. Special emphasis is to be put on the fact that the arbitral tribunal must not violate fundamental principles of EU law².

⁷ Cf. CR/Cremer, Article 272 AEUV mn. 10 with further references.
⁸ Article 1 para. 3 Protocol (No 7) on the privileges and immunities of the European Union, OJ 2010 C 83/266.
¹ Cf. CR/Cremer, Article 273 AEUV mn. 1 with further references.
² Cf. Schwarze/Schwarze, Article 273 mn. 4 with further references.

III. Judgment of the ECJ

4

The judgment is not limited to a mere declaration pursuant to Articles 259, 260 TFEU. The judgment may also grant specific performance, depending on the content of the arbitral agreement.

The enforcement follows from the operative part of the judgment and Articles 280, 299 TFEU.³

Article 274 [Jurisdiction of the courts or tribunals of the Member States] (ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Bibliography: *Alter*, The European Court's Political Power: Selected Essays, 2009; *Chalmers/Davies/Monti*, European Union Law, 2nd ed. 2010, 150; *Kombos*, The ECJ and Judicial Activism: Myth or Reality?, 2010.

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I. General remarks

1

Article 274 TFEU is based on the former Article 240 TEC and is almost identical in its wording. The provision forms a **clause for the benefit** of the Member States' national jurisdiction ('save where') regarding legal disputes of the EU. If the Treaties do not contain any provisions granting the ECJ the competence to decide an action in which the Union is involved, the competence of a national court to give a judgment is not excluded. In other words, the ECJ has **no monopoly** to decide on lawsuits to which the Union is a party.

Article 274 TFEU, however, does not establish a competence of its own but rather presupposes already existing competences of the national courts.¹ These competences are granted and governed by the relevant **national rules of procedure** and require sufficient legal bases in the national constitutions.

II. Content of the provision

3

Article 274 TFEU deals with actions to which the Union is a party in case that no exclusive competences of the ECJ according to the Treaties or to arbitration agreements² exist. This is especially true when the Union acts as a **private actor** (in particular con-

³ See Streinz/Ehrliche, Article 273 AEUV mn. 11.

¹ Cf. Schwarze/Schwarze, Article 274 AEUV mn. 4.

² See Article 272 TFEU.

cerning fiscal activities) or when the **contractual liability** of the EU according to Article 340 para. 1 TFEU is in dispute.

4

III. Immunity of the Union

The Union does not enjoy immunity in trials before national courts. As to measures of execution and enforcement of judgments, see Article 272 TFEU mn. 9.

5

IV. Conflicts of competences

In order to prevent a conflict of competences between a national court and the ECJ, either a **preliminary reference** to the ECJ can be made (Article 267 TFEU) or the plea that the case is pendency before the ECJ (**lis pedens**) may be raised.

Article 275 [No jurisdiction in the common foreign security policy; exceptions]

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Bibliography: *de Londras/Kingston*, Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe, 58 American Journal of Comparative Law 2010, 259; *Govare*, Multi-Faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon, 13 Cambridge Yearbook of European Legal Studies 2010, 87; *Peers*, Salvation outside the church: judicial Protection in the Third Pillar after the Pupino and Segi judgements, 44 CMLRev 2007, 883; *van Elsuwege*, EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency, 47 CMLRev 2010, 987.

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1

I. General aspects and genesis of the norm

Article 275 TFEU incorporates the text of draft-Article III-376 TECE only with editorial changes caused by the Lisbon mandate, replacing the existing Article 46 TEU (old version). The **jurisdiction of the Union is broadened** because it had not been possible to obtain legal remedy at the ECJ for CFSP issues before. It is mainly the **‘dissolution’ of the pillar structure** that facilitates the new provision. Before the entry into force of this new provision, a competence of the ECJ concerning CFSP and PJC issues required a **special justification**, due to the three-pillar architecture. This reflected very well the separation between the intergovernmental and supranational fields of the Union’s policies. Today,

the ECJ has jurisdiction over the whole ‘unified’ European Union law and the opposite is true: Whereas earlier a specific competence of the ECJ needed to be enshrined explicitly in primary law, today primary law has to explicitly state if, in exceptional cases, the ECJ shall have no jurisdiction.

However, even the older version did not conclude that CFSP legal acts could under no 2 circumstances be interpreted or applied as relevant rules through the ECJ. The ECJ was at least considered to **implicitly** take these provisions into account. This was and is still applicable today if any act of one of the Union’s institution infringes rules in the excluded fields of Union law, for example if an institution usurps the competence reserved to another institution. Furthermore, an implicit relevance of CFSP provisions could be determined, for instance if formerly separated EU institutions and EC institutions worked together, e.g. concerning the application of the former Article 301 TEC. The opinion that the ECJ should not check the illegality or invalidity of an existing CFSP act (on the merits or regarding procedural mistakes) is placing undue restrictions on the review of those provisions of the Union whose applicability is depending implicitly on this question. The ECJ has always been bound comprehensively by ‘law’ (Article 19 para. 1 s. 2 TEU). It is a (constitutional) court acting under the **rule of law** (see also ‘the rule of law’ as a value of the Union in Article 2 TEU). Being bound by law does not allow leaving any blind spots on the jurisdictional landscape. Otherwise, effective legal protection and effective law enforcement, two cornerstones of the principle of the rule of law, would be at stake. This is all the more true since the three-pillar-structure has been given up.

But even today not the whole field of CFSP is subject to judicial review, see Article 269 3 TFEU in addition. Especially **issues of high political relevance**, very typical in the context of CFSP, stay shielded from any kind of judicial review¹. However, it is a very important step forward, towards the rule of law, that now all measures aiming at any natural or legal person and having direct effect on them can be reviewed by the ECJ. It is a simple equation: The higher the relevance for fundamental rights, the more urgent the question of effective legal protection². This is equally true for economic as well as non-economic sanctions³. The task of the ECJ to determine within its jurisdiction, whether an act is covered by either the CFSP or another policy of the Union, functions as an important safeguard: It minimizes the ‘incentive’ for a Member State to ‘escape’ to the CFSP for the only reason to be ‘safe’ from the jurisdiction of the ECJ.

II. Content and structure of the provision

Article 275 para. 1 TFEU states that the jurisdiction of the ECJ does neither include provisions relating to the CFSP nor acts adopted on the basis of these provisions. The CFSP, now integrated in the Union, still is intergovernmental in nature and remains the sovereign domain of the Member States. Moreover, the highly political character of the CFSP measures has been emphasized by the Member States since the very beginnings of the CFSP (cf. mn. 3 above). Article 275 para. 1 TFEU is nothing but a statement of ‘judicial restraint’ enshrined in primary law. The Member States simply did not trust the ECJ to apply a sufficient degree of ‘judicial self-restraint’; consequently, the ECJ did not have jurisdiction in the relevant matters at all.

Article 275 para. 2 TFEU provides control of compliance with Article 40 TEU. The 5 clause is modelled according to Articles 46 and 47 TEU (old version) as well as draft-

¹ See Article 269 TFEU mn. 1.

² See *VHvH/Pache*, Article 275 AEUV mn. 3.

³ See most recently ECJ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II*, Grand Chamber Decision of 18 July 2013, not yet officially published.

Article III-308 TECE (Article 40 TEU mns 1 et seq.). The decisive question is to distinguish whether a certain EU policy lies within the scope of CFSP or goes beyond CFSP, having its legal basis in the framework of other policies. As stated above, the ECJ purposefully has the power of jurisdiction over such conflicts of competences (see mn. 3 above). Details will remain highly controversial, case by case. Article 275 para. 2 alternative 1 TFEU does not establish an independent type of procedure; on the contrary, it requires an admissible complaint (such as an infringement proceeding, Article 268 TFEU, or an action for annulment, Article 264 TFEU) and only modifies the content of what the ECJ is allowed to decide on the merits.

6 However, Article 275 para. 2 alternative 2 TFEU plays an even more important role, especially regarding the effective guarantee of fundamental rights. This clause is broadening the existing possibilities of protecting individual rights. The former distinction between economic and non-economic sanctions is given up if a case concerns ‘reviewing the legality of decisions providing for restrictive measures against natural or legal persons’. Furthermore, judicial review is not limited to the implementing measure but it also includes the secondary legislation that it is based upon. The primary law as whole delivers the relevant standard of legality. The admissibility of a claim is regulated by Article 263 para. 4 TFEU⁴.

Article 276 [No jurisdiction for measures of the police of the Member States]

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Bibliography: *Danws/Lynskey*, The Ever-Longer Arm of EC Law – The Extension of Community Competence into the Field of Criminal Law, 45 CMLRev 2008, 131; *De Hert/Papakonstantinou*, The PNR Agreement and Transatlantic Anti-Terrorism Cooperation: No Firm Human Rights Framework on Either Side of the Atlantic, 46 CMLRev 2009, 885; *Peers*, Mission Accomplished – EU Justice and Home Affairs Law after the Treaty of Lisbon, 48 CMLRev 2011, 661.

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1 **I. General remarks and genesis of the norm**

The newly added Article 276 TFEU transports the text of draft-Article III-377 TECE into the primary law, with editorial changes caused by the Lisbon mandate only. Its predecessor in primary law is Article 35 para. 5 TEU (old version). Even though the ECJ generally has comprehensive jurisdiction after the amalgamation of the three pillars, also concerning judicial and police cooperation, this power of jurisdiction is still subject to restrictions in future. ‘Review[ing] the validity or proportionality of operations carried

⁴ See Article 263 TFEU mns 18 et seq.

out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security', as a **sensitive field concerning sovereignty**, is still excluded from the jurisdiction of the ECJ. Furthermore, special transitional provisions apply under the Protocol on Transitional Provisions (Title VII) regarding the jurisdiction of the ECJ in the area of freedom, security and justice.

The ECJ so far could only exercise jurisdiction concerning Police and Judicial Co- 2
operation in Criminal Matters (PJC) under special conditions. In particular, it was necessary to have a declaration of the Member States that explicitly recognised the competence of the ECJ, taking account of the intergovernmental character of the former EU law. The ECJ nevertheless had sought to harmonise the fields of PJC with other EU policies.¹ In doing so, the Court related to the 'dynamic towards supra-nationality', which had already become apparent in the Treaty of Amsterdam. The Treaty of Amsterdam had already transferred the fields of visa, asylum, migration and judicial cooperation into the TEC and, through this, into the realm of supranational policies. Article 68 TEC, however, had formulated restrictions on the protections of rights, which were definitively not in line with the legal requirements under the rule of law, especially regarding the implications for fundamental rights².

Pursuant to the old law, the jurisdiction of the ECJ had to be granted explicitly. Today, the reverse applies: If the ECJ jurisdiction shall be restricted, an explicit provision in the primary law is necessary. This is the most important impact of Article 276 TFEU.

II. Content of the provision

3

Only a list of exceptions is the leftover of the old characteristics that had shaped the third pillar of the former EU legislation. It takes into account strongly the sovereignty of the Member States ('masters of the Treaties'). In no case and under no circumstances, the ECJ has jurisdiction to review the validity or proportionality of operations carried out by the police or any other law-enforcement authorities. Neither does the ECJ have jurisdiction to review the exercise of the competences incumbent on the Member States with regard to the maintenance of law, public order and safeguarding of internal security. The competence of the national courts to control such measures stays untouched; just as the competences of the European Court of Human Rights enshrined in the ECHR, to which each Member State is and the Union will be a (future) party.

The statement regarding preliminary rulings is merely declaratory in nature but not 4
without symbolic power: The ECJ is not competent to review the validity or proportionality of operations carried out by the police or any other law-enforcement authorities of the Member States within this practically important procedure. Concerning the review of national legislation, the ECJ has never had an implicit competence. Therefore, a clarification has never been necessary. The restriction is also applicable in the infringement proceedings, in which the ECJ examines whether or not a Member State measure complies with Union law³. It re-emphasizes an explicit **sovereignty reservation** in favour of the Member States in the fields of public order and security. Comparable to other contexts, the ECJ will reserve an autonomous interpretation of the Union law to prevent potential tendencies of Member States to escape in their sovereign domain of the 'ordre public'.

¹ ECJ Case C-105/03 *Pupino* [2005] ECR I-5285.

² See VHVH/*Pache*, Article 276 AEUV mn. 3.

³ See VHVH/*Pache*, Article 276 AEUV mn. 7.

Article 277 [Incidental judicial review]
(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Bibliography: *Barav*, The exception of illegality in Community Law: A Critical Analysis, 11 CMLRev 1974, 371; *Bebr*, Judicial Remedy of private Parties against normative Acts of the European Communities: The Role Exception of Illegality, 4 CMLRev 1966, 7; *Lang*, Actions for declarations that Community Regulations are invalid: The duties of national courts under Article 10 EC, 28 ELRev 2003, 102; *Lauwaars*, Lawfulness and legal Force of Community Decisions, 277 et seq.; *Moloney*, Case C-239/99, Nachi Europe GmbH v. Hauptzollamt Krefeld, judgement of the Full Court of 15 February 2001 [2001] ECR I-1197, 39 CMLRev 2002, 393; *Usher*, Direct and individual concern – An effective remedy or a conventional solution?, 28 ELRev 2003, 575; *Voermans/Schuermans*, Better Regulation by Appeal, 17 European Public Law 2011, 507.

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1 I. Origin and purpose of the regulation

Article 277 TFEU determines that every party of a case pending before a European Court (ECJ and **General Court**) can invoke the inapplicability of a legal act – no matter what institution, body or other office of the Union breaches superior Union law – if the validity of the act is indirectly decisive for the outcome of the case. The new version of Article 277 TFEU preserves the essence of Article 241 TEC and it adopts the major content of draft-Article III-378 TECE. Compared to the previous legal situation, Article 227 TFEU extends the possibility of an (indefinite) **implicit complaint** concerning any legal act with general validity.

2 Origin and history of the normative development show that the **implicit judicial review** of Article 277 TFEU (as well as Article 156 EAEC Treaty) is to be seen in connection to the former **Article 36 para. 3 ECSC Treaty**. This article provided to raise a plea of illegality in an action for annulment only if the determination of financial sanctions was concerned. To this extent, the ECJ allowed the judicial review of decisions and recommendations (according to Article 14 ECSC Treaty). The ECJ considered Article 36 para. 3 ECSC Treaty to be the expression of a general principle of law. Therefore, the regulatory idea of Article 36 para. 3 ECSC Treaty could be applied even beyond the scope of application of the respective article.¹ This is now made clear by Article 277 TFEU, which translates the old and relatively broad judge-made interpretation into a written norm with primary law quality.

¹ ECJ Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* [1980] ECR 907.

II. Implicit complaint

3

The provision deals with implicit complaints that are made in the course of pending legal actions before the ECJ. The provision does not open avenues of judicial review or grant legal standing in cases pending before another (namely national) court.² Article 267 TFEU applies for a corresponding implicit complaint or reprimand before a court of a Member State.³ The question of validity can be raised here anytime, too, but only the ECJ is competent to determine the invalidity⁴.

From now on, it is explicitly stated that any legislative act can be subject of an implicit complaint if and when the validity of a legal act is decisive for the outcome of the case⁵.

The possibility of an implicit complaint is limited in cases in which the claiming party (plaintiff, applicant) could have brought an action for annulment (Article 263 TFEU) but missed the time limit. If the litigation is an infringement proceeding against a Member State because this Member State failed to comply with an EU legislative act, the Member State cannot rely on Article 277 TFEU to implicitly claim the invalidity of this legislative act. The Member State should have instead brought an action of annulment.⁶ It is disputed whether a Member State or a Union institution or a body or any other office of the Union can invoke the inapplicability of a regulation if the invalidity of this regulation was neither identifiable nor foreseeable within the time limit of Article 263 para. 5 TFEU. This would not be the case if Article 277 TFEU was only to compensate for an otherwise not at all existing entitlement to bring a claim. It is also controversial whether a **decision** could be challenged within the scope of application of Article 277 TFEU⁷. The wording seems to be quite clear: A decision is not an 'act of general application'. In cases regarding decisions, the ECJ mostly relied on the failure to observe time-limits. Consequently, the beneficiaries of State aid cannot challenge a decision based on Article 108 para. 2 TFEU that is issued against a Member State if the beneficiary failed to observe the time limit, even though the Member State had informed the beneficiary of the Commission's decision in writing.⁸

An implicit review is initiated by the ECJ, acting ex officio, if there is sufficient cause. There is no need for a **formal complaint** by one of the parties to the dispute.

III. Legal consequence

7

The implicit complaint can only lead to the inapplicability of the legislative act between the parties of the complaint. Beyond that, the validity of the legislative act is not touched upon. In particular, the act is not annulled. The relevant institution, organ, body or office of the Union can, however, repeal or modify the legislative act – and should do so following the rule of law-standards as expressed by Article 2 TEU⁹.

² ECJ Joined Cases 89/69 and 91/86 *L'Etoile commerciale* [1987] ECR 3005.

³ ECJ Case C-239/99 *Nachi Europe* [2001] ECR I-1197.

⁴ See Article 267 mns 17 et seq.

⁵ ECJ Case 92/78 *Simmmenthal* [1979] ECR 777 (800).

⁶ ECJ Case C-74/91 *Commission v Germany* [1992] ECR I-5437; Case C-183/91 *Commission v Greece* [1993] ECR I-3131.

⁷ See CR/Cremer, Article 277 AEUV mn. 6.

⁸ ECJ Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833 (846), cf. subsequent decisions CFI Joined Cases T-244/93 and T-486/96 [1995] ECR II-2265; ECJ Case C-241/01 *National Farmers' Union* [2002] ECR I-9079.

⁹ Cf. Article 267 TFEU mns 37 et seq.

Article 278 [No suspensory effect; suspension]
(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Bibliography: *Fiebig*, The indemnification of costs in proceedings before the European Courts, 34 CMLRev 1997, 89; *Jacobs*, Interim measures in the law and practice of the Court of Justice of the European Communities, in: Bernhardt (ed.), Interim measures indicated by international courts, 1994, 37.

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1

I. Lacking of suspensory effect

Actions brought before the Court of Justice (including the General Court) shall not have suspensory effect. This was already laid down in Article 242 TEC and is taken over by Article 278 TFEU without amendments. The only practical implication for this provision is given in the case of actions against an enforceable and burdensome measure by an institution of the Union because obviously these are the only circumstances that may cause the need of a suspensory effect regarding the subject-matter of the procedure (‘contested act’, see Article 278 s. 2 TFEU). This applies to actions for annulment against legal acts of a Union institution according to Article 264 TFEU as well as to actions of servants of the Union for annulment of a service-related measure according to Article 270 TFEU. If there is no ‘contested act’ of a Union’s institution (see Article 278 s. 2 TFEU) as subject of the proceedings whose operation is to be repelled, the provision is meaningless in the cases of actions for failure to act (Article 265 TFEU), actions for compensation (Article 268 TFEU) and infringement proceedings against a Member State (Articles 258 et seq. TFEU). Only then, interim measures (Article 279 TFEU) are available. Even though – compared to the total number of pending cases – the importance of interim legal protection remains very low, its importance to ensure **effective legal protection** cannot be underestimated.

2

II. Suspension of operation

As a compensation for the missing suspensory effect, Article 278 s. 2 TFEU in conjunction with Articles 160 et seq. RoP ECJ provides for the opportunity to suspend the operation of the contested measure by the ECJ. If another measure having the same effect is less restrictive, it has to be preferred¹. Article 299 para. 4 TFEU contains a special regulation for the suspension of enforcement based on a legal act of the Union.

¹ ECJ Joined Cases C-239/96 R and C-240/96 R *UK v Commission* [1996] ECR I-4475.

1. Admissibility of the motion

3

- Principal proceedings which are admissible with a sufficient degree of probability and whose permissibility is not seriously contested have to be **pending** (see as well Article 160 para. 1 RoP ECJ).²
- The plaintiff of the principal proceedings is **authorized for the motion**; the intervener (Articles 129 et seq. RoP ECJ) is authorized only if he is accepted to take part as an intervener in this proceeding as well³.
- The **aim of the motion** is the suspension of operation of the contested measure. The motion may (also) be based on consequential effects of the measure, but only if the measure is removed by the success of the action⁴. Any additional aims of the motion may only be reached by way of interim measures (Article 279 TFEU).

2. Merits of the motion

6

- The suspension of the operation has to be a matter of **urgency** (see Article 160 para. 2 RoP ECJ). It is urgent if the missing of the requested suspension would cause serious and irreparable damage⁵. If the claimant applies for the suspension of operation of a measure which causes the suspension of payments (such as salary payments to a civil servant), the ECJ assumes a case of urgency only if the absence of an interim measure exposes the applicant to a situation which threatens its very existence⁶.
- The suspension of operation has to be necessary in law and in fact (Article 160 para. 2 RoP ECJ); meaning that the principal proceedings have to have a **reasonable chance of success (prediction of the main proceedings' outcome)**⁷.
- The facts presented as reasons for application shall establish a *prima facie* case (see Article 160 para. 3 RoP ECJ), which means that there has to be a significant degree of probability that the submission of facts is correct (relieved burden of proof, no need for full proof). The type of *prima facie* evidence (such as affidavits, submission of documents) is at the applicant's full discretion, meaning he or she may refer to all admissible means of evidence.

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3. Discretionary decision

10

- The decision is at the (dutiful) discretion of the Court (president)⁸.
- The Court shall balance the interest of the applicant and the massive consequences in the event of suspension that would affect the interest of the Union or the detrimental effects on third parties⁹.
- It is possible to condition the suspension on the lodging by the applicant of security (see Article 162 para. 2 RoP ECJ), which may be limited in amount in the light of the circumstances (Article 162 para. 2 RoP ECJ).
- The suspension must not be a **prejudice to the decision on the merits of a case**¹⁰.

² ECJ Case C-117/91 R *Bosman* [1991] ECR I-3353; Case 118/83 R *CMC* [1983] ECR 2583.

³ ECJ Case 792/79 R *Camara Care* [1980] ECR 119.

⁴ ECJ Case 186/80 R *Suss* [1980] ECR 3501.

⁵ ECJ Case C-296/93 R *France v Commission* [1993] ECR I-4181.

⁶ ECJ Case 92/78 R *Simmmenthal* [1978] ECR 1129.

⁷ ECJ Case C-345/90 P-R *Hanning* [1991] ECR I-231; Case 3/75 R *Johnson* [1975] ECR 1.

⁸ Cf. CR/Wegener, Articles 278/279 AEUV mn. 29.

⁹ ECJ Case C-180/96 R *UK v Commission* [1996] ECR I-3903; Case 26/76 R *Metro* [1976] 1353.

¹⁰ ECJ Case 50/69 R *Germany v Commission* [1969] ECR 449.

4. Procedure

The procedure shall follow Article 160 RoP ECJ resp. Article 104 RoP GC. The decision shall be made by an order of the president of the ECJ (or the president of the respective chamber), who can confer this decision to the ECJ (resp. the Chamber). This also applies to the General Court¹¹.

Article 279 [Interim measures]
(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Bibliography: Bernhardt (ed.), Interim Measures Indicated by International Courts, 1994; Castillo de la Torre, Interim Measures in Community Courts: Recent Trends, 44 CMLRev 2007, 273; Prete/Smulders, The Coming of Age of Infringement Proceedings, 47 CMLRev 2010, 9; see as well the bibliography on Article 278 TFEU.

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I. Application for interim measures

The TFEU provides for the temporary suspension of operation regarding acts of institutions of the Union contested in the main proceedings (Article 278 TFEU) and the interim measures in accordance with Article 279 TFEU as two **measures** of interim legal protection granted by the ECJ. Whereas the first alternative is a pendant to Article 242 TEC, the second alternative adopted Article 243 TEC without amendments. The differentiation between the temporary suspension of operation (by interim injunction) and the interim measure is also known in the respective administrative law provisions of the Member States. Furthermore the TFEU provides for an opportunity to temporarily suspend the enforcement of decisions of the Commission concerning payment (Article 299 para. 4 TFEU) and judgements (Article 280 TFEU).

The scope of interim measures includes cases in which the suspension of a contested operation is not providing enough interim legal protection or is precluded from the outset only because the main action is not based on a defence against a measure of a Union institution¹. In the case of infringement proceedings against a Member State (Articles 258, 259 TFEU), the ECJ deems interim measures admissible even though they exceed the aim of the main proceedings². Reference has to be made to the provisions of Article 160 paras 1–3 RoP ECJ in this context.

¹¹ On legal remedies, see CR/Wegner, Article 278/279 AEUV mn. 30; on the relevant provisions of EU law on interim legal protection before national courts concerning the enforcement of EU law and therefore the effet utile, which become relevant in this context, see *ibid.* mns 31 et seq.

¹ Such as in the case of an action for failure to act in accordance with Article 265 TFEU or in the case of an action for compensation according to Article 268 TFEU.

² ECJ Case C-195/90 R *Road tax for heavy goods vehicles* [1990] ECR I-3551.

II. Admissibility of the motion

3

- The main proceedings have to be **pending**, its admissibility has to be sufficiently probable and any serious doubts concerning the permissibility in other respects must not exist³.
- The plaintiff of the main proceedings is **authorised** for the motion⁴. 4
- The **aim of the motion** is a preliminary arrangement of the disputed legal relationship within the scope of the main proceedings. Interim measures must not prejudice the decision on the merits of a case. The mere declaratory character of the expected decision in the main proceedings is no obstacle to the interim measure. The substantial obligation of the defendant to act and the preliminary of the measure requested by way of an interim measure are decisive factors (see Article 162 para. 4 RoP ECJ). 5

III. Merits of the motion

6

- An order for interim measures is conditional upon the existence of circumstances giving rise to an **urgency** to prevent serious and irreparable damages to the requesting party⁵.
- A necessity in fact and law is required additionally, meaning that the principal proceedings must have a **reasonable chance of success (prediction of the main proceedings' outcome)**⁶. 7
- The underlying statement of facts has to **establish a prima facie case**⁷. 8

IV. Procedure

9

The procedure of interim measures is regulated in Articles 160 et seq. RoP ECJ resp. Articles 104 et seq. RoP GC⁸. The enforcement of interim measures may be depending on requirements like security payments. As far as the enforcement is possible, it shall follow the provisions concerning the enforceability of judgments of the ECJ⁹.

Article 280 [Enforceability of judgments] (ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Bibliography: *Kennet*, The Enforcement of Judgements in Europe, 2001; *van Ree/Uzelac* (eds), Enforcement and enforceability, 2010.

³ See Article 278 TFEU mn. 3.

⁴ For the intervener see Article 278 TFEU mn. 4.

⁵ See also Article 278 TFEU mn. 6; ECJ Case C-87/94 R *Commission v Belgium* [1994] ECR I-1395.

⁶ Cf. Craig/de Búrca, EU law, 439.

⁷ See also Article 278 TFEU mn. 8.

⁸ See also Article 278 TFEU mn. 13.

⁹ See Article 280 TFEU.

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1 I. General remarks

Article 280 TFEU regulates the enforceability of judgments of the ECJ. The provision has its substantially similar primary law predecessor in Article 244 TEC. According to the old as well as to the new version of the Treaties, the term ‘judgment’ has to be understood in a technical sense. Article 280 TFEU applies to all decisions of the Court having enforceable content, and therefore also to interim measures¹ and determinations of costs². The same applies to settlements and other enforceable deeds drawn up in front of the ECJ³.

2 II. Enforceable decisions

The execution of decision requires that the respective decision have to be **enforceable**. This only applies to **judgments granting performance** but does not include declaratory judgments or judgments affecting a legal relationship (however, in these cases, there might be an enforceable decision on the determination of costs that part of the respective judgment⁴).

3 The reference to Article 299 TFEU does not lead to the conclusion that the enforceability of judgments granting performance is limited to those judgments containing a payment title. By referring to Article 299 TFEU, it has been clarified that judgments of the Court shall be qualified as similar actions to the actions of Council, the Commission and the ECB when it comes to enforceability. The limitation under Article 299 para. 1 TFEU is only applicable to safeguard sovereignty within the relation between Member States and Council, Commission or ECB. This emphasises the competence of the Court to make the final decision⁵.

4 III. Party against whom enforcement is sought

The party against whom enforcement is sought follows from the **judgment** (order, settlement, etc.). It may be the defeated natural person or legal entity but also the European Union or a Member State.

5 Article 1 s. 3 Protocol (No 7) on the privileges and immunities of the European Union⁶ has to be observed in enforcement proceedings of a judgment granting performance against the Union. According to this provision, property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the ECJ.

¹ Article 162 para. 2 RoP ECJ.
² Article 145 para. 3 RoP ECJ.
³ Cf. CR/Wegner, Article 280 AEUV mn. 2.
⁴ Cf. CR/Wegner, Article 280 AEUV mn. 2.
⁵ Cf. CR/Wegner, Article 280 AEUV mn. 1.
⁶ Title amended with effect from 1 December 2009 by protocol of 13 December 2007, OJ 2007 C 306/165, consolidated version at OJ 2010 C 83/266.

The enforcement of a judgment granting performance against a Member State is only admissible to the extent that the national civil procedure law gives a possibility of enforcement. It cannot be approved that enforcement against a Member State shall be generally inadmissible because Article 280 TFEU refers to the second half sentence of Article 299 para. 1 TFEU. This particular provision only applies to the enforceable content of decisions by the Commission and the Council. Furthermore, there is no need for improving the position of the Member States compared to the jurisdiction of the Union, also because enforcement against a Member State is only admissible in so far as national civil procedure law provides for it.

IV. Procedure

7

The enforcement procedure follows Article 299 paras 2–4 TFEU.

Article 281 [Statute] (ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

Bibliography: *Barbier de la Serre*, Accelerated and expedited procedures before the EC courts, 43 CMLRev 2006, 783; *Jaeger*, The standard of review in competition cases involving complex economic assessments: towards the marginalisation of the marginal review?, 2 Journal of European competition law & practice 2011, 295; *Lenaerts/Arts/Maselis/Bray*, Procedural Law of the European Union, 3rd ed. 2012; *Plender* (ed.), European Courts, Practice and Procedure, 1997; *Tridimas*, The European Court of Justice and the EU Constitutional Order, 2007; *Wägenbaur*, Court of Justice of the EU: Statute and Rules of Procedure, 2010.

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I. General remarks

1

Articles 251–281 TFEU contain the basic rules of the TFEU on the judicial organisation and the different types of proceedings. They are supplemented by the Statute of the ECJ, its Rules of Procedure and the Rules of Procedure of the General Court and the Civil Service Tribunal. The Instructions to the Registrar complete the canon of provisions¹. Article 281 TFEU is the last provision on the Court and deals with its Statute only. The rule traces back to Article 245 TEC. The main features of the Protocol on the Statute continue to exist without amendments even after the Reform Treaty but adaptations caused by the Lisbon mandate became necessary. A change of content may be identified in Arti-

¹ See Article 253 TFEU mns 11 et seq.

cle 281 para. 2 TFEU. Any amendment of the Statute must follow the ordinary legislative procedure according to Article 294 TFEU now with the exception of Title I and Article 64 Statute ECJ (concerning the rules governing the languages).

2

II. Statute

The **Protocol** (No 3) on the Statute of the Court of Justice of the European Union² (adapted to the Treaty of Lisbon) is attached to the TEU and the TFEU. According to Article 51 TEU, the Statute is part of the Treaties and thus equally entails primary Union law.

3 The Statute includes provisions on the status of the Judges and Advocates-General (Title I), on the judicial organisation (Title II) and procedural rules (Title III). The SEA added Title IV on the Court of First Instance, nowadays renamed 'General Court' (see Article 256 TFEU).

4 Any amendments to the Statute in relation to Title I (Judges and Advocates-General) as well as to Article 64 (rules governing the languages) are possible only by amendment of the Treaties (Article 48 TEU). Apart from that, Article 281 para. 2 TFEU provides an exceptional simplified revision procedure concerning the remaining titles of the Statute on judicial organisation and procedural rules. European Parliament and the Council may change the respective provisions through the ordinary legislative procedure, namely by request of the ECJ and after consultation of the Commission. In addition, the Commission has a right of proposal, whereas the ECJ has to be consulted.

SECTION 6 THE EUROPEAN CENTRAL BANK

Article 282 [Tasks and actions; legal personality; independence; right of consultation]

1. The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.

2. The ESCB shall be governed by the decision-making bodies of the European Central Bank. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives.

3. The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.

4. The European Central Bank shall adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133, with Article 138, and with the conditions laid down in the Statute of the ESCB and of the ECB. In accordance with these same Articles, those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters.

² OJ 2010 C 83/210.

5. Within the areas falling within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.

Bibliography: *Bini Smaghi*, Central Bank Independence in the EU: From Theory to Practice, 14 ELJ 2008, 446; *Krauskopf/Steven*, The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of its Existence, 46 CMLRev 2009, 1143; *Quaglia*, Central Banking Governance in the European Union: a Comparative Analysis, 2008; *Zilioli/Selmayr*, The Constitutional Status of the European Central Bank, 44 CMLRev 2007, 355.

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I. Normative genesis; general remarks

1

The newly established Article 282 TFEU defines the institutional architecture of the European System of Central Banks (ESCB) on the one hand and of the European Central Bank (ECB) on the other hand. The provision applies to all Member States, regardless of whether they participate in the common currency (as Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Slovenia, Spain do) or still pursue an autonomous currency policy (Denmark, Great Britain, Sweden, as well as the accession countries), as the explicit differentiation in Article 282 para. 1 TFEU emphasises. Article 282 TFEU corresponds to Article 13 para. 1 TEU, which ascribes institutional character to the ECB after the entering into force of the Lisbon Reform Treaty. Constitutional role model of this revision is draft-Article I-30 TECE; its text was largely adopted into the new framework, albeit with some necessary editorial modifications. This provision already had a predecessor in primary law whose regulatory content is now also determined by Article 282 TFEU. This is how the central elements of the deleted Article 107 paras 1 and 2 TEC were incorporated in the TFEU.

While Articles 119 et seq. TFEU generally shape the content of the economic and monetary policy, Articles 282 et seq. TFEU contain the institutional foundations. The distinction between the ESCB, consisting of the ECB and all national central banks, and the Eurosystem, consisting of the ECB and all national central banks whose currency is the euro, is crucial. The monetary policy of the EU is pursued especially by the latter. The ESCB/ECB mechanism is more thoroughly outlined in the Protocol on the Statute of the European System of Central Banks and the European Central Bank (Statute ESCB/ECB).

II. The European System of Central Banks (paras 1 and 2)

3

With regard to the field of monetary policy in a single monetary zone, the European System of Central Banks gives an example for the **pre-federal structures**¹ respectively the **character of a constitutional compound being based on the idea of multilevel-constitutionalism**² of the EU. The ESCB combines centralized and decentralized components. On the one hand it favours a strong European Central Bank, on the other hand

¹ Cf. *Häberle*, Europäische Verfassungslehre, 426 et seq.

² BVerfGE 89, 155 – *Maastricht*: ‘compound of states’ (‘Staatenverbund’).

it seeks to safeguard and maintain autonomous freedom to manoeuvre for the national central banks as independent central banks. Due to the compound of the ESCB, the national central banks remain independent. As long as they do not become part of the euro system, they are free to enact their monetary policies **independently**. One needs to distinguish between the **euro area**, the members of the Exchange Rate Mechanism II (ERM II) and the remaining members within the ESCB. There is no overlap between the ESCB and the ERM. Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Rumania, Sweden and the United Kingdom are no members of the ERM II; however, they are, *ipso iure*, members of the ESCB. The ESCB with its supranational and prefederal, centralized and decentralized components is not built upon the strongly unified system of e.g. the German Bundesbank but rather upon the US Federal Reserve System³.

- 4 This becomes particularly evident with regard to the role of the national central banks. They remain **independent institutions** of the Member States and do not become outright subdivisions of the ECB⁴. Their positioning within the ESCB is carried out through national law. The national central banks⁵ have to be as equally independent as the ECB itself, in order to prevent indirect influences.
- 5 The ESCB is led by the executive organs of the ECB. The most important organ is the **ECB Governing Council**. It consists of the presidents of all national central banks whose currency is the Euro and six members of the Executive Board. Through this Council, the heads of the national central banks may meaningfully and sustainably influence the policies and decisions of the ECB Governing Council. By this, the hierarchical structure of national central banks depending on the policy setting power of the ECB is significantly qualified.
- 6 The primary aim of integration and cooperation of the ESCB is **price stability maintenance**. Article 282 para. 2 TFEU refers to the EU goal in Article 3 para. 3 TEU and expresses the stability premise for the European monetary policy (Article 119 para. 2 TFEU). Independent from the stability premise, the ESCB supports the general economic policy in the EU in order to achieve its goals. Again, this is the institutional match for the substantive specifications as found in Article 119 para. 2 TFEU.

7 III. The European Central Bank (paras 3 to 6)

While draft-Article I-30 para. 3 TECE determined the character of the ECB as an institution, Article 282 para. 3 TFEU is limited to define its **legal personality**. The characterisation as an institution of the Union, newly established by the Reform Treaty, follows from Article 13 para. 1 TEU already (until the entering into force of the Reform Treaty, the ECB was no institution of the EU but merely an **agency sui generis**). The ECB is structured similarly to the US Federal Reserve (see mn. 3 above) or to the predecessor of the German Bundesbank, '*Bank deutscher Länder*'.⁶ The ESCB gained the most legal and functional capacity in each Member State according to legal persons under its law (cf. Article 9 para. 1 Statute ESCB) and it also obtained a form of limited international legal personality (different from the Commission).

- 8 The power of the ECB with regard to monetary policy is immense. It is the sole institution deciding over the issuing of the euro. In addition to that, Article 282 para. 3 TFEU guarantees that the ECB remains independent. While this independence distinguishes

³ Cf. CR/Häde, Article 282 AEUV mn. 4.

⁴ Cf. Häde, Die Deutsche Bundesbank in der Währungsunion, in: Hahn (ed.), Die Europäische Währung, 1999, 103 at 108.

⁵ See Article 14 Statute ESCB.

⁶ Cf. CR/Häde, Article 282 AEUV mn. 4.

the ECB from many other EU institutions, its mirror image is to be identified in the independent character of the Commission, the Court of Auditors or the EESC. Independence builds the ‘institutional core’⁷ of the European Monetary System as a whole. Both the Statute of the ESCB as well as the Statute of the ECB, further develop this independence in various ways (relating to institutional, personal, functional and financial independence). Article 282 para. 3 TFEU requires all Union institutions, bodies, offices, agencies and in particular the governments of the Member States to guarantee and adhere to this independence, specifying the principle of sincere cooperation. This independence is not an end in itself, but first and foremost committed to achieve price stability. In the context of this primary objective, the ECB also supports the economic policy of the Union. However, the ECB does not control the issuing of currencies outside of the euro area (see Article 282 para. 4 TFEU).

Article 282 para. 4 TFEU illustrates the juridical yardstick of the ECB’s competences. 9
The ECB adopts the necessary measures for the proper fulfilment of its tasks according to Articles 127–138 and 138 TFEU as well as to the Statute of the ESCB and ECB.

According to Article 282 para. 5 TFEU, the ECB has gained the **right to be heard** be- 10
fore the enacting of legal acts at EU level as well as at Member State level. Connected to this right to be heard, the ECB gained the **right to comment and give its opinion**.

Article 283 [Structure of the organs]
(ex Article 112 TEC)

1. The Governing Council of the European Central Bank shall comprise the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the Member States whose currency is the euro.

2. The Executive Board comprises the President, the Vice-President and four other members.

The President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank.

Their term of office shall be eight years and shall not be renewable.

Only nationals of Member States may be members of the Executive Board.

Bibliography: ECB (ed.), *Legal aspects of the European System of Central Banks*, 2005; *Gaitanides*, *Geld- und Währungsrecht*, in: Schulze/Zuleeg/Kadelbach (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 2nd ed. 2010; *Gruber*, *Privileges and Communities of the European Central Bank*, 2007; *Krauskopf/Steven*, *The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of its Existence*, 46 CMLRev 2009, 1143.

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⁷ See VHVH/Rodi, Article 282 AEUV mn. 15.

1

I. General remarks

Article 283 TFEU largely copies the wording and functional content of Article 112 TEC, albeit with some necessary editorial and substantive changes. In para. 2, the former differentiation between lit. a and lit. b was eliminated. Additionally, it is determined that the European Council chooses and appoints the President, the Vice-President and the members of the Executive Board by way of qualified majority. Prior to this amendment, unanimity was required. Just as before, Article 283 TFEU in conjunction with Articles 10 and 11 Statute ESCB determine the organisation of the ECB, particularly the formation and composition of the two highest decision-making organs (Governing Council and Executive Board of the ECB).

2

II. Governing Council

According to Article 283 para. 1 TFEU, the Governing Council consists of six members of the Executive Board of the ECB and the presidents of the national banks within the euro area (see Article 10 Statute ESCB). It is the highest body of the ECB and issues directives and decisions in order to guarantee the achievement of all tasks conferred to the ESCB, although there is no strict hierarchy between the Governing Council and the Executive Board of the ECB.

3

III. Executive Board of the ECB

According to Article 283 para. 2 TFEU, the Executive Board consists of the President, the Vice-President and four further members (see Article 11 Statute ESCB). They have to be nationals of the Member States. The (relatively long) mandate of 8 years and the prohibition of re-appointment are meant to guarantee their independence. The functional division of tasks between Governing Council and Executive Board of the ECB is set up as follows: The Governing Council is in charge of the basic decisions and determines the (especially monetary policy) guidelines for the ESCB, whereas the Executive Board of the ECB carries out the day-to-day business of the ECB.

4

The members of the Executive Board are chosen and appointed by the European Council by way of qualified majority. They have to be experienced and acknowledged personalities in the field of currency and banking issues. The Council (at the ministerial level) gives a recommendation after having consulted the European Parliament and the ECB Council.

Article 284 [Rights to participate; annual report] (ex Article 113 TEC)

1. The President of the Council and a member of the Commission may participate, without having the right to vote, in meetings of the Governing Council of the European Central Bank.

The President of the Council may submit a motion for deliberation to the Governing Council of the European Central Bank.

2. The President of the European Central Bank shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB.

3. The European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis.

The President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament.

Bibliography: *Amténbrink*, The Democratic Accountability of Central Banks, 1999; *Louis*, The Economic and Monetary Union: Law and Institutions, 41 CMLRev 2004, 575; *Magnette*, Towards 'Accountable Independence'? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model, 6 ELJ 2000, 326.

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I. Participation in meetings of ECB and Council

1

Article 284 TFEU, like its primary law predecessor Article 113 TEC, determines the participation at the sessions of the Governing Council, the annual report and the therefore connected possibilities of the European Parliament to be informed.

The president of the Council of the European Union and a member of the Commission may participate in the meetings of the Governing Council without having a right to vote. The President of the Council has a right of petition.

The president of the ECB may attend meetings of the Council of the European Union if questions related to the objectives and tasks of the ESCB are being discussed.

II. Annual report of the ECB

4

According to Article 284 para. 3 subpara. 1 TFEU, the ECB gives an annual report to the European Parliament, the Council, the Commission and the European Council. The Council and the European Parliament may hold a general debate based on this report in which the president of the ECB participates under Article 283 para. 2 TFEU. The duty of the ECB to report is highly important because all members of the ECB decision-making bodies (personal and functional) as well as the ESCB itself are completely independent and therefore free from any influence of the European Parliament as well as the national Parliaments. Despite honouring this independence, there has to be **democratic publicity** (to a certain extent) on monetary and currency policy, created by means of **parliamentary criticism**¹.

Article 15 Statute ESCB specifies the duty to report.

5

¹ Cf. CR/Häde, Article 284 AEUV mn. 9.

6

III. Committees of the European Parliament

According to Article 284 para. 3 subpara. 2 TFEU, the competent Committees of the European Parliament may hear the president of the ECB as well as other members of the Executive Board either on their own initiative or at the request of the European Parliament.

SECTION 7

THE COURT OF AUDITORS

Article 285 [Tasks; composition]

(ex Article 246 TEC)

The Court of Auditors shall carry out the Union’s audit.
It shall consist of one national of each Member State. Its Members shall be completely independent in the performance of their duties, in the Union’s general interest.

Bibliography: *Crespo*, Public Expenditure Control In Europe: Coordinating Audit Functions In The European Union, 2005; *Inghelram*, The European Court of Auditors: Current Legal Issues, 37 CMLRev 2000, 127.

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1

I. Genesis of the norm, general remarks

The Court of Auditors has been created as a body of **external financial control** by the treaty amending the primary law of 22 July 1975. It replaced the Audit Board, which had carried out the task of financial audit before, a task that it performed for the last time in respect to the budget of 1976. The provisions on the Court of Auditors were stipulated in Articles 246 et seq. TEC. Now, Article 13 para. 1 TEU defines the Court of Auditors as an organ of the Union whereas Articles 285 et seq. TFEU contain detailed rules on its composition, mandate and functioning. Article 285 TFEU adopts the provisions of Article 246 TEC and partly also those of Article 247 TEC. The addition in para. 1, that the norm deals with an audit of ‘the Union’, has declaratory effect only. The newly added para. 2 adopts the wording of Article 247 para. 1 TEC in its first sentence with editorial changes only, while the wording of Article 247 para. 4 subpara. 1 TEC is incorporated in its second sentence.

2

II. Mandate, composition, independence

Since the amendments provided by the Treaty of Maastricht, the Court of Auditors has been one of the main institutions of the Union (Article 13 para. 1 TEU). A right to bring actions against other institutions has explicitly been conferred to it under Article 263

para. 3 TFEU. It is headquartered in Luxembourg¹. The Court of Auditors is independent, especially protected by Articles 285 and 286 TFEU. Insofar, it has a special position within the institutional framework of the Union, similar to the ECB.

The Court of Auditors cooperates with the national audit organs of the Member States. 3 In its Declaration No 18, the Nice Treaty Conference requests the Court of Auditors and the national audit organs 'to improve the framework and conditions for cooperation between them, while maintaining the autonomy of each', referring to the competence of the President of the Court of Auditors to set up a contact committee with the chairpersons of the national audit institutions. There is no institutionalised cooperation of the national audit organs, comparable to the ESCB/ECB system.

The Court of Auditors does not possess an audit monopoly². In particular, the Euro- 4 pean Parliament is involved in external financial audit and supervision, too.

While the Amsterdam Treaty provided for a Court of Auditors of 15 members, since 5 Nice – following the practice of the Court of Auditors – it is explicitly laid down that each Member State is entitled to nominate one of its citizens as a member of the Court. Article 285 para. 2 TFEU emphasises the complete independence of its members and their duty to commit themselves to the Union's general interest.

Article 286 [Requirements for members; appointment and term of office] (ex Article 247 TEC)

1. The Members of the Court of Auditors shall be chosen from among persons who belong or have belonged in their respective States to external audit bodies or who are especially qualified for this office. Their independence must be beyond doubt.

2. The Members of the Court of Auditors shall be appointed for a term of six years. The Council, after consulting the European Parliament, shall adopt the list of Members drawn up in accordance with the proposals made by each Member State. The term of office of the Members of the Court of Auditors shall be renewable.

They shall elect the President of the Court of Auditors from among their number for a term of three years. The President may be re-elected.

3. In the performance of these duties, the Members of the Court of Auditors shall neither seek nor take instructions from any government or from any other body. The Members of the Court of Auditors shall refrain from any action incompatible with their duties.

4. The Members of the Court of Auditors may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

5. Apart from normal replacement, or death, the duties of a Member of the Court of Auditors shall end when he resigns, or is compulsorily retired by a ruling of the Court of Justice pursuant to paragraph

The vacancy thus caused shall be filled for the remainder of the Member's term of office.

¹ See Article 341 TFEU.

² Cf. CR/Waldhoff, Article 285 AEUV mn. 5.

Save in the case of compulsory retirement, Members of the Court of Auditors shall remain in office until they have been replaced.

6. A Member of the Court of Auditors may be deprived of his office or of his right to a pension or other benefits in its stead if the Court of Justice, at the request of the Court of Auditors, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.

7. The Council shall determine the conditions of employment of the President and the Members of the Court of Auditors and in particular their salaries, allowances and pensions. It shall also determine any payment to be made instead of remuneration.

8. The provisions of the Protocol on the privileges and immunities of the European Union applicable to the Judges of the Court of Justice of the European Union shall also apply to the Members of the Court of Auditors.

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1

I. Composition

Article 286 TFEU adopts the provisions of the old Article 247 TEC with some modifications: Para. 1 and para. 4 subpara. 1 have been deleted, since they are included in Article 285 TFEU now. Further amendments are either of an editorial nature or have a clarifying function but do not lead to any substantial changes. The Members of the Court of Auditors are appointed by the Council for a term of six years (Article 286 para. 2 TFEU). Article 286 para. 1 TFEU defines the qualifications necessary for appointment and highlights their independence. The Council decides with a qualified majority after consulting the European Parliament from a list that is composed according to the proposals made by the individual Member States (Article 286 para. 2 TFEU). The Council determines the conditions of employment of the Members of the Court of Auditors (Article 286 para. 7 TFEU).

2

II. Legal status of the Members

The Members of the Court of Auditors are **independent** (see Article 286 para. 3 TFEU; already para. 1 calls for their independence to be ‘beyond doubt’, a legal requirement that seems to be difficult to deal with in practice). In addition, they have to serve the Union’s general interest¹. Different from the Executive Board of the ECB, there is the possibility of re-election, allowing a certain political influence with a view to a possible re-election of a Court Member.

3 The legal status of the Members is comparable to the Judges of the ECJ (parallel occupation: para. 4; end of duties: paras 5, 6; financial compensation: para. 7; privileges and immunities: para. 8).

¹ This is already provided for in Article 285 para. 2 TFEU for the whole institution of the Court of Auditors.

**Article 287 [Audit action]
(ex Article 248 TEC)**

1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union. It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination.

The Court of Auditors shall provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions which shall be published in the Official Journal of the European Union. This statement may be supplemented by specific assessments for each major area of Union activity.

2. The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases of irregularity.

The audit of revenue shall be carried out on the basis both of the amounts established as due and the amounts actually paid to the Union.

The audit of expenditure shall be carried out on the basis both of commitments undertaken and payments made.

These audits may be carried out before the closure of accounts for the financial year in question.

3. The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Union, on the premises of any body, office or agency which manages revenue or expenditure on behalf of the Union and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget. In the Member States the audit shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence. These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit.

The other institutions of the Union, any bodies, offices or agencies managing revenue or expenditure on behalf of the Union, any natural or legal person in receipt of payments from the budget, and the national audit bodies or, if these do not have the necessary powers, the competent national departments, shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task.

In respect of the European Investment Bank's activity in managing Union expenditure and revenue, the Court's rights of access to information held by the Bank shall be governed by an agreement between the Court, the Bank and the Commission. In the absence of an agreement, the Court shall nevertheless have access to information necessary for the audit of Union expenditure and revenue managed by the Bank.

4. The Court of Auditors shall draw up an annual report after the close of each financial year. It shall be forwarded to the other institutions of the Union and shall be published, together with the replies of these institutions to the observations of the Court of Auditors, in the *Official Journal of the European Union*.

The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union.

It shall adopt its annual reports, special reports or opinions by a majority of its Members. However, it may establish internal chambers in order to adopt certain categories of reports or opinions under the conditions laid down by its Rules of Procedure.

It shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

The Court of Auditors shall draw up its Rules of Procedure. Those rules shall require the approval of the Council.

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1

I. Object of examination

Article 287 TFEU adopts the provisions of Article 248 TEC. In this course, however, the competences are extended. The term 'bodies' of the Communities is replaced by the more precise expression 'bodies, offices or agencies', extending the audit competence to all institutions of the Union.

- 2 The Court of Auditors conducts the external examination of the accounts of the Union. It supervises the whole financial and economic management. To this end, the Court examines all **revenue and expenditure of the Union**. The financial auditing is not limited to the expenditure and revenue that is included in the budget of the EU (Article 310 TFEU). To the contrary, the Court of Auditors also examines all **bodies, offices and agencies** created by the Union (even if they possess an independent legal personality, e.g. the European Centre for the Development of Vocational Training), provided that the founding document does not explicitly suspend such supervision. The fields of the former second and third pillar of the pre-Lisbon EU (CFSP and PJCCM, now '**area of freedom, security and justice**') fall into the Court's competence because their expenditure is listed in the Union's budget *ipso iure* now¹. The **European Central Bank** is only audited concerning its operational efficiency of the management, not concerning its annual balance sheet (Article 27 Statute ESCB). The European Investment Bank is audited in respect to its management of Union expenditure and revenue (Article 287 para. 3 subpara. 3 TFEU) but not in respect to its own resources and resources gained from the capital markets (Article 12 Statute EIB). Due to the respective agreement, the Court's audit expands to the European Development Fund, too². The Court of Auditors remains competent for auditing EURATOM³.

¹ Insofar clarifying: Article 41 TEU.

² Article 33 para. 2 Internal Agreement, OJ 1998 L 156/108, 118.

³ See GHN/Magiera, Article 287 AEUV mn. 5.

II. Criteria for supervision

3

Criteria for the audit work of the Court are: **legality** (i.e. consistence with primary and secondary EU law) and **regularity** of revenue and expenditure. Legality and regularity include economic efficiency (economy, efficiency and effectiveness) of the budget management (Article 287 para. 2 subpara. 1 s. 1 TFEU).

In detail: The Court compares the payments actually made with the revenue and expenditure planned in the budget. According to Article 287 para. 2 subpara. 1 s. 2 TFEU, it reports on any cases of irregularity (for the term ‘irregularity’, see Article 1 para. 2 Regulation 2988/95⁴). This provision was inserted by the Treaty of Amsterdam and highlights the particular importance of financial audit.

A statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions has to be drawn up by the Court of Auditors and is to be presented to the European Parliament and the Council. This statement may be supplemented by specific assessments for each major area of Union activity. It is to be published in the Official Journal of the EU.

III. Procedure

6

1. General remarks

The audit is to be based on records. The organs of the Union and every body, office or agency which manages revenue or expenditure on behalf of the Union and the Member States, including any natural or legal person in receipt of payments from the budget, have to provide the Court of Auditors on request with the necessary documents and information. In the Member States, the Court carries out the audit in cooperation with national audit bodies or – if these do not have the necessary powers – with the competent national departments which are indicated by the Member States for this purpose. The Court of Auditors and the national audit bodies of the Member States, whose independence is to be respected, are requested to cooperate in a spirit of trust; in this respect the principle of sincere cooperation (Article 4 para. 3 TEU) provides for a duty of mutual cooperation and support already⁵. Explicitly, the Court of Auditors has access to documents of the European Investment Bank, too. The Court, the EIB and the Commission conclude an agreement in this respect.

2. Audit performed ‘on the spot’

7

The Court is entitled to perform the auditing on the spot, i.e. in the **departments** of the Union’s organs and bodies and ‘in the Member States’, and thus in particular in the respective departments. The audit in the **Member States** is carried out in cooperation with the national audit bodies or – if these do not have the necessary powers – with the competent national departments. The national departments may take part in the audit process.

An audit on the spot is also permissible in case of **private recipients of payments**. National legislation may, however, limit this right.

The Statements of the Council of the year 1975 that the audit of revenue ‘shall not cover substantive transactions properly so called shown in the supporting documents

⁴ OJ 1995 L 312/1.

⁵ See CR/Waldhoff, Article 287 mn. 10.

which relate to such establishment; accordingly, the audit on the spot shall not be carried out by recourse to the debtor⁶ are outdated now and not applicable anymore but might still be qualified as interpretation aid.

10

3. Timeframe

Even though financial audit is basically an ex-post examination, the Court of Auditors does not have to wait for the statement of account for the respective fiscal year to be published. The audit can already take place within the current fiscal period (Article 287 para. 2 subpara. 4 TFEU).

11

IV. Reports

1. Annual report

The Court of Auditors presents the result of its audit in an annual report. It has to be transmitted until 31 October of the year following the relevant fiscal year and it has to contain an assessment of the soundness of financial management. The Court has the option to add general observations which it sees fit to make⁷. It has to be submitted to the other EU organs and is published in the Official Journal (Part C) together with the respective replies of the institutions (Article 287 para. 4 subpara. 1 TFEU).

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2. Special reports

In addition and on its individual discretion, the Court may draft special reports or submit opinions on the request of one of the EU's institutions (Article 287 para. 4 subpara. 2 TFEU).

13

3. Decision-making

To adopt reports, special reports and opinions, the majority of the Members of the Court of Auditors is required (Article 287 para. 4 subpara. 3 TFEU). The Court may form chambers for the adoption of certain categories of reports and opinions in accordance to the Rules of Procedures (see mn. 14 below).

14

V. Rules of procedure

The Rules of Procedure are decided upon by the Court and are approved by the Council (Article 287 para. 4 subpara. 5 TFEU)⁸.

⁶ No 2 of the Statements attached to the Treaty amending certain financial provisions of 22 July 1975, OJ 1977 L 359/1.

⁷ See Article 143 paras 2–6 Financial Regulation applicable to the general budget.

⁸ On this, see OJ 2005 L 18/1.

CHAPTER 2

LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND
OTHER PROVISIONS

SECTION 1

THE LEGAL ACTS OF THE UNION

Article 288 [Legal acts; catalogue]
(ex Article 249 TEC)

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

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

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

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

Recommendations and opinions shall have no binding force.

Bibliography: *Bast*, New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law, 49 CMLRev 2012, 885; *Best*, Legislative Procedures After Lisbon: Fewer, Simpler, Clearer?, 15 MJ 2008, 85; *von Bogdandy/Bast/Arndt*, Legal Instruments in European Union Law and their Reform: a Systematic Approach on an Empirical Basis, 23 YEL 2004, 91; *Craig/de Búrca*, Instruments and the hierarchy of norms, in: id., EU law, 5th ed. 2012, 103; *Emmert/Pereira de Azevedo*, L'Effet horizontal des directives, 29 RTDE 1993, 503; *Hinarejos*, On the Legal Effect of Framework Decisions and Decisions, 14 ELJ 2008, 620; *Hofmann*, Legislation, Delegation and Implementation under the Treaty of Lisbon, 15 ELJ 2009, 482; *König*, Gesetzgebung, in: Schulze/Zuleeg/Kadelbach (eds), Europarecht. Handbuch für die deutsche Rechtspraxis, 2nd ed. 2010; *Lenaerts/Desomer*, Towards a Hierarchy of Legal Acts in the EU, 11 ELJ 2005, 744; *Murray*, Observations on the Interpretative Process of the Court of Justice, in: Heusel (ed.), Community Law in Practice, 1997, 41; *Türk*, The Concept of the 'Legislative' Act in the Constitutional Treaty, 6 German Law Journal 2005, 1555.

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1

I. General remarks

1. Normative genesis

While the draft-TECE, adequate to the constitutional density of European law, suggested a new typology of legal acts distinguishing between ‘legislative act’ and ‘non-legislative acts’, Article 288 TFEU sticks to the system predetermined by Article 249 TEC. After the failure of the draft-TECE and during the Lisbon reform process, any impression of an integration level comparable to the one of a State should have been avoided even terminologically¹. Therefore the ‘European law’ and the ‘European framework law’ did not find entrance into the TFEU, even though the explicit recognition of a supranational law has been overdue for a long time².

2 Nevertheless Article 288 TFEU contains modifications of Article 249 TEC. Para. 1 of the reworded Article 288 TFEU names all kinds of legislative acts of the Union in a unifying manner. These acts apply consistently to all organs of the Union now. Consequently, all legal acts specifically assigned to the second or third pillar are replaced, namely ‘general guidelines’, ‘common strategies’, ‘joint actions’ as well as ‘common positions’ within the second pillar and ‘common positions’, ‘framework decisions’, ‘decisions’ as well as ‘conventions’ within the third pillar. While the terminology of a ‘decision’ remains unchanged for certain legal acts³, the content was substantially modified: Now, a decision may also be addressed to an indeterminate group of addressees⁴ and may therefore become generally binding. It might have been modelled after the ‘general ruling’ that is (not only) known as a technical term of German administrative law.

3

2. Conferred powers

Article 288 para. 1 TFEU confirms the **principle of conferral** for any action of the Union’s institutions (‘[t]o exercise the Union’s competences’). The provision itself establishes neither a competence to determine competences (so-called ‘competence-competence’) nor a competence to adopt one of those legal acts but rather names the **typology of legal acts**. The competence rules may be identified separately within the respective policy areas.

4

3. Types of actions

Article 288 TFEU enumerates the **five different types of actions respectively types of legal acts** which the institutions of the Union may have recourse to when taking actions according to their competences and when – on the basis of **primary law** – **secondary law** is created. This concerns the so-called ‘Quintet of the Treaty of Rome’ (see the identical but meanwhile removed provision of Article 161 EURATOM Treaty), that faced the trio of the meanwhile expired ECSC Treaty (see Article 14 ECSC Treaty) when the EEC was founded. Legal acts may take the form of legislative acts on the conditions of Article 289 TFEU. These legislative acts constitute no independent type of action but rather a specific manifestation.

¹ See Schwarze/Hatje (eds), *Der Reformvertrag von Lissabon*, EuR 2009, Beiheft 1.

² See Lenaerts/Desomer, *Towards a Hierarchy of Legal Acts in the EU*, 11 ELJ 2005, 744.

³ See Article 249 para. 1 TEC resp. Article 288 para. 1 TFEU.

⁴ Cf. Craig/de Búrca, *EU law*, 106 et seq.

4. Hierarchy of norms

5

There is no explicit hierarchy of norms concerning the different types of action. However, due to the character of each particular type, the following principles may apply: A regulation overrides directives as well as decisions. A regulation may implicitly modify these two types of legal acts in the specific case. If a competence rule empowers to issue a regulation, it is possible to enact a directive. Secondary Union law is to be interpreted preferably in consistence with the Treaties as primary law⁵ – comparable to the interpretation in conformity with the constitution in national constitutional law; the same applies to the relation of implementing regulation and basic regulation⁶.

II. Regulation

6

The regulation represents the **legislation of the Union** and might therefore be characterised as ‘European law’ even though the Reform Treaty avoids this constitutional clarification. A regulation is a general legal rule with direct effect in every Member State⁷.

A regulation shall have general application, meaning that it is addressed to an indeterminate group of people. Consequently, the conditions for the adoption of a regulation may also be met after the regulation was enacted. If it is not generally applicable, it might be a mere pseudo-regulation which might rather be a bunch of (case-by-case) decisions⁸. This distinction is relevant to legal protection⁹.

A regulation applies **directly in every Member State** in all its parts. There is no need for any implementation into national law¹⁰ or an executive order by institutions of the Member States of any kind. A regulation is applicable regardless of any measures adopting it into national law¹¹.

Article 288 para. 2 TFEU emphasises that a regulation ‘shall be binding in its entirety’, clarifying the **distinction from a directive**. A linguistic distinction may be achieved very insufficiently only because every legal act – as long as it does not exceed its competence norm – ‘shall be binding in its entirety’ of course. A regulation may contain the empowerment to adopt further legal acts of the Union’s institutions (especially to issue implementing regulations) if the regulation itself remains incomplete to the particular extent (‘limping’ regulation)¹².

III. Directive

10

1. Term

A directive is a legal act addressed to the Member States committing them to take actions according to the content of the directive. Especially harmonisation of national law is facilitated by this means¹³. The directive constitutes the **first** (supranational) stage of a **two-staged legislative procedure**. Within the first stage, the harmonisation programme

⁵ ECJ Case C-168/01 *Bosal Holding* [2003] ECR I-9409.

⁶ ECJ Case C-61/94 *Commission v Germany* [1996] ECR I-3989.

⁷ Cf. *Craig/de Búrca*, EU law, 105.

⁸ ECJ Case 242/81 *Roquette Frères* [1982] ECR 3213, 3230.

⁹ See Article 263 TFEU mns 29 et seq.

¹⁰ Cf. *Craig/de Búrca*, EU law, 105.

¹¹ ECJ Case 94/77 *Zerbone* [1978] ECR 99; Case 74/69 *Krohn* [1970] ECR 451, 459.

¹² See Article 291 TFEU mn. 3.

¹³ Cf. *Craig/de Búrca*, EU law, 106.

is determined to be binding according to Union law and a transposition period is set; within the **second** (national) stage, this programme has to be transposed into national law by the Member States.

11

2. Effect

a) The Member States' obligation to transpose

The programme contained in the directive (the 'result to be achieved') is binding on all Member States, comparable to a 'framework law'¹⁴. It has to be **transposed into Member State law** within the transposition period set out in the directive. Only if an implementation is obsolete for geographic reasons, an obligation to implement cannot be created. Therefore it was irrelevant for the transposition of Directive 96/48 concerning a high-speed rail system that high-speed trains had neither been in operation nor had been planned in Ireland at that time¹⁵. A mere general reference to Union law is insufficient and cannot be qualified as a (proper) transposition¹⁶. National law has to guarantee that national authorities effectively apply the directive in full¹⁷. The direct effect of directives (see mn. 17 below) is only a minimum guarantee and cannot justify a Member State from taking implementing measures sufficient to meet the purpose of each directive¹⁸. During the transposition period, Member States must refrain from taking any measures liable seriously to compromise the result prescribed by the directive¹⁹. The Member States have to ensure in particular that violations of Union law have to be penalised according to material and procedural rules comparable to those sanctioning violations of national law of the same kind and seriousness whereas the respective sanctions at least have to be effective, adequate and deterrent²⁰. A Member State can neither invoke domestic conditions ('resistance of the local community') to justify the disregard of the obligations and time limits set by the directive nor that the directive provides for an entirely new system calling for substantial changes of the law. National transitional provisions enacted after the end of the transposition period are inadmissible if they lead to a deferral of the deadline for transposition of the directive²¹. The compliance with the directive by issuing a mere administrative provision that may be changed anytime does not fulfil the obligations created by the directive²², neither does a system of declarations of commitment by the persons concerned; a specific legal framework is required²³. The transposition of a directive into national law does not necessarily require provisions to be incorporated formally and verbatim in express, meaning specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appro-

¹⁴ Cf. VHVH/Vedder, Article 288 AEUV mn. 20.

¹⁵ ECJ Case C-372/00 *High-speed rail system* [2001] ECR I-10303.

¹⁶ ECJ Case C-96/95 *Commission v Germany* [1997] ECR I-1653.

¹⁷ ECJ Case C-365/93 *Commission v Greece* [1995] ECR I-499.

¹⁸ ECJ Case C-253/95 *Commission v Germany* [1996] ECR I-2423.

¹⁹ ECJ Case C-129/96 *Wallonie* [1997] ECR I-7411; Case C-14/02 *ATRAL* [2003] ECR I-4431.

²⁰ ECJ Case C-180/95 *Draehmpaehl* [1997] ECR I-2195; Case C-382/92 *Commission v UK* [1994] ECR I-2435; and Case C-383/92 *Commission v UK* [1994] ECR I-2479.

²¹ ECJ Case C-396/92 *Bund Naturschutz* [1994] ECR I-3717.

²² ECJ Case 361/88 *TA-Luft* [1991] ECR I-2567; Case C-95/92 *Commission v Italy* [1993] ECR I-3119.

²³ ECJ Case C-340/96 *Commission v UK* [1999] ECR I-2023, 2042; Case C-255/93 *Commission v France* [1994] ECR I-4949.

priate, rely on them before the national courts²⁴. The fact that the ECJ does not accept norm-concretising administrative provisions as suitable transposition was met with partly loud criticism in Germany²⁵.

The **competence** of domestic authorities (such as government or legislative bodies) for transposing directives depends on the respective domestic law of the Member State²⁶. These authorities are free to choose form and means of a directive's transposition into national law. They decide by themselves how to adapt their domestic legislation in conformity with a directive²⁷. The binding objective shall merely oblige the institution of the Union to adhere to (more or less concrete) guidelines. In practice, the Unions' institutions do not consistently consider this idea basing on the **principle of subsidiarity** (Article 5 para. 3 TEU). Directives are often very detailed, so that the respective national legislative bodies have no other option but to transpose the directive literally without executing any legislative leeway. The ECJ does not encounter this lack of Member States' sovereignty emerging in practice. Due to the general clauses establishing the policy-making power, a substantial breach at the expense of the Member States' legislative competence not provided for in the TFEU was created.

b) Barrier effect

The **barrier effect** of a directive results from the Member States' obligation to implement, meaning that domestic law that has been harmonised in conformity with the directive may only be changed in the context of the directive²⁸. Changes of harmonised law violating the directive may fail because of the directive's direct effect (see mn. 17 below).

c) Interpretation standard

It follows from the ratio of the directive in conjunction with Article 4 para. 3 TEU that the interpretation of harmonised national law has to be **guided** by the wording and purpose of the directive²⁹. It is irrelevant whether the national law provisions were adopted before or after the directive concerned was issued³⁰.

As far as legal terms of harmonised national law are consistent with legal terms of the directive they have to be interpreted correspondingly with the concepts of Union law. If national courts have any interpretation doubts, they are obliged to bring a procedure pursuant to Article 267 TFEU.

Especially the attention to detail of many directives, as having become customary, may lead to the consequence that the ECJ takes over large parts of the national supreme courts' task to protect and preserve legal unity by ensuring the uniform interpretation of national law. The principle of **interpretation of national law in conformity with a directive** is a generally recognised peculiarity of the principle of interpretation in conformity with Union law.

d) Direct effect

Individuals may rely directly upon provisions of a directive against any national provision which is incompatible with the directive in so far as the provisions define rights

²⁴ ECJ Case C-96/95 *Commission v Germany* [1997] ECR I-1653.

²⁵ Cf. CR/Ruffert, Article 288 AEUV mns 39 et seq.

²⁶ With specific focus on transposition within the federal state Kössinger, Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat, 1989, 36 et seq.

²⁷ ECJ Case C-190/90 *Commission v Netherlands* [1992] ECR I-3265.

²⁸ ECJ Case C-208/88 *Commission v Denmark* [1990] ECR I-4445.

²⁹ ECJ Case 14/83 *von Colson, Kamann* [1984] ECR 1891; Case C-37/92 *Vanacker* [1993] ECR I-4947.

³⁰ ECJ Case C-334/92 *Wagner Miret* [1993] ECR I-6911; Case C-371/97 *Gozza* [2000] ECR I-7881.

which the individuals are able to assert against the State if – in the absence of transposition measures adopted within the prescribed transposition period – the provisions are unconditional and sufficiently precise to be applicable in the particular case³¹. The reason is that a Member State may not assert national laws against individuals, which the Member State has failed to eliminate (harmonisation) by not adopting the transposition measures required by the directive within the prescribed period. A directive may have direct effect even though the Treaties allow Member States to request derogation from the implementation of that directive³². The doctrine of a directive's direct effect developed by the ECJ merely concerns the **relation between an individual that would benefit from provisions of the directive and the Member State**, or any organisation or body that is subject to the authority or the control of the State³³. A Member State can neither invoke provisions of a not yet transposed directive that impose an obligation on an individual³⁴ nor can individuals invoke provisions of a not yet transposed directive **in relation to other individuals** – so-called **horizontal third-party effect**³⁵. This means that invoking direct effect of a directive's provision is also prevented if a third party would be disadvantaged inevitably (a mere adverse impact on third-party right in terms of 'incidental adverse effect' does not prevent direct effect³⁶). A directive may be taken into consideration if the application of a domestic legal provision within a civil litigation contains a substantial procedural defect due to the noncompliance to a provision of the directive³⁷. This effect of a directive was to qualify as a fact of the objective legal order³⁸. The possibility to make recourse to a directive when interpreting domestic legal provisions (see mn. 16) remains unaffected anyway.

- 18 Individuals may invoke provisions of a directive even if the directive has already been transposed but the harmonised law does not correspond to the directive.
- 19 The Bundesverfassungsgericht (German Federal Constitutional Court) held that the jurisdiction of the ECJ concerning the direct effect of directives was compatible with the German approval law on the EEC Treaty because the ECJ's jurisdiction, that has considerable impact on the development of the law, stays within the limits of the European tradition of jurisdiction³⁹.
- 20 On the individual's claim for State liability against the defaulting Member State, see Article 4 para. 3 TFEU. The failure to transpose a directive may be brought before the ECJ under certain conditions⁴⁰.

21

IV. Decision

The decision is a binding legal act addressed to one or more addressees. Compared with the regulation, the decision claims **individual validity** (and not general applicabil-

³¹ ECJ Case 41/74 *van Duyn* [1974] ECR 1337; Case 8/81 *Becker* [1982] ECR 53; Case C-346/97 *Braathens Sverige* [1999] ECR I-3419.

³² See Article 114 para. 6 TFEU; ECJ Case C-319/97 *Kortas* [1999] ECR I-3143.

³³ ECJ Case C-188/89 *Foster* [1990] ECR I-3313.

³⁴ ECJ Case 152/84 *Marshall* [1986] ECR 723; Case C-168/95 *Arcaro* [1996] ECR I-4705.

³⁵ ECJ Case C-106/89 *Marleasing* [1990] ECR I-4135; Case C-91/92 *Faccini Dori* [1994] ECR I-3325; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281; Case C-235/03 *QDQ Media* [2005] ECR I-1937.

³⁶ ECJ Case C-201/02 *Delena Wells* [2004] ECR I-723; Joined Cases C-152/07 to C-154/07 *Arcor* [2008] ECR I-5959.

³⁷ ECJ Case C-443/98 *Unilever Italia* [2000] ECR I-7535, 7565.

³⁸ Cf. GHN/*Nettesheim*, Article 288 AEUV mns 160 et seq.

³⁹ BVerfGE 75, 223.

⁴⁰ Cf. CR/*Ruffert*, Article 288 AEUV mn. 46.

ity). Its addressees may be natural persons and legal entities as well as Member States. Furthermore the revision of Article 288 TFEU allows for decisions with an **indeterminate group of addressees** that may become **generally binding**, resulting from an *argumentum e contrario* of Article 288 para. 3 s. 2 TFEU: 'A decision which specifies those to whom it is addressed shall be binding only on them' – otherwise they are **generally binding**.

Of course, the explicitly-mentioned **addressees** are affected by the respective decisions addressing them, meaning that these persons are explicitly identified by the decision. Furthermore this type of decision may indirectly concern persons that are not expressly referred to as addressees. Until the Lisbon Treaty entered into force, it was decisive whether the legal act was concerning these persons directly and individually under Article 263 para. 4 TFEU. This difficult distinction became obsolete with the newly created option of issuing generally binding decisions. However, it remains relevant for the purpose of answering the question whether non-privileged claimants have a right of action.

A natural person or legal entity may be directly and individually concerned by a decision addressed to a **Member State** if the Member State does not remain any discretionary powers as to executing measures towards the respective person or entity (such as the prohibition of the Commission towards a Member State to grant an aid to this person or entity).

In fact, if the addressees are concerned directly and individually, a legal act that is named regulation is rather a bunch of decisions (**bogus regulation**). Individual concern in this sense may be claimed only if the legal act affects the legal position of non-addressees because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom the legal act is addressed⁴¹. To distinguish a decision from a regulation, it was important whether the group of persons concerned was already specified when the legal act was adopted or whether other persons may also meet the conditions (in an abstract sense). Since now there are also generally binding decisions, the general and individual-related criterion for distinction does no longer apply. A provision of a directive may implicitly concern a decision⁴².

A **decision** in the context of the **CFSP** – still retaining its **intergovernmental** character, even though incorporated into the Treaties – continues to remain an exception. This policy area does not provide for any legislative acts in the future.

V. Recommendations and opinions

Recommendations and opinions are **non-binding** legal acts. The principle of conferral does not apply to them⁴³. They may have indirect legal effect if they are procedural requirements for the adoption of a binding legal act or if they create confidence in the continuation of the underlying legal conception or assessment of facts that is worth protecting. The Council's political resolutions (such as the Hague Resolution of 3 November 1976 on the common fisheries policy) cannot, however, produce legal effects capable of limiting the Council's legislative powers⁴⁴.

⁴¹ ECJ Case 26/86 *Deutz* [1987] ECR 941.

⁴² ECJ Case C-298/89 *Gibraltar v Council* [1993] ECR I-3605.

⁴³ See Article 17 TEU.

⁴⁴ ECJ Case C-4/96 *NIFPO* [1998] ECR I-681.

27

IV. 'Unnamed legislative acts' of the institutions

The TFEU does not assign all acts of the Union's institutions provided for by the respective competence norms to the types of action expressly mentioned in Article 288 TFEU (see Articles 18 para. 2, 42 para. 1, 91 para. 1 TFEU). If these institutions are competent to adopt such an unspecified action, they are free to explicitly name the type of action either in accordance with the catalogue of Article 288 TFEU or differently. But since the generally binding decision was introduced, there is almost no scope of application left for these 'unnamed legislative acts', especially since the term 'decision' was used in previous practise, too. Legal protection does not depend on the name but rather on the **substantive nature** of a legal act.

- 28 Decisions with binding external effect have to be distinguished from those legal acts affecting institutions and departments **in their internal relationship**. These may concern internally binding procedural rules or substantive guidelines (such as work programmes) with internally binding or merely recommending effect (such as the Code of Conduct on public access to Commission and Council documents⁴⁵). They may be adopted either by an institution in the context of its organisational power or within a 'conciliation agreement' of several institutions to validate their duty to mutual sincere cooperation⁴⁶. The non-compliance with such a procedural rule may have impact on the validity of legal acts having external effect.

29

VII. 'Improper Council decisions'

Decisions of the governments' **representatives meeting within the Council**⁴⁷ do not constitute a legal act of the Union. They concern agreements of the Member States in form of decisions related to aspects closely tied to the Union and entered into by representatives of the governments **on the occasion of a Council meeting**. These 'improper Council decisions' do not constitute an action of representatives of the Council but rather an action of representatives of the Member States. Insofar as the Treaties provide for such decisions, potential approval requirements of national Parliaments or formal ratification procedures are dispensed for their adoption.

- 30 Insofar as the Treaties provide for such decisions – meaning facilitated means of Treaty amendment only – the provisions created by them have to be qualified as Union law. Apart from that, these decisions establish **obligations under international law accompanying the Treaties**. On the one hand they are limited by Union law and on the other hand they may serve as guidelines for its interpretation.

*Article 289 [Ordinary and special legislative procedure;
right of initiative in specific cases]*

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Coun-

⁴⁵ CFI Case T-105/95 WWF [1997] ECR II-313.

⁴⁶ See Article 13 TEU.

⁴⁷ See Article 16 TEU.

cil, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

Bibliography: *Craig/de Búrca*, Instruments and the hierarchy of norms, in: id., EU law, 5th ed. 2012, 112; *Hofmann*, Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, 15 ELJ 2009, 482.

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I. General remarks 1

Article 289 TFEU does not have any model within former primary law or the draft Constitutional Treaty. The provision gives a summary of the legislative procedures in direct systematic relation to the legal acts of the Union (Article 288 TFEU). The previous four forms of legislative procedure¹ are reduced to two: **ordinary legislative procedure** and **special legislative procedure**. The ordinary legislative procedure as to Article 289 para. 1 TFEU becomes the general rule. According to this provision, the European Parliament and the Council jointly adopt a regulation, directive or decision on proposal of the Commission. Article 294 TFEU contains detailed rules on the procedure, which corresponds to the previous codecision procedure (Article 251 TEC) in most parts. By reforming the legislative procedures, the European Parliament finally grows to a genuine, equal co-legislator next to the Council and one of the significant democratisation options of the EU has been honoured². However, consultation and assent procedure have not become obsolete completely but live on as specific legislative procedure in Article 289 para. 2 TFEU. The cooperation procedure is no longer mentioned but widely replaced by the ordinary legislative procedure; however, the particularly regulated ‘special legislative procedures’ may contain structures of the cooperation procedure.

II. Ordinary legislative procedure (para. 1) 2

The European Parliament already became a central actor in the context of EU-legislation when the codecision procedure was introduced. With this process, the level of democratic legitimization of the Union’s law-making was strengthened and now culminates in the rule of the ‘ordinary legislative procedure’. The assumption of common **con-**

¹ See for the consultation procedure Article 308 or Article 37 para. 2 TEC, for the assent procedure Articles 105 para. 6, 107 para. 5, 161, 190 para. 4, 300 para. 3 subpara. 2 TEC, for the cooperation procedure Article 252 TEC and for the codecision procedure Article 251 TEC.

² Cf. *Calliess*, Optionen zur Demokratisierung der EU, in: *Bauer/Huber/Sommerrmann* (eds), *Demokratie in Europa*, 2005, 281 at 291 et seq.

stitutional terminology conveys that it concerns ‘genuine’ law-making under ‘genuine’ participation of the European Parliament **executing a considerable legislative function**. The fact that Article 288 TFEU – in contrast to the draft-TECE – abandons the term ‘European law’ appears – especially within this systematic context – to be a half-hearted concession to all those that feared an enormous ‘closeness’ of the constitutional Union to a State.

- 3 However, the Parliament does not advance to a single legislator following the example of constitutional democracies by the Lisbon Treaty. The Council remains the co-legislator of the European Parliament, the ‘**institutional balance**’ will be – much more than a strict separation of powers – the rationale of functional separation within the Union in the future and all legal acts adopted within the ordinary legislative procedure are joint actions of the European Parliament and Council³. Article 294 TFEU regulates further details.

4 III. Special legislative procedures (para. 2)

Deviating from the ordinary legislative procedure, the special legislative procedure (according to the various options available, it would be appropriate to call it ‘special legislative procedures’) is regulated in Article 289 para. 2 TFEU. The provision contains an abstract definition only and the specific implementation may be identified within special provisions of the Treaties on separate policy areas establishing respective conditions on decision-making and the kind of participation. The special legislative procedures widely correspond to the previous consultation (e.g. Articles 21 para. 3, 77 para. 3 as well as 81 para. 3 TFEU) and assent (e.g. Article 86 para. 1, 223 para. 1 as well as 253 TFEU) procedures. The special legislative procedure is applicable in the areas of justice and security, budget and taxes but may be identified among other sections of Union policies, too.

5 IV. Legislative acts (para. 3)

Article 289 para. 3 TFEU introduces the term ‘legislative act’. This allegedly terse determination contains an essential clarification concerning adoption and normative standard of the respective legal acts (see mn. 1 above). Moreover, it reveals that **law-making** already exists within the Union. All legal acts adopted according to one of the two legislative processes are qualified as legislative acts⁴. Resulting from an *argumentum e contrario*, all legal acts not adopted under this procedure have to be classified as **legal acts without legislative character**⁵.

6 V. Extended right of initiative (para. 4)

Basically, the monopoly on initiatives lies within the Commission. Article 17 para. 2 s. 1 TEU states: ‘Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise’. Article 289 para. 4 TFEU relates to these exceptions: A group of Member States or the European Parliament may launch an initiative, the European Central Bank may submit a recommendation, the Court of Justice or the European Investment Bank may submit a respective request. However, Article 289 para. 4 TFEU is of a **declaratory** respective **referencing** nature only. It results

³ Cf. *Craig/de Búrca*, EU law, 54.

⁴ Cf. *Craig/de Búrca*, EU law, 112 et seq.

⁵ Cf. *Fischer*, Der Vertrag von Lissabon, 428.

from the relevant Treaty provision of the respective policy area whether the right of initiative in derogation of Article 289 para. 1 TFEU exists⁶.

Article 290 [Delegation of legislative power to the Commission]

1. 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.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;**
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.**

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

Bibliography: *Bergström*, Comitology, Delegation of Powers in the European Union and the Committee System, 2005; *Bradley*, Delegated Legislation and Parliamentary Supervision in the European Community, FS Bieber, 2007, 286; *Joerges/Neyer*, From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology, 3 ELJ 1997, 373; *Pollack*, The Engines of European Integration. Delegation, Agency and Agenda Setting in the EU, 2003; *Szapiro*, Comitologie: rétrospective et prospective après la réforme de 2006, 11 RDUE 2006, 545.

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I. General remarks

1

Article 290 TFEU is modelled on draft-Article I-36 TECE, whose content was taken over with some editorial but also substantive amendments. In addition, the provision replaces Article 202 indent 3 TEC. The new article deals with the delegation of power to the Commission to adopt certain non-legislative acts. This created a primary law basis for these acts, representing an important prerequisite for legal certainty. While the tertiary legislation by the Commission was based on the Comitology Decision of the Council¹ before, a direct legal basis is to be found in the TFEU now. Further on, the EP is entitled to the same rights as the Council.

The provision has the same legislative objective as provisions at the national level that allow for the adoption of administrative regulations by the executive branch. The parlia-

⁶ See the clear wording: '[i]n the specific ECJ Case s provided for by the Treaties'.

¹ See Article 202 indent 3, Article 211 indent 4 TEC.

mentary legislator shall be unburdened from regulating these issues, which are not essential elements of the legislative act. An additional clarification may be drawn from a systematic perspective that takes into account Article 291 TFEU: While Article 290 TFEU deals with quasi-legislative delegation, Article 291 TFEU is concerned with implementing acts. This differentiation becomes particularly important with a view on the participation of EP, Council and Member States in the decision-making process.

3

II. The delegation of para. 1

Article 202 indent 3 TEC contained a competence of the Council to confer powers for the implementation of the Council's acts on the Commission. Article 211 indent 4 TEC referred to this rule, stating that the Commission had the power to adopt **implementing measures** without making a difference between measures with a quasi-legislative character and other implementing measures. The provision comprised legal acts of a general or a more concrete nature, which specified the provisions of the implemented act. Even before the amendment of the provision by the SEA, it had already been practiced by the Council to confer such competences to the Commission under previously defined conditions, which allowed the Council to revoke the conferral or to be heard before the Commission exercises its powers.

4

The present Article 290 para. 1 TFEU is much more precise compared to the pre-Lisbon situation. It formulates a legal basis and, at the same time, it formulates the basic requirements for a conferral of quasi-legislative (i.e. non-legislative) acts. These acts are of a non-legislative nature for formal reasons since they are not enacted according to Article 290 TFEU. Nonetheless, according to the explicit wording, the provision deals with legal acts that are of a general applicability (meaning that their outreach is not limited to a predefined group of addressees) – however, their content is limited by their function to supplement or amend certain non-essential elements of the original legislative act. The precise definition of what is essential in a concrete case may be difficult. Different from e.g. the German '*Wesentlichkeitstheorie*' (theory that substantive decisions on material law must be made by the legislature rather than by the executive), it does not only have the meaning that a limitation of fundamental (human) rights generally has to be defined by the parliamentary legislative act itself. The content is rather essential in the sense of the present article if it is concerned with a more or less fundamental question². The power to conferral has to be exercised within the form of a legislative act, comparable to the requirement of a '*Gesetzesvorbehalt*' (**'specific enactment'**) in German law.

5

According to Article 290 para. 1 subpara. 2 TFEU, the delegating act has to be specific enough to determine objective, content, applicability and duration of the conferral. This follows from the principle of the (democratically legitimised) rule of law.

6

III. The meaning of para. 2

Article 290 para. 2 TFEU calls for the legislative act to explicitly lay down the conditions to which the delegation is subject to. This is necessary for a democratic foundation of the delegated act and due to the rule of law principle. The following alternatives are possible: (a) The European Parliament or the Council may decide to revoke the delegation (this includes a revocation of the competence from the Commission). (b) It is also

² Cf. VHVH/Vedder, Article 290 AEUV mn. 3.

possible that EP or Council reserve a right to approve the delegated act so that it may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. EP and Council decide on these reserved rights by the majority requirements set out in Article 290 para. 2 TFEU: The European Parliament shall act by a majority of its component members, the Council by a qualified majority.

The provision of Article 290 para. 2 TFEU contains an exhaustive list. The Union legislative is barred from introducing other control mechanisms comparable to a comitology procedure³.

IV. The meaning of para. 3

8

The new Article 290 para. 3 TFEU only states that delegated acts shall be named as such by inserting the adjective ‘delegated’ in their title. This again serves the requirements of legal certainty and is consistent with the Commission’s previous practice. This practice has been elevated to formal law now.

V. The relation to the ‘comitology decision’

9

The new provision of Article 290 TFEU causes a possible conflict with the comitology procedure. The comitology procedure was reformed in 2006 and has been based on the Comitology Decision⁴ since then. The two procedures are not isolated from each other, they rather overlap considerably (especially in the field of legal acts that were subject to the regulatory procedure with scrutiny according to Article 5a Decision 1999/468). In case of conflict between the two procedures, the following rules apply: Secondary legislation has to be measured against primary law. Therefore, secondary law has to be **interpreted in the light of primary law**. If this is not possible, secondary legislation has to be amended in order to be in conformity with primary law. By Article 12 Regulation 182/2011⁵, adopted on the basis of Article 291 para. 3 TFEU and regulating two procedures for the issuing of implementing acts within the meaning of Article 291 TFEU at the Union level (advisory procedure according to Article 4 Regulation 182/2011 and examination procedure according to Article 5 Regulation 182/2011), Decision 1999/468 was repealed; exceptions exist for already existing basic acts making reference to Article 5a Decision 1999/468. Therefore the former comitology procedures do not apply to delegated legal acts in the meaning of Article 290 TFEU any longer (except for the one according to Article 5a Decision 1999/468 mentioned in Article 12 Regulation 182/2011). Thus, on the one hand, the advantages of these procedures could get lost because Article 290 TFEU, which is the only legal basis for the delegation of power to the Commission to adopt non-legislative acts within the meaning of Article 290 TFEU, does not prescribe any involvement of other institutions; on the other hand, the Commission still remains free to consult expert committees and thus to incorporate expertise into the delegated law-making process⁶. Nevertheless, this does not create any legal obligation to involve the respective committees⁷.

³ ECJ Case C-133/06 *Parliament v Council* [2008] ECR I-3189.

⁴ Decision 1999/468, OJ 1999 L 184/23, as amended by Decision 2006/512, OJ 2006 L 200/11.

⁵ OJ 2011 L 55/13.

⁶ See Declaration No 39 on Article 290 TFEU, OJ 2010 C 83/350.

⁷ See *König*, in: Schulze/Zuleeg/Kadelbach (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 2nd ed. 2010, § 2 mn. 106.

Article 291 [Implementing legal acts]

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word 'implementing' shall be inserted in the title of implementing acts.

Bibliography: *Bergstrom*, Comitology: Delegation of Powers in the European Union and the Committee System, 2005; *Dougan*, The Treaty of Lisbon: Winning Minds, Not Hearts, 45 CMLRev 2008, 617; *Hofmann*, Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, 15 ELJ 2009, 482; *Schütze*, From Rome to Lisbon: 'Executive Federalism' in the (new) European Union, 47 CMLRev 2010, 1385; see also the literature on Article 290 TFEU.

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1

I. General remarks

Article 291 TFEU finds its predecessor in draft-Article I-37 TECE, whose wording is similar but with some editorial and substantive amendments. At the same time, it largely replaces Article 202 indent 3 TEC. Its content is of a fundamental nature: Generally, the Member States have the task to implement Union legislation at the national level. This follows from the principle of sincere cooperation already, which is specified in Article 291 para. 1 TFEU. Therefore, the provision is not only to be understood as a right of the Member States but at the same time also as an obligation to act accordingly. Article 291 paras 2–4 TFEU contain exceptions from this rule.

2

II. Rule and exceptions, paras 1 and 2

Article 291 para. 1 TFEU represents the basic principle of the implementation of EU law. It is the role of the Member States to implement EU legislation in their realm. This does not only refer to the administrative implementation by the executive branch but also to measures taken by the national legislative (e.g. concerning the implementation of directives) or the national judiciary (effective application of EU law). Article 291 para. 2 TFEU formulates exceptions from this rule. In general, these exceptions allow for implementing measures by the Union where uniform conditions for implementing legally binding Union acts are needed – these exceptions have to be construed in a narrow man-

ner. The power to enact respective implementing measures may be conferred to the Commission and (in duly justified specific cases in the field of the CFSP) to the Council. The necessary circumstances of uniform implementation are to be examined according to the characteristics of the individual case but also in accordance with the *effet utile* principle. When national implementation alone might not guarantee an effective implementation, direct implementation by the Union may become necessary. The most important areas in this context lay within the fields of competition law, the law of State aid and the common commercial policy including foreign trade law.

If the Union law shall be implemented directly by the Union's institutions, an explicit power has to be conferred on them. These implementing acts can be distinguished from the quasi-legislative measures under Article 290 TFEU by their function already. Article 202 indent 3 TEC did not determine this distinction accurately. According to this former Treaty provision, the Council had the competence to confer the decision-making power on **implementing measures** to the Commission, meaning non-legislative acts with a general or concrete content which elaborate the provisions of a legal act in a more specific and detailed manner. It has been a longstanding practice of the Council to confer such powers to the Commission under certain prerequisites only, allowing the Council to revoke the conferral in individual cases or allowing the Council to be heard before an implementing act is adopted by the Commission. Although Articles 290 and 291 TFEU distinguishes between the two types of conferred powers, an overlapping between implementing acts and delegated quasi-legislative acts may occur. Therefore, the Union legislative has a margin of appreciation to choose between the two instruments and to take the appropriate measure in each individual case.

III. The power of control of the Member States, para. 3

4

The competence of the Commission to adopt implementing measures is subject to control by the Member States. The modalities of this supervision ('rules and general principles concerning mechanisms for control') are to be defined in advance by the EP and the Council in a regulation (**Regulation EU (No) 182/2011** laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers; see mn. 6 below). The present Article 291 para. 3 TFEU is formulated much narrower than the old Article 202 TEC: The rules and general principles are limited to regulating the control by the Member States and cannot refer to the implementing powers of the Commission in general anymore¹.

IV. The clarification in para. 4

5

The newly introduced Article 291 para. 4 TFEU defines, in parallel to Article 290 para. 2 TFEU, that implementing acts have to be explicitly named as such, meaning their title has to contain the adjective 'implementing' in order to enhance legal certainty. The rule is consistent with the Commission's previous practice, which has been elevated to formal law.

¹ On the different control mechanisms according to Regulation 182/2011, see mn. 6 below.

V. The relation to the old ‘comitology decision’ and the new Regulation 182/2011

The new provision of Article 291 TFEU has caused similar potential conflict with the comitology procedure as Article 290 TFEU. The comitology procedure has been reformed in 2006 and is based on the Comitology Decision² since then. In the case of conflict between the two, so far the following rules have applied: Secondary legislation has to be measured against primary law. However, Regulation 182/2011 entered into force in the meantime. It is based on the comitology procedure but makes considerable amendments. Regulation 182/2011 sets up two procedures, according to which the Member States carry out their control: advisory procedure and examination procedure. The decision-making process takes place in a Committee. The examination procedure ensures that implementing acts cannot be adopted by the Commission if they are not in accordance with the opinion of the Committee. It should apply for the adoption of acts of general scope designed to implement basic acts and specific implementing acts with a potentially important impact (see also No 10 et seq. of the recitals of the Regulation). According to Article 2 para. 2 Regulation 182/2011, the following fields are subject to the examination procedure: (a) programmes with substantial implications; (b) the common agricultural and common fisheries policies; (c) the environment, security and safety, or protection of the health or safety, of humans, animals or plants; (d) the common commercial policy; (e) taxation. In other cases usually the advisory procedure shall apply. However, due to Article 2 paras 1 and 3 Regulation 182/2011, there is still a broad discretion regarding the choice between the two procedures. The procedure before the Committee is subject to revision by an Appeal Committee (Article 6 Regulation 182/2011). Derogation from the procedures provided for by the regulation becomes possible in urgent and other specifically defined cases (see e.g. Article 8 Regulation 182/2011 – this relates to provisional anti-dumping or countervailing measures).

Article 292 [Legal basis for recommendations]

The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

- 1 The new Article 292 TFEU serves as legal basis for the adoption of recommendations. It is modelled on draft-Article I-35 TECE. Recommendations are legal acts without legislative character. According to Article 292 s. 1 TFEU, recommendations may be adopted by the Council. Article 292 s. 4 TFEU also entitles the Commission – without a special conferral in the individual case being necessary – and the ECB – in those cases provided for in the Treaties – to adopt recommendations. Specific procedural rules are stipulated in Article 292 s. 2 and s. 3 TFEU.
- 2 Although recommendations are not legally binding, they remain to be legal acts and therefore need a legal basis. The wording of Article 292 TFEU leaves open whether or not

² Decision 1999/468/EC, OJ 1999 L 184/23, as amended by Decision 2006/512/EC, OJ 2006 L 200/11.

the Council has a comprehensive competence to adopt recommendations, as it is the case for the Commission. It would be a logical conclusion to understand Article 292 TFEU as a general legal basis for the adoption of recommendations. However, Article 292 s. 2 and s. 3 TFEU imply a narrow(er) understanding, seeing the competence to adopt recommendations as being accessory to other competences. This would mean that the Council is only entitled to make recommendations if it also has the power to adopt legal acts (*argumentum a maiore ad minus*).

SECTION 2
PROCEDURES FOR THE ADOPTION OF THE ACTS AND
OTHER PROVISIONS

Article 293 [Commission proposal; right to amend]
(ex Article 250 TEC)

1. Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in paragraphs 10 and 13 of Article 294, in Articles 310, 312 and 314 and in the second paragraph of Article 315.
2. As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act.

Bibliography: See literature on Article 294 TFEU.

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I. General remarks 1

Article 294 TFEU finds its predecessor in Article 250 TEC. The newly introduced exceptions in Article 293 para. 1 TFEU concern the conciliation procedure, the multiannual financial framework and the budget of the EU (see mn. 2 below). The provision deals with cases in which the Commission starts the law-making process in accordance with the specific rules of competence. By this, it specifies the right of initiative and the more or less comprehensive monopoly of initiative of the Commission.

II. Recommendation by the Commission 2

1. Function

If the Council acts according to the competences laid down in the TFEU, based on a proposal made by the Commission, this proposal forms a **mandatory** part of the procedure, representing the institutional balance and separation of functions of EU law. If the proposal is missing, a legal act based on this procedural error is unlawful and can be challenged with an action for annulment under Article 263 TFEU. The proposal of the

Commission guarantees that the **general interest** of the Union is considered in the law-making process of the Council. It is therefore of great importance for the EU's common welfare. This is particularly important when the Council decides with qualified majority vote – by now the regular majority requirement. The consistency of the legal act with the proposal of the Commission is a safeguard for the overruled minority insofar as the Commission is entitled to act solely in the general interest. This is why amending the Commission's proposal by **majority vote in the Council is not permitted** – according to para. 1 an amendment requires unanimous voting. An exception was contained only in Article 251 para. 5 TEC (decision by EP and Council) so far. The first half-sentence of Article 293 para. 1 TFEU formulates further exceptions now: among these are, as also under the TEC, cases involving the Conciliation Committee, now to be found in Article 294 paras 10 and 13 TFEU; and new the EU budget (Article 310 TFEU), the multiannual financial framework (Article 312 TFEU), finally the annual budget (Articles 314 and 315 para. 2 TFEU).

- 3 The proposal of the Commission is relevant in all its parts, including the statement of reasons (Article 296 para. 2 TFEU) and the concrete competence on which it is based. This is practically relevant in particular because the legislative procedure may differ, depending on the competence on which it is based.

4 **2. Alterations**

The Commission is entitled to alter its proposal at any time in the course of the legislative procedure (Article 293 para. 2 TFEU). By this, it can accommodate concerns of other institutions, in particular such of the Council, so that a majority for the proposal becomes possible. The altered proposal of the Commission is not bound to any form. It therefore does not have to be drafted in written form but can be presented in the course of a Council meeting¹. In case of significant amendments, procedural steps prior to the amendment have to be repeated (participation of other institutions) – as long as the amendment is not intended to incorporate the opinion of the institution concerned into the proposal. In particular the EP has to be heard again. If the amendment amounts to only small changes compared to the original proposal, procedural recurrence is not needed². In its Resolution of 16 May 2006³, the EP opposed the possibility to amend the Commission's proposal after a common position has been adopted.

Article 294 [Codecision procedure] (ex Article 251 TEC)

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.

4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

¹ ECJ Case C-400/92 *Germany v Commission* [1994] ECR I-4701.

² ECJ Case 41/69 *Chemiefarma* [1970] ECR 661; Case C-58/01 *Océ NV* [2003] ECR I-9809.

³ OJ 2006 C 297E/140, mn. 13a.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:

- (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
- (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
- (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

- (a) approves all those amendments, the act in question shall be deemed to have been adopted;
- (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of

Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

Bibliography: *Boyron*, The Co-Decision Procedure: Rethinking the Constitutional Fundamentals, in: Craig/Harlow (eds), *Lawmaking in the European Union*, 1998, chapter 7; *Craig*, The Lisbon Treaty, Law, Politics and Treaty Reform, 2010, 48 et seq.; 260 et seq.; *Crombez*, Co-decision: Towards a Bicameral European Union, 1 EUP 2000, 363; *Dashwood*, Community Legislative Procedure in the Era of the TEU, 19 ELRev 1994, 343; *Dashwood*, European Community Legislative Procedures after Amsterdam, 1 DYELS 1998, 25; *Earnshaw/Judge*, From Co-operation to Co-decision: The European Parliament's Path to Legislative Power, in: Richardson (ed.), *European Union, Power and Policy Making*, 1996, chapter 6; also see the literature on Article 289 TFEU.

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1

I. General remarks

The ordinary legislative procedure finds its predecessor in the codecision procedure of the EP (Article 251 TEC). It has been introduced into the TEC by the Maastricht Treaty and forms an indispensable step for the constitutional dynamics of integration, in particular with a view to a realisation of a more democratic structure within the EU¹. The draft-TECE has given new impulses to the development of European constitutional law also in the field of law-making. Its failure only led to a brief delay of the respective reforms since the Lisbon Treaty is in line with the amendments proposed by the Constitutional Treaty, strengthening the codecision procedure and developing it further into the current ‘ordinary legislative procedure’. It might be inconsequent that the present provision does not make use of the term ‘European law’ anymore; however, this does not have any impact on the radical substantive changes in the codecision procedure.

2

The procedure enables the EP to take part in legislation on an equal footing with the Council, meaning that the EP is recognised as a real, **directly democratically legitimised co-legislator**. The legal act that comes into existence through such a codecision of Council and EP represents the standard procedure of legislation now (see mn. 3 below). If in the course of the legislative procedure the Conciliation Committee (Article 294 paras 10 to 12 TFEU) drafts a proposal, the principle that the Council can alter a proposal of the Commission only by unanimous vote is abandoned.

¹ ECJ Opinion 1/92 *Netherlands v Commission* [1992] ECR I-2821.

II. Scope of application

3

The ordinary legislative procedure is applied in cases prescribed by the Treaties. The number of cases, in which the procedure becomes relevant, had been vastly extended by the Treaties of Amsterdam and Nice already. Today, Article 294 para. 1 TFEU confirms that the ordinary legislative procedure is the standard legislative procedure. In addition, the Treaty enables the Council to decide (in certain specially defined cases) unanimously that a special legislative procedure shall be replaced by the ordinary legislative procedure (e.g. in Article 192 para. 2 TFEU or Article 48 para. 7 TEU).

III. Procedure

4

With a view to procedural steps, Article 294 TFEU uses the term ‘readings’ in a typical constitutional terminology. The procedure can consist of up to three of these readings. The third reading is preceded by a conciliation procedure before a Conciliation Committee – comparable to similar mechanisms in federal legal systems.

1. First Reading

5

The legislative procedure begins with a (necessary) proposal by the Commission (Article 294 para. 2 TFEU, constituting almost a comprehensive initiative monopoly of the Commission). The proposal is to be forwarded to the EP and the Council. Subsequently, the EP adopts a position and communicates it to the Council. This is a significant step forward compared to the previous situation in which the EP only formulated an opinion. Now it has become a real co-legislator also from a formal point of view. The position of the EP is, like the following (approving) position of the Council, constitutive for the enactment of the legal act. In addition, the new wording underlines that the EP always has to be the first of the two legislative institutions that has to deal with the Commission’s proposal. Only after this, the Council makes its decision on the proposal – as a reaction to the EP’s position. In doing this, the Council has two possibilities:

- If the Council approves the position of the EP, the proposed legal act will be adopted in the wording which corresponds to the position of the EP.
- If it does not approve the position, it adopts its position and communicates it to the European Parliament; consequently, there is no reference to a ‘common position’ anymore.

The Council decides by qualified majority (Article 16 para. 3 TEU), as long as the decision of the Council does not differ from the Commission’s proposal – probably even in an amended later version in accordance with Article 293 para. 2 TFEU. In all other cases, the Council decides unanimously (Article 294 para. 9 TFEU).

2. Second Reading

7

If the Council did not approve the position of the EP but adopted an own position, the EP has to deal with the proposal in a second reading. The Council fully informs the EP of the reasons leading to the adoption of its own position. Likewise the Commission informs the EP of its position. This reciprocal obligation to inform the other institutions, which is prescribed by Article 294 para. 6 TFEU, is a specification of the principle of sincere cooperation².

² See already ECJ Case C-65/93 *Parliament v Council* [1995] ECR I-643.

- 8 The European Parliament may **approve** the position communicated to it by the Council by a majority of the votes cast within three months after the reception of such communication (Article 231 para. 1 TFEU). In this case, the legal act is deemed to be adopted. According to Article 294 para. 7 lit. a TFEU, the same effect occurs if the EP has **not taken a decision** within the said period of time. The period of three months may be extended by a period of one month at the initiative of the Council or the EP (Article 394 para. 14 TFEU).
- 9 The EP may also **reject** the position of the Council by a qualified majority vote of its component members (see Article 14 para. 2 TEU). In this case, the proposed act shall be deemed **not** to have been **adopted** (Article 294 para. 7 lit. b TFEU).
- 10 The EP may finally propose **amendments** to the Council's position. This requires the absolute majority of its component members. In this case, a **second reading** takes place in the **Council** (Article 294 para. 7 lit. c TFEU).
- 11 The **Council** may **approve all those amendments** within three months of receiving the amendments. In this case, the act in question shall be deemed to have been **adopted** in the amended version, Article 294 para. 8 lit. a TFEU. The Council decides on the amendments with a qualified majority if they have been approved by the Commission's position; otherwise it shall act unanimously (Article 294 para. 9 TFEU).
- 12 If the Council does **not approve all amendments** of the EP, the President of the Council, in agreement with the President of the EP, convenes a meeting of the Conciliation Committee (Article 294 para. 8 lit. b TFEU).

13 **3. Third Reading**

- The Conciliation Committee acts in order to prepare a third reading (Article 294 para. 10 TFEU). It seeks to draft a **joint text** with assistance of the Commission (Article 294 para. 13 TFEU) within a period of six weeks (extension is possible for another two weeks in accordance with Article 294 para. 14 TFEU).
- 14 The Conciliation Committee is composed of members of the Council or their representatives (i.e. the permanent representatives according to Article 240 para. 1 TFEU) and an equal number of members representing the EP. The members of the Council decide by qualified majority; the members of the EP do not vote by absolute majority any longer but by the majority of the votes cast.
- 15 After the period for conciliation has elapsed, Council and Parliament undertake a third reading of the proposal.
- 16 If a joint text has been drafted by the Committee, a **common legal act** of the European Parliament and the Council is **adopted** when the EP and the Council decide within a period of **another six weeks** (an extension of two more weeks is possible according to Article 294 para. 14 TFEU). The EP acts by a majority of the votes cast, while the Council acts by a qualified majority. Even if the Commission did not alter its proposal in accordance with the Committee's draft (see Article 293 para. 1 TFEU), the requirement of a qualified majority remains the same (see Article 293 para. 2 TFEU).
- 17 If either the Council or the EP fails to adopt the draft of the Committee, the proposed act shall be deemed not to have been adopted (Article 294 para. 13 TFEU).
- 18 If a joint text is not drafted within the set period, the proposed act shall be deemed not to have been adopted (Article 294 para. 12 TFEU).

19 **IV. Special provisions**

Article 294 para. 15 TFEU contains some special provisions for cases in which the initiative monopoly of the Commission does not apply and a legislative act is submitted on

the initiative of a group of Member States, on a recommendation by the European Central Bank or at the request of the Court of Justice. In these cases Article 294 para. 2, para. 6 s. 2 and para. 9 TFEU shall not apply. Instead, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may for their side request the opinion of the Commission throughout the entire procedure. In addition, the Commission may also deliver an opinion on its own initiative. Above this, it may take part in the Conciliation Committee in accordance with Article 294 para. 11 TFEU if it deems this necessary.

V. Excursus: The involvement of national parliaments

20

The Lisbon Treaty involved the national Parliaments with the legislative procedure at the Union level for the first time. This is due to several reasons: Firstly, it shall compensate the increase of competences of the EU; secondly, the democratic legitimacy of the Union level shall be enhanced by creating a doubled democratic foundation, to the EP on the one hand and to the national Parliaments on the other hand. Not least also the principle of subsidiarity is to be safeguarded³.

Against this background, Protocol No 1 on the role of national Parliaments in the European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality, both attached to the Lisbon Treaty⁴ call for the Commission to communicate its legislative proposals to the national Parliaments at the same time as they are communicated to the EP and the Council. By this, the national Parliaments shall be involved in the legislative procedure as soon as possible. The national Parliaments are given a period of eight weeks to formulate potential concerns relating to the proposal. The proposal of the Commission has to be revised if at least one third of the national Parliaments suspect a violation of the principle of subsidiarity. In case of a proposal within the ordinary legislative procedure, a revision becomes necessary only if half of the national Parliaments bring forward reasoned concerns. However, this procedure is not to be understood as a 'yellow card' for the proposal. If the Commission wants to uphold its proposal, it has to formulate its own reasoned opinion, which has to be communicated to EP and Council; these reasoned opinions have to be taken into account within the further procedure⁵.

The manner of the parliamentary involvement is decided upon by the Member States in their national legislation, e.g. in connection with the national accompanying law on the Lisbon Treaty⁶.

Article 295 [Interinstitutional agreements]

The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.

³ Cf. *Uerpmann-Witzack*, Frühwarnsystem und Subsidiaritätsklage im deutschen Verfassungssystem, 36 EuGRZ 2009, 461.

⁴ OJ 2010 C 83/203 and C 83/206.

⁵ Article 7 para. 3 Protocol No 2 on the application of the principles of subsidiarity and proportionality.

⁶ Cf. *Nettesheim*, Die Integrationsverantwortung – Vorgaben des BVerfG und gesetzgeberische Umsetzung, 63 NJW 2010, 177.

Bibliography: *Driesen*, Interinstitutional Conventions and institutional balance, 33 ELR 2008, 550; *Eiselt/Slomiski*, Subconstitutional engineering: negotiation, content and legal value of interinstitutional agreements in the EU, 12 ELJ 2006, 209; *Monar*, Interinstitutional Agreements: The Phenomenon and its Dynamics after Maastricht, 31 CMLRev 1994, 693.

- 1 Article 295 TFEU is new to primary law. It reflects a special aspect of the principle of loyalty: the obligation of sincere cooperation between the EU's institutions. It is – with certain editorial and substantive amendments – modelled on draft-Article III-397 TECE. The cooperation procedure, which systematically followed the codecision procedure, has been abandoned.
- 2 Today, Article 295 TFEU forms the legal basis for so-called interinstitutional agreements, which are already part of EU law and have been considered to be legally binding by the ECJ¹. The provision acknowledges that such agreements are necessary; furthermore, there is even an obligation of the Union's institutions to advise each other and to formulate specific rules for their cooperation. Interinstitutional agreements may be defined as understandings between two or more institutions with the aim to set up procedural, interpretative or gap-filling rules. The provision explicitly names the EU's main institutions (EP, Council and Commission). An analogous application in case of other institutions, bodies, offices and agencies remains doubtful. Although such institutions may – as in the past – conclude agreements, these agreements are of a non-binding character and may therefore not contain rights that could be enforced in front of the ECJ.
- 3 Only matters falling within the competence of the respective institution may be regulated by agreement. They must be in line with the Treaty provisions.
- 4 Article 295 TFEU does not contain any further definition of the legal quality of such agreements. However, it explicitly acknowledges that – depending on the individual case – they **may be legally binding** (although they do not have to). In particular, it has to be assessed whether the institutions acted with the intention to be legally bound.

Article 296 [Selection of specific type of acts; reasons]
(ex Article 253 TEC)

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case by case basis, in compliance with the applicable procedures and with the principle of proportionality.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

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¹ Cf. *Craig/de Búrca*, EU law, 107.

I. General remarks

1

Article 296 TFEU amends Article 253 TEC and takes over the wording of draft-Article I-39 TECE with minor editorial changes. The new first paragraph introduces a general clause for all cases in which the Treaties do not explicitly require a specific legal instrument. In these cases the Union may choose the instrument that is made use of. However, this choice is limited insofar as the Union has to observe the principle of proportionality. This means that, for instance, a directive usually has to be preferred over a regulation as long as there is no need for a detailed regulatory regime with direct applicability. The statement of reasons (Article 296 para. 2 TFEU) has to make reference to the application of the principle of proportionality.

II. The obligation to state reasons

2

Article 253 TEC, which contained only one paragraph, was moved to the second section of the article. All legal acts, not only legislative acts, have to contain a statement of reasons. The statement of reasons is an instrument of self-monitoring of the acting institution and it provides for a better possibility of the addressee of a legal act¹ to assess the legality of the measure. An insufficient statement of reasons constitutes a breach of an essential procedural rule². The obligation to provide a statement of reasons only applies to the institutions of the Union, not to national legislation applying or implementing EU legal acts³.

The statement of reasons is contained in the **preamble** of the legal act in practice. In addition, reference has to be made to the proposals (of the Commission) and to the opinions (e.g. of the EP or the EESC).

III. Content and extent

4

The statement of reasons has to incorporate the essential **legal and factual considerations** on which the legal act is based⁴. They may be formulated in a very brief manner. However, a mere repetition of the wording of the competence as it is laid down in the Treaties and on which the legal act is based is not sufficient⁵. Particular reference has to be made to the questions of subsidiarity and proportionality⁶.

Decisions, at least those relating to individual cases, have to reflect the essential reasons in a clear wording that relates to the concrete case without leaving significant room for doubts⁷. A decision on State aid has to show on which of the exceptions of Article 107 para. 3 TFEU it is based⁸. If a decision on recovery of an aid is adopted in a context that the addressee is familiar with and pursuant to an (earlier) decision which explains in detail how the aid in question was incompatible with the common market, no additional

¹ See Article 263 TFEU.

² ECJ Case C-296/93 *France and Ireland v Commission* [1996] ECR I-795.

³ ECJ Case C-70/95 *Sodemare* [1997] ECR I-3395.

⁴ ECJ Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507.

⁵ ECJ Case C-325/91 *France v Commission* [1993] ECR I-3283.

⁶ See Article 5 Protocol No 2 on the application of the principles of subsidiarity and proportionality.

⁷ ECJ Joined Cases C-260/91 and C-261/91 *Diversint* [1993] ECR I-1885; Joined Cases C-328/99 and C-399/00 *SIM 2 Multimedia* [2003] ECR I-4035.

⁸ ECJ Case C-113/00 *Spain v Commission* [2002] ECR I-7601.

reasoning in the latter decision is necessary⁹. The obligation to provide a statement of reasons can be limited due to an obligation of secrecy (e.g. of an examination commission); insofar the communication of the marks can be treated as an alternative form of reasoning¹⁰.

- 6 Normative acts** (directives and regulations) on the contrary ‘may be confined to indicating the general situation which led to its adoption, on the one hand and the general objectives which it is intended to attain on the other. Consequently it is not possible to require that it should set out the various facts, which are often very numerous and complex, on the basis of which the regulation was adopted, or a fortiori that it should provide a more or less complete evaluation of those facts’¹¹. This is even more true in cases in which the factual and legal context is well-known to the interested parties¹². The reasoning of an anti-dumping regulation has to indicate whether EU institutions sufficiently assessed ‘whether the injury on which they intend to base their conclusions actually derived from dumped imports and must disregard any injury deriving from other factors, in particular from the conduct of [Community] producers themselves’¹³. If the adoption of an anti-dumping regulation is declined, it is insufficient to merely refer to the lack of the necessary majority in the Council¹⁴.

7 **IV. Consequences of improper reasoning**

The statement of reasons belongs to the formal procedural rules. A violation thereof may cause the nullity of the legal act¹⁵. However, the violation has to be essential in order to cause this legal consequence. This is the case if the infringement of the formal requirement allows for an insufficiency concerning the content:

- inadequate statement of reasons¹⁶;
- the competence named in the legal act is inapplicable in the present case, provided that this failure may affect the legislative procedure, in particular a required voting majority or the lack of involvement of other institutions: e.g. referring to Article 43 and Article 115 TFEU instead of solely to Article 115 TFEU¹⁷; to Article 192 TFEU instead of Article 114 TFEU¹⁸.

A subsequent amendment of reasons is not possible.

8 **V. Framework for measures**

The newly introduced Article 296 para. 3 TFEU goes far beyond the mere requirement of proper reasoning. Council and EP are now bound not to adopt legal acts that are not provided for in the policy area concerned. The framework for measures of the legislative institutions of the Union therefore is more limited by primary law than it was the case before the entering into force of the Lisbon Treaty.

⁹ ECJ Case C-75/95 *Belgium v Commission* [1999] ECR I-3671.

¹⁰ ECJ Case C-254/95 P *Parliament v Innamorati* [1996] ECR I-3423.

¹¹ ECJ Case 5/67 *Beus* [1968] ECR 83; Case C-150/94 *UK v Council* [1998] ECR I-7235.

¹² ECJ Case C-27/00 *Omega Air* [2002] ECR I-2569.

¹³ ECJ Case C-358/89 *Extramet* [1992] ECR I-3813.

¹⁴ ECJ Case C-76/01 P *Eurocoton* [2003] ECR I-10091.

¹⁵ See Article 263 para. 1 TFEU.

¹⁶ ECJ Joined Cases C-329/93, C-62/95, C-63/95 *Bremer Vulkan Verbund* [1996] ECR I-5151.

¹⁷ ECJ Case 68/86 *UK v Council* [1988] ECR 855.

¹⁸ ECJ Case C-300/89 *Titanium dioxide waste* [1991] ECR I-2867.

**Article 297 [Signature; publication; entering into force]
(ex Article 254 TEC)**

1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.

Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.

Legislative acts shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

2. Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.

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I. Normative genesis, publication, ratification

1

Article 297 TFEU is modelled on Article 254 TEC but also incorporates elements of draft-Article I-39 TECE. Like the latter, the present provision differentiates legislative acts (Article 297 para. 1 TFEU) from non-legislative acts (Article 297 para. 2 TFEU) – following the new systematic terminology of the Lisbon Treaty. In respect to the first group of acts (Article 297 para. 1 TFEU), it further differentiates acts adopted under the ordinary legislative procedure from acts adopted under a special legislative procedure. The important role under the principle of the rule of law remains the same as for the predecessor norm of Article 254 TEC: **Union law** has to be made **publicly available**. The organ of publication is – after the merger of the three pillars – called ‘Official Journal of the European Union’ now.

Legislative acts have to be ratified. Acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council – i.e. the chairpersons of the two ‘real co-legislators’ (Article 297 para. 1 subpara. 1 TFEU). However, legislative acts that have been adopted in a special legislative procedure are to be signed by the president of the institution adopting them (Article 297 para. 1 subpara. 2 TFEU). Legal acts with a non-legislative character adopted in the form of regulations, directives or decisions, when the latter do not specify whom they are addressed to, shall be signed by the President of the institution adopting them (Article 297 para. 2 subpara. 1 TFEU).

- 3 The following acts have to be **published** in the Official Journal:
- 4 – all legislative acts, irrespective if they were adopted in the ordinary or a special legislative procedure (Article 297 para. 1 subpara. 3 s. 1 TFEU). The public availability of legislative acts is an essential condition for the realisation of the principle of the rule of law.
- 5 – Due to their general application the following non-legislative legal acts have to be published in the OJ: regulations and directives addressing the Member States as well as decisions which do not specify to whom they are addressed (Article 297 para. 2 subpara. 2 s. 1 TFEU).
- 6 **Before their publication**, legislative acts and other legal acts that have to be published are **legally inexistent**. As long as they have not been published, from a technical perspective, only a draft of the legal act exists.

7 **II. Notification**

The following acts become effective with notification to the addressee:

- directives (of Council and Commission) directed to only some (not all) Member States (the ‘other directives’), Article 297 para. 2 subpara. 3 TFEU.
 - decisions addressed to a specified addressee, again Article 297 para. 2 subpara. 3 TFEU.
- 8 Although publication is not necessary for measures named in mn. 5 above, it is common practice of the Union to publish them in the Official Journal (OJ Section C) for information purposes.
 - 9 The legal act is notified if it reaches the addressee and if the addressee has the possibility to take note of its content. The publication for informative purpose in OJ Section C cannot replace the individual notification of the addressee¹. The case is different if the addressee – irrespective how – has gained knowledge of the comprehensive text². The notification of Union measures requires the communication of their comprehensive text; a mere summary of its content is not sufficient because the addressee would not be able to seek effective legal protection against them³. The formal decisions of the Commission are signed by the president and the executive secretary and, if required, they are notified by the president. Authentication of a legal act necessarily has to precede its notification⁴. The point of time of notification is crucial for the period of time in which legal action against the act is possible.

10 **III. Time of entering into force**

Legislative and legal acts that have to be published become effective on the date specified in the act; in the absence of such a specified date they enter into force on the twentieth day following the day of their publication (Article 297 para. 1 subpara. 3 s. 2 and para. 2 subpara. 2 s. 2 TFEU).

- 11 There is an assumption that the date of publication set out in the Official Journal is given correctly. However, this assumption may be refuted. The relevant date is the date on which the Official Journal is actually available in all the official languages of the EU⁵.

¹ Cf. CR/Ruffert, Article 297 AEUV mn. 13 with reference to ECJ Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

² ECJ Case 52/69 *Geigy* [1972] ECR 787.

³ ECJ Case C-143/95 P *Socurte* [1997] ECR I-1.

⁴ ECJ Case C-286/95 P *Imperial Chemical Industries* [2000] ECR I-2341.

⁵ ECJ Case 98/78 *Racke* [1979] ECR 61; Case 99/78 *Decker* [1979] ECR 101.

The principle of legal certainty prohibits the definition of a date for the entering into force being earlier than the date of publication (retroactivity). An exception applies ‘where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected’⁶. 12

Article 298 [European administration]

- 1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.
- 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

Bibliography: *Craig*, EU Administrative Law, 2006; *Gerapetritis*, Proportionality in Administrative Law, 2000; *Hofmann/Türk* (eds), Legal Challenges in EU Administrative Law, 2009; *Nieto-Garrido/Delgado*, European Administrative Law in the Constitutional Treaty, 2007; *Hofmann/Rowe/Türk*, Administrative Law and Policy of the European Union, 2011; *Schwarze*, European Administrative Law, rev. 1st ed. 2006.

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I. European administration, para. 1 1

Article 298 TFEU does not have an actual predecessor. It is modelled on draft-Article III-398 TECE. It has to be read in the context of Article 41 CFREU, which provides for a right to good governance. The provision gives a clear legal basis for the establishment of a Union administration. This does not lead to a conferral of competences, being in line with the principle of conferral. The right of the Union to organise its administrative branch is therefore limited by the competences the Union already possesses¹. Within this framework, the Union has to create administrative structures that are functionally adequate and compatible to its institutions’ tasks. These structures shall enable the Union to better perform its tasks in an appropriate manner.

Also without such an explicit legal basis, a complex and differentiated system of European administrative law has evolved already before the Lisbon Treaty entered into force. It was and is formed out of a comparative assessment of general principles of the administrative law in the Member States, while at the same time, today, the EU administrative law influences the national administrative law – this multidimensional system may be called a ‘**multilevel administrative cooperation**’². 2

Article 298 para. 1 TFEU names three generally formulated but nonetheless central qualitative criteria which do not only apply to the Union’s administration as such but also to the whole system of multilevel administrative cooperation: the administration shall be organised in an **open, independent and efficient** manner. The adjective ‘open’ reflects 3

⁶ ECJ Case 98/78 *Racke* [1979] ECR 61; Case C-290/00 *Duchon* [2002] ECR I-3567.
¹ Cf. *VHvH/Epping*, Article 298 AEUV mn. 2.
² ‘Europäischer Verwaltungs(rechts)verbund’, *Schmidt-Aßmann/Schöndorf-Haubold*, Der Europäische Verwaltungsverbund, 2005.

the need of transparency, which has now found a general acknowledgement particularly in Article 11 paras 2 and 3 TEU and has been elevated to the status of a fundamental right in Article 41 CFREU. The efficiency of the administration, explicitly called for in the context of the individual institutions, correlates with the functional logic of the administration and an administration that serves the interests of the (European) citizen (but as any principle of efficiency it also relates to a sound financial management and budgetary rigour). Finally, the relative independence of the administration is a consequence of the rule of law-based separation of powers, which calls for a separation not only of the three classical branches but also of the executive and the administrative branch.

4

II. European ‘administrative legislation’

Within the above-mentioned competence framework and considering Article 298 para. 1 TFEU, Article 298 para. 2 TFEU forms the legal basis for a **‘European administrative legislation’**. EP and Council adopt the relevant provisions by regulations in accordance with the ordinary legislative procedure. This is a clear sign for the foundation of this administrative legislation respecting the rule of law. The limits of the competence are further defined in the staff regulations and in the conditions of employment under Article 336 TFEU.

Article 299 [Decisions as enforceable orders; Enforcement]
(ex Article 256 TEC)

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Bibliography: *Bossard*, Law enforcement in Europe, 1993; *Kennet*, Enforcement of judgements in Europe, 2000; *van Rhee/Uzelac* (eds), Enforcement and Enforceability, 2010.

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I. Enforcement order

1

Article 299 TFEU is based on Article 256 TEC, whose wording was taken over with editorial amendments but without substantive changes. Legal acts of the ECB were added to the provision (which has become an institution of the Union now)¹. Thus legal acts of the Council, the Commission or the ECB are enforcement orders as long as they are not addressed to States but to natural and legal persons and impose a **pecuniary obligation** on them.

Legal acts addressed to private natural or legal persons containing **other obligations** 2 (e.g. the duty to tolerate an official search or an obligation to hand over certain documents) are not encompassed by the provision and are not explicitly dealt with in EU primary law (different from Article 83 para. 2 EURATOM Treaty). However, if regulations of the Council allow for such a decision, Article 299 TFEU does not hinder the provision from being enforceable².

The judgments and decisions of the ECJ serve as enforcement orders, too (Article 280 3 TFEU). The legal acts of the ECB (Article 132 para. 2 TFEU), which have already been enforceable before the Lisbon Treaty, are now explicitly mentioned.

II. Procedure

4

The enforcement procedure based on the enforcement order is generally subject to the national enforcement law of the Member States in the territory of which the enforcement measures shall be carried out³.

The order for its enforcement (Article 299 subpara. 2 TFEU) (i.e. the execution clause) 5 has to be appended on request of the party asking for enforcement (Article 299 subpara. 3 TFEU). The clause is appended by the national authority which the government of the Member State has designated for this purpose. The national authority only verifies the authenticity of the decision.

After this procedure has been completed, the party requesting the enforcement (i.e. 6 the Council or the Commission) may directly apply for enforcement measures at the competent authorities within the Member State (Article 299 subpara. 3 TFEU). Depending on national enforcement law and the object of enforcement, this authority may be a bailiff, a court, etc. Not only the competent body but also the specific procedure of the enforcement is governed entirely by national law.

III. Legal protection

7

The competence to provide legal protection in cases of enforcement is split between the ECJ and the national courts (Article 290 subpara. 4 TFEU).

The practically important decision of suspension of enforcement based on the order 8 may only be ordered by the ECJ (or the General Court). It is possible if the judgment debtor brings forward the argument that enforcement is obsolete due to subsequent changes (e.g. performance or waiver of the payment). The procedure follows the rules set out by Articles 160 et seq. RoP ECJ (especially Article 165 RoP ECJ). Against this

¹ Cf. *Fischer*, Der Vertrag von Lissabon, 438.

² Article 261 TFEU; as to this question ECJ Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859.

³ Cf. *CR/Ruffert*, Article 299 mn. 4.

background, national courts cannot suspend the enforceability of the enforcement order under national law.

- 9 However, the **manner in which the enforcement is carried out** (how enforcement based on the title takes place) falls within the jurisdictional competence of the national courts in accordance with the respective national legislation.

CHAPTER 3 THE UNION'S ADVISORY BODIES

Article 300 [Economic and Social Committee; Committee of the Regions]

1. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions, exercising advisory functions.

2. The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas.

3. The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.

4. The members of the Economic and Social Committee and of the Committee of the Regions shall not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Union's general interest.

5. The rules referred to in paragraphs 2 and 3 governing the nature of the composition of the Committees shall be reviewed at regular intervals by the Council to take account of economic, social and demographic developments within the Union. The Council, on a proposal from the Commission, shall adopt decisions to that end.

Bibliography: *Andenas/Türk* (eds), Delegated Legislation and the Role of the Committees in the EC, 2000; *Christiansen/Kirchner*, Committee Governance in the European Union, 2000; *Collins/Jeffery*, Whither the Committee of the Regions?, 1997; *Färber/Forsyth* (eds), The Regions – Factors of Integration or Disintegration in Europe?, 1996; *Jeffery*, The Regional Dimension of the European Union, 1997; *Jørges/Vos* (eds), EU Committees: Social Regulation, Law and Politics, 1999; *Kokott*, Federal States in Federal Europe: The German 'Länder' and Problems of European Integration, 3 EPL 1997, 607; *Kotzur*, Die soziale Marktwirtschaft nach dem Reformvertrag, in: Pernice (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung, 2008, 191; *Morgan*, The Consulting Function of the Economic and Social Committee of the European Community, 1991; *Osborne*, The Economic and Social Committee, 1991; *Smismans*, Law, Legitimacy and European Governance: Functional Participation in Social Regulation, 2004; *id.*, Civil Society and Legitimate European Governance, 2005; *van der Voort*, In Search of a Role. The Economic and Social Committee in European Decision Making, 1997; *Warleigh*, The Committee of the Regions, 1999; *Weatherill/Bernitz* (eds), The Role of Regions and Sub-National Actors in Europe, 2005.

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I. General remarks, normative genesis

1

The European Economic and Social Committee (EESC) and the Committee of the Regions (CoR) are counselling institutions of the Union. The first gives influence to the organised civil society, the latter does the same for regional and local actors in the Member States. Hitherto the two institutions were regulated separately in Articles 257 et seq. TEC respectively Articles 263 et seq. TEC. Due to the high degree of parallels between the two institutions concerning their profiles of tasks, their functioning and rights, already draft-Article I-32 TECE suggested a common legal basis for the EESC and the CoR. This regulatory concept is taken over by Article 300 TFEU, which adopts more or less the wording of draft-Article I-32 TECE with the necessary editorial amendments. Apart from the effect of systematising bundling, the norm does not contain any substantive amendments. In particular both Committees do not amount to institutions in the meaning of Article 13 para. 1 TEU. They remain supporting organs in the meaning of Article 13 para. 4 TEU, which is identical with Article 300 para. 1 TFEU. By this, Article 300 TFEU finally qualifies as a typical framework article, which is followed by more specific rules for the respective Committee, first for the EESC and then for the CoR.

II. The Economic and Social Committee (EESC)

2

Article 300 TFEU firstly defines the EESC as a subsidiary or supporting institution within the institutional framework of the Union. It had already been present in the old EEC architecture since the Rome Treaties of 1957. Since the EESC possesses, apart from its mere supportive function, relatively comprehensive autonomy in matters of personnel, budget and rules of procedure, its legal status has become similar to that of a fully developed institution of the Union. It has its seat in Brussels¹. The counselling activities of the EESC require specific expertise and detailed knowledge of the situation in the Member States². Although not explicitly defined in the Treaties but practically important: The EESC is also counselling candidate States. The counselling activities and the functions implicitly set out by Article 300 para. 1 TFEU are specified in Article 304 TFEU.

Article 300 para. 2 TFEU deals with the composition of the EESC. This aspect is further elaborated by Article 301 et seq. TFEU as well as by its Rules of Procedure. The Committee consists of representatives of the organised civil society of which important groups are named in an exemplary, not comprehensive manner. The provision names, less detailed than its predecessor and with a slightly different (less abstract) focus, the social, the economic, the citizen-related, the professional and the cultural spheres. The strong link with several major groups of civil society makes the Committee itself an actor of civil society, apart from its mere function as a subsidiary institution of the Union. The Committee shall perform an institutionalised mediating function³, shall 'facilitate civil dialogue and provide the institutional forum for this'⁴. The Committee sees itself as a

¹ Protocol No 6 on the location of the seats of the institutions, OJ 2010 C 83/265.

² ECJ Joined Cases 281, 283–285, 287/85 *Germany, France, Netherlands, Denmark and UK v Commission* [1987] ECR 3202.

³ 'Privileged intermediary', No 13 Protocol on cooperation between the European Commission and the European Economic and Social Committee, OJ 2012 C 102/1.

⁴ Opinion of the EESC 'addressed to the 2003 Intergovernmental Conference', OJ 2004 C 10/43, 3.1.3.

‘forum’⁵ and ‘bridge’⁶ between the Europe of the citizens and the Europe of the institutions. Furthermore it is an objective of **counselling participation of interested parties** to compensate for other deficits concerning legitimacy and participation⁷.

- 4 The counselling function of the EESC relates to the legislative procedures rather than to the executive functions of the EU institutions⁸. Counselling is foremost realised by the formulation of opinions. Further details as to this may be found in Article 304 TFEU.

5 III. The Committee of the Regions (CoR)

The normative structure concerning the Committee of the Regions set out in Article 300 para. 3 TFEU is parallel to those of the EESC in Article 300 para. 2 TFEU. Also this Committee is a ‘subsidiary institution’ and ‘supportive institution’ with counselling function. The CoR has been created by the Maastricht Treaty in order to compensate (at least to a certain extent) the lack of the Union to take into account the interests of the sub-national level of the Member States. It therefore also represents the ideas of subsidiarity⁹ and governance in close local relation to the citizen^{10, 11}. The role of the CoR was strengthened by the Treaties of Nice and Amsterdam. By this, the territorial entities below the national State level gained more influence in Union legislation relating to matters of regional impact. Thus the idea of a Europe of Regions becomes more visible at least in parts. The seat of the CoR is located in Brussels¹².

- 6 With a view to the composition of the Committee, Article 300 para. 2 TFEU speaks of ‘representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly’. The term ‘regional and local bodies’ is intentionally formulated in a broad manner, taking into account the different legal situations at the sub-national levels within the Member States. It just requires a territorial entity that possesses defined boundaries and a minimum of administrative and legislative competences¹³. The representatives have to be legitimised by an electoral mandate. The membership in the CoR is accessory to this mandate because only this can guarantee the legitimising effect. Typical members of the Committee may include members of municipal councils or also directly elected mayors.
- 7 Apart from its counselling function, the CoR supervises the principle of subsidiarity. The latter function has been newly introduced. According to Article 8 para. 2 Protocol on subsidiarity and proportionality¹⁴, the Committee may bring an action before the ECJ in order to clarify whether a legislative act violates the principle of subsidiarity, provided that the CoR had to be heard during the law-making process.

⁵ Opinion of the Economic and Social Committee on ‘The 2000 Intergovernmental Conference — The role of the European Economic and Social Committee’ (2000/C 117/06), OJ 2000 C 117/28.

⁶ CONV 323/02, 8.

⁷ Cf. *Smismans*, Law, Legitimacy and European Governance: Functional Participation in Social Regulation, 2004.

⁸ Cf. *Streinz/Burgi/Hölbling*, Article 300 AEUV mn. 6.

⁹ See Article 5 paras 1, 3 TEU.

¹⁰ See Article 10 para. 3 TEU.

¹¹ Cf. *VHvH/Epping*, Article 300 AEUV mn. 6.

¹² No 6 Protocol on the location of the seats of the institutions, OJ 2010 C 83/265.

¹³ Cf. *CR/Suhr*, Article 300 AEUV mn. 29 with further references.

¹⁴ OJ 2010 C 83/206.

IV. Independence and common interest

8

Article 300 para. 4 TFEU guarantees full independence for the members of both Committees. They possess a **free mandate**. Consequently, the members of the EESC are not bound by any instructions of one of the various groups they represent. Likewise the members of the CoR are not bound to any instructions by their home countries or the regional bodies they represent. However, in practice there will remain strong ties between each member and the interest group he or she represents, of course.¹⁵ A limitation as to this aspect is set by the general interest orientation. Within these limits, however, conflicting interests, objectives and perspectives are natural and intended.

V. Review of composition

9

Article 300 para. 5 TFEU makes the activities of the Committee more dynamic in a specific manner. The composition of the Committee is not fixed once and forever but has to be reviewed on a regular basis. It is the objective of this review **to take into account the economic, social and demographic developments** within the Union. As to this end, the Council decides on a proposal of the Commission.

SECTION 1
THE ECONOMIC AND SOCIAL COMMITTEE

*Article 301 [Composition of the Economic and Social Committee]
(ex Article 258 TEC)*

The number of members of the Economic and Social Committee shall not exceed 350.

The Council, acting unanimously on a proposal from the Commission, shall adopt a decision determining the Committee's composition.

The Council shall determine the allowances of members of the Committee.

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I. Composition

1

Article 301 TFEU builds on Article 258 TEC but establishes numerous modifications, also with recourse to draft-Article III-389 TECE. The main innovation concerns the composition of the Committee. Even though the overall number of members must not exceed 350, the specific composition is no longer determined by primary Union law. Instead, this is reserved for a unanimous Council decision, acting on a proposal of the Commission (Article 301 subpara. 2 TFEU). Until such a decision enters into force, Article 7 Protocol (No 36) on transitional provisions¹ – meaning the distribution of seats

¹⁵ See VHvH/*Epping*, Article 300 AEUV mn. 9.

¹ OJ 2010 C 83/322.

determined in Nice – applies. By waiving this fixation at the primary law level, the composition of the Committee is **dynamised** in many respects²: with a view to social, economic and demographic change but also related to the potential enlargement of the Union. The rigid rates of the Nice model do not sufficiently take these developments into account; the requirement for unanimity secures the Member States interests, especially of the smaller States. The members do not need to hold the citizenship of the respective sending State; it is common practice but neither stringently required by the wording nor the ratio legis.

2

II. Status of the members

The individual members execute their mandate legally independently, solely bound to the general interest of the Union, now laid down in Article 300 para. 4 TFEU. They are neither bound by instructions of their home States nor by any other association. Their affiliation to one of the existing groups is based on personal choice. It is conceivable that single members do not join a specific group. The independence requires that members cannot be forced to resign when leaving the sending association³.

3 According to Article 10 para. 2 Protocol on Privileges and Immunities, the members enjoy limited **immunity**, also towards their home States.

4 The Council determines the remuneration of the members by qualified majority.

Article 302 [Appointment of members] (ex Article 259 TEC)

1. The members of the Committee shall be appointed for five years The Council shall adopt the list of members drawn up in accordance with the proposals made by each Member State. The term of office of the members of the Committee shall be renewable.

2. The Council shall act after consulting the Commission. It may obtain the opinion of European bodies which are representative of the various economic and social sectors and of civil society to which the Union's activities are of concern.

1 Article 302 TFEU builds on Article 259 TEC. However, the provision extends the mandatory period of appointment from four to five years. Consequently, Article 303 TFEU extends the terms of office of the chairman and the officers to two and a half years. There is a two-step procedure in place: It is still the **Council** that appoints the members, drawing on a list proposed by the Member States. From now on, the term of office shall be five years. Reappointment is permitted.

2 Article 302 para. 2 TFEU contains another innovation – taking extending effect on the one hand and serving a limiting function on the other hand. While so far merely the opinion of the relevant European organisations of the different economic and social branches could be obtained, this applies for organisations of civil society as well now. However, opposite to the prior legal situation, the ‘interest’ of an organisation in an intervention by the Union does no longer suffice. This criterion did not provide for any rational restriction. Therefore, the new Article 302 para. 2 TFEU requires the respective organisations to be ‘concerned’ by the activities of the Union. However, the practical effects of this ‘tightening’ might rather be small (see mn. 3 below).

² See Article 300 para. 5 TFEU.

³ Cf. Schwarze/*Sichert*, Article 301 AEUV mn. 9.

Summarising the (two) procedural steps: The appointment procedure shall be initiated **3** by **proposals** drawn up by the Member States. In a second step a **list of candidates** shall be compiled thereof. The **Commission** shall be consulted (Article 302 para. 2 s. 1 TFEU). In practice, the facultative obtaining of opinions from the respective European organisations – now extended to those of civil society (Article 302 para. 2 s. 2 TFEU) – will be disregarded regularly. The **Council** decides by qualified majority.

Article 303 [Chairman; officers; Rules of Procedure; convention]
(ex Article 260 TEC)

The Committee shall elect its chairman and officers from among its members for a term of two and a half years.

It shall adopt its Rules of Procedure.

The Committee shall be convened by its chairman at the request of the European Parliament, the Council or of the Commission. It may also meet on its own initiative.

The TFEU governs – as the TEC did before – only a few aspects of the organisation **1** and procedure of the EESC. The details of these issues are left to the Rules of Procedure of the EESC. Article 303 TFEU is an exception in this sense, building on Article 260 TEC. The extension of the EESC's terms of office to five years (Article 302 para. 1 TFEU) necessitates a parallel extension of the chairman's and officers' terms of office to two and a half years. Moreover the European Parliament may convene the Committee upon request as well now.

The necessity to elect a **chairman (president)** and **officers (presidency)** is explicitly **2** laid down in Article 303 TFEU and therefore prescribed by primary law. The chairman shall be elected among the members of the EESC. The same applies to the presidency. So far it was composed of the chairman, two vice chairmen, one member per Member State as well as the three presidents of the groups and sections. Due to the removal of the group structure¹ – emphasising the uniformity of the EESC – a revision of the Rules of Procedure and therefore the composition of the presidency became necessary. According to the new Rules of Procedure², the presidency merely encompasses the chairman as well as the two vice chairmen³.

The chairman convenes the Committee; he is obliged to do so at the request of the **3** European Parliament, the Council or the Commission (Article 303 subpara. 3 TFEU).

Article 303 subpara. 2 TFEU leaves the regulation of further organisational and proce- **4** dural issues to the Rules of Procedure that shall be determined by the EESC itself.

A common organisational structure of the EESC and the newly established Committee **5** of the Regions (Articles 305–307 TFEU) was agreed upon in a protocol of the Maastricht Treaty already; but the Amsterdam Treaty dissolved this commonality except for logistic 'common services' (e. g. translation, printing office).

Article 304 [Right of consultation]
(ex Article 262 TEC)

The Committee shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide. The Committee may be consulted

¹ The merely facultative division into specialised sections according to Article 261 TEC was removed by the Reform Treaty.

² OJ 2010 L 324/52.

³ See Article 11 RoP EESC.

by these institutions in all cases in which they consider it appropriate. It may issue an opinion on its own initiative in cases in which it considers such action appropriate.

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time limit which may not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time limit, the absence of an opinion shall not prevent further action.

The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.

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1 I. General remarks

Article 304 TFEU modifies Article 262 TEC, whose para. 4 was removed in order to put the European Parliament on an equal footing with Council and Commission in paras 1 to 3. This symbolic reform did not lead to any change in substance. The division into specialised sections was dropped by the abolition of Article 261 TEC. Consequently, these sections are not mentioned in Article 304 TFEU either; in contrast the uniformity of the EESC is underlined more than before.¹

2 Consulting the EESC is still a significant part of the legislative or decision-making processes of European Parliament, Council and Commission. These institutions ensure a consultation by giving the EESC the opportunity to submit an opinion. An explicit provision was introduced with the Amsterdam Treaty, resulting in a right of consultation of the EECs for the European Parliament (which was not possible before). Since the entering into force of the Reform Treaty, the European Parliament is finally put on an equal footing with the other institutions.

3 II. Obligatory and facultative consultation

A consultation is **obligatory** insofar as the Treaties explicitly prescribe it². Compliance with the consultation obligation has to be indicated in the respective legal act (Article 296 para. 2 TFEU). The absence of consultation or indication constitutes a lack of an essential procedural requirement (Article 263 para. 2 TFEU) that might cause the nullity of the legal act. The EESC might not – for lack of a right to sue³ – invoke the ECJ to claim such violations. Indirect legal protection exists to the effect that the Commission particularly may contest such a procedural error by means of an action for annulment (Article 263 para. 2 TFEU). Otherwise the lack may be claimed incidentally (Article 267 or Article 277 TFEU).

4 European Parliament, Council and Commission may set a time limit for the submission of an opinion (Article 304 subpara. 2 TFEU) which may not be less than one month. After its expiry, the lack of an opinion will not be considered.

¹ Cf. Fischer, Der Vertrag von Lissabon, 443.
² Cf. Craig/de Búrca, EU law, 68.
³ Only the CoR was included in Article 263 para. 3 TFEU by the Reform Treaty.

In other cases, if European Parliament, Council or Commission consider it necessary, the consultation is **facultative** (Article 304 subpara. 1 s. 2 TFEU). In addition, the EESC possesses the **right to take up decisions on its own authority** on any matter concerning the scope of duties of the Union; insofar the EESC is not limited to economic or social issues.

III. Opinion

6

The EESC submits its opinion as well as a report on the consultation to the **European Parliament**, the **Council** and the **Commission** at the same time, although the opinion was solely requested by one of these institutions. The Commission is still given the opportunity to modify a proposal according to Article 293 para. 2 TFEU, even though merely the Council has obtained the opinion by then. The Council may publish an opinion in section ‘C’ of the Official Journal.

SECTION 2
THE COMMITTEE OF THE REGIONS

*Article 305 [Composition; selection and appointment of members]
(ex Article 263, second, third and fourth paragraphs, TEC)*

The number of members of the Committee of the Regions shall not exceed 350.

The Council, acting unanimously on a proposal from the Commission, shall adopt a decision determining the Committee’s composition.

The members of the Committee and an equal number of alternate members shall be appointed for five years. Their term of office shall be renewable. The Council shall adopt the list of members and alternate members drawn up in accordance with the proposals made by each Member State. When the mandate referred to in Article 300(3) on the basis of which they were proposed comes to an end, the term of office of members of the Committee shall terminate automatically and they shall then be replaced for the remainder of the said term of office in accordance with the same procedure. No member of the Committee shall at the same time be a Member of the European Parliament.

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I. General remarks

1

Article 305 TFEU builds on Article 253 TEC, whose para. 1 was removed due to the common general remarks on EESC and CoR in Article 300 TFEU. In parallel to the EESC, the term of office was extended from four to five years, in turn having direct implications on the president’s and officers’ terms of office. From now on, according to Article 306 TFEU, they are elected for two and a half years. In parallel to the EESC, the dis-

tribution of seats is no longer entrenched in primary law but prescribed by secondary law facilitating potential needs for change. In addition to its consulting function, the CoR obtained an invigorated function to monitor the **subsidiarity principle**. According to Article 8 para. 2 Protocol (No 2) on the application of the principles of subsidiarity and proportionality¹, the CoR may bring actions against legislative acts before the ECJ due to the infringement of the subsidiarity principle for as much the TFEU provided for a mandatory consultation concerning this particular legislative act².

- 2 The establishment of a Committee of the Regions, a dynamically propelled instrument of integration since the Maastricht Treaty, shall ensure that the territorial subdivisions of the Member States may execute an advisory right to participate in the region-based legislative activity of the Union. It complements the efforts that are identifiable in the TEU to embank the 'remoteness from the citizen', caused by the centralisation throughout the Union³, and thus particularly provides for the German understanding of the **principle of federalism**⁴ as well as the regional democratic recourse – in regional/local every day's life⁵.
- 3 The Committee is, comparable to the EESC, an **advisory body** of the Union (Article 13 para. 4 TEU, Article 300 para. 1 TFEU). Its specific task is the information of European Parliament, Council and Commission (Article 307 para. 1 or para. 3 TFEU) in all cases in which regional interests or especially cross-border cooperation are involved. However, the advisory capacity of the committee is not limited to these issues. The headquarters is located in Brussels⁶.

4

II. Composition

The overall number of members of the CoR must not – as the EESC – exceed 350. The term of office amounts to five years and is adapted to the one of the European Parliament. The determination of the composition by primary law was consciously abandoned by removing the former Article 263 para. 1 TEC. The distribution of seats follows a unanimous Council decision on a proposal of the Commission (Article 305 subpara. 2 TFEU). Until such a decision enters into force, the composition is governed by Article 8 Protocol (No 36) on transitional provisions⁷. According to their size, different quotas are allotted to the Member States (no proportionality relating to demographic aspects).

5

III. Appointment

The Council appoints the members as well as the same amount of substitutes according to a two-stage procedure by qualified majority (2nd stage). Reappointment is permitted. Prior to this, the candidates are proposed by the respective Member States (1st stage). The selection of candidates is governed by national law. This also applies to the issue to what extend municipalities have to be considered in relation to regional territorial entities (it is contentious whether regions are to be favoured over local territorial

¹ OJ 2010 C 83/206.

² See Article 300 TFEU mn. 7; see *Piris*, The Lisbon Treaty, 235.

³ See Article 5 TEU on the subsidiarity principle.

⁴ See *Häberle*, Europäische Verfassungslehre, 457 et seq.

⁵ See *Kotzur*, Grenznachbarschaftliche Zusammenarbeit in Europa, 90 et seq., 95 et seq.

⁶ See Article 341 TFEU.

⁷ OJ 2010 C 83/322.

entities⁸). A consideration according to an approximately equivalent number seems to be appropriate and serves the participating respectively integrating function of the CoR. In practice, local territorial entities even form the majority.

The candidates have to hold a regional or local authority electoral mandate or have to be politically accountable to an elected assembly⁹. The retirement from their national (regional- or local-based) mandate causes the disqualification from holding office. Article 305 subpara. 3 s. 4 TFEU states explicitly that the member's term of office terminates automatically when the mandate referred to in Article 300 para. 3 comes to an end (**accessoriness**). A successor is to be appointed for the remainder of the said term of office in accordance with the same procedure. The members must not be members of the European Parliament at the same time (**incompatibility**).

IV. Status of the members

The members exercise their mandate legally independently (now explicitly laid down in Article 300 para. 4 TFEU¹⁰). They are neither bound to instructions of their home State nor of the territorial entities (regions).

According to Article 10 para. 2 Protocol (No 7) on the privileges and immunities of the European Union¹¹, the members enjoy limited **immunity**, also towards their home States.

Article 306 [Chairman; Rules of Procedure; convention] (ex Article 264 TEC)

The Committee of the Regions shall elect its chairman and officers from among its members for a term of two and a half years.

It shall adopt its Rules of Procedure.

The Committee shall be convened by its chairman at the request of the European Parliament, the Council or of the Commission. It may also meet on its own initiative.

The TFEU regulates, as for the EESC, only a few organisational and procedural issues of the Committee at the level of primary Union law. It leaves the detailed regulation to the Rules of Procedure (subpara. 2).

The necessity to elect a **chairman** and **officers** is laid down explicitly in primary law already (Article 306 subpara. 1 TFEU). In this respect, Article 306 TFEU replaces Article 264 TEC and adapts the chairman's and officers' term of office to the extended mandatory period of the Committee (Article 305 subpara. 3 s. 1 TFEU). The chairman shall still be elected by the Committee from its midst. From now on, the term of office shall be two and a half years. The same adjustment applies to the officers.

The chairman convenes the Committee; he is obliged to do so on request of the European Parliament (this also is an important innovation of the Reform Treaty corresponding to the role of the EP as genuine co-legislator), the Council or the Commission.

Article 306 subpara. 2 TFEU leaves the regulation of further organisational and procedural issues to the **Rules of Procedure**, which shall be enacted by the Committee itself

⁸ See CR/Suhr, Article 300 AEUV mn. 29.

⁹ See Article 300 TFEU mn. 6; cf. Craig/de Búrca, EU law, 69.

¹⁰ See Article 300 TFEU mn. 8.

¹¹ OJ 2010 C 83/266.

(autonomy to adopt Rules of Procedure). The latest revision entered into force on 10 January 2010¹ and has been adapted to the legal situation after Lisbon.

*Article 307 [Rights of consultation]
(ex Article 265 TEC)*

The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time limit which may not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time limit, the absence of an opinion shall not prevent further action.

Where the Economic and Social Committee is consulted pursuant to Article 304, the Committee of the Regions shall be informed by the European Parliament, the Council or the Commission of the request for an opinion. Where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter.

It may issue an opinion on its own initiative in cases in which it considers such action appropriate.

The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.

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1 **I. Consultation**

Article 307 TFEU replaces Article 265 TEC. From now on, the EP is equal to the Council and the Commission. But this highly symbolic reform is not accompanied with any substantive amendments; the former Article 265 para. 4 TFEU led to the same consequences, still advisory tasks are conferred to the Committee of the Regions. The Committee shall assert regional/local aspects within the decision procedure of EP, Council and Commission; this also (and especially) applies to cases concerning **cross-border cooperation**.

2 For this purpose, the CoR may submit opinions. Every opinion of the Committee as well as a report of the proceedings shall be forwarded to EP, Council and Commission (Article 307 subpara. 5 TFEU). The former informal information of the European Parliament is now explicitly laid down in the provision. In practice without objection, the Committee does not confine itself to opinions in a narrow sense; it occasionally adopts resolutions on political issues. So far the opinions of the Committee were prepared by its **specialist committees** that have been established for the different fields of operation,

¹ OJ 2010 L 6/14.

namely cohesion policy, economic and social policy, sustainable development, culture and education, constitutional issues, governance in Europe as well as external relations.

II. Cases of consultation

3

The Committee of the Regions is entitled to submit opinions in the following cases:

- if the TFEU explicitly provides for it. In these cases the proper consultation is prerequisite for the legitimacy of the respective legislative act of a Union institution (**obligatory consultation**).

These cases concern:

5

- employment (Article 148 TFEU: Council guidelines; Article 149 TFEU: Incentive measures);
- social policy (Article 153 paras 2 and 3 TFEU);
- education, vocational training and young people (Articles 165, 166 TFEU);
- culture (Article 167 TFEU);
- public health (Article 168 TFEU);
- trans-European networks in the areas of transport, telecommunications and energy infrastructure (Article 172 TFEU);
- economic and social cohesion (Article 175 TFEU: Reports on the progress in this respect; Article 177 TFEU: Structural Funds; Article 178 TFEU: European Regional Development Fund);
- environment (Article 192 TFEU);
- European Social Fund (Article 164 TFEU);
- transport (Article 91 TFEU).

The consultation represents a special case in those (following) situations when it is intended for the EESC. In this case, the **obligation** is limited to the **information** by EP, Council or Commission (Article 307 subpara. 3 TFEU):

6

- if the **European Parliament**, the **Council** or the **Commission** consider the submission of an opinion to be appropriate (**facultative consultation**).
- if the Committee itself considers it appropriate (**right to take up decisions on their own authority**), Article 307 subpara. 4 TFEU. An objective restriction is not intended. In this context, the Committee of the Regions also adopts resolutions on political issues.

7

8

III. Time limit

9

The European Parliament, the Council and the Commission may set the Committee of the Regions a time limit for the submission of an opinion (Article 307 subpara. 2 TFEU)¹, which may at least be one month. However, the Committee is not obliged to submit an opinion. Upon expiry of that period of time, the absence of a respective opinion may be left out of consideration.

IV. Legal protection

10

Prior to the Reform Treaty, the Committee of the Regions had, parallel to the EESC, no proper right of action for annulment before the ECJ. Indirect legal protection only existed to the extent that especially the Commission could claim relevant procedural er-

¹ See also Article 304 mn. 4 concerning the EESC.

rors by taking an action for annulment or the defect could be pleaded incidentally². The parallelism of the two consultative committees was abandoned with the Lisbon Reform Treaty. Now, pursuant to Article 263 para. 3 TFEU, the Committee of the Regions has explicit power to **take an action for annulment to protect its own prerogatives**. Moreover, according to Article 8 s. 2 Protocol (No 2) on the application of the principles of subsidiarity and proportionality³, the Committee, provided that it has an obligatory right to be heard, is entitled to claim a **violation of the principle of subsidiarity** after the adoption of a legislative act. Article 263 TFEU also applies in this case⁴.

CHAPTER 4

THE EUROPEAN INVESTMENT BANK

Article 308 [Legal personality; members; Statute]

(ex Article 266 TEC)

The European Investment Bank shall have legal personality.
The members of the European Investment Bank shall be the Member States.
The Statute of the European Investment Bank is laid down in a Protocol annexed to the Treaties. The Council acting unanimously in accordance with a special legislative procedure, at the request of the European Investment Bank and after consulting the European Parliament and the Commission, or on a proposal from the Commission and after consulting the European Parliament and the European Investment Bank, may amend the Statute of the Bank.

Bibliography: *Dunnett*, The European Investment Bank: Autonomous Instrument of Common Policy?, 31 CMLRev 1994, 721; *Käser*, The European Investment Bank; Its Role and Place within the European Community System, 4 YEL 1984, 303; *Skiadas*, European Court of Auditors and European Investment Bank: An Uneasy Relationship, 5 EPL 1999, 215.

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1

I. General innovations, amendment of the Statue

Article 308 TFEU links to the rule of Article 266 TEC. **Amendments of the Statue** of the Bank may be carried out by unanimous Council decision in the future. The requirement of ratification is generally omitted – the former Article 266 para. 3 s. 2 TEC was removed. Since the Reform Treaty entered into force the **Statute** of the Bank has been – without changing its legal nature as primary Union law – **substantially amended**. The following **proposals** were incorporated:

- 2
- The range of financial instruments shall be enlarged; therefore the Bank may, according to Article 18 Statute EIB, also be able to grant technical support. The new Article 16 Statute EIB provides the legal basis for an enhanced risk management. The decision pro-

² See Article 267 respectively Article 277 TFEU.

³ OJ 2010 C 83/206.

⁴ See CR/*Suhr*, Article 300 AEUV mn. 25.

cedures were simplified. Article 19 Statute EIB intends to empower the Board of Directors to take all necessary emergency measures in the event of restructuring a financing operation. At the same time, according to Article 28 Statute EIB, the Bank shall be empowered – like the EIF – to establish subsidiaries or other entities with own legal personality and financial autonomy from now on. Especially the global financial crisis of 2008/2009 showed that a responsible handling of risks is inevitable. Therefore, Article 12 Statute EIB aims at strengthening the audit committee (by increasing the number of members from three to six). Article 25 Statute EIB aims at strengthening the rights of the employees of the Bank in case of liquidation.

The EIB still has to be qualified as an **organisationally autonomous institution of the Union** with own legal personality under international and domestic law¹. Members of the Bank are *ipso iure* all Member States of the Union (and nobody else), see Article 308 subpara. 1 s. 2 TFEU. Laid down in a protocol, the Statute of the Bank is part of the Treaties and therefore qualifies as primary Union law². In the version of the TEC (as mentioned above in mn. 1), the Council was solely empowered to amend certain parts of the Statute by unanimous vote, regarding amongst other things capitalisation, provisions on the Board of Directors and the permissible amount of granted loans and guarantees. With the Lisbon Treaty the permission to simplified contract amendment was extended to the entire Statute. The amendment has to comply with the particular legislative procedure within the meaning of Article 289 para. 2 TFEU. Not only the Commission but also the EIB holds a right of initiative. The Parliament has to be involved by consultation.

The EIB is based in Luxembourg.

II. Organisation

The Bank is directed and managed by a Board of Governors, a Board of Directors and a Management Committee (Article 6 Statute EIB).

The **Board of Governors** consists of the **Ministers** designated by the Member States. It issues general directives for the credit policy of the Bank, especially according to the aspiring goals to gradually develop the internal market. The Board of Governors carries out the general supervision over the other organs and makes the fundamental decisions for the operation of the Bank (Article 7 Statute EIB).

Today, the **Board of Directors** consists of 29 ordinary and 19 alternate members, appointed by the Board of Governors for five years. Every Member State and the Commission appoint one ordinary member each. Every Member State has the right to appoint alternate members, graduated by size. The Commission appoints an alternate member, too. The Federal Republic of Germany, France, Italy and the United Kingdom appoint two alternate members each; one alternate member each is appointed by the Commission and – by common accord – Spain and Portugal; Belgium, Luxembourg, the Netherlands, Denmark, Greece, Ireland and Romania jointly appoint two alternates. Austria, Finland, Sweden, Estonia, Latvia and Lithuania jointly appoint two alternates as well. The remaining four are appointed by Bulgaria, Croatia, Czech Republic, Cyprus, Hungary, Malta, Poland, Slovenia and Slovak Republic by common accord.

The members of the Board of Directors are solely accountable to the Bank (**institutional autonomy**).

The Board of Directors provides for the proper administration of the Bank. It is entitled to take the exclusive decision in respect of granting loans or guarantees from their

¹ Article 26 Statute EIB, see also ECJ Case 110/75 *Mills v EIB* [1976] ECR 955.

² See Article 308 subpara. 2 s. 1 TFEU.

own resources (in a broader sense³) as well as raising loans; the Board of Directors also fixes the interest rates on loans and guarantee commissions (Article 9 Statute EIB).

- 10 In principle, decisions of the Board of Directors are taken by at least one third of the members entitled to vote representing at least 50% of the subscribed capital (Article 10 Statute EIB).
- 11 The Management Committee consists of a president and eight vice presidents and is appointed by the Board of Governors on a proposal of the Board of Directors for the duration of six years. The Management Committee is solely accountable to the Bank as well. Under authority of the president and supervision of the Board of Directors, the Management Committee discharges the current business of the Bank. The president of the Management Committee represents the Bank in judicial and other matters (Article 11 para. 6 Statute EIB).
- 12 An audit committee, which beforehand consisted of three – now of six (see mn. 2 above) – members, appointed by the Board of Governors, verifies annually whether the Bank's practice is in conformity with best banking practices and audits the accounts of the Bank (Article 12 Statute EIB). Besides that, the European Court of Auditors is entitled to exercise a limited power of audit under the conditions set out by Article 287 para. 3 TFEU.

13

III. Jurisdiction of the ECJ

For the jurisdiction of the ECJ over litigations concerning the EIB, see Article 271 TFEU as well as Article 27 para. 1 s. 2 Statute EIB. Article 270 TFEU is applicable in the event of disputes between the EIB and personnel of the Bank⁴. In any other constellation, the competent national courts decide (Article 27 para. 1 Statute EIB).

Article 309 [Task of the EIB] **(ex Article 267 TEC)**

The task of the European Investment Bank shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union. For this purpose the Bank shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

- (a) projects for developing less-developed regions;
- (b) projects for modernising or converting undertakings or for developing fresh activities called for by the establishment or functioning of the internal market, where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States;
- (c) projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.

In carrying out its task, the Bank shall facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Union Financial Instruments.

³ See Article 309 TFEU mn. 7.

⁴ ECJ Case 110/75 *Mills v EIB* [1976] ECR 955.

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I. General remarks

1

The general task of the Bank is to contribute to the balanced and steady development of the internal market in the interest of the Union. This contribution is made – without pursuing a profit-making purpose (Article 309 subpara. 1 s. 2 TFEU) – by financing investments in the branches of production and infrastructure. The Lisbon Treaty did not alter the mission of the Bank. Article 308 TFEU largely adopts the regulatory content of Article 267 TEC. The provision speaks of ‘internal market’ instead of ‘common market’ now; lit. b has been adapted to the achieved development status of the internal market, the ‘progressive establishment’ has been replaced by ‘establishment or functioning’ of the internal market. All further amendments are of a mere editorial nature. The EIB still grants loans and gives guarantees (see Article 18 Statute EIB) for the following projects in all sectors of the economy:

- Development of **less-developed regions**, meaning the improvement of infrastructure as well as assistance for economic sectors, especially in economically less-developed regions of the Union (Southern Italy, Greece, Ireland, Northern Ireland, Portugal, regions of Spain, Corsica, the French Overseas Departments as well as some eastern parts of Germany including Berlin). The developmental stage of a region is (still) determined by making recourse to the Structural Funds Regulation. The assistance has shifted more and more to Member States in central and Eastern Europe. 2
- Modernising or converting undertakings or developing **fresh activities**. According to the amendment, a relation of the project to the establishment or functioning of the internal market and the lack of entirely financing the project by the various means available are required. 3
- Projects of **general interest** – expression of a prefederal-cooperative Union – to several Member States that cannot be entirely financed by the various means available in the individual Member State. This particularly includes projects that may contribute to bringing markets together and the integration of economies of the Member States¹. 4

The assistance is basically confined to projects within the European territory of the Member States (Article 16 para. 1 Statute EIB). The Board of Governors may, on proposal from the Board of Directors, authorise exceptions (Article 16 para. 1 Statute EIB). This particularly applies to financial aid for Overseas Countries and Territories (OCT) of the Member States (Articles 182 et seq., Articles 198 et seq. TFEU). 5

II. Development cooperation

6

Exceeding the agenda in Article 309 TFEU, the EIB was assigned to further tasks by agreements of the European Union with third countries. The EIB gives financial aid within the development and cooperation policy of the Union, such as in the context of the ACP-Convention towards the ACP States (see Article 217 TFEU, Article 62 para. 5 Cotonou Partnership Agreement²). The Council of the European Union insofar globally

¹ See the General Directive for the credit policy of the Bank, part II, para. 2.

² OJ 2000 L 317/3.

granted authorisations according to Article 16 para. 1 subpara. 2 Statute EIB up to the maximum amounts set out in the respective association and cooperation agreements.

7

III. Funding

The Bank raises its funds on the capital market (bonds); besides, the EIB utilises its own resource, namely the capital paid in by the Member States as well as reserve assets.

8 In addition, the Bank manages funds of the Union, EURATOM and the Member States. Within this **'fiduciary management'**, the Bank finances investments in developing countries as well as special initiatives under special conditions from bonds or budgetary means of the Union and the Member States.

9 For support in the field of trans-European networks as well as in the telecommunications and energy sectors, the **European Investment Fund** (EIF) was established on the basis of Article 30 Statute EIB in 1994 (now Article 28 Statute EIB).

TITLE II FINANCIAL PROVISIONS

Article 310 [Budget; budgetary principles] (ex Article 268 TEC)

1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget.

The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314.

The revenue and expenditure shown in the budget shall be in balance.

2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 322.

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.

4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.

5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.

6. The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union.

Bibliography: *Bieber*, Rechtswirkung und gerichtliche Kontrolle des EH-Haushalts, DVBl. 1986, 961; *Buser*, Die Finanzierung der EU-Möglichkeiten und Grenzen einer EU-Steuer nach Europarecht und Grundgesetz, 17 Zeitschrift für europarechtliche Studien 2014, 91; *European Commission*, Financial Regulation applicable to the general budget of the Union and its rules of application, 2013; *Matthijs*, The Bud-

get of the European Union, IES Working Papier 4/2010; *Lindner*, Conflict and change in Eu. U. budgetary politics, 2005; *Saarilahti*, Les innovations des procédures budgétaires de l'Union européenne, 573 *Revue de l'Union Européenne* 2013, 641; *Viessant*, Le budget de l'Union européenne après l'entrée en vigueur du traité de Lisbonne, 541 *Revue du marché commun et de l'union européenne* 2010, 524; *de Wilde*, Politicisation of the EU Budget. Conflict and the Constraining Dissensus, 35 *West European Politics* 2012, 1075.

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I. Overview

1

Building upon the relevant provisions of the failed Constitutional Treaty, the Treaty of Lisbon has re-structured and simplified the financial provisions, modified the budgetary procedure (strengthening the role of the European Parliament: Article 314 TFEU), and sends a clear signal for a further improvement of the budgetary discipline by basing the rules on the financial perspective on a legal mechanism under the role of primary Union law (multiannual financial framework: Article 312 TFEU).

Article 310 TFEU does not only serve as the initial provision for the entire subject-matter, but also contains the principal rules regarding the expenditures of the Union; the revenue side is dealt with in Article 311 (own resources).

Article 310 underscores the importance of the budget for the proper financial management by the European executive branch. It lists several principles which are binding for the financial management and which are specified in further provisions on the secondary level, especially in Articles 3 et seq. of the Financial Regulation. Following a new trend of financial policy the EU budget is now embedded in a system of medium-term fiscal planning (para. 4: multi-annual financial framework, Article 312 TFEU).

II. General budget

4

The budget provides an overview of the Union's estimated revenues and expenditures for the forthcoming fiscal year and shows how these are to be brought into balance. The Treaty of Amsterdam laid down the principle of a general budget for the (then) European Communities, which now applies to the entire Union, including Euratom.

In view of the single legal personality attained by the Union (Art. 1(III)(3) TEU) is no longer necessary today to differentiate between the expenditures of the Communities on the one hand and specific expenditures of the Union on the other. Exception is only to be made for certain expenditures arising from the Common Foreign and Security Policy (CFSP): Specific rules apply a) for operative costs arising from operations having military or defence character and b) in cases, in which the Council decides so by unanimous votes for other CFSP expenditures (cf. Article 41 TEU: expenditures are not charged to the Union budget, but to Member States directly).

The financial rules concerning the budget are presently laid down in *Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002*.¹

¹ OJ 26.10.2012 L 298/1; complemented by *Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012*, OJ 31.12.2012 L 362/1.

6

III. Legal nature of the budget

As far as the establishing of the budget is concerned, Article 310 paras 1 and 2 TFEU refers to the procedure in accordance with Article 314 and expressly specifies the European Parliament and the Council as the budgetary authority. The budget forms an annex to the declaration of the President of the European Parliament that the budget has been finally adopted (Art. 314 para. 9 TFEU). This declaration is to be attributed to the European Parliament; it has a constitutive effect since it is only after its adoption that the budget may produce legal effects.

7 The declaration cannot be classified under the catalogue of legal acts contained in Article 288 TFEU. It must be considered an act *sui generis* generating specific legal effects towards both EU institutions and Member States. The Commission (Article 317 TFEU) and the other institutions (Article 55 Financial Regulation 2012) are authorized to implement the budget. The Member States on their part are obliged to pay the amount of VAT- and GNI-based resources as fixed in the EU budget. The budget has no legal effect toward other third parties.²

8 Council, Commission and Member States may bring an action for annulment of the budget declaration of the EP President. This action must be directed against the European Parliament, to which the President's declaration must be attributed.³ The Court controls compliance with the provisions on the institutional competences in budget procedures and with the rules on inter-institutional cooperation. With regard to substance, the Court instead accepts a broad margin of political discretion by EU organs.

9 If the action for annulment is successful, the financial procedure must be taken up again at the point where the legal infringement had taken place. Furthermore, the Court may state which of the effects of the act which it has declared void shall be considered to produce continuing effect.⁴

10 Actions for annulment of Union institutions among each other may also be considered for single segments of the financial procedure, if infringement of individual procedural rules has been claimed.⁵

11

IV. Budgetary principles

Article 310 TFEU, supplemented and specified by other financial provisions of the Treaty, designates a number of principles, the observation of which is considered essential for a good management of public budgets. Although undoubtedly of a legally binding nature, these principles may nevertheless be subject to (narrow) exceptions as well as adaptations to the specific needs of the European Union. Particularly important are the 'budgetary principles' listed in Title II of the Financial Regulation (2012), which specify and substantiate the respective requirements of EU primary law.

12 According to **Article 6 Financial Regulation (2012)** the budget shall be established and implemented in accordance with the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account, universality, specification, sound financial management (which requires effective and efficient internal control), and transparency. Articles 7–34 of the 2012 Regulation elaborate these eight principles in greater detail.

² ECJ Cases 294/83 *Les Verts* [1984] ECR 3325; 34/86 *Council v EP* [1986] ECR 2203.

³ ECJ Case C-284/90 *Council v EP* [1992] ECR 2321.

⁴ Article 264 para. 2 TFEU; ECJ Case C-41/95 *Council v EP* [1995] ECR I-4411.

⁵ *Bieber*, DVBl. 1986, 964.

The **principles of unity and budgetary accuracy** (Article 310 para. 1 TFEU, Article 7 13 Financial Regulation (2012)) require all items of revenue and expenditure of the Union to be included in the budget⁶. The budget must also record the guarantees for borrowing- and-lending operations including the European Financial Stability Mechanism and Balance of Payment Facility operations.

Article 310 para. 1 subpara. 3 TFEU and Article 17, 18 Financial Regulation (2012) 14 contain the **principle of balance (equilibrium) of the budget**. The Union may not raise loans within the framework of the budget.

The **principle of annuality** (Article 310 paras 1 and 2 TFEU) means that the budget is 15 established for one budgetary year (Article 313 TFEU) and that the expenditure is authorized for the annual budgetary period only. Commitments which lead to payment obligations in later years only must also be entered in the budget (commitment appropriations).⁷ The budget must be adopted before the budgetary year has started. In case of a failure an emergency budget is to be applied (Article 315 TFEU).

According to the **principle of specification** (Article 316 TFEU) revenues must be clas- 16 sified in the budget according to their descent, expenditures according to their nature and purpose. The appropriations may not be used for different purposes and only within the budgetary year. Exceptions are permitted for appropriations declared as mutually coverable or as allowed to be carried forward to the next financial year.

The **principle of universality** provides that 'total revenue shall cover total payment 17 appropriations.' (Article 20 Financial Regulation (2003)). Revenues and expenditures must be entered in full without any adjustment against each other ('no-netting principle' or 'gross budget rule').

Article 320 TFEU follows the **principle of the unit of account** by choosing the Euro. 18

Sound financial management (Articles 30–33 Financial Regulation (2012)) implies 19 that appropriations are used in accordance with the principles of economy, efficiency and effectiveness.

The **principle of transparency** (Articles 34, 35 Financial Regulation (2012)) requires 20 the publication of accounts, budgets and reports, primarily in the Official Journal. Information on recipients must also be made available, although with due regard to the requirements of the protection of personal data.

CHAPTER 1 THE UNION'S OWN RESOURCES

Article 311 [Financial Resources] (ex Article 269 TEC)

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

Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category.

⁶ For an exception regarding the CFSP see above mn. 4.

⁷ Article 10 Financial Regulation (2012).

That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.

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1

I. General observations

Within the framework of the EU budgetary law is Article 311 TFEU constitutes the central rule for the revenues of the Union. The wording of the first paragraph ('shall provide itself') must not be misunderstood: This formula does not imply that the institutions of the Union may decide upon on their own which kind and which amount of financial resources Member States are to provide for Union purposes; but rather means that the Member States will secure the resources necessary for financing the Union's administrative apparatus and the implementation of Union policies. This is made clear in para. 3 s. 3 (necessity of approval by the Member States given in accordance with their constitutional requirements).

2

II. Own resources

1. Concept

Originally the financial resources of the Community (now: Union) consisted primarily of direct contributions by Member States for EU expenditures not covered by other means. In 1970 the Council initiated a reform which finally (1980) – 'without prejudice to other revenues' – resulted in replacing such financial contributions by so-called 'own resources'.¹ These resources were attributed to the Union budget from the outset and independently of the scale and pattern of expenditure. Finally, the new principle was incorporated into the Treaty of Maastricht (ex-Art. 201, later ex-Art. 269 TEC) and taken over by the Treaty of Lisbon.

¹ Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (70/243 ECSC, EEC, EURATOM).

2. Kinds of own resources

3

Resources are defined in Article 2 of the present (2007) Own Resources Decision² as follows:

a) ‘Traditional own resources’

Agricultural levies, premiums, additional or compensatory amounts, additional amounts or factors, as well as contributions and other duties provided for within the framework of the common organisation of the markets in sugar, and **Common Customs Tariff duties** and other duties established or to be established by the institutions of the Union in respect of trade with non-member countries. These resources amount to approximately 12 % of the total budget (Financial Report 2012).

b) VAT resources

Subject to certain exceptions and corrections (in particular in favor of the United Kingdom, cf. Art. 4 para. 2 Own Resources Decision 2007) a uniform rate levied on the harmonised VAT base of each Member State. The assessment base may not exceed 50 % of GNI for each Member State, as defined in para. 7; the uniform rate referred to in para. 1 lit. b was fixed at 0.30 %. For the period 2007–2013 only, the rate of call of the VAT resource for Austria was fixed at 0.225 %, for Germany at 0.15 % and for the Netherlands and Sweden at 0.10 %. According to Financial Report 2012 the VAT own resource makes up scarcely 11 % of the total budget.

c) GNI resources

With more than 70 % of the total budget (Financial Report 2012) currently by far the largest contributor to EU funding, GNI resources derive from a fixed rate of the Gross National Income of each Member State. This rate is determined in the light of the total of all other revenue on the basis of Council Regulation 1287/2003 (GNI Regulation). This resource is used to balance revenue and expenditure, i.e. to fund the part of the budget not covered by other sources of income.

The **catalogue of own resources is not limited** for the future. Revenue deriving from any new charges may be introduced within the framework of a common policy, provided that the procedure, laid down in Article 311 TFEU, has been followed. Such new charges will also constitute own resources entered in the general budget of the European Union.

3. Collection of own resources

8

The Union’s own resources are collected by the Member States in accordance with their national law and are made available to the Commission. Regarding agricultural levies and customs duties in order to cover collection costs, Member States retain 25 % of these amounts.

III. Further resources

9

Own resources according to Article 311 TFEU are only those which have been defined in the procedure provided for in this Article. Besides this there may be further resources

² Council Decision 2007/436; this Decision will be replaced by Decision 2014/335 after consent will have been given by all 28 Member States (comp. mn. 10).

which may accrue to the Union. About 6% of the budget (Financial Report 2012) is derived from taxes on EU staff salaries, financial contributions of third countries to certain Union programs and fines or penalties imposed on business enterprises resulting from infringement of competition laws or other provisions (e.g. forfeited guarantees³).

10

IV. Procedures

Well aware of a particular sensitivity concerning sovereign rights of the Member States, Article 311 para. 3 provides for a two step procedural system concerning the definition of the Union's own resources: at EU level, the Council may, after having consulted the EP, take a decision laying down the provisions on the Union's system of own resources by a unanimous vote. However, for its entering into force this decision must also be approved by the Member States on the basis of their constitutional requirements. Thus, concerning the sharing of financial burden, a Member State, on the one hand, in the procedure of taking the decision is entitled to a right to veto, and on the other hand, in entering a domestic procedure for approving the Council's decision, it is in need to convince its citizens' representatives that such financial rules are necessary and should be accepted.

11 **Para. 4** contains a new provision by which the own-resources decision, attributed to all Member States on a national level, may empower the Council to lay down implementing measures for the Union's own resources system by means of a regulation based on qualified majority (Article 16 para. 3 TEU). This decision, however, has to be approved by the European Parliament. The scope of this opening clause is so far unclear and needs to be politically outlined and, as the case may be, be authoritatively defined by the European Court of Justice. Whatever its outcome, the opening clause must not render the procedure laid down in para. 3 meaningless.⁴ Measures according to para. 4 must not be confused with the long established implementing rules laid down by Article 322 para. 2 TFEU.

12 The Council's Own-Resources Decision of 7 June 2007⁵ entered into force on 1 March 2009 with retroactive effect from 1 January 2007.⁶ With a view to the Member States' right of approval, a retroactive effect of more than two years seems highly problematic.

CHAPTER 2

THE MULTIANNUAL FINANCIAL FRAMEWORK

Article 312 [Multiannual financial framework]

1. The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources.

It shall be established for a period of at least five years.

The annual budget of the Union shall comply with the multiannual financial framework.

2. The Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council

³ ECJ Case 66/80 *International Chemical Corporation* [1981 ECR 1217].

⁴ Probably, too narrow: VHvH/Rossi, Art. I-54, mn. 10.

⁵ 2007/436, OJ 2007 163/17.

⁶ Cf. also Article 11 Own-Sources Decision.

shall act unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph.

3. The financial framework shall determine the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations. The categories of expenditure, limited in number, shall correspond to the Union's major sectors of activity.

The financial framework shall lay down any other provisions required for the annual budgetary procedure to run smoothly.

4. Where no Council regulation determining a new financial framework has been adopted by the end of the previous financial framework, the ceilings and other provisions corresponding to the last year of that framework shall be extended until such time as that act is adopted.

5. Throughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption.

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I. Overview

1

Due to the lack of an express treaty provision, up to and until the entry into force in 2009 of the Lisbon treaty, EU medium term financial planning was governed by mere interinstitutional agreements of EU organs concerned – a procedure agreed upon in the so-called Delors I and II packages (1987/1992). By virtue of the new Article 312 TFEU this practice has become part of the ordinary budget procedure. This provision prescribes for the multiannual financial framework to be adopted in a legally binding form (a ‘regulation’, see para. 2) and to have a minimum duration (five years, para. 1 subpara. 2), but also defines the minimum content of this legal act and its relationship vis-à-vis the annual budget (para. 1 subpara. 3).

II. Function and content

2

Primary objective of Article 312 TFEU is to improve budget discipline and transparency. The decision on the system of the Union's own resources (Article 311 TFEU), the multiannual financial framework and the budget (Article 310 TFEU) are thus made visible as correlated elements of one single budgetary procedure. Within this process the dominant feature is that it is the revenues which are to determine expenditures (and not, as hitherto, the other way round): whereas the decision according to Article 311 TFEU (comp. Article 312 para. 1 subpara. 1 TFEU: ‘the limits of its own resources’), with respect to the expenditure side the same function is assigned to the multi-annual financial framework which provides the medium-term perspective (Article 312 para. 1 subpara. 1

TFEU: ‘develops in an orderly manner’); these guidelines are now declared to be binding for the budget formulation process (Article 312 para. 1 subpara. 3 TFEU).

- 3 These normative provisions provide in particular for the definition of financial ceilings on payment as well as commitment appropriations which must be confined to distinct categories of expenditure limited in number and – as a rule of transparency – must correspond to the Union’s major sectors of activity (para. 3). Since in practice these categories are not only defined quite broadly, but Parliament further has a right of co-determination with regard to the multiannual financial framework, too, fears that this procedure may eventually jeopardize Parliament’s sovereignty in budget matters are unfounded. The same *raison d’être* of clarity and transparency also underlies the provision of para. 3 subpara. 2 requesting the financial framework to include any other provision necessary to have the annual budgetary procedure run smoothly.

4

III. Procedure

It was particularly the net contributors who – when negotiating the Lisbon Treaty – insisted that the decision on the multiannual financial framework would continue to be adopted by unanimous vote and that the European Parliament, too, were to consent not by a simple (see Article 231 TFEU), but rather by a qualified majority (of the Parliament’s component Members).

- 5 However, the Council may act by a qualified majority, if authorized to do so by a unanimous vote of the European Council (para. 2 subpara. 2, ‘passerelle clause’). The Netherlands in a Declaration to the Lisbon Treaty (No 59) have made unambiguously clear that they will agree to this passerelle decision only after a revision according to Article 311 para. 3 TFEU will have provided the Netherlands with a satisfactory solution for its ‘excessive negative net payment position’.
- 6 In case the Council was not able to adopt a regulation determining a new financial framework for the period after the expiry of the previous one, the provisions of this previous framework, and particularly the ceilings as its core elements, are extended until a new framework is adopted (para. 4).
- 7 Para. 5 serves as reminder that the general principle of loyal cooperation of the Union institutions (Article 13 para. 2 s. 2 TFEU) has to be duly taken into account by institutions involved in the formulation and adoption of the multiannual financial framework, too. In contrast to Article 324 TFEU, this provision does not lay down any specific procedural rules for accomplishing the necessary dialogues.

CHAPTER 3 THE UNION’S ANNUAL BUDGET

Article 313 [Financial year] (ex Article 272(1), TEC)

The financial year shall run from 1 January to 31 December.

- 1 Article 313 TFEU substantiates the principle of annuality (Article 310 para. 1 TFEU) by referring to the calendar year. The revenues and the expenditures of the Union are basically appropriated for this period only. and in general may be used only within this

time span. Only exceptionally may unexpended appropriations be carried forward to the next calendar year (see Article 316 TFEU).

Article 314 [Procedures]
(ex Article 272(2) to (10), TEC)

The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions.

1. With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget, which may contain different estimates.

The draft budget shall contain an estimate of revenue and an estimate of expenditure.

2. The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented.

The Commission may amend the draft budget during the procedure until such time as the Conciliation Committee, referred to in paragraph 5, is convened.

3. The Council shall adopt its position on the draft budget and forward it to the European Parliament not later than 1 October of the year preceding that in which the budget is to be implemented. The Council shall inform the European Parliament in full of the reasons which led it to adopt its position.

4. If, within forty-two days of such communication, the European Parliament:

- (a) approves the position of the Council, the budget shall be adopted;
- (b) has not taken a decision, the budget shall be deemed to have been adopted;
- (c) adopts amendments by a majority of its component members, the amended draft shall be forwarded to the Council and to the Commission. The President of the European Parliament, in agreement with the President of the Council, shall immediately convene a meeting of the Conciliation Committee. However, if within ten days of the draft being forwarded the Council informs the European Parliament that it has approved all its amendments, the Conciliation Committee shall not meet.

5. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament within twenty-one days of its being convened, on the basis of the positions of the European Parliament and the Council.

The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

6. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee agrees on a joint text, the European Parliament and the Council shall each have a period of fourteen days from the date of that agreement in which to approve the joint text.

7. If, within the period of fourteen days referred to in paragraph 6:

- (a) the European Parliament and the Council both approve the joint text or fail to take a decision, or if one of these institutions approves the joint text while the other one fails to take a decision, the budget shall be deemed to be definitively adopted in accordance with the joint text; or
- (b) the European Parliament, acting by a majority of its component members, and the Council both reject the joint text, or if one of these institutions rejects the joint text while the other one fails to take a decision, a new draft budget shall be submitted by the Commission; or
- (c) the European Parliament, acting by a majority of its component members, rejects the joint text while the Council approves it, a new draft budget shall be submitted by the Commission; or
- (d) the European Parliament approves the joint text whilst the Council rejects it, the European Parliament may, within fourteen days from the date of the rejection by the Council and acting by a majority of its component members and three-fifths of the votes cast, decide to confirm all or some of the amendments referred to in paragraph 4(c). Where a European Parliament amendment is not confirmed, the position agreed in the Conciliation Committee on the budget heading which is the subject of the amendment shall be retained. The budget shall be deemed to be definitively adopted on this basis.

8. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee does not agree on a joint text, a new draft budget shall be submitted by the Commission.

9. When the procedure provided for in this Article has been completed, the President of the European Parliament shall declare that the budget has been definitively adopted.

10. Each institution shall exercise the powers conferred upon it under this Article in compliance with the Treaties and the acts adopted thereunder, with particular regard to the Union’s own resources and the balance between revenue and expenditure.

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1

I. Overview

The legislative procedure for establishing the budget was significantly simplified by the Lisbon Treaty. The new procedure does not any more differentiate between so-called obligatory and non-obligatory expenditures; the number of procedural steps has been reduced and stricter time limits have been introduced.

2 The Union’s institutions involved in the budget procedure are the Commission, the European Parliament and the Council. The role of the Commission has considerably been strengthened. Not only is the Commission responsible for preparing the draft budget; it also takes part in the Conciliatory Committee’s proceedings. Council and European Parliament together form the two arms of the budgetary authority establishing,

with a slight preponderance of the latter (see para. 7d). Due to the legally binding multi-annual financial framework (Article 312 para. 1 TFEU) to be adopted by a unanimous decision of the Council (Article 312 para. 2 TFEU), single Member States still exert a strong (indirect) influence on the concrete shaping of the budget.

The budget becomes legally effective by the declaration of the President of the European Parliament that the budget has been definitively adopted (Article 314 para. 9 TFEU). In accordance with the principle of transparency, the President of the European Parliament is under a legal obligation to have the budget published in the Official Journal (Article 34 para. 2 Financial Regulation (2013)).

II. Conduct of the procedure

In order to secure that the budget is adopted before the beginning of the fiscal year, the procedure of establishing the budget is characterized by a tight time schedule. Thus the failure to act of a single institution may not prevent the procedure to proceed. An obstruction policy is thus normally excluded. The mediation role of the Commission may prevent the procedure from failing.

1. Drafting the budget

Except for the European Central Bank, which succeeded in maintaining its budgetary independence (Article 282 para. 3 TFEU), every Union institution must draw up estimates of its expenditures before 1 July of every year. These estimates are transmitted to the Commission which consolidates these estimates (Article 314 para. 1 subpara. 1). According to the principles of unity and budgetary accuracy¹ this draft budget must contain all revenues and expenditures (Article 314 para. 1 subpara. 2). The Commission then submits the draft to the European Parliament and the Council on 1 September at the latest (Article 314 para. 2 subpara. 1).

2. Deliberation and decision-making: first attempt

At first it is the task of the Council to define its position by qualified majority (comp. Article 16 para. 3 TEU) and forward it to the European Parliament. This must be done until 1 October at the latest.

Then in the following 42 days the European Parliament has three options:

If it approves the Council's position (para. 4 lit. a) or if it does not take a position at all (para. 4 lit. b) the budget is adopted (lit. a) or is deemed to have been adopted (lit. b). In order to become legally binding it is only necessary for the President of the EP to issue a corresponding declaration to that effect (para. 9). In this phase of the procedure it is important that the Commission may still amend the draft budget (para. 2 subpara. 2), something which facilitates consensus-building on an informal basis or within the framework of a trilogue as provided for in Article 324 TFEU.

If, however, the European Parliament – by a majority of its component members – adopts amendments to the position of the Council and transmits the amended draft to the Council and the Commission, the procedure goes on. The next stage would be the procedure of the Conciliation Committee. There is, however, an – although very limited – period of time during which the conciliation procedure may still be avoided: If within ten days the Council approves all the amendments adopted by the European Parliament, the Conciliation Committee will not meet (para. 4 lit. c).

¹ See Article 310 mn. 13.

9

3. Procedure of the Conciliation Committee

Article 314 para. 4 TFEU provides some basic rules concerning the composition and the procedure of the Conciliation Committee. The Committee is composed of the members of the Council or their representatives, and an equal number of members of the European Parliament. The Commission takes part in the proceedings, taking initiatives with a view to reconciling the different positions (para. 5 subpara. 2). Within 21 days the Committee is supposed to develop a common draft budget which must be consented to by a qualified majority of the Committee members representing the Council and a majority of the Committee's EP representatives.

- 10 If there is no agreement within 21 days, the budget procedure has to start anew from the very beginning: a new draft budget must be submitted by the Commission (para. 8).

11

4. Deliberation and decision-making: second attempt

If the Conciliation Committee – within those 21 days – has reached an agreement on a joint text, the fate of the budget depends on the reaction of the European Parliament and the Council for which a maximum of 14 days is allotted (para. 6).

- 12 The draft budget is adopted, if both institutions approve the joint text; in case no decision is taken at all, approval shall be deemed to have been granted, even if it is both institutions which do not react (para. 7 lit. a).

The draft budget, on the other hand, is considered to be definitively rejected, if either both institutions reject the joint text, or, finally, if one of them rejects it while the other one fails to take a decision (para. 7 lit. b) or if only the European Parliament by a majority of its component members rejects the joint text while the Council, on its part, approves it (para. 7 lit. c).

- 13 In the last possible scenario – approval by the European Parliament, but rejection by the Council – there is a chance for the European Parliament to impose its position against the Council. Within a further period of 14 days it may confirm all or some of its own amendments by a special majority: if approved by a majority of its component members and three-fifths of the votes cast, the respective amendment is adopted; otherwise, the draft adopted by the Conciliation Committee is deemed to be part of the budget and the budget as a whole adopted on this basis (para. 7 lit. d).

14

III. Budgetary standards and rules

Para. 10 points at the obligation of each institution engaged in the budgetary procedure to observe both, the applicable rules laid down in the Treaties, in particular the budgetary principles of Article 310 TFEU, as well as secondary Union law. Concerning this latter set of rules, special mention is made of the rules concerned with the Union's own resources² and the balance between revenue and expenditure.

**Article 315 [Emergency budget]
(ex Article 273 TEC)**

If, at the beginning of a financial year, the budget has not yet been definitively adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of any chapter of

² Comp. Article 311 mn. 2 et seq.

the budget in accordance with the provisions of the Regulations made pursuant to Article 322; that sum shall not, however, exceed one twelfth of the appropriations provided for in the same chapter of the draft budget.

The Council on a proposal by the Commission, may, provided that the other conditions laid down in the first paragraph are observed, authorise expenditure in excess of one twelfth in accordance with the regulations made pursuant to Article 322. The Council shall forward the decision immediately to the European Parliament.

The decision referred to in the second paragraph shall lay down the necessary measures relating to resources to ensure application of this Article, in accordance with the acts referred to in Article 311.

It shall enter into force thirty days following its adoption if the European Parliament, acting by a majority of its component Members, has not decided to reduce this expenditure within that time-limit.

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I. General remarks 1

In order to allow the Union to continue its activities¹ Article 315 TFEU provides that – as an exception to the principle of annuality – expenditures may be effected on a provisional basis. This emergency budget is subject only to the condition that a regular budget has not been established at the beginning of the fiscal year on 1 January (Article 313 TFEU). This may be due to delays in the budgetary procedure (Article 314 TFEU) or to the fact that the budget had been annulled by the ECJ².

Implementing provisions are to be found in Article 16 Financial Regulation (2012). 2

II. Expenditures 3

1. Monthly twelfths

Regarding the ‘provisional twelfths regime’ Article 315 para. 1 TFEU provides a double check: The monthly expenditures may not amount to more than one twelfth of the appropriations in the preceding budget, and in addition may not exceed one twelfth of the appropriations provided for in the draft budget. Thus the decisive amount is the respective lower one.

Appropriations are allocated according to the chapters of the relevant budget (comp. 4 also Article 316 para. 2 TFEU).

2. Exceeding expenditures 5

According to para. 2 and to Article 16 para. 4 Financial Regulation (2012), expenditures exceeding one provisional monthly twelfth may be authorized by a qualified major-

¹ See Article 16 para. 4 Financial Regulation (2012).

² ECJ 34/86 Council/EP (Budget 1986) 1986 ECR 2155.

ity decision of the Council provided that the conditions of paragraph 1 are being met. However, the overall total of the appropriations available in the preceding budget or the draft budget may in no circumstances be exceeded.³ The decision also lays down the necessary measures relating to the resources (para. 3). It enters into force 30 days following its adoption, unless the European Parliament becomes active within this period.

6 The European Parliament must be informed immediately by the Council by forwarding its decision on authorization. Within that 30 days delay, it may now take the decision to reduce the expenditure provided for in the Council's decision. In this case the Commission has to submit a new proposal. If the Parliament, however, informs the Council and the Commission that it does not wish to reduce that expenditure, the Council's decision will enter into force even before the expiry of the 30 days.⁴

7

III. Revenues

Revenues may flow to the Union also in times of an emergency budget. As far as the revenues depend on a determination in the budget (VAT and GNI resources) the existing rates of call remain applicable until the entry into force of the new rates.⁵ Only if the revenues needed would exceed the former budget or the draft budget it will be necessary to take a decision regarding the revenue side. The legal basis for such action is provided for in Article 315 para. 3 TFEU.

Article 316 [Transferability, specification]
(ex Article 271 TEC)

In accordance with conditions to be laid down pursuant to Article 322, any appropriations, other than those relating to staff expenditure, that are unexpended at the end of the financial year may be carried forward to the next financial year only.

Appropriations shall be classified under different chapters grouping items of expenditure according to their nature or purpose and subdivided in accordance with the regulations made pursuant to Article 322.

The expenditure of the European Parliament, the European Council and the Council, the Commission and the Court of Justice of the European Union shall be set out in separate parts of the budget, without prejudice to special arrangements for certain common items of expenditure.

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³ Article 16 para. 5 Financial Regulation (2012).
⁴ Article 16 para. 4 subpara. 2 Financial Regulation (2012).
⁵ Article 2 para. 6 Own Resources Decision 2007/436.

I. Overview

1

Article 316 TFEU explicates two particularly important budget principles concerning expenditures: the principle of annuality (Article 310 mn. 15) and the principle of specification (Art. 310 mn. 16). With respect to the former principle this is done in an indirect way by stipulating restrictive rules regarding the (exceptional) transfer of appropriations to the next financial year (para. 1). Paras 2 and 3 instead provide for certain structural features in order to bring the budget in conformity with the latter principle.

II. Annuity

2

1. Cancellation of appropriations

The principle of annuity, which simultaneously serves the budget's clarity and the regular political control, limits, as a matter of principle, the appropriations of the budget to the fiscal year; appropriations not used by the end of the financial year will be cancelled (Article 13 para. 1 subpara. 1 Financial Regulation (2012)). Expenditures due to be made in the next year therefore usually need an appropriation in the new budget.

2. Carry-over of appropriations

3

As an exception to the principle of annuity it is, in accordance with paragraph 1 and the financial regulation, permitted to carry forward any appropriations – except for those concerning staff expenditures – to the next financial year. This means that these expenditures may be used for the purpose defined in the budget in the next year at the latest.¹ The appropriations concerning staff expenditures, however, lapse: these expenditures always need a new appropriation in the next financial year.

The procedure regarding the transfer of unexpended appropriations is laid down in Articles 13 et seq. Financial Regulation (2012). It allows the carry-over of appropriations to the next financial year by a decision of the institution concerned or – in certain cases – they may be carried over automatically.²

3. Multiannual appropriations

5

Further exceptions to the principle of annuity exist regarding multiannual appropriations according to Article 10 para. 4 in conjunction with special provisions in Part Two of the Financial Regulation (2012) concerning the European Agricultural Guarantee Fund, external actions as well as administrative appropriations. The appropriations concerned may be committed globally or being made in annual instalments.

III. Specification

6

With respect to expenditures the principle of specification means that appropriations are to be classified under strictly defined chapters according to their intended use. This is not only to enhance budget clarity but also commits the bodies involved to the object and purpose of the appropriations.

¹ ECJ Case C-284/90 *Council v EP* 1992 ECR I-2321.

² Article 13 para. 4 Financial Regulation (2012).

- 7 In contrast to the earlier, less strict formula (Article 271 para. 3 TEC: “as far as may be necessary”), Article 316 para. 2 TFEU now contains a rigorous obligation for the EU budget authority (“shall”) to comply with the regulatory requirements of the Financial Regulation, in particular to its Articles 43 et seq. By declaring essential and obligatory basic structural elements of the budget, this provision further provides for certain normative limits for the discretion of the EU organs to amend the Financial Regulation.
- 8 Paragraph 3 stipulates the budget to contain separate parts setting out the specific expenditures of the European Parliament, the Commission, the European Court of Justice and the Council together with the European Council, an institution which, as a consequence of its new status as EU organ (Article 13 TEU), is for the first time explicitly mentioned in this context. However, surprisingly enough and devoid of any rational justification, what is missing in this listing is the European Court of Auditors.
- 9 Financial Regulation (2012), however, lays down in Article 43 that each institution is assigned a separate section of the budget, with the exception of the European Council and the Council, which share the same section. According to Article 2 lit. b Financial Regulation (2012) the concept of ‘institution’ covers ‘the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions, the European Ombudsman, the European Data Protection Supervisor and the European External Action Service (the ‘EEAS’); the European Central Bank, instead, shall not be considered as an institution of the Union’.
- 10 In view of the progressive proliferation of administrative activities of the Commission, the Financial Regulation, in order to improve transparency, provides in Article 196 para. 1 that only the total amount of the appropriations for the European offices will be entered in a specific budget line within the Commission’s budget section, whereas the single appropriations will be set out in detail in an Annex to that very section.

CHAPTER 4 IMPLEMENTATION OF THE BUDGET AND DISCHARGE

Article 317 [Implementing the budget] (ex Article 274 TEC)

The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.

The regulations shall lay down the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities. They shall also lay down the responsibilities and detailed rules for each institution concerning its part in effecting its own expenditure.

Within the budget, the Commission may, subject to the limits and conditions laid down in the regulations made pursuant to Article 322, transfer appropriations from one chapter to another or from one subdivision to another.

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I. Responsibility of the Commission

1

The Commission has the main responsibility for implementing the budget. It allocates the resources to the administrative bodies of the Union and, if required, to the Member States, and thereby authorizes them to make use of these financial means. In view of its accountability under Article 319 TFEU acting under its own responsibility, the Commission proceeds within the framework of the applicable legal provisions, in particular the Financial Regulation (2012), and with due regard to the principles of sound financial management (Article 310 para. 5 TFEU). The discretionary powers of the Commission in this field may not be encroached upon by the Council.¹

II. Participating institutions and Member States

2

A substantial part of the budget is administrated and expended by the Member States. This factum is reflected in paragraph 1 where explicit mention is made of the Commission's cooperation with the Member States. However, it does not follow from this cooperation that Member States are vested with a responsibility similar to that of the Commission. It is only certain assignments for implementing the budget which are delegated from the Commission to the Member States. Article 59 Financial Regulation (2012) expressly provides that 'where the Commission implements the budget under shared management, implementation tasks shall be delegated to Member States.' However, also in the case of such a 'shared management', the Commission retains its control rights. Para. 1 s. 2 substantiates the principle of loyal cooperation (Article 4 para. 3 TEU) for a vertical relationship and specifies this obligation by again (comp. s. 1) referring to the principle of 'sound financial management'.

Para. 2 lays down an obligation of the budgetary authorities to adopt provisions within 3 the financial regulation (Article 322 TFEU) identifying the duties of the Commission and the Member States regarding the implementation of the budget. This was effected by the adoption of the new Financial Regulation (2012), particularly by its Article 59 which provides in its first paragraph that 'the Commission and the Member States shall fulfill their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation.' The Commission may also address other Union institutions and confer to them the requisite powers concerning the implementation of their sections of the budget.²

III. Transfer of appropriations

4

As an exception to the principle of specification (Article 316 TFEU mn. 6), the Commission may transfer appropriations of the expenditure side of the budget from one chapter to another or from one subdivision to another. The details are dealt with by the

¹ ECJ Case 16/88 *Commission v Council* 1989 ECR 3457.

² Article 55 Financial Regulation (2012).

Financial Regulation (2012). With regard to operational expenditure, the maximum of transfer appropriations by the Commission between chapters within the same title is 10 % of the appropriations per year (Article 26 FR). A similar rule applies for transfers initiated by the other institutions (Article 25 FR); which on their part, however, submit their transfer proposals to the European Parliament and the Council for decision (Article 27 FR).

**Article 318 [Accounting, evaluation report]
(ex Article 275 TEC)**

The Commission shall submit annually to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget. The Commission shall also forward to them a financial statement of the assets and liabilities of the Union.

The Commission shall also submit to the European Parliament and to the Council an evaluation report on the Union's finances based on the results achieved, in particular in relation to the indications given by the European Parliament and the Council pursuant to Article 319.

- 1 Since responsibility for the implementation of the budget (Article 317 para. 1 TFEU) falls upon the Commission, accountability does so, too. For this purpose it prepares a report on budgetary management for the preceding financial year as well as a financial statement relating to the development of the assets and liabilities of the Union during this year (para. 1). **The budgetary implementation report**, which aggregates all budgetary operations for the year in terms of revenue and expenditure, is accompanied by explanatory notes supplementing and commenting on the information given in the report (Article 146 Financial Regulation (2012)). The **financial statement** comprises a balance sheet and the statement of financial performance representing all assets and liabilities, the financial situation and the economic result for the preceding year (Article 145 FR). The Commission forwards these documents to the European Parliament, the Council and the Court of Auditors by 31 July (Article 148 para. 5 FR). The details of the procedure are laid down in Articles 141 et seq. FR).
- 2 According to para. 2, combined with Article 166 para. 2 FR, the Commission is also obliged to prepare a **report on the Union's finances evaluating the measures** taken in the light of observations, comments and instructions which the European Parliament and the Council have given. The Member States are called upon to cooperate with the Commission by informing it of the measures they have taken in this respect in order to enable the Commission to take these data into account in its report (Article 166 para. 2 s. 2 FR). The reports are to be transmitted to the European Parliament and the Council, and also to the Court of Auditors (Article 166 para. 2 s. 3 FR). A second (and broader) purpose of the evaluation report lies in the strengthening of democratic control of the implementation of the budget. What is ultimately intended is a political assessment which is required in this context.¹

¹ Streinz/Niedobitek, EUV/AEUV, Article 318 mn. 10 et seq.

**Article 319 [Discharge procedures]
(ex Article 276 TEC)**

1. The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget. To this end, the Council and the European Parliament in turn shall examine the accounts, the financial statement and the evaluation report referred to in Article 318, the annual report by the Court of Auditors together with the replies of the institutions under audit to the observations of the Court of Auditors, the statement of assurance referred to in Article 287(1), second subparagraph and any relevant special reports by the Court of Auditors.

2. Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request.

3. The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.

At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.

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I. General observations

1

As a consequence of its prime responsibility for the implementation of the budget (Article 317 TFEU), the Commission must be subjected to a political control by the discharge procedure. Discharge means that the institution responsible for controlling the Commission has no objections against its implementation of the budget. This does not preclude any claims for reimbursement or damages against certain officials.

Apart from the statement of administrative correctness, the discharge also comprises a comprehensive evaluation of the manner in which the Commission is conducting its implementing activities and consequently comprises a strong political component ('dual function' of the discharge procedure).

Originally, the discharge was given by the Council; by the Treaty amendment of 22 March 1970 this task was then conferred to the Council together with the European Parliament alone, which, however, decides on a Council recommendation. Thus, in this core area of classical parliamentary functions, the European Parliament has already for a long time attained decisive political influence.

- 4 Independently from the discharge procedure proper, but functionally connected with it, Article 319 para. 2 TFEU contains the basis for a fundamentally comprehensive monitoring of the budget management by the European Parliament. This provision is specified in more detail by the Financial Regulation (2012), as e.g. by Article 150 FR.

5 **II. Procedure**

The basis of the discharge is provided by the accounts, the financial statement (Article 318 para. 1 TFEU), the evaluation report (Article 318 para. 2 TFEU), the annual report by the Court of Auditors, including the replies of the institutions under audit, its special reports, and the statement of assurance (Article 287 TFEU). The European Parliament may ask the Commission to give evidence pertaining to the execution of expenditure or the operation of financial control systems (para. 2).

- 6 A precondition for the granting of discharge is a recommendation by the Council, adopted by qualified majority (Article 16 para. 3 TEU). However, the European Parliament is not obliged to follow the Council's recommendation (Article 288 para. 5 TFEU).
- 7 The decision of the Parliament is given by a majority of the votes cast (Article 231 para. 1 TFEU).
- 8 The Article 319 on the discharge procedure being rather rudimentary, more detailed rules on this subject are to be found in Articles 164 et seq. Financial Regulation (2012).

9 **III. Legal consequences**

If the examination does not cause any significant objections, the European Parliament will decide to give a discharge to the Commission. Minor objections, which may accompany this decision, must be remedied (para. 3).

- 10 If there are, however, significant objections the discharge a) may be given under the reservation of appropriate measures, or b) may be stayed until appropriate measures have been taken. In any case the European Parliament or the Council may ask the Commission to report on the measures taken (para. 3 subpara. 2). Although, the practical relevance of this duty to report has probably been diminished by the introduction of the evaluation report according to Article 318 para. 2 TFEU, it will still be possible in the future to ask for very specific informations, and, unlike the evaluation report under Article 318 TFEU, the present report must be transmitted to the Court of Auditors (para. 3 subpara. 2 s. 2).

A definitive refusal by the European Parliament to give a discharge to the Commission is impermissible since there is simply no alternative for the budget and the financial statement to be brought in accordance with the law by way of constructive dialogue (comp. also Article 164 FR) and the budget procedure may not be (ab)used as a substitute for a vote of no-confidence (Article 234 TFEU).

**CHAPTER 5
COMMON PROVISIONS**

***Article 320 [Units of account: EURO]
(ex Article 277 TEC)***

The multiannual financial framework and the annual budget shall be drawn up in euro.

Article 320 TFEU designates the euro as the relevant unit of account in relation to the multiannual financial framework (Article 312 TFEU) and the annual budget (Article 310 TFEU). 1

Article 320 TFEU is applicable not only for the drawing up of the framework and the budget, but also applies for the financial management as a whole, including budget implementation and control. 2

**Article 321 [Public transfer; communications]
(ex Article 278 TEC)**

The Commission may, provided it notifies the competent authorities of the Member States concerned, transfer into the currency of one of the Member States its holdings in the currency of another Member State, to the extent necessary to enable them to be used for purposes which come within the scope of the Treaties. The Commission shall as far as possible avoid making such transfers if it possesses cash or liquid assets in the currencies which it needs.

The Commission shall deal with each Member State through the authority designated by the State concerned. In carrying out financial operations the Commission shall employ the services of the bank of issue of the Member State concerned or of any other financial institution approved by that State.

As long as the euro has not become the common currency of all Member States the Commission may have holdings in the currency of a single Member State. The Commission may use its holdings in the currency of a Member State for a **transfer into the currency of another Member State**. It may, however, do so only if this is necessary to enable these holdings to be used for purposes within the scope of the Union Treaties. Furthermore the Commission must notify the competent authorities of the Member States affected regarding this transfer. 1

The transfer of holdings in **currencies of third States** is not explicitly mentioned in the TFEU; it is, however, not excluded. 2

The sphere of application of **para. 2** of this Article is not confined to transfer of assets mentioned in para. 1. It comprises all of the financial relations of the Commission with the Member States. Each Member State decides independently about the authority by which it wants to be represented. Usually this is the Ministry of Finance of the Member State. In the special case of financial operations the Commission employs the bank of issue of the Member State concerned or any other financial institution which this State has chosen. Also in so far it is the Member State who decides by which institute it wants to be represented. 3

**Article 322 [Financial rules]
(ex Article 279 TEC)**

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

- (a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;

(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.

2. The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Court of Auditors, shall determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements.

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1 I. General remarks

Article 322 TFEU designates the **supplementary provisions** which are held necessary for implementing the Union Treaties in the financial and budget area, such as particularly the annual budget (Article 310 TFEU), the Own Resources Decision (Article 311 TFEU) and the Multiannual Financial Framework (Article 312 TFEU) and lays down the relevant legislative procedure.

- 2 The first paragraph provides in lit. a for certain financial rules and in lit. b for controlling provisions in concordance with the general procedural rules for establishing the budget (Article 314 TFEU) the **equal participation of the European Parliament in the legislative process**. The role of the Court of Auditors is also enhanced from the right to make a mere comment to a right to be consulted.
- 3 According to the second paragraph, however, concerning certain implementing rules in the area of the Union's own resources in concordance with Article 311 para. 3 TFEU, the privileged status of the Council has been altered only in so far that unanimity is not any more required for the adoption of the pertinent rules.

4 II. Budgetary and controlling procedures (para. 1)

The new Financial Regulation of 25 October 2012 (Regulation on the financial rules applicable to the general budget of the Union (No 966/2012), OJ L 298 of 26 December 2012), in force since 1 January 2013, complemented by the Delegated Regulation of the Commission (No 1268/2012, OJ 2012 L 362) comprises e.g. rules on budgetary principles (Title II), establishment and structure of the budget (Title III), implementation of the budget (Title IV), procurement (Title V), grants (Title VI), prizes (Title VII), financial instruments (Title VIII), presentation of the accounts and accounting (Title IX), external audit and discharge (Title X). In so far the legislative assignment laid down in lit. b also has broadly become fulfilled (comp. Articles 71 et seq. and Articles 147 et seq. Financial Regulation (2012)).

5 III. Implementation of the Own Resources Decision

Provisions covering the method and the procedure according to which the Member States make the revenues – as a rule the Union's own resources, Article 311 TFEU – available to the Commission, and determine the method for providing the necessary

cash resources are to be found in Council Regulation 609/2014 and Council Regulation 608/2014.

Article 323 [Securing funding]

The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties.

This Article has been inserted by the Lisbon Treaty as a consequence of the elimination of the former distinction drawn between obligatory and non-obligatory expenditures. The Union institutions taking part in the budgetary procedure are obliged by this provision to ensure that the financial means are made available in order to make sure that the Union is able to fulfil its legal obligations in respect of third parties. The concept of ‘third parties’ has a broad meaning. It comprises all kinds of creditors, not only Member States and third States, but also natural and juridical persons. 1

The provision exerts legal effects only among the three Union institutions responsible for the budget. It does not address the Member States; their corresponding obligation is to be derived from Article 311 para. 1 TFEU, and it does not grant legal entitlements to ‘third parties.’¹ 2

Article 324 [Trilogue in the Budgetary Procedures]

Regular meetings between the Presidents of the European Parliament, the Council and the Commission shall be convened, on the initiative of the Commission, under the budgetary procedures referred to in this Title. The Presidents shall take all the necessary steps to promote consultation and the reconciliation of the positions of the institutions over which they preside in order to facilitate the implementation of this Title.

This new Article inserted by the Lisbon Treaty does not only create legal basis for the assimilation of the positions which so far had already been practiced informally; but it lays down an explicit commitment to this approach. Apart from the fact that it is the Commission who has to take the initiative for introducing the trilogue, the procedure can be operated in a flexible manner by the Presidents of the three institutions. The Article might be considered as specifying the principle of ‘loyal cooperation’ (Article 13 para. 2 s. 2 TEU); a position obstructing the reconciliation process would be incompatible with the obligation derived from this principle. 1

The Interinstitutional Agreement of 17 May 2006 (OJ 2006 C 139/1) contains in its Part II and Annex 2 detailed provisions concerning the negotiation and concertation proceedings in the budgetary procedures. These provisions must be considered as legally binding. 2

¹ Streinz/Niedobitek, EUV/AEV, Article 323 mn. 7.

CHAPTER 6
COMBATING FRAUD

*Article 325 [Protection of the Union’s financial interests]
(ex Article 280 TEC)*

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union’s institutions, bodies, offices and agencies.
2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.
3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies.
5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

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I. Background

The financial interests of the EU are particularly vulnerable to fraud because of the specific structure of its budget, on the revenues side by the ‘traditional own sources’ (customs and VAT), and on the expenditures side by financial aids and refunds in the agriculture and fisheries sector and the regional and cohesion policy area. According to the Commission’s annual fraud report 2011 on the expenditure side it is cohesion policy which remains the sector with the highest number of irregularities reported as fraudulent (54 % of the total) and the biggest financial impact (69 % of the total of € 295 million). The estimated financial impact of irregularities reported as fraudulent on the revenue side (traditional own resources) for 2011 was € 109 million.¹

¹ Annual Report 2011 COM (2012) 408 final, p. 6.

For a long time there were no adequate mechanisms to protect the financial interests of the Union against the massive danger of fraud. A first impulse for an improvement was given by the ECJ in its judgment of 21 September 1989² ('Greek maize scandal'), concerning a case where agricultural levies were fraudulently withheld from the Community budget. Referring to the principle of loyal cooperation (now: Article 4 para. 3 TFEU) the Court declared that Member States 'must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.' As a consequence, by the Treaty of Maastricht, the predecessor of the present Article 325 TFEU was included into the EC-Treaty (ex-Article 209a, later ex-Article 280), comprising two paragraphs (now paras 2 and 3 of the present Article 325 TFEU) and paras 1, 4 and 5 were added by the Treaty of Amsterdam.

The **Treaty of Lisbon** continued to further develop the mechanism to combat fraud and similar legal activities. Instead of countering such activities only in the Member States' sphere of responsibility, it extended the area of protection also to 'all the Union's institutions, bodies, offices and agencies' by correspondingly amending paragraphs 1 and 4. The most important change, however, was brought about by **deleting the second sentence in paragraph 4**, which stipulated: 'These measures shall not concern the application of national criminal law or the national administration of justice.' Together with the **new Article 86 TFEU** which creates the legal basis for establishing a European Public Prosecutor's Office for the protection of the Union's financial interests, this may be properly understood as an almost revolutionary act, since criminal law and procedure are widely considered cornerstones of state sovereignty. As a consequence the field of combatting fraud has become a forum for discussions about a **possible development of a 'corpus iuris' of criminal law** within the Union.

II. Details

Following the above-mentioned judgment of the ECJ³ **Article 325 para. 1 TFEU** formulates as a general principle that all measures based on this Article must contribute to creating a deterring effect. Measures applied must be of a kind and weight that they are really suited to influence possible criminals (**'imperative of efficiency'**).

The **second paragraph** substantiates this general obligation specifically addressing the Member States and demanding that they take the same measures to counter fraud affecting the financial interests of the Union as they do in cases where their own financial interests are at stake (**'imperative of assimilation'**). It is particularly important that this obligation does not only address the national legislative, but equally the national administrative and judicial bodies, including police and public prosecutors.

A key role in implementing this coordinating obligation is played by the **Advisory Committee for Coordination of Fraud Prevention (COCOLAF)**, established on the basis of **para. 3** by the Commission.⁴ In addition, the Commission in 1999 established

² ECJ Case 68/88 *Commission v Greece* 1989 ECR 2965.

³ Mn. 2.

⁴ Decision 94/140 of 23 February 1994, OJ1994 L 61/27, amended by the Commission Decision of 25 February 2005, OJ L 71/67 of 17 March 2005.

the European Anti-Fraud Office (OLAF: 'Office européen de lutte antifraude')⁵ It enjoys far reaching investigating competences in relation to the Union bodies (also the European Central Bank⁶) as well as towards the Member States.

- 7 Since the restriction in regard to criminal law and administration has been deleted from **para. 4**, this provision has become a legal basis for material and procedural law beyond merely administrative rules and sanctions. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, can now adopt the necessary measures also in the field of criminal law against fraud affecting the financial interests of the Union.
- 8 The obligatory annual report of the Commission, **based on para. 5**, is prepared by COCOLAF for the adoption and presentation by the Commission, the last report covering the year 2011.⁷

TITLE III ENHANCED COOPERATION

Article 326 [Principles] (ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Bibliography: see Article 20 TEU.

- 1 Title III on enhanced cooperation builds on **Article 20 TEU**. It serves to lay down details particularly in the area of procedural rules. Partly it only repeats basic provisions of Article 20.
- 2 Article 326 para. 1 TFEU emphasizes that Member States participating in an enhanced cooperation and thereby taking the lead in proceeding to the goal of an 'ever closer Union' (Article 1 para. 2 TEU) remain **bound by the existing Union law**. In this context para. 2 explicitly names some central rules of Union law which have to be observed.
- 3 The cooperation may **not undermine the internal market**. According to the legal definition in Article 26 para. 2 TFEU the internal market comprises '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.' Furthermore the **economic, social and territorial cohesion**, the objectives of which are defined in Article 174 TFEU, must particularly be taken into account.
- 4 In addition Article 326 para. 2 TFEU refers to the elementary principles of the internal market, namely the **prohibition of barriers or discrimination in trade relations** between Member States which the ECJ has developed on the basis of the prohibition of measures having equivalent effect like quantitative restrictions and which the Court has

⁵ Decision 1073/1999, OJ 1999 L 210/24; reorganisation effective on 1 February 2012.

⁶ ECJ Case C-11, 15/00 *Commission v ECB*, 2003 ECR I-7147.

⁷ See above mn. 1.

expanded to all of the activities within the internal market.¹ Finally paragraph 2 mentions **the ban on distorting competition** between Member States by private or public actions like anti-trust and state aid (Articles 101–118 TFEU).

Article 327 [Relationship to non-participating Member States]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

This provision deals with the relationship of the participants of the enhanced cooperation on the one hand and the **non-participating Member States** on the other hand. These rules are kept very general and can already be deduced from the general obligations of EU membership.

The Member States participating in an enhanced cooperation apply the acts and decisions of the Union institutions which are taken within the framework of that cooperation like any other secondary Union law. In contrast the **non-participants** are not bound by such acts and decisions. Encroachments into the competences, rights and obligations of non-participants are not allowed. On the other hand these Member States may not impede the implementation of the enhanced cooperation.

Article 328 [Accession open to all Member States]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

Article 328 para. 1 TFEU concerns the **right to participate** in an enhanced cooperation. In this context, only the general formal preconditions are mentioned by the Article. When an enhanced cooperation is established every Member State may participate if it meets the **specific conditions** laid down by the authorizing decision of the Council (Article 329 TFEU).

For participating subsequent to the establishment of the enhanced cooperation the interested members must additionally agree to be bound by the legal acts which have already been taken within the cooperation's framework.

¹ Cf. Article 34 TFEU mn. 7 et seq.

- 3 In the interest of an ‘ever closer Union’ (comp. Article 1 para. 2 TEU) the group of participants should in the course of time become **as strongly expanded as possible**, because the participants form an avant-garde to which the other Member States should join up quickly. Correspondingly the Commission and the participating Member States are obliged to take care for a widely spread participation.
- 4 This is also in the interest of the European Parliament and the Council who are both **regularly informed** by the Commission and – if the GFSP is concerned – by the High Representative about the development of the enhanced cooperation.

Article 329 [Procedure of authorisation]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

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1 **I. Authorization by the Council**

The enhanced cooperation in the sense of Article 20 TEU must be authorized by the Council (Article 329 TFEU). This decision is taken in different procedures, depending on whether the cooperation concerns the area of internal EU policies or the area of the GFSP. Facilitating conditions for an enhanced cooperation are provided for in the area of cooperation in criminal justice and police matters.¹

¹ Article 20 TEU mn. 5.

II. Areas of internal policies

2

The Council's decision authorizing an enhanced cooperation is as a rule taken on a proposal of the Commission and after the consent of the European Parliament (para. 1 subpara. 2).

The Member States intending to establish an enhanced cooperation first ask the Commission to submit a corresponding proposal to the Council. When addressing the Commission the Member States explain the scope and the objectives of their project. If the Commission refuses the request, it has to inform the Member States about the reasons of its refusal. The Member States concerned may bring an action for nullity (Article 263 TFEU) against the Commission's negative decision to the ECJ.

The Council decides with qualified majority (Article 16 para. 3 TEU). A unanimous decision is requested only, if it deviates from the Commission's proposal (Article 293 para. 1 TFEU) by modifying, restricting or expanding it. The right to veto the Council's decision, which originally was a right of every Member State, was abolished by the Treaty of Nice.

III. Area of the CFSP

5

If an enhanced cooperation should be established in the area of the CFSP, it is also necessary that the Council authorizes the project. In the procedure leading to such a decision, however, the intergovernmental nature of the CFSP becomes visible. There is no need of a proposal by the Commission. The Member States interested in such cooperation address the Council directly.

The Council forwards the request to the High Representative for the CFSP and to the Commission. The High Representative provides an opinion on whether the intended cooperation is coherent with the CFSP. The Commission provides an opinion to the other aspects of the request, particularly to its coherence with the internal Union policies.

A consent of the European Parliament is not required. The European Parliament is only informed of the request. It is left to the discretion of the EP to give an opinion on the matter.

The Council takes the decision unanimously. This means that any Member State can impede an enhanced cooperation of other Member States in the area of the CFSP with its veto for which it does not even have to give any reasons. There is no room for a legal control of the Council's decision by the ECJ (Article 24 para. 1, subpara. 2 s. 6 TEU).

Article 330 [Right to participate in deliberations and voting] (ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).

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1 I. General rules

Since the enhanced cooperation takes place within the framework of the Treaties, the activities of the Member States participating in the cooperation are in principle subject to the general procedures laid down in the Treaties. This is principally true for all of the EU institutions. The European Parliament, the Commission, the ECJ and the European Court of Auditors are acting in their usual composition and according to the procedures as provided for by the Treaties also within the framework of the enhanced cooperation.

2 II. Decision-making of the Council

Special rules have to be applied only regarding the decision-making of the Council. Whereas all the Member States representatives in the Council may join in the deliberations of the Council in matters of the enhanced cooperation, **only the representatives of the Member States participating** in the enhanced cooperation may **take part in the vote**.

3 Therefore the requirement of **unanimity** concerns only the Member States participating in the enhanced cooperation. Abstentions of these representatives – as elsewhere – do not prevent the decision sought for.

4 If a **qualified majority** is necessary, the decision of the Council, if it is taken **before 1 November 2014**, is subject to Article 3 para. 4 of the Protocol (No 36) on transitional provisions, where it is ‘defined as the same proportion of the weighted votes and the same proportion of the number of the Council members and, if appropriate, the same percentage of the population of the Member States concerned as laid down in para. 3 of this Article.’

5 Only **from 1 November 2014 onwards** the provision on the ‘double majority’ as contained in Article 238 para. 3 TFEU will be applicable.

6 III. New Member States

The acts and decisions taken within the framework of an enhanced cooperation are **not considered part of the ‘Union acquis’**¹ which Member States newly acceding to the Union would be obliged to accept as binding.

*Article 331 [Accession of further Member States]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)*

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where

¹ Article 49 TEU mn. 22.

necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330.

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I. General remarks 1

The procedural provisions for acceding to an already existing enhanced cooperation distinguish – just like the procedure of establishing the cooperation – between accession to a cooperation established within the CFSP and the cooperation within other policy areas. In the latter field the Commission is given stronger weight; there is, however, no mentioning of the European Parliament.

II. Internal policy areas 2

The applicant State first notifies its intention of joining an existing cooperation framework to the Council and the Commission (para. 1 subpara. 1). The primary responsibility to make a decision lies with the Commission.

The Commission must answer within a time limit of four months after the notification 3 whether the applicant meets the criteria for participation. If the answer is positive, the Commission confirms the participation. It simultaneously decides about transitional

measures which seem to be necessary for applying the legal provisions already enacted to the acceding State (para. 1 subpara. 2). The Member States already participating in the enhanced cooperation concerned cannot impede the accession of the applicant.

- 4 In case the answer of the Commission is negative, because the applicant does not yet meet the conditions for participation, it enacts an intermediary decision. Therein it indicates the arrangements which the applicant State has to adopt within a certain time limit. After this deadline the Commission reexamines the application within four months taking into account the new circumstances. In case of a positive outcome it now decides about possibly necessary transitory measures (subpara. 3).
- 5 If, however, the outcome is again negative, the Applicant State may refer the matter to the Council. The Council decides with a qualified majority (Article 16 para. 3 TEU) in its composition confined to the group of the Member States participating in the enhanced cooperation concerned (Article 331 para. 1 subpara. 3 s. 4 in connection with Article 330 TFEU). This means that these Member States are able to accept the application in spite of the Commission's negative attitude; they cannot, however, override a positive decision of the Commission. In the first alternative, the Council may also adopt the transitional measures which the Commission had originally proposed.

6

III. CFSP area

In the CFSP field (para. 2) the applicant State notifies its intention to participate in the enhanced cooperation to the Council, the High Representative and the Commission. The capacity to decide on the matter lies with the Council in its composition of the participating Member States.

- 7 In the procedure thus initiated the Council first consults the High Representative. The High Representative also acts on behalf of the Commission (Subparas 3 sent. 4 in connection with Article 330 TFEU). Insofar the High Representative particularly takes the position which the Commission has on the question of coherence with the internal policies of the Union (Comp. also Article 329 para. 2 subpara. 1 s. 2 TFEU).
- 8 The Council in its composition of the Member States participating in the enhanced cooperation takes its decisions unanimously (Article 331 para. 2 subpara. 3 in connection with Article 330 TFEU). If it confirms the participation of the applicant it may adopt the necessary transitional measures on a proposal of the High Representative. If the Council, however, does not consider the conditions of participation as being fulfilled, it adopts an intermediary decision listing the necessary steps for satisfying them and setting a time-limit after which it will re-examine the application. Subsequently the final decision will be taken.

Article 332 [Budget]

**(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)**

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

- 1 The administrative costs of the EU institutions resulting from their engagement with the enhanced cooperation are borne by the Union.

The other expenditures resulting from enhanced cooperation are borne by the participating Member States alone. The Council may, however, after consulting the European Parliament, refer all or part of such costs to the general budget of the Union. This decision must be taken unanimously in the Council's composition of all its Members. 2

**Article 333 [Council voting procedure]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)**

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

Article 333 TFEU contains 'bridge' or 'passerelle' clauses which provide to the Council the competence for two ways of bringing about an implicit Treaty amendment in order to simplify procedures within the framework of an enhanced cooperation. These possibilities are precluded, however, if the Council's decisions have military or defence implications. 1

Para. 1 allows the Council to switch **from a procedure requiring unanimity to a qualified majority**. The Council in this case acts unanimously in its composition of the Member States participating in the enhanced cooperation.¹ 2

Similarly according to para. 2 the Council – after having consulted the European Parliament – may unanimously decide to change **from a special legislative procedure to the ordinary legislative procedure** (see Article 289 TFEU). 3

**Article 334 [Principle of coherence]
(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU
and ex Articles 11 and 11A TEC)**

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

This provision has been incorporated in the TEU by the Treaty of Nice. It specifies the principle of coherence of Article 13 para. 1 TEU and Article 7 TFEU (see also Article 329 para. 2 subpara. 1 s. 2 TFEU) and imposes on Council and Commission the responsibility and the duty to cooperate to this end. 1

¹ Article 330 TFEU. For defining the term 'qualified majority' in this context see Article 330 TFEU mn. 4.

PART SEVEN
GENERAL AND FINAL PROVISIONS

Article 335 [Legal Personality of the Union in the Member States]
(ex Article 282 TEC)

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

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1 I. Legal Personality in the domestic sphere

Whereas Article 47 TEU is concerned with the legal personality of the Union in general, particularly with its legal personality in international law, Article 335 TFEU grants the Union the most extensive **legal capacity accorded to legal persons** in each of the Member States.

2 Article 335 TFEU relates to the **Union as such**, not to its institutions, subordinate administrative entities or agencies. These bodies, however, may attain their own legal personality by primary law (like the European Central Bank on the basis of Article 129 para. 2 TFEU and Article 9.1 ESCB/ECB Statute) or by the legislative acts constituting legal agencies.

3 In its first sentence, the Article lists examples representing the **most important aspects of legal personality** within the Member States. These concern the capacity to acquire or dispose of movable and immovable property and the capacity to be a party to legal proceedings. In regard to potential litigation and enforcement proceedings, Article 274 TFEU and Article 1 Protocol on Privileges and Immunities¹ have to be taken into account.

4 II. Representation by institutions

In the second sentence of Article 335 TFEU, the function of **representing the Union** is conferred on the **Commission**. The newly inserted third sentence, however, expressly recognizes an established practice according to **which each of the institutions**, in view of their administrative autonomy, may represent the Union in matters relating to their respective operation. This capacity is being interpreted quite broadly; it implies not only ancillary administrative and fiscal activities for its own administrative bodies but also the responsible management of the budget allocated to them², including the conduct of legal proceedings.

¹ See Article 343 TFEU.
² Cf. also Article 317 para. 2 s. 2 TFEU and Article 55 Financial Regulation (2012).

**Article 336 [Staff Regulations, Conditions of Employment]
(ex Article 283 TEC)**

The European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

Article 336 TFEU includes the legal basis for the standards of the **European civil service law**, called 'Staff Regulations of Officials of the EU and the Conditions of Employment for other servants of the Union.' A consolidated version (as of 1 January 2014) of the Regulation is available at EurLex (1962 R 0031). Administrative units enjoying legal personality (particularly agencies of the Union, like the European Defence Agency), however, are not directly affected by the EU service law. In these cases, the acts establishing these units usually refer to the corresponding Union law. The European Central Bank and the European Investment Bank have their own staff regulations.

The regulations and conditions established on the basis of Article 336 TFEU are bound by the rules of **primary EU law**, like the Protocol on Privileges and Immunities¹ or the principles of the rule of law and the fundamental rights of the citizens².

Contrary to the legal situation until the entering into force of the Lisbon Treaty, the respective regulations are now adopted not by the Council alone but jointly by the European Parliament and the Council in accordance with the **ordinary legislative procedure**.

Employment law disputes between the Union and its servants (Article 270 TFEU) are dealt with by a specialised court set up under Article 257 TFEU, the **Civil Service Tribunal**.³

**Article 337 [Commission's Right to Information and Checks]
(ex Article 284 TEC)**

The Commission may, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, collect any information and carry out any checks required for the performance of the tasks entrusted to it.

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I. General remarks

1

For the performance of its tasks, particularly of its duty to **monitor** the application of Union law^{1*}, the Commission depends on information and verifications. Article 337

¹ See Article 343 TFEU.

² Cf. Article 6 TEU.

³ Council Decision 2004/752 establishing the European Union Civil Service Tribunal.

^{1*} On this, see Article 17 para. 1 TEU.

TFEU lays down the principle that the Commission has a **general right** to collect information and carry out checks as far as these are required for performing its tasks. However, Article 337 TFEU does not by itself confer powers to take the necessary actions; rather the right to information and checking is subject to specification of this general principle by secondary Union law laid down by the Council acting by a simple majority²; this act is not subject to any further conditions.

- 2 A general act as described in Article 337 TFEU has not been adopted yet. This does not, however, exclude that a corresponding right of the Commission with respect to the Member States or other Union institutions may be derived from different legal principles, like *e.g.* the duty to cooperate for facilitating the achievement of the Union's tasks according to Articles 4 and 13 para. 1 TEU. Article 337 TFEU only relates to information and checks **of the Commission**.³ It covers only orders of the Commission which create a legal obligation for the addressee to comply⁴. The Commission may at any time make a – legally not binding – request on the carrying out of checks (*e.g.* by asking for the submission of supporting documents).

3 **II. Information and checks**

Information consists of the reporting of facts and factual circumstances. **Checks** are measures to control the accuracy of the reports and, above that, all further measures aimed at investigating the facts and factual circumstances. Such measures comprise the request for presentation of documents or files, as well as on-the-spot inspections including the search for still unknown information sources.⁵

- 4 However, a distinction must be drawn between these measures and their enforcement via direct compulsion.⁶

5 **III. Duties of Member States**

The Council has not yet adopted a general duty concerning information and checks addressed to the Member States. However, **the Member States' duty to cooperate**, which may comprise a duty to grant information, can already be derived from Article 4 para. 3 TEU. Specific (legally binding) requests for information may be addressed to the Member States by the Commission on the basis of specific Treaty provisions in connection with the principle of 'implied powers' (for instance within the framework of State aid control under Article 108 TFEU).

- 6 An exception from the duty to grant information is provided by Article 346 para. 1 lit. a TFEU concerning information, the disclosure of which the addressed Member State considers contrary to the essential interests of its security.

² See Article 238 para. 1 TFEU.

³ Regarding *e.g.* the European Court of Auditors comp. Article 287 para. 3 subpara. 2 TFEU and Article 161 Financial Regulation (2012).

⁴ See Article 288 para. 4 TFEU.

⁵ ECJ Joined Cases 46/87 and 227/88 *Höchst* [1989] ECR 2859; 136/79 *National Panasonic* [1980] ECR I-2033.

⁶ ECJ Joined Cases 46/87 and 227/88 *Höchst* [1989] ECR 2859.

IV. Duties of market citizens

7

The single market citizen, and particularly each undertaking, is obligated – apart from duties emanating from a contractual basis – to provide information or tolerate checking measures only on the basis of a corresponding act of the Council.

In the field of competition law, the Council's antitrust regulation is of primary practical importance; see Articles 18 (requests for information) and 20 (powers of inspection) Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Article 19 Regulation 1/2003 on the power to take (oral) statements. 8

The professional obligation to maintain **strict confidentiality**, which can be derived from general legal principles (like e.g. for attorneys, notaries, tax consultants, auditors and medical doctors) may limit the Commission's right to information.⁷ See also Article 339 TFEU. 9

Undertakings may also not be forced to incriminate themselves beyond rendering information on facts; this would amount to an interference with the requirements of due process and the rights of defence.⁸ However, the ECJ does not recognize a general right of non-disclosure of documents even if these could be used by the Commission in order to establish the existence of an infringement.⁹ 10

V. Enforcing measures

11

The decision of the Commission addressed to a **Member State** may be enforced by launching infringement procedures at the ECJ¹⁰.

With respect to **private persons and undertakings** the enforcement procedure must have a clear legal basis.¹¹ The means may consist of a fine, a periodic penalty payment or the use of direct force. For the use of direct force, Article 20 para. 6 and para. 7 Regulation 1/2003 refer to the obligatory assistance by national administrative institutions like the police or equivalent enforcement authority or – if required by national law – a judicial authority¹². 12

*Article 338 [Union Statistics]
(ex Article 285 TEC)*

1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Union.

⁷ ECJ Cases 155/78 *M v Commission* [1980] ECR 1797; 155/79 *A.M. & S Europe Ltd.* [1982] ECR 1575.

⁸ ECJ Case 374/87 *Orkem* [1989] ECR 3283; GC Case T-112/98 *Mannesmann Röhrenwerke* [2001] ECR II-729.

⁹ ECJ Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-5915.

¹⁰ For this, see Article 258, 259 and 261 TFEU; see also Article 299 para. 1 TFEU.

¹¹ ECJ Case C-210/00 *Hofmeister* [2002] ECR I-6453.

¹² ECJ Joined Cases 46/87 and 227/88 *Höchst* [1989] ECR 2859.

2. The production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; it shall not entail excessive burdens on economic operators.

- 1 Inserted by the Treaty of Amsterdam, Article 338 TFEU forms the **sole legal basis for all acts of the Union in the area of statistics**, and therefore functions as a *lex specialis* to Article 337 TFEU; the only exception, for activities concerning statistics by the European Central Bank, is recognized in paragraph 1¹. It provides rules on preconditions and the procedure for the production of statistics of the Union. Taking into account the progressive ‘condensation’ of the internal market law, accompanied by a growing intensity of interventions, and also the increasing political sensitivity of statistical information, the adoption of corresponding legal acts has been subjected to **parliamentary participation** finally (‘ordinary legislative procedure’, Article 294 TFEU).
- 2 The basic legal act defining nature and extent of production of statistics is **Regulation 223/2009 on European statistics**. ‘Statistics’ is defined as ‘quantitative and qualitative, aggregated and representative information characterising a collective phenomenon in a considered population’ by this regulation; and ‘development’ as meaning ‘the activities aiming at setting up, strengthening and improving the statistical methods, standards and procedures used for the production and dissemination of statistics as well as at designing new statistics and indicators’².
- 3 **Statistical measures** are embedded in a multiannual programme providing the framework for the development, production and dissemination of European statistics, the main fields and the objectives of the actions envisaged for a maximum of five years. This is now created by **Regulation 99/2013 on the European statistical programme 2013-17**. The competent authority within the Commission is **Eurostat** as one of the Directorates-General of the Commission.³
- 4 Special relevance must be attached to the **legal principle of proportionality**, which plays a specific role in matters of statistics, as can be seen by the wording of Article 338 TFEU in its first paragraph (‘necessary’) as well as in its second paragraph (‘not entail excessive burdens on economic operators’).
- 5 Article 338 para. 2 TFEU cites six general principles for statistics legally binding on the Union in its legislative activities, which are partially specified in Regulation 223/2009.

Article 339 [Professional Secrecy]
(ex Article 287 TEC)

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

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¹ Regarding the ECB, see Regulation 2533/98 concerning the collection of statistical information by the European Central Bank.
² See Article 3 Regulation 223/2009 with further definitions.
³ Commission Decision 2012/504/EU on Eurostat.

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I. General remarks

1

This Article is conceived as a counterpart to Article 337 TFEU, comprising, however, information which has been acquired by other means than by explicit requests or checks of the Commission. The provision is accompanied by rules on data protection (Articles 8 and 16 CFREU). It is tensely related to the provisions on transparency, particularly Article 15 TFEU and Article 42 CFREU (right of access to documents) as well as Article 296 TFEU (duty of stating reasons for legal acts).

II. Protected information

2

Information covered by the obligation of professional secrecy in the sense of Article 339 TFEU is any information which is known to a restricted number of persons in their official capacity only.

Information covered by the principle of professional secrecy may not be used in a way which allows unauthorized third parties to obtain knowledge of it. 3

The interest in observing secrecy is qualified for protection if secrecy is necessary for averting a material or immaterial damage and if it outweighs the public interest in disclosing decision-making bases. Thus the investigation of the Commission is confidential; and the fine intended by the Commission to be imposed on an undertaking is subject of professional secrecy, as long as the final decision on the sanction has not been adopted.¹ 4

It may be justified to protect the **anonymity of an informer** who was promised confidentiality regarding his identity.² 5

The tension between the obligation to secrecy on the one hand and the public interest in historical research on the other hand is dealt with in Article 4 Regulation 354/83 concerning the opening to the public of the **Union's historical archives**. 6

III. Persons bound to secrecy

7

According to Article 339 TFEU, a legal obligation to observe professional secrecy is imposed on the members of Union institutions, the officials and other servants of the Union, and also the members of (more than 200) committees established by primary or secondary Union law, even if these persons are not employed by the Union.

All other persons, like those employed by an agency or appointed as an ad hoc representative for the Union or for implementing Union law, have an obligation to professional secrecy created by the founding act of the pertinent body or by their relevant contract, which usually will refer to Articles 17 and 19 Staff Regulations of Officials and the Conditions of Employment of other servants of the Union. 8

Provisions of secondary Union law may also obligate a broader circle of persons (e.g. officials of Member States implementing Union law) to observe professional secrecy (e.g. Article 28 Antitrust Regulation 1/2003). 9

¹ GC Case T-62/98 *VW v Commission* [2000] ECR II-2707.

² ECJ Case 145/83 *Adams* [1985] ECR 3539.

10 The duty to observe professional secrecy continues after the person's term of office has ceased.

11 **IV. Sanctions**

Violating this obligation may lead to a **duty of the Union to pay damages** under Article 340 para. 2 TFEU.³

12 Consequences under a **Member State's domestic criminal law** are not excluded but there are legal gaps in view of immunity rules, particularly since the scope of application of domestic law is regularly limited to national officials.

13 **Disciplinary measures** may be directed against the respective official or other person⁴. Regarding the personal liability of its servants towards the Union, see Article 340 para. 4 TFEU.

**Article 340 [Public liability of the Union]
(ex Article 288 TEC)**

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

Bibliography: *Aboudrar-Ravanel*, Responsabilité et primauté, ou la question de l'efficience de l'outil, 88 RMCUE 1999, 644; *Albors-Llorens*, Remedies against the EU Institutions after Lisbon: An Era of Opportunity, 71 Cambridge Law Journal 2012, 507; *Anagostasars*, The Allocation of Responsibility in State Liability Actions for Breach of Community Law, 26 ELRev (2001), 139; *Beljin*, Staatshaftung und Europarecht, 2000; *Dougan*, The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence, 6 EPL 2000, 103; *id.*, National Remedies before the Court of Justice, 2004; *Heukels/McDonnell* (eds), The Action for Damages in an Community Law Perspective, 1997; *Ross*, Beyond *Franco*, 56 M.L.R. 1993, 55; *Schermers/Heukels/Mead* (eds.), Non-Contractual Liability of the European Communities, 1988; *Tridimas*, Liability For Breach of Community Law: Growing Up and Mellowing Down?, 38 CMLRev 2001, 301; *van Gerven*, Bridging the Unbridgeable: Community and National Tort Law After *Franco* and *Brasserie*, 45 I.C.L.Q. 1996, 507; *Leczykiewicz*, Private Party Liability in EU Law: In Search of the General Regime, 12 CYELS 2009–2010, 252; *Wattel*, National Procedural Autonomy and Effectiveness of EC Law, 35 LIEI 2008, 109.

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³ ECJ Case 45/83 *Adams* [1985] ECR 3539.

⁴ See Article 86 Staff Regulations and Articles 49 and 76 Conditions of Employment.

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I. General remarks

1

Like its predecessor Article 288 TEC, Article 340 TFEU is the central provision in the context of the liability regime of the Union and a key element of the principle of the rule of law at the Union level. The provision is the legal basis for a right to compensation against the Union based on contractual (para. 1) and non-contractual (paras 2 and 3) liability. Para. 4 deals with the personal liability of servants towards the Union. Concerning the liability of Member States in any case of a breach of Union law, reference should be made particularly to the **principle of loyalty** in Article 4 para. 3 TEU as legal basis. The very notion of 'general principles common to the laws of the Member States' (paras 2 and 3) was used by the ECJ to actively create judge-made law and to dynamically develop the Union's legal order way beyond liability law, e.g. when shaping European fundamental rights before the Lisbon Treaty and before the Charter on Human Rights had entered into force¹.

The Lisbon Reform Treaty left the overall set-up of the European liability law, by and large, unchanged. Nevertheless, the single legal personality of the EU causes important consequences. Thus, the rules on liability are also applicable to measures based on the former second and third pillar (CFSP on the one hand, PCJ respectively an 'area of freedom, security and justice' on the other hand). Moreover, the reformulated para. 3 clarifies the hitherto controversial question of an obligation regarding the ECB in cases of liability.

In principle, the national courts are competent for claims of contractual liability (Article 274 TFEU). A competence of the ECJ is only possible via an **arbitration agreement** (Article 272 TFEU). Claims of non-contractual liability (para. 2) are exclusively decided by the ECJ or, at first instance, the General Court (Article 268, Articles 254 et seq. TFEU). The same shall be applicable for claims of the Union against its servants (Article 270 TFEU); then the Civil Service Tribunal is the competent court (Article 257 in connection with Article 256 paras 1 and 2 TFEU as well as Council Decision 2004/752/EC, Euratom).

II. Contractual liability (para. 1)

4

The Union is 'liable' for the proper fulfilment of its contracts with third parties. The term is to be interpreted broadly. The contractual liability includes pre-contractual breaches of duty as well as legal obligations. In case of a breach of contractual obligations, the third party can claim damages against the Union. The details are to be taken from the law which is applicable to the contract. This will be the law which governs according to the **national provision on the conflict of laws**. The national court will be the competent court to decide (Article 274 TFEU). If the ECJ is competent to decide (Article 272 TFEU), the contractually agreed applicable law is to be determined based on a non-written rule of Union law. This non-written law primarily aims at the will of the contracting parties, which can be expressed e.g. by the parties' submission under the contracting terms of the Union. If Union law is applicable, e.g. in case of public law contracts, the

¹ See *Degan*, General Principles of Law, Finn 3 YBIL 1992, 1.

relevant substantive rules have to be developed focussing on the general legal principles common to the laws of the Member States (para. 2). It seems reasonable to submit especially administrative contracts of the Union to EU law, although the (dogmatic) structures of such 'European contract law' still remain very rudimentary.

5

III. Non-contractual liability (para. 2)

1. Basis

Article 340 para. 2 TFEU deals with the general non-contractual liability of the Union and determines the obligation to compensate for any damage caused by faulty performance of duties in the non-contractual field. The obligation is ensured independently from the possibility of the person negatively concerned to bring an action for annulment (Article 263 TFEU) or for failure to act (Article 265 TFEU) against the institution involved. As to the extent of the liability, the provision refers to general principles common to the laws of the Member States. This does not only refer to the similarities within the detailed provisions of national rules of liability in the performance of public duty; para. 2 rather includes an authorisation for the ECJ to **dynamic law-making** on the basis of general principles that evolved through European law tradition (see mn. 1 above). To do so, the ECJ uses the method of weighing law comparison. In its jurisprudence the ECJ granted a claim for damages to everyone who suffered damage through an unlawful act of a Union institution. This holds true without limitations regarding the administrative field (individual acts); in the legislative field (legislative acts of the Union), the ECJ greatly limited the liability.² In the contested *Köbler* case, the ECJ extended liability of Member States even to **judicial injustice**. Because of the parallel structure of national liability and the Union's liability – the general principles, which are the basis for the liability law of the Union, evolved from the national liability law – this has to be applicable also to the judicial injustice of the EU itself. It is hard to imagine that the ECJ would pronounce a right to claim for litigation concerning its own faults in application of law. One could think about cases of the General Court and the specialised courts if a prior primary mean of appeal is missing³.

6

2. Eligibility requirements

Competent **respondent** is the Union.⁴ **Applicant** can be anyone who suffered damage through an act of the Union. This can be a natural or legal person of private law or a legal person of public law. Persons that are not member or resident of a Member State may be taken into account, too.

7 **Damage** is any disadvantage that the damaged has suffered regarding her/his/its financial assets or other legal interests⁵. This includes the loss of profits if it can be proved⁶.

8 The disadvantage for the damaged has to be caused **by the Union**, meaning through its institutions, bodies (such as e.g. EIB)⁷ or servants in performance of their duties. Also the failure to act can be a damage causing action (e.g. lack of information over a risk⁸).

² ECJ Case C-224/01 *Köbler* [2003] ECR I-10239.

³ Like this: CR/Ruffert, Article 340 AEUV mn. 23.

⁴ For the contrary opinion, that the very institution causing damage might be the legitimised respondent, cf. GH/v. *Bogdandy*, Article 340 AEUV mn. 43.

⁵ Also if immaterial in nature, Case C-259/96 *P de Nil* [1998] ECR I-2915.

⁶ ECJ Joined Cases 5, 7 and 13 to 24–66 *Kampffmeyer* [1967] ECR 245.

⁷ ECJ Case C-370/89 *SGEEM* [1992] ECR I-6211.

⁸ CFI Case T-572/93 *Odigitria* [1995] ECR II-2025.

An act only on occasion of performance of duty is not sufficient (e.g. a car accident with a private car caused by a servant on an official visit⁹). A procedural cooperation of an institution of the Union with an institution of a Member State which is causing damage (only) in order to attribute the damaging act to the Union is also not sufficient. However, this is different if the (illegal) act of the Union respectively one of its institutions did not leave any discretionary power for the national authority¹⁰. Article 4 para. 3 TEU is applicable regarding the liability of a Member State. The landmark decision regarding the liability of Member States, which the ECJ derived from a synopsis of Article 4 para. 3 TEU, the *effet utile* principle and the protection of individual rights, are the joined cases *Francovich*¹¹. Since the ECJ can reasonably rely on these dogmatically convincing legal foundations, a conclusion of analogy to Article 288 TFEU is not necessary.

Illegality: The action of the Union must violate, sufficiently flagrant (see mn. 13 below), a rule of Union law that aims, at the very least, at the protection of the individual (the norm must encapsulate a 'duty to protect', so called *Schöppenstedt* formula). The term 'protecting provision' is understood in a rather broad way by the ECJ¹². These norms especially include principles guaranteed by Union law, such as the principle of an administration based on the rule of law (e.g. legitimate expectations, proportionality and all rights to good administration that are now enshrined in Article 41 CFREU). A fault of the Union's institution is not necessary. The liability for damages that were caused by **lawful actions** of the Union had not been recognised by the jurisdiction for a long time and was left open after a long discussion of the problem of damage caused by a legal trade embargo (Article 215 TFEU)¹³. New tendencies display that the General Court and the ECJ are willing to accept claims for damage in cases of extraordinary and special damages¹⁴ – following the German rule of the so-called 'extraordinary sacrifice'¹⁵.

There needs to be an **adequate causal link** between the damage and the action of the Union's institution. This is not the case if there are mere shortcomings in the statement of reasons¹⁶. If the damage occurred anyway, the causal link will have to be denied. The same is true if the financial loss occurred due to general economic risks that are immanent to the affected sector¹⁷ or if the claiming party, aware of the circumstances, acted at its own risk¹⁸ or if it neglected its duty to minimise damages¹⁹.

3. Especially: liability for legal actions

The Union is liable for its legal actions (adopting regulations, directives) under Article 340 para. 2 TFEU. However, the ECJ increased the conditions of a liability claim for cases that are based on decisions about economic policy. The acting institutions of the Union shall not be restricted by potentially impeding claims for damages if general inter-

⁹ ECJ Case 9–69 *Sayag* [1969] ECR 329.

¹⁰ Cf. Article 268 TFEU mn. 3.

¹¹ Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357 mns 31 et seq.

¹² See CR/Ruffert, Article 340 AEUV mn. 18.

¹³ CFI Case T-184/95 *Dorsch Consult* [1998] ECR II-667; rejected for the destruction of an animal population infected with an epidemic, Joined Cases C-20/00 and 64/00 *Booker Aquaculture* [2003] ECR I-7411.

¹⁴ ECJ Case C-152/88 *Sofrimport* [1990] ECR I-2477.

¹⁵ German technical term: '*Sonderopfer*'; for an overview, see Schwarze/Berg, Article 340 AEUV mn. 52 with reference to the quoted decision of *Dorsch Consult*; very critical, because the proof of a respective general principle was never given, CR/Ruffert, Article 340 AEUV mn. 52.

¹⁶ ECJ Case C-358/90 *Mariano* [1992] ECR I-2457.

¹⁷ ECJ Case C-59/83 *Biovilac* [1984] ECR 4057.

¹⁸ CFI Case T-572/93 *Odigitria* [1995] ECR II-2025.

¹⁹ ECJ Joined Cases C-104/89 and C-37/90 *Mulder* [1992] ECR I-3061.

ests and individual interests in the field of economic policy have to be balanced.²⁰ Even if the legal act was declared invalid, it could be expected from the individual to take the risks of the relevant economic sector without claiming of damages from public funds within reasonable limits.

- 13 According to the *Schöppenstedt* formula created by the ECJ in a landmark decision, liability of the Union requires ‘a sufficiently flagrant violation of a superior rule of law serving the protection of the individual’²¹. This formula was adjusted and enhanced through further case-law²².
- 14 The violation is sufficiently flagrant if the acting institution has disregarded its limitations of competence in a **manifest** and **grave** manner.²³ The ECJ qualified an infringement of the principles of equality as a serious infringement if a limited and clearly characterized group of enterprises was hit and the damages went beyond the general economic risks typical for the relevant sector of the economy.²⁴ In contrast, the infringement of the principle to protect legitimate expectations is not sufficiently flagrant if the Council takes account of greater public interest without exceeding its limits of discretion **manifestly** and **gravely**.²⁵ Shortcomings in the statement of reason of any kind of legislation are not, in any case, suitable to incur liability of the Union.²⁶
- 15 Actions for damages based on normative injustice have rarely been successful in practice. For example, damage was granted because of the discrimination of producers of *Quellmehl* and *Gritz* against producers of corn starch concerning the abolition of refunds²⁷; for the reason of missing transitional provisions of establishing compensatory amounts of money²⁸; for reasons of a discriminating non-allocation of a representative reference quantity to milk producers that were obliged not to supply milk within the reference year²⁹.
- 16 The predictability of decisions of the ECJ using the above-mentioned *Schöppenstedt* formula created and further developed by the ECJ is little. As an alternative, it is proposed to **claim the infringement of a fundamental right** of the claimant³⁰.

17 4. Consequence of liability

The consequence of liability is an entitlement to **compensation in money**, the amount of which is calculated by a comparison of the income which the damaged victim would have achieved in the ordinary course of events and the income which actually was achieved or could have been achieved (including income from substitute activities)³¹. Interests are added to the entitlement to compensation from the date of the judgment onwards³².

- 18 The entitlement becomes time-barred after five years (Article 46 Statute ECJ). The limitation period dates from the point at which the allegedly aggrieved party might be

²⁰ ECJ Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* [1978] ECR 1209.

²¹ ECJ Case C-5/71 *Schöppenstedt* [1971] ECR 975.

²² For instance ECJ Case C-352/98 P *Bergaderm* [2000] ECR I-5291.

²³ Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* [1978] ECR 1209; CFI Case T-4/01 *Renco v Council* [2003] ECR II-171.

²⁴ ECJ Joined Cases 117/76 and C-16/77 *Ruckdeschel* [1977] ECR 1753.

²⁵ ECJ Joined Cases C-104/89 and C 37/90 *Mulder* [1992] ECR I-3061.

²⁶ ECJ Case 106/81 *Kind* [1982] ECR 2885 as an example of established legal precedent.

²⁷ ECJ Case 238/78 *Ireks-Arkady* [1979] ECR 2955.

²⁸ ECJ Case 74-74 *CNTA* [1975] ECR 533.

²⁹ ECJ Case C-120/86 *Mulder I* [1988] ECR 2321; Joined Cases C-104/89 and C-37/90 *Mulder II* [1992] ECR I-3061; Joined Cases C-104/89 and C-37/90 *Mulder III* [2000] ECR I-203.

³⁰ Cf. *Fuß*, EuR 1978, 360.

³¹ ECJ Joined Cases C-104/89 and C-37/90 *Mulder* [1992] ECR I-3061.

³² ECJ Case C-152/88 *Sofrimport* [1990] ECR I-2477.

able to cite all the elements required for a case to be considered one of non-contractual liability, e.g. the alleged existence of unlawful conduct on the part of the EU-institutions, the alleged damage concerned, and the existence of a causal link between the alleged unlawful conduct and the loss claimed due to the resulting damage³³. Whoever is affected has to invoke the limitation period of claim. The court will not act *ex officio*.

IV. Liability of servants

19

If the Union is liable towards a third party according to Article 340 TFEU, it can take **recourse** against the servant who is responsible for the incorrect performance of duty under specific circumstances. In this respect, paragraph 4 refers to the provisions of the Staff Regulations or the rules of employment applicable for the servant concerned. According to Article 22 Staff Regulations, the Union can request the servant to fully or partially compensate for damages which the Union suffered from as a result of serious misconduct on his/her part in the course of or in connection with the performance of her or his duties.

A direct liability of the servant towards the third party is excluded. This already results 20 from the abolition of Article 40 Para. 2 ECSC Treaty that had (until its abolition via Article 26 Merger Treaty) contained a rule on personal liability.

Article 341 [Seat of the institutions of the Union] (ex Article 289 TEC)

The seat of the institutions of the Union shall be determined by common accord of the governments of the Member States.

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I. Seat of the Union

1

Article 341 TFEU refers to the ‘institutions of the Union’ only but it must also comprise the seat of the Union itself. The seat of the Union is mentioned (only in passing) in Article 16 Protocol (No 7) of the Privileges and Immunities of the European Union where the duties concerning diplomatic missions of third States are imposed on the Member State ‘in whose territory the Union has its seat’. Since there is no provision identifying this Member State, the most suitable place to be considered for the Union’s seat is where the administrative activities of the Union are focused. Thus the seat of the Union is Brussels.¹

³³ See *Wägenbaur*, Court of Justice of the EU, 2013, Article 46 Statute mn. 4. Also see ECJ Case 51/81 *DeFranceschi* [1982] ECR 117.

¹ Cf. *Beutler*, EuR 1983, 284.

2

II. Seat of the institutions

The Member States have acted according to their obligation to determine the seat of the Union's institutions only at the Edinburgh European Council in 1992. Prior to this Council, there were only 'preliminary working places'. In 1997, the common accord reached at Edinburgh was included in a Protocol annexed to the Treaty of Amsterdam. This Protocol was amended and adopted as a new Protocol (No 6) to the Lisbon Treaty. By being adopted in a Protocol, the provisions on seats became a rule of primary Union law². However, in view of the explicit provision laid down in Article 341 TFEU, the definition of the seats of the institutions may also be amended by a mere 'common accord' of the Member States in the future.

3 III. Protocol No 6 on the location of the seats of the institutions and certain bodies, offices, agencies and departments of the European Union

Reaching beyond the legislative mission spelled out in Article 341 TFEU, the Protocol No 6 does not only deal with 'institutions' but also, as its title describes, defines the location of the seats 'of certain bodies, offices, agencies and departments of the European Union'.

4 In its only article, Protocol No 6 lays down the seats of the institutions and of some bodies as follows:

(a) **European Parliament: Strasbourg.**

The EP holds the 12 periods of monthly plenary sessions here, including the budget session. According to the ECJ³, a modification (fewer plenary sessions) is allowed in the year of the European elections. The periods of additional plenary sessions are held in Brussels; the committees of the European Parliament meet in Brussels; the General Secretariat of the European Parliament and its departments remain in Luxembourg.

(b) **Council: Brussels.**

During the months of April, June and October, the Council holds its meetings in Luxembourg.

(c) **Commission: Brussels.**

Some departments listed in Articles 7, 8 and 9 Decision 67/446/EEC stay in Luxembourg, among them the Official Publications Office, the Statistical Office and the Data-Processing Department, the Hygiene and Industrial Safety Departments and the Directorate-General for the Dissemination of Information.

(d) **Court of Justice of the European Union: Luxembourg.**

(e) **Court of Auditors: Luxembourg.**

The other bodies listed in Protocol No 6 are: the **Economic and Social Committee**: Brussels; the **Committee of the Regions**: Brussels; the **European Investment Bank**: Luxembourg; the **European Central Bank**: Frankfurt; and the **European Police Office (Europol)**: The Hague.

5 The seats of further bodies and particularly many agencies were defined in their founding acts or in separate decisions based on Article 341 TFEU.

² See Article 51 TEU.

³ Case C-345/95 *France v EP* [1997] ECR I-5215.

**Article 342 [Languages]
(ex Article 290 TEC)**

The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.

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I. General remarks **1**

Apart from the **Treaty languages**¹, which are relevant for laying down the primary Union law and its interpretation, there are the **official languages of the institutions** used for external communications and also their **working languages**.

The EU language system is a politically highly sensible matter because it is closely connected with the Union's obligation to respect the national identity of the Member States and their equal status in the Treaties². This is already reflected in the **unanimity rule** in Article 342 TFEU. According to this article, the **Council** has to lay down provisions on the language system via regulation. This rule led to the adoption of the general **Regulation 1/1958** determining the languages to be used by the European Economic Community, at last amended by Regulation 517/2013 of 13 May 2013 (accession of Croatia).

A special regime was created for the **European Court of Justice** by primary law (Article 64 ECJ Statute), which refers to the Rules of Procedure of both the ECJ (Article 36–42) and the General Court (Articles 35–37).

A specific provision on languages referring to Article 55 TEU is laid down in Article 24 para. 4 TFEU concerning the **right to petition**.

On first sight, **official languages and working languages** are the same. However, as can be told by the substance of the provisions of Regulation 1/58, as far as working languages are concerned the Regulation addresses only those languages which are treating the institution's external contacts, not the languages used internally with no immediate outside effects. Regulation 1/58 does not explicitly lay down the **internal working languages** of institutions and bodies of the Union. Such internal working languages can mostly be found in their particular rules of procedure. In these internal fields considerations of practicability may have led to a reduction of the number of working languages. Thus in the work of the Commission – prior to taking a decision – all relevant documents must have been presented at least in **English, French and German**. In its daily practice, it is English which is apparently becoming ever more dominant. 72% of all EU documents are originally prepared in English, 12% in French and 3% in German nowadays.

¹ See Article 55 TEU.

² See Article 4 para. 2 TEU and Article 22 CFREU.

II. Council Regulation No 1 and special rules

Article 1 Regulation 1/58 in its latest version, applicable after the accession of Croatia on 1 June 2013, determines the following languages as the **'official languages and the working languages'** of the Union institutions:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

- 7 After Irish (Gaelic) has been granted full status of an official language in 2005³ from 1 January 2007 onwards, the number of the **official languages** of the institutions **equals the number of Treaty languages**.
- 8 On the basis of Council Conclusion of 13 June 2005 on the official **use of additional languages** within the Council and possibly other institutions and bodies of the European Union, according to which diversity must be taken into consideration to a greater extent, an administrative agreement was concluded with the Spanish Government to the effect that documents considered important have also become edited in **Catalan/Valencian, Basque and Galician**. These languages, however, have not (yet) reached official status.
- 9 The **Official Journal of the European Union** must be published in all of the official languages.⁴ The case of diverging texts is governed by the principle of harmonious interpretation.⁵
- 10 As a rule, the **official languages** of the Union institutions have **equal status**. This means that regulations and other documents of general application must be drafted in all of the official languages.⁶ Each Member State and each person subject to the jurisdiction of a Member State must have the opportunity to communicate with a Union institution in any of the official languages selected by the sender⁷; the reply must be drafted in the same language⁸. Documents sent by a Union institution without request must be drafted in the official language of the Member State addressed or of the Member State having jurisdiction over the person addressed.⁹
- 11 The Union institutions may, however, stipulate in their rules of procedure which of the languages are to be used in **specific cases**.¹⁰ This does **not violate the principle of non-discrimination** if these rules are adequate and proportionate.¹¹
- 12 Thus, for example, the special provisions concerning the official languages at the Office for Harmonization in the Internal Market (Trade Mark and Designs) were approved by the ECJ¹². These contain the following rules: While the application for a Union trade mark could be filed in one of the official languages of the EU, the Council had unanimously confined the official languages of the Office to English, French, German, Italian and Spanish. The applicant must indicate a language of the Office as a second language, the use of which he accepts as a possible language for opposition, revocation or invalidity proceedings.

³ Regulation 920/2005.

⁴ Article 5 Regulation 1/58.

⁵ ECJ Cases 80/76 *North Kerry Milk* [1977] ECR 425; 30/77 *Bouchereau* [1977] ECR 1999; 283/81 *CILFIT* [1982] ECR 3415; see also Article 55 TEU mn. 6.

⁶ Article 4 Regulation 1/58.

⁷ ECJ Case 98/78 *Racke* [1979] ECR 69.

⁸ Article 2 Regulation 1/58.

⁹ Article 3 Regulation 1/58.

¹⁰ Article 6 Regulation 1/58.

¹¹ Case C-361/01 P *Kik* [2003] ECR I-8283.

¹² Case C-361/01 P *Kik* [2003] ECR I-8283, affirming the first instance Case T-120/99 *Kik* [2001] ECR II-2235.

The **non-compliance** with the provisions concerning the official languages may justify an action for annulment¹³, except where the answer of the addressee indicates that the document was read and understood.¹⁴ Publication in three languages of notices of EU competitions and the obligation to take the selection tests in one of those languages amount to discrimination on the ground of language.¹⁵ 13

**Article 343 [Privileges and immunities of the European Union]
(ex Article 291 TEC)**

The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.

Article 343 TFEU does not by itself define and explain the privileges and immunities of the European Union in the territories of the Member States but refers to the Protocol of 8 April 1965 which had originally been annexed to the Merger Treaty of the same date, and which, in its consolidated version, has now become **Protocol No 7 to the Lisbon Treaty**. The same is true regarding the European Central Bank and the European Investment Bank, which are dealt with in this Protocol, too¹. 1

The Protocol deals with the privileges and immunities of the Union, its institutions and advisory bodies (like the Economic and Social Committee and the Committee of the Regions)² and their members, officials and other servants. It also accords the customary diplomatic immunities and privileges to missions of third countries accredited to the Union³. 2

Particular rules are laid down for the Members of the European Parliament⁴, for the representatives of Member States taking part in the work of Union institutions⁵, and the European Court of Justice⁶, the latter, however, subject to Article 3 of the Protocols on the Statute of the Court of Justice concerning the particular immunities of the Judges and Advocates-General. The Members of the Court of Auditors are included in Article 20 Protocol No 7 by Article 286 para. 8 TFEU, which refers to the position of Judges and Auditors-General. 3

Article 17 Protocol No 7 emphasizes that the immunities, privileges and facilities are accorded to officials and other servants **'solely in the interest of the Union'**.⁷ These rules are meant to secure the ability of the Union, its institutions and bodies to independently perform their tasks. In concordance with this rule, Article 8 Protocol No 7 provides that the opinion (in the broadest sense) of a Member of Parliament is covered by immunity only where it has been expressed in the performance of his duties. This implies, accord- 4

¹³ See Article 263 TFEU; Case C-263/95 *German v Commission* [1998] ECR I-441.

¹⁴ Case 41/69 *Chemiefarma* [1970] ECR 661.

¹⁵ Case C-566/10 P *Italy v Commission*, Judgment of 27 November 2012, not yet officially published, and also the Staff Regulations of Officials of the European Communities requiring a notice of open competition to be published in the OJ.

¹ See Articles 21, 22 Protocol No 7.

² See Article 10 para. 2 Protocol No 7.

³ See Article 16 para. 1 Protocol No 7.

⁴ See Articles 7–9 Protocol No 7.

⁵ See Article 10 (1) Protocol No 7.

⁶ See Article 20 Protocol No 7.

⁷ See Article 17 Protocol No 7; ECJ Case C-2/88 *Zwartveld* [1990] ECR I-4405.

ing to the case-law of the ECJ, the requirement of a direct and obvious link between the opinion expressed and the performance of the parliamentary duties.⁸ For the purpose of applying the Protocol, the institutions of the Union have to cooperate with the responsible authorities of the Member States⁹. Consequently, each institution is required to waive the immunity of an official or other servant if the waiver is considered not to be contrary to the interests of the Union.¹⁰

- 5 The inviolability of a Member of the European Parliament cannot be claimed when a Member is found in the act of committing an offence. The European Parliament is not prevented from exercising its right to waive the immunity of one of its Members.¹¹

**Article 344 [Exclusive dispute settlement methods of the Union]
(ex Article 292 TEC)**

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Bibliography: *Cardwell/French*, Who decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute, 19 *Journal of Environmental Law* (2007), 121; *Djeffal*, The Iron Rhine Case – A Treaty's Journey from Peace to Sustainable Development, *ZaöRV* 71 (2011), 569; *Lavranos*, The MOX Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbiter?, 19 *Leiden Journal of International Law* (2006) 223; *Lock*, The ECJ and the ECtHR: The Future Relationship between the Two European Courts, *LIPCT* 2009, 375.

- 1 On the basis of the Member States' duty to follow the principle of cooperation¹, Article 433 TFEU declares that the provisions of the Treaties concerning the jurisdiction of the **European Court of Justice** for litigation between the **Member States in matters of EU law** are **exclusive**. Such provisions are Articles 259 and 273 TFEU. Article 344 TFEU thus safeguards the unity of the Union's legal order. Together with Article 267 para. 3 TFEU, which also centralizes the decision on the validity and the interpretation of EU law, this allocation of exclusive competences is meant to concentrate the task of observing the law in the interpretation and application of the Treaties at the European Court of Justice, as required by Article 19 para. 1 TEU.
- 2 According to the purpose of Article 344 TFEU, the settlement of a dispute is to be understood as a settlement in **judicial or arbitration proceedings** only. An extra-judicial settlement between Member States remains permissible but its outcome must be compatible with EU law.
- 3 In the case of a '**mixed agreement**' with its own judicial system (e.g. the UN Convention on the Law of the Sea), this system may not be used in disputes between EU Member States in so far as EU law may be involved.² The preliminary question whether such a case exists must also be brought to the ECJ.
- 4 In the '**Iron Rhine Arbitration**' (Belgium v Netherlands), the arbitral tribunal, under the auspices of the Permanent Court of Arbitration³, dealt extensively with Article 344

⁸ ECJ Case C-163/10 *Patriciello* [2011] ECR I-07 565; Joined Cases T-346/11 and T/347/11 *Gollnisch v Parliament*, Judgment of 17 January 2013, not yet officially published.

⁹ See Article 18 Protocol No 7.

¹⁰ See Article 17 para. 2 Protocol No 7; Case T-497/93 *Hogan* [1995] ECR II-703.

¹¹ See Article 9 para. 3 Protocol; Case T-345/05 *Mote v EP* [2008] ECR II-2849.

¹ ECJ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

² Case C-459/03 *MOX Plant* [2006] ECR I-4635.

³ Arbitral Award of 24 May 2005.

TFEU. In spite of a clear EU background (trans-European networks, Fauna and Flora Habitats Directive) in view of the peculiarities of the case, it could not detect an excluding effect originating in Article 344 TFEU.

Article 345 [System of property ownership] (ex Article 295 TEC)

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

I. General Remarks

1

Article 345 TFEU formulates a reservation in favour of the rules on property ownership in the Member States. The shaping of the system of property ownership remains in the Member States' competence. In particular it is the domestic legal systems which decide on the preconditions and the modalities of a policy of privatization or nationalization. Neither the Treaties nor secondary EU law may put this principal competence of the Member States in question.¹

II. Relationship of Union law and domestic system of property ownership 2

The protection of the domestic system of property ownership does not exclude the overall application of the **existing provisions of Union law**. The freedoms of the internal market and the application of competition rules cannot be impaired by the Member States invoking Article 345 TFEU.² In particular, in the case of measures concerning **nationalization**, the limits drawn by Article 37 TFEU (trade monopolies) and Article 106 TFEU (service monopolies) must be respected. For the industrial and commercial property in its relationship to the principle of free movement of goods, only Article 36 TFEU is relevant.³ The free movement of capital may only be limited if the domestic provisions are justified by the reasons cited in Article 65 para. 1 TFEU or by overriding reasons of public interest, which apply to all persons or undertakings operating in the respective Member State.⁴ In addition, the Member State's act must comply with the principle of proportionality and the general prohibition of discrimination laid down in Article 18 TFEU.

Furthermore, the Member States are bound by the principle of **sincere cooperation in mutual respect**.⁵ Whether this principle allows the nationalization of a whole branch of industry may depend on the circumstances of the particular case.⁶

¹ Case C-309/96 *Annibaldi* [1997] ECR I-7493.

² Case C-302/97 *Konle* [1999] ECR I-3099.

³ Case C-350/92 *Spain v Council* [1995] ECR I-1985.

⁴ Comp. the problem of so-called 'golden shares' in Case C-503/99 *Commission v Belgium* [2002] ECR I-4809; Case C-483/99 *Commission v France* [2002] ECR I-4781; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; and regarding the Lower Saxony VW-law: Case C-338/00 *Commission v Germany* [2003] ECR I-9189.

⁵ See Article 4 para. 3 TEU.

⁶ Cf. *Weis*, NJW 1982, 1910, regarding the French nationalizations in 1982.

4

III. Fundamental right to property

Regarding its own measures, the Union has to respect the fundamental right to property of the single person. This rule, however, is not based on Article 344 TFEU, which describes a mere limit of the Union's competences, but on the duty to respect the fundamental rights laid down in **Article 6 TEU** with relations to the CFREU, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional traditions common to the Member States.

**Article 346 [exception in case of essential security interests]
(ex Article 296 TCE)**

1. The provisions of this Treaty shall not preclude the application of the following rules:

- (a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
- (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

Bibliography: *Bratanova*, Legal Limits of the National Defence Privilege in the European Union (Bonn 2004); *Eisenhut*, Europäische Rüstungskoooperation – zwischen Binnenmarkt und zwischenstaatlicher Zusammenarbeit (Nomos 2010); *Koutrakos*, Trade, Foreign Policy and Defence in EU Constitutional Law (Hart 2001) 165; *Lebeck*, National Security Exceptions to EU-Law: European Customs Policies and Beyond, ELRev. 2010, 98; *Poell*, Offsets in Defence procurement under EU Law, EuZW 2013, 774; *Richter*, Die Rüstungsindustrie im Europäischen Gemeinschaftsrecht – Nationale Sicherheit im Gemeinsamen Markt (Nomos 2007); *Trombetta*, La protection des intérêts nationaux de la défense quand la défense devient européenne, RMC 2005, 441; *Trybus*, On the application of the E.C. treaty to armaments, ELRev. 2000, 663; *Trybus*, The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions, CMLRev 2002, 1347; *Trybus*, The Tailor-Made Defence and Security Procurement Directive: Limitation, Flexibility, Descriptiveness and Substitution, ELRev. 2013, 3.

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1

I. Overview

Articles 346–348 TFEU have always been part of EU primary law and the substance of these provisions has remained unchanged ever since 1958. They contain **safeguard provisions** for the security interests of the Member States. As a general exception which is applicable across the Treaty, Article 346 TFEU allows for derogations from the entire

scope of EU primary law, such as competition law, fundamental freedoms, or public procurement law. However, their exceptional character demonstrates that in principle, the whole industry and policy area of defence production and trade is subject to the general rules of EU law. Since Articles 346 and 347 TFEU provide for (national security interest) exceptions from the fundamental rules of European (economic) integration, these provisions are, in accordance with general rules of interpretation, to be **interpreted narrowly**.¹

Article 346 TFEU limits the obligations under the Treaty regarding all kind of Member State's obligations to provide information, as well as concerning the production of and trade in war material. The extensive application of the provision by Member States remains one of the principal obstacles for the creation of an internal market for defence goods. Although its abolition has been discussed several times, the provision remained unchanged to date.

II. Right to refuse the supply of information (para. 1 lit. a)

Article 346 para.1 lit. a TFEU contains an exception from all general and specific obligations of the Member States vis-à-vis the EU to supply information.² The right to refuse the supply of information is not limited to the area of defence goods. It rather extends to all 'essential security interests' of the Member States. The provision also applies vis-à-vis other Member States and private persons, provided these actors rely on an EU law based right to information.³ So far, this provision has not become relevant in practice.

On substance, the supply of information has to harm the **essential security interests** of the relevant Member State.⁴ The context of Articles 347 and 348 TFEU shows that these interests must touch upon the existence and functioning of the State concerned. The Member State disposes of a margin of appreciation ('it considers') when assessing these conditions. However, the right to refuse supply of information has to be reasoned in each individual case, and the legitimacy of the evocation of 'essential security interests' is subject to a special review procedure provided for in Article 348 TFEU. In this review procedure, the right to refuse information on the basis of Article 346 para.1 lit. a TFEU is not applicable, unless the Member State invokes specific reasons for which it fears divul-gation of information.⁵

As a direct consequence of the legitimate invocation of Article 346 para. 1 lit. a TFEU, EU bodies are also barred from inquiring into or gathering such (refused) information on their own initiative.

III. Production of and trade in arms, munitions, and war material (para. 1 lit. b)

Under certain conditions and in individual cases, regarding arms, munitions, and war materials, Article 346 para. 1 lit. b TFEU releases Member States from the ordinary rules and procedures laid down by EU law. This exemption may apply both to the **production of**, as well as the **trade in defence goods**. The latter case is particularly relevant in the

¹ ECJ Case C-222/84 *Johnston* [1986] ECR I-1684.

² For details concerning these obligations see Article 337 TFEU.

³ Schwarze/Becker/Hatje/Schoo/Karpenstein, Article 346 mn. 7.

⁴ See below mn. 8.

⁵ GHN/Jaeckel, Article 348 mn. 8.

field of trade restrictions due to national **export control** regimes, although this area is now regulated by a **specific Directive** in order to facilitate intra-community transfers of defence goods.⁶

There is no duty for Member States to notify the invocation of Article 346 TFEU.⁷ This concession to Member States' security concerns does indeed constitute a significant derogation from the usual procedure under the Merger Regulation (Competition Law) and Article 108 TFEU (State Aid Law), respectively.

- 7 The exception provided for in para. 1 lit. b only applies to **arms, munitions, and war materials** enumerated in a list, unanimously adopted by the Council on 15 April 1958 (Article 346 para. 2 TFEU). Despite the technical progress over the last 60 years, the list has never been modified. It contains purely military goods as well as dual-use-goods, i.e. goods which can be used both for military and civil purposes.⁸ The (never officially published) list is exhaustive, which means that – *ratione materiae* – the exception can be exclusively invoked for goods which are contained therein.⁹ As regards dual-use goods, these have to be specifically intended for their possible military use in order to be covered by the list.¹⁰ For **dual-use goods** in general, Regulation 428/2009¹¹ provides for a comprehensive legal framework on the level of the EU.
- 8 The Member State's derogation from EU law on the basis of Article 346 TFEU has to be necessary for the protection of its **essential security interests**, the definition of which is the sole responsibility of the Member State (now explicitly stated in Article 4 para. 2 s. 3 TEU). Respective interests may cover both, threats to internal as well as external security,¹² provided they are likely to have an impact on the existence or the functioning of the Member State. Furthermore, foreign policy considerations may constitute a legitimate security interest.¹³ However, the limitation to 'essential' security interests demands a **narrow interpretation** of the scope of application of Article 346 para.1 lit. b TFEU.¹⁴ In any case, mere considerations of economic policy are not covered by this provision.
- 9 Despite the **wide margin of appreciation** of Member States with regard to the definition of their essential security interests ('it considers'),¹⁵ each invocation of the exception has to be justified individually – derogations under Article 346 TFEU are limited to exceptional and clearly defined cases. This justification is subject to a limited judicial review of its proportionality ('**necessary**'),¹⁶ in which the Member State's use of its margin of appreciation can also be scrutinized.¹⁷ In particular, 'necessity' requires that the aim of the measure which deviates from EU law cannot be reached in any different – EU law compatible – way. The **burden of proof** for the necessity of the measures which have been taken lies with the Member State invoking the exception.¹⁸

⁶ Directive 2009/43 on the Intra-Community Transfer of Defence Goods, OJ 2009 L 146/1.

⁷ ECJ Case T-26/01 *Fiocchi munizioni SpA* [2003] ECR II-3951 mn. 59.

⁸ See the Council's answer to the question of MEP Bert Staes, OJ. 2001 C 364E/85.

⁹ CFI Case T-26/01 *Fiocchi munizioni SpA* [2003] ECR II-3951 mn. 61; but see the somewhat contradicting statement in Whereas 10 of Regulation 2009/81 on Defence Procurement ('wide interpretation').

¹⁰ See ECJ Case C-615/10 *InsTiimiOy* ECR [2012] nyr.

¹¹ OJ 2009 L 134/1.

¹² ECJ Case C-273/97 *Sirdar* ECR [1999] I-7403.

¹³ ECJ Case C-89/94 *Leijer* ECR [1995] I-3231.

¹⁴ ECJ Case C-414/97 *Commission v Spain* ECR [1999] I-5599 mn. 21; Interpretative Communication of the Commission on the application of Article 296 TFEU, COM (2006) 779, at p. 8.

¹⁵ CFI Case T-26/01 *Fiocchi munizioni SpA* [2003] ECR II-3951 mn. 58.

¹⁶ See also in that sense ECJ Case C-372/05 *Commission v Germany* ECR [2009] I-11801, at mn. 69.

¹⁷ ECJ Case C-414/97 *Commission v Spain* ECR [1999] I-5599 mn. 20 et seq., referring to ECJ Case C-222/84 *Johnston* ECR [1986] 1684; as regards the level of scrutiny see also Article 348 TFEU mn. 4.

¹⁸ ECJ Case C-414/97 *Commission v Spain* ECR [1999] I-5599 mn. 22.

According to the last sentence of the provision, actions or omissions on the basis of Article 346 para. 1 lit. b TFEU **must not adversely affect conditions of competition** regarding products which are not intended for specifically military purposes. This caveat is in particular relevant with regard to **offsets**, i.e. compensatory transactions in return for defence procurements. It amounts to an outright prohibition of so-called civil offsets.¹⁹ In the area of state aid law, lit. b impedes justification of cross-subsidisation between civil and military activities of a company under Article 346 para. 1 TFEU.²⁰

Art. 346 para. 1 lit. b TFEU cannot be considered as *lex specialis* vis-à-vis other security exceptions provided for in EU treaty law. Rather, in accordance with the principle of subsidiarity and due to its exceptional nature, recourse to this provision in order to justify measures in derogation from EU law can only be considered a means of last resort.²¹

IV. Commission's 'Defence Package' and 'Action Plan'

Despite the rather narrow scope of application of Article 346, **Member States** have **used this exception** – and are often still using it – **extensively** in order to promote and protect national defence industries. While the Commission has been very reluctant to take action against this practice in the past, it recently seems willing to enforce a more limited use of this clause. With this aim in view and in order to clarify the scope of application of the provision, the Commission has passed an Interpretative Communication²² on Article 346 TFEU in 2006. In 2009, the EU enacted two specific instruments in the fields of intra-community transfer of arms²³ and public procurement of defence goods²⁴, in order to facilitate trade and cross-border procurement of defence goods. The Directives address concerns of Member States that existing general instruments (such as general EU public procurement law) are unsuited for defence procurement due to specific necessities in the field, such as for example security of supply and confidentiality. With these tailor-made instruments in place, the Commission counts on now being better placed to enforce the respect of EU internal market rules also with regard to the defence sector.

In contributing to the European Council's summit on defence in December 2013, the Commission has issued an Action Plan²⁵ in which it emphasizes its willingness to do away in particular with offset-obligations, circumvention of state aid and public procurement rules within the EU. It remains to be seen whether these measures will finally change the hitherto practice of the Member States to 'buy national' and foster their indigenous defence undertakings.

¹⁹ See *Eisenhut*, Offsets – A Strange Animal at the brink of extinction, ELRev. 2013, 393.

²⁰ ECJ Case C-246/12 P *Ellinika Nafpigeia v Commission*, OJ 2013 C 114/21.

²¹ ECJ Case C-367/89 *Richardt* ECR [1991] I-4621 mn. 31; for a different opinion see *GS/Gilsdorf/Brandtner*, pre Article 296 mn. 9.

²² Interpretative Communication of the Commission on the application of Article 296 TFEU, COM (2006) 779.

²³ Directive 2009/43, OJ 2009 L 146/1.

²⁴ Directive 2009/81, OJ 2009 L 216/76.

²⁵ Communication COM (2013) 542 – Towards a More Competitive and Efficient Defence and Security Sector.

Article 347 [emergencies clause]
(ex Article 297 TEC)

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Bibliography: *Kotzur*, Die Weltgemeinschaft im Ausnahmezustand?, AVR 2004, 353; *Koutrakos*, Is Article 297 a ‘Reserve of Sovereignty’?, CMLRev 2000, 1339; *Koutrakos*, The Notion of Necessity in the Law of the European Union, Netherlands Yb of International Law 41 (Springer 2010), p. 194; *Stefanou/Xanthaki*, A legal and political interpretation of articles 224 and 225 of the Treaty of Rome (Aldershot 1997); *Trybus*, European Union Law and Defence Integration (Hart 2005), 167; *Wirbel*, Der Ausnahmezustand im Gemeinschaftsrecht. Zu Inhalt und Grenzen des Article 224 EG-Vertrag (University of Bonn 1994).

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1 I. Overview

Prima facie, Article 347 TFEU is only concerned with certain consultation obligations. However, although not obvious from the wording, the provision does also (implicitly) provide a legal basis for Member States to derogate from their treaty obligations due to reasons of internal, external, or international security. This implicit content of the provision is simply a logical prerequisite for any consultation obligation on the effects of such derogation on the internal market. Furthermore, Article 348 para. 2 explicitly mentions the ‘powers provided for in [...] Article [...] 347’.¹

Article 347 TFEU contains a **procedural aspect** when it obliges Member States to consult each other in order to strike a balance between the political and military interests of a certain Member State on the one hand and the interest of the EU as a whole in a functioning internal market on the other hand.² As a ‘wholly exceptional clause’,³ which allows for a derogation from all Treaty obligations, Article 347 TFEU has to be interpreted narrowly⁴ and its application has to be justified in detail for each and every single case. Article 347 may only be used if other exceptions – apart from Article 346 TFEU, which can be invoked in parallel – do not apply.⁵

2 To date, the Court has addressed the provision only once, in an interim measure against Greece.⁶ In all other cases in which Article 347 TFEU was invoked by Member

¹ AG Jacobs, ECJ Case C-376/89 *Richardt* [1991] ECR I-4621, at mn. 32.
² CR/Calliess, Article 297 mn. 2.
³ AG Jacobs, Joint Opinion in ECJ Cases C-83/94 and C-70/94 *Werner und Leifer* [1995] ECR I-3189.
⁴ ECJ Cases 13/68 *Salgoil* [1968] ECR 694; 222/84 *Johnston* [1986] ECR 1651, at mn. 26. See also above Article 346 TFEU mn. 1.
⁵ See also above Article 346 TFEU mn. 11.
⁶ ECJ Case C-120/94 *FYROM* [1994] ECR I-3037.

States, the Court avoided ruling on the exception.⁷ Thus, the correct interpretation of the provision, in particular with regard to the extent of judicial review of the Court⁸ and the substantial criteria of the state of necessity, is still open to debate.

II. Emergency measures

3

1. State of necessity

Article 347 TFEU states three types of situations in which the obligations of a Member State under the Treaties are suspended due to **security policy measures** of that State. In these situations, the Member State may take protective measures contrary to internal market rules. When assessing such situations, the Member States dispose of a wide **margin of appreciation**:

- serious internal disturbances affecting the maintenance of law and order; these situations cover, *inter alia*, **civil war, severe internal unrest, or major natural or technical disaster**. Intensive, persisting terrorism is likely to be covered by this category if it threatens the security of the State. In any case, the notion of ‘law and order’ has to be interpreted restrictively, and narrower than in Article 36 TFEU.⁹ Mere turmoil in times of social or economical crises with strikes and demonstrations will usually not be sufficient, unless it amounts to large-scale internal unrest.¹⁰
- ‘**war or serious international tension** constituting a threat of war’: this alternative covers armed conflicts of a Member State with a third State as well as wars between third States which have a destabilising effect on the affected Member State.¹¹
- obligations which a Member State has accepted for the purpose of **maintaining peace and international security**: Such obligations may result from the application of economic sanctions on the basis of resolutions of the UN Security Council (Article 41 of the UN Charter) or from other actions taken in the framework of systems of collective security or self-defence such as for example NATO.

2. Action by the State

7

Unilateral measures adopted for security reasons and affecting the functioning of the internal market may consist, *inter alia*, in limitations regarding the exercise of TFEU’s **fundamental freedoms** and in import and/or export restrictions (**‘trade embargo’**). As to the latter scenario, the scope of application seems very limited today because such measures are – as a rule – anyway taken on the EU level (see Article 215 TFEU).

In case the EU makes use of its competence to impose **sanctions**, Article 347 TFEU can in turn provide the basis for a derogation of individual Member States from common EU action. If the conditions of Article 347 TFEU are met, a Member State may abstain from participating in the implementation of relevant EU measures and either impose its own (more extensive) sanctions, or refrain from imposing coercive measures at all, always under the condition that such separate action is in compliance with the principle of proportionality. However, in case the EU has taken a binding Joint Action (Article 28 TEU), derogations are not permissible.

⁷ See for example ECJ Cases C-367/89 *Richardt* [1991] ECR I-4621; 222/84 *Johnston* [1986] ECR 1684; C-89/94 *Leifer* [1995] ECR I-3231.

⁸ See Article 348 TFEU mn. 5.

⁹ AG *Jacobs*, Joint Opinion in ECJ Cases C-83/94 and C-70/94 *Werner und Leifer* ECR [1995] I-3189, at mn. 45 et seq.

¹⁰ GHN/*Jaekel*, Article 347 mn. 15.

¹¹ GS/*Gilsdorf/Brandtner*, Article 297 mn. 4 et seq.

9

III. Obligation to consult with other Member States

In the situations described under mn. 3–6, Member States are obliged to consult each other in order to take the necessary steps to prevent the functioning of the internal market from being affected. To this end, the threatened State has the **duty to inform** the other Member States and the European Commission comprehensively and as early as possible.¹² These consultations will usually take place in the Council, but in any case they have to take place within the EU's institutional framework.¹³

10 Ideally, on the basis of these consultations the EU will reach a joint decision, or – in the alternative – the Member State concerned is on its own initiative willing to tailor its emergency measures to the needs of the internal market. If no such decision can be reached, or if the internal market is nonetheless affected, in a further step, the **consultation obligation** provided for in Article 348 para. 2 TFEU intervenes

**Article 348 [adjustment measures, infringement procedures]
(ex Article 298 TEC)**

If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.

By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling *in camera*.

Bibliography: *Canor*, The Limits of Judicial Discretion in the European Court of Justice (Nomos 1998); *Hummer*, Das griechische Embargo, (Nomos, Tome 1, 1995), at p. 511; *Trybus*, The EC Treaty as an instrument of European defence integration: judicial scrutiny of defence and security exceptions, CMLRev 2002, 1347.

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1

I. General

The ‘**wholly exceptional clauses**’¹ of Articles 346 and 347 TFEU feature a further specificity regarding the scrutiny of their observance by the European Commission, and also with regard to judicial review of their correct application by the European Courts. Whereas para. 1 of this provision provides for a special preliminary proceeding for the examination of measures which may distort competition, para. 2 on its part modifies the ordinary infringement procedure under Article 258 TFEU.

¹² Schwarze/*Karpenstein*, Article 347 mn. 11.

¹³ GHN/Jaeckel, Article 347 para. 28.

¹ AG Jacobs, ECJ Joint Opinion in Cases C-83/94 and C-70/94 *Werner und Leifer* ECR [1995] I-3189.

The special provision of Article 348 TFEU does not exclude the invocation of Articles 346 or 347 TFEU under Court proceedings in accordance with Article 267 TFEU (preliminary ruling)² nor does the provision prevent the Commission to make recourse to the 'ordinary' infringement procedure under Articles 258/259 TFEU.³ The right to refuse the supply of information, provided for in Article 346 para.1 lit. a TFEU, does not apply in the context of Article 348 TFEU.⁴

II. Adjustment procedure

If security policy measures of a Member State adopted on the basis of Article 346 or Article 347 TFEU lead to a **distortion of competition in the internal market**, the Commission, together with the Member State concerned, has to examine how these measures can be adjusted to the legal framework of the EU treaties. The outcome of this assessment does not necessarily have to be the complete removal of the treaty violation; however, the minimum requirement is that the EU interest in a functioning internal market is duly taken into consideration.⁵ If, in turn, a Member State refuses to make reasonable adjustments, this may constitute an infringement and may lead to a procedure under para. 2 and Article 258 TFEU. Distortions of competition regarding non-military goods which are already unlawful under Article 346 para. 1 lit. b (2nd half-sentence), cannot be subject to the procedure under Article 348 para. 1 TFEU.⁶ Thus, Article 348 para.1 TFEU only applies if the measures distorting competition concern defence goods as defined in Article 346 para. 2 TFEU. With regard to state aid, Article 348 para. 1 TFEU has to be applied in lieu of Article 108 TFEU.⁷

III. Special infringement procedure

When taking security measures under Articles 346 or 347 TFEU, Member States dispose of a wide margin of appreciation ('it considers'). This, however, does not prevent judicial review of the way in which a State makes use of these exceptional prerogatives in a particular case. According to Article 348 para.2 TFEU, the ordinary infringement procedure is subject to two **modifications**: (1) the preliminary proceeding between the Member State and the Commission, and (2) the publicity of the procedure.

In departure from the procedure under Articles 258 and 259 TFEU, there exists no mandatory pre-litigation procedure. The rest of the procedure remains unchanged. The procedure under Article 348 is only obligatory for the Commission if the Member State concerned invokes an exception according to Articles 346 or 347 TFEU from the beginning. Otherwise, the Commission has a discretionary power ('may') to either use this special procedure or to recur to the ordinary infringement procedure, including the pre-trial exchange of written pleadings between Commission and Member State, according to paras. 1 of Article 258 or Article 259 TFEU.

The scope of the audit and the **level of scrutiny** to be applied by the Court when assessing a Member State's (ab)use of Articles 346 or 347 TFEU on the basis of Article 348

² Streinz/Kokott, Article 298 mn. 10.

³ ECJ Case C-414/97 *Commission v Spain* ECR [1999] I-5599.

⁴ See above Article 346 TFEU mn. 4. For a different opinion see *Heinteschel von Heinegg* EUV/AEUV Article 348 mn. 11.

⁵ GHN/Jaeckel, Article 348 mn. 5.

⁶ See for example *Hummer*, in: FS Everling, 1995, 535.

⁷ CFI Case T-26/01 *Fiocchi munizioni SpA* [2003] ECR II-3951 mn. 39, 72.

sic definition of the territorial scope of Union law is now given in Article 52 TEU, consisting of a list of the Member States and referring to Article 355 TFEU for details and exceptions concerning specific territories with peculiarities of their international legal status. Article 349 TFEU, as the third part, is confined to providing a legal basis for exceptional rules specifying the principle of solidarity in respect to particular outermost regions of some Member States. These territories are economically relevant to the Union because of their adjacent maritime areas (200-miles-zone¹) and various agricultural products.

II. Outermost territories

2

The regions falling within the scope of Article 349 TFEU comprise only the relevant territories of France, Spain and Portugal listed in its first paragraph. **French territories** are the *départements d'outre-mer* (DOM) *Guadeloupe, French Guiana, Martinique, Réunion*.

In addition, paragraph 1 mentions the French Caribbean islands *Saint-Barthélemy* and *Saint-Martin*, which were separated from Guadeloupe as '*collectivités d'outre-mer*' ('COM') in 2007. However, this provision was modified by the European Council Decision of 29 October 2010 amending the status of Saint-Barthélemy, which has now become an associated overseas territory according to Part 4 (Articles 198 et seq.) TFEU. Under Article 355 para. 6 TFEU, France also made a formal request to the European Council to change the EU status of *Mayotte*, currently among the overseas countries and territories, which became an outermost region from January 2014 onwards.²

The relevant **Portuguese** territories are two autonomous regions: the *Azores* and *Madeira*; **Spain** is represented by the *Canary Islands* as one of its *comunidades autónomas*.

III. Special provisions

5

The 'outermost territories' form an integral part of these Member States and therefore are generally included in the scope of Union law.³ However, these regions are considered to be severely restrained in the development of their structural social and economic situation on account of their geographical situation and detrimental factors connected with it. Thus Article 349 para. 1 TFEU **authorizes the Council** on a proposal from the Commission and after consulting the European Parliament, to take specific measures aiming at fully integrating these regions into the European economic area. In fact, the Union is empowered to pursue a particular form of regional and cohesive policy with significantly developmental aims and instruments.

On 17 June 2010, the **European Council**⁴ adopted the **Europe 2020 Strategy**, a new '*strategy for jobs and smart, sustainable and inclusive growth*'. Subsequently, the **Council**⁵ stressed that this strategy should be **fully applied in the outermost regions**, taking into account their special characteristics and constraints. The Council recognised "the need for a balance between measures to offset the specific and permanent constraints of the

¹ COM (2007) 507 final, para. 4.4.

² COM (2012) 287 final, fn. 1.

³ See already ECJ Cases 148/77 *Hansen* [1978] ECR 1805; C-163/90 *Legros* [1992] ECR I-4625.

⁴ EUCO 13/10, Conclusions.

⁵ 3023rd FOREIGN AFFAIRS Council meeting, 14 June 2010.

outermost regions on one hand and those that aim to promote their advantages and opportunities on the other”.

- 7 On 20 June 2012, the **Commission** published a communication⁶ entitled: ‘The outermost regions of the European Union: towards a partnership for smart, sustainable and inclusive growth’. The aim of the programme is a concerted effort to reform, modernise and diversify their economies as the best way to ensure a more prosperous future. Embedded in a reformed cohesion policy, the program emphasizes as “axes of a renewed EU strategy”:

- (1) Improving accessibility to the single market.
- (2) Increasing competitiveness through modernisation and diversification of the overseas regions’ economies.
- (3) Strengthening regional integration within the outermost regions.
- (4) Reinforcing the **social dimension** of the outermost regions’ development.
- (5) Mainstreaming **climate change action** into all relevant policies.

- 8 The communication also deals with the specific activities which should enable the Union to reach the strategy’s aims in cooperation with the Member States and the outermost regions.

Article 350 [Benelux-Union] (ex Article 306 TEC)

The provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties.

Bibliography: *Janson*, Benelux: closer cooperation within the European Union?, 2006; *Wouters/Vidal*, Towards a Rebirth of Benelux, Leuven Centre of Global Governance Studies Working Paper No. 2, January 2008.

- 1 The economic integration between **Belgium and Luxembourg**¹ and between **Belgium, Luxembourg and the Netherlands**² reached between these Member States so far and their further continuation should not be impeded by the Union.³ The latter Treaty was set to expire on 31 October 2010. In order to have the Union continue and simultaneously expand its application beyond the economic sector, a Treaty “revising the Treaty establishing the Benelux Economic Union” was signed on 17 June 2008, the name of the Union now changed to ‘Benelux Union’.
- 2 These regional Unions have **priority over EU law** if their status of integration is already more advanced than that of the European Union.⁴ This may release the Benelux States from their duties of equal treatment and non-discrimination. In so far their combined territories are treated like that of a single Member State. A discriminating rule is, however, only justified if and as far it is necessary for the functioning of the provisions adopted within the Benelux framework.⁵ As far as Union law has the same or a higher standard of integration, it supersedes the law of the sub-regional Union according to the

⁶ COM (2012) 287 final.

¹ Treaty of 25 July 1921, LNTs 9, 223; consolidated version of 29 January 1963, UNTS 547, 39.

² Treaty of 2 May 1958, UNTS 381, 165.

³ ECJ Case 105/83 *Pakvries* [1984] ECR 2101.

⁴ ECJ Case 105/83 *Pakvries* [1984] ECR 2101.

⁵ ECJ Joined Cases C-367–377/93 *Rodens* [1995] ECR I-2229: discriminating taxation.

general rules.⁶ Article 51 para. 2 Benelux-Treaty refers to the ECJ the **exclusive competence** for dealing with such collision cases.

*Article 351 [Former Agreements of Member States]
(ex Article 307 TEC)*

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Bibliography: *Manzini*, The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law, 2001 EJIL 781.

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I. General remarks 1

Article 351 TFEU is exclusively intended to safeguard the legal rights of third States, thereby expressing the Union's respect for international law.¹ It is concerned with the relationship between Union law and **international treaties**, which were **concluded between Member States and third States before the Union Treaties** or the accession to them went into force.

If interpreted broadly, Article 351 TFEU must also be **applied to treaties with other 2 subjects of international law** (particularly with international organizations) and in analogy to later unforeseeable new competences of the EU². In the case of multilateral treaties, the third State must have become a party to the international treaty prior to the entering into force of the Union Treaties or the Member State's accession to them.³

⁶ ECJ Case 38/75 *Nederlandse Spoorwegen* [1975] ECR 1439.
¹ See Article 26 (*pacta sunt servanda*), Article 30 consecutive treaties, Article 34 (*pacta tertiis nec nocent nec prosunt*) Vienna Convention on the Law of Treaties.
² Disagreeing: *Manzini*, EJIL 2001, 786.
³ ECJ Case C-364–365/95 *T. Port* [1998] ECR I-1023.

- 3 A **treaty amending the former treaty** after a Member State has become bound by Union law is not covered by Article 351 TFEU.⁴ Equally, the general rule of priority of Union law applies in the case of *inter-se-treaties* (concluded between Member States without participation of third States)⁵ without restriction.⁶
- 4 As far and as long as the **Union** has not made use of its concurring competences, the Member States may, as a rule, enter into agreements with third States on the particular matter; they are, however, obliged to take into account the possibility that the Union will make use of its competence and enter into a treaty on the same matter. As a consequence, the Member State will for example include a cancellation or adaptation clause in the agreement with the third State.⁷

5

II. Non-affection clause

Article 351 para. 1 TFEU wants to protect Member States from colliding obligations emanating from international law and Union law. Its non-affection clause allows Member States to fulfil their obligations towards third States resulting from former treaties.⁸ The case is different if such a treaty only gives the Member State a right to act in a certain way without an obligation to do so. The Member State must not make use of such a right if this act would infringe Union law.⁹ Article 351 para. 1 TFEU accepts the status quo in international law; it does not, however, bind the Union to the treaty with the third State¹⁰ and does not allow Member States a margin of discretion standing in opposition to Union law in regard to the future development of their treaties.

6

III. Member States' duty of adaptation

Article 351 para. 2 TFEU lays down a **duty of Member States to reconcile their treaty obligations** towards third States with Union law.¹¹ The Member States must endeavour to resolve possible collisions in favour of Union law in a way that is in conformity with international law, *e.g.* by a regular notice of termination or by negotiations with the third State aiming at an accession of the Union to the Member State's place in that treaty if the Union has the relevant competences. Article 6 para. 1 subpara. 2 Act of Accession 2003 expressly prescribes: To the extent that agreements between one or more of the new Member States on the one hand, and one or more third countries on the other, are not compatible with the obligations arising from this Act, the new Member State shall take all appropriate steps to eliminate the incompatibilities established. If a new Member State encounters difficulties in adjusting an agreement concluded with one or more third countries before accession, it shall, according to the terms of the agreement, withdraw from that agreement.

⁴ ECJ Case C-523/04 *Commission v Netherlands – Open Skies Agreement* [2007] ECR I-3267 mn. 51.

⁵ ECJ Case 235/87 *Matteucci* [1988] ECR 5589; Joined Cases C-241/91 and C-242/91 *RTE TV program listings* [1995] ECR I-743.

⁶ Exception: Article 350 TFEU concerning the Benelux-Union.

⁷ ECJ Case 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

⁸ ECJ Case C-158/91 *Levy* [1993] ECR I-4287.

⁹ ECJ Cases C-124/95 *Centro-Com* [1997] ECR I-81 mn. 60; C-523/04 *Commission v Netherlands – Open Skies Agreement* [2007] ECR I-3207 mn. 51.

¹⁰ ECJ Case 812/79 *Burgoa* [1980] ECR 2803.

¹¹ ECJ Case C-62/98 *Commission v Portugal* [2000] ECR I-5171 mn. 49.

If – in the case of **multilateral treaties and international organizations** – this cannot be accomplished, the Member States must take appropriate measures to adjust their position to the rights and obligations arising from Union law.¹² It is their duty to take steps to ensure that the institutions or bodies of such organizations do not take decisions which are incompatible with Union law.¹³ They will follow the recommendation or advice given by the competent Union institution. A Member State may not invoke its foreign policy interests as ranking higher.¹⁴

IV. Most-favoured nation treatment

8

Article 351 para. 3 TFEU formulates a special rule **concerning a most-favoured nation clause** in favour of third States in the Member States' former treaties. The preferences of the Union in regard to its Member States (*e.g.* freedom from custom duties, freedom of establishment) may not be forwarded to third parties because these internal preferences must be seen in the entirety of the Union. An unwritten rule, however, is that withholding these advantages must not collide with the treaty concluded with the third State. But this will rarely be the case, *e.g.* because of the express or implicit exception from the most-favoured nation clause like in the case of establishing a customs union.¹⁵

Article 352 [Flexibility clause] (ex Article 308 TEC)

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

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¹² See Article 6 para. 12 subpara. 1 Act of Accession (2003).

¹³ ECJ Case C-62/98 *Commission v Portugal* [2000] ECR I-5171 mn. 52; Case C-203/03 *Commission v Austria* [2005] ECR I-935 mn. 62.

¹⁴ ECJ Case C-62/98 *Commission v Portugal* [2000] ECR I-5171 mn. 50.

¹⁵ See Article XXIV GATT.

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1

I. General remarks

From its very beginnings the project of European integration has been designed for a long-term development, particularly by legislative activities of its institutions. Even the founding Member States of the European Economic Community were aware that the competences of the legislative institutions which were expressly emphasized in the Treaty might not be sufficient for the full realization of the Treaty's objectives. In view of the principle of conferral of powers¹, which required a specifically determined competence for each legally binding act of the Community, they made it possible from the very beginning by (at that time) Article 235 EEC-Treaty (later replaced by ex-Article 308 TEC, now Article 352 TFEU) for the Council to adopt a legislative act for attaining the Treaty's objectives under specific preconditions even in cases for which the Treaty had not laid down the appropriate competences. In this regard there was no need for amending the Treaty in the rather cumbersome procedure provided for in (now) Article 48 TEU.

2 The application of Article 352 TFEU comprises the whole framework of the Union policies and therefore also reaches out to the former intergovernmental matters of the TEU, with the exception of the CFSP as set out in paragraph 4.

3 Starting in 1972, the Article containing the flexibility clause became particularly important for developing the internal market's 'accompanying policies' for the purpose of 'rounding off' the Treaty. The extensive legislative activities in the fields of environment, research, industrial and energy policy as well as regional, social and monetary policy was based on this clause at the suggestion of the Paris 1972 summit which stated that in view of tasks laid down in the different programmes of action, 'it was desirable to make the widest possible use of all the dispositions of the Treaties, including Article 235 of the EEC Treaty [now Art. 352 TFEU]'. This suggestion was widely followed until the Single European Act and the Maastricht Treaty expressly incorporated a great number of new policy areas into the EC Treaty, thereby diminishing the Article's fields of application. It now serves, for example, to establish EU agencies or modernizing the private company law.

4 The question of **the kind and the extension of such a flexibility clause** exempting from the duty of acting on powers specifically assigned to the Union is a **core issue** in the relations between the Member States and the Union. The Lisbon Treaty Conference therefore thought it necessary to confirm its opinion in Declaration 42 annexed to its Final Act.² It is now settled case law of the ECJ that recourse to this 'flexibility clause' is not allowed for adopting acts having a fundamental impact on the Treaties.³ Such cases rather need an amendment of the Treaties (Article 48 TEU), including its ratification by the Member States according to their constitutional requirements. The Bundesverfassungsgericht (German Constitutional Court), for instance, even insisted that the German government representative in the Council must vote against a proposal made on the basis of Article 352 TFEU if he had not attained a previous permission by the German legislature.⁴

¹ Now Article 5 para. 2 TEU.

² OJ C 83/351 of 20. 3. 2010.

³ Opinion 2/94 ECHR [1996] ECR I-1759.

⁴ BVerfGE 123, 123, 167; English version: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

II. Requirements of the Article

5

1. Objectives of the Treaties

In defining the objectives of the Union relevant for applying the ‘flexibility clause’ a **distinction must be made in view of very general aims and values** like some of those set out in the preambles of the Treaties or in Article 3 para. 1 TEU (the Union’s aim ‘to promote peace, its values and the wellbeing of its peoples’). If these general aims were sufficient to create a Union competence for legal acts overriding the Member States’ legislation, it would be impossible to define the specific demarcation between Articles 352 TFEU and Article 48 TEU. In violation of Article 4 para. 1 TEU, the competences of the Union might become unlimited for all practical purposes, the Member States would lose their sovereignty, and the Union would attain the position of a federal State.

Thus the objectives of the Treaties allowing to make use of the ‘flexibility clause’ of Article 352 para. 1 TFEU must be defined by concentrating on more specific aims, particularly those specified in the provisions of single policy areas. The Lisbon Treaty Conference underlined this position in its Declaration 41⁵ on Article 352 TFEU by declaring that the reference to the objectives as set out in paragraph 1 does not include the aims identified in Article 3 para. 1 TEU but refers to **Article 3 paras 2 and 3 TEU** and to the objectives of **Article 3 para. 5 TEU** concerning external action under Part V TFEU.

Article 352 para. 4 TFEU excludes the whole area of the Common Foreign and Security Policy from the ‘flexibility clause’. This is confirmed by Declaration 41 of the Lisbon Conference, where it notes that in accordance with Article 31 para. 1 TEU, **legislative acts may not be adopted in the CFSP area**.

Article 352 para. 3 TFEU, newly included since the Lisbon Reform Treaty, also has only a clarifying function: It emphasizes that Treaty provisions expressly excluding the harmonization of Member States’ laws or regulations (e.g. Art. 165 para. 4, Article 167 para. 5, Article 168 para. 5 TFEU) must not be circumvented by measures based on Article 352 TFEU.⁶

2. Necessity of action

9

The other precondition for allowing an action of the Union is its being strictly necessary for attaining the Treaties’ objectives. In view of the breadth of the Union objectives, however, the Union institution enjoys a wide margin of discretion in assessing this necessity. In addition, the principles of subsidiarity and proportionality⁷ must be observed.

Due to the specific quality of Union law (precedence over national law/homogenous interpretation/legal protection by the ECJ) the necessity of a Union action cannot be denied only because the Member States would remain to be competent to bring the relevant policy area under identical domestic rules or under an international agreement with an identical content anyway.

3. Lack of specific competences

11

Article 352 TFEU as a norm providing competences for the Union **only applies subsidiarily**. A measure may be based on this rule if the Treaties do not otherwise provide the necessary specific competence.⁸

⁵ OJ 2010 C 83/350 of 20. 3. 2010.

⁶ Case C-376/98 *Tobacco Advertising* [2000] ECR I-8419 mn. 79.

⁷ See Article 5 paras 3 and 4 TEU.

⁸ ECJ Cases 45/86 *APS I* [1987] ECR 1493 mn. 13; 242/87 *Erasmus* [1989] ECR 1425 mn. 6; C-295/90 *Students Directive* [1992] ECR I-4193.

- 12 A specific Union competence may exist already in cases in which it can be derived by interpreting an existing Union rule in the sense of the ‘effet utile’ principle⁹ or as an ‘implied power’¹⁰.
- 13 A specific Union competence may be lacking in cases in which such powers do not fully meet the requirements for attaining the particular objectives (e.g. allowing only a directive instead of a regulation).¹¹

14 III. Legal consequences

Article 352 TFEU empowers the Council to **adopt the appropriate measures**. These may consist of all the acts defined in the catalogue of Article 288 TFEU but also of unspecified acts affecting Member States or individuals. Competences to conclude treaties with third Parties may be established by the ‘flexibility clause’, too¹², however, according to a revised concept of the ECJ, only in so far as the Union has made use of its corresponding internal legislative competence.¹³

- 15 Even if the conditions of the flexibility clause are met, there is **no obligation** for the Union to adopt measures on the basis of Article 352 TFEU.¹⁴

16 IV. Procedure

The measures taken on the basis of Article 352 TFEU are to be adopted by the **Council**, acting **unanimously** on a **proposal from the Commission**.

The Lisbon Treaty has introduced as a further requirement that the **European Parliament**, which so far had to be consulted only, must give its **consent**. This is a further procedural guarantee against any abuse of the flexibility clause by the combined executive branches of the Member States acting in the Council.

- 17 The democratic control and legitimacy is further strengthened by the Commission’s duty to make use of the ‘**early warning system**’ regarding the subsidiarity principle referred to in paragraph 2, which is meant to secure the possibility of effective influence of the **national Parliaments** in this legislative process.

Article 353 [Exclusion of ‘Passerelle’ Clauses]

Article 48(7) of the Treaty on European Union shall not apply to the following Articles:

- **Article 311, third and fourth paragraphs,**
- **Article 312(2), first subparagraph,**
- **Article 352, and**
- **Article 354.**

- 1 Article 48 para. 7 TEU lays down a simplified procedure (*‘passerelle’*) for allowing an amendment of specific Articles of the TFEU which require unanimous votes for the Council decisions taken on their basis. The amendments are concerned with the chang-

⁹ ECJ Case 242/87 *Erasmus* [1989] ECR 1425.

¹⁰ ECJ Case 22/70 *AETR* [1971] ECR 263.

¹¹ ECJ Case 8/73 *Massey-Ferguson* [1973] ECR 897.

¹² ECJ Case 22/70 *AETR* [1971] ECR 263.

¹³ Opinion 1/94 *WTO* [1994] ECR I-5267 mn. 89.

¹⁴ ECJ Case 22/70 *AETR* [1971] ECR 263 mn. 95.

ing of the unanimity rules of these Articles to allowing votes taken by majority. The simplified procedure is also applicable for amendments regarding the changing from a ‘special legislative procedure’ to an ‘ordinary legislative procedure’.

The simplified procedure consists of a unanimous decision of the European Council acting with consent of the European Parliament but without requiring ratification by the Member States. However, the national Parliaments are informed of the proposal. If one national Parliament rejects the proposal within six months, the European Council cannot adopt the decision.

Article 353 TFEU excludes this simplified procedure in four particular cases of politically highly sensible areas: Article 311 paras. 3 and 4 TFEU (own resources of the Union), Article 312 para. 2 subpara. 1 TFEU (establishing the multiannual financial framework), Article 352 TFEU (flexibility clause concerning Union competence in cases not specifically provided for by the Treaty) and Article 354 TFEU (sanctions against Member States).

***Article 354 [Voting rules of the sanctions procedure]
(ex Article 309 TEC)***

For the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article.

For the adoption of the decisions referred to in paragraphs 3 and 4 of Article 7 of the Treaty on European Union, a qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty.

Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Article 7 of the Treaty on European Union, the Council acts by a qualified majority on the basis of a provision of the Treaties, that qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty, or, where the Council acts on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 238(3)(a).

For the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members.

Bibliography: see Article 7 TEU.

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I. Object of the provision

1

This Article supplements the rules of Article 7 TEU on sanctions against a Member State by provisions on the voting procedure.

2

II. Voting rules of the sanctions procedure

The Government representative of the Member State against which a procedure under Article 7 TEU has been initiated **cannot take part in the voting** as a member of the European Council or the Council. This Member State cannot be a judge in its own case.

3 As a consequence, the Member State concerned is not relevant for calculating the **number of Member States sufficient for initiating the procedure** (one third of the Member States according to Article 7 para. 1 or para. 2 TEU). This is also true for calculating the majority of four fifth of the Member States for the **decision of the Council** determining according to Article 7 para. 1 TEU that there is a clear risk of a serious breach of the values of the Union.

4 The unanimity of a decision of the **European Council** required by Article 7 para. 2 TEU for determining the existence of a serious and persistent breach is not precluded by abstaining votes of European Council members present in person or being represented.¹

5 For **decisions of the Council on suspending certain rights** of the Member State concerned (Article 7 paras 3 and 4 TEU), the **qualified majority** is calculated according to Article 238 para. 3 lit. b TFEU. This means that it is necessary to have a majority of at least 72% of the members of the Council representing the participating Member States in order to fulfil the condition of a qualified majority. In addition, the States constituting the majority must comprise at least 65% of the population of these States.

6 For the **time until 31 October 2014**, however, Article 3 para. 4 **Protocol (36) on transitional provisions** is relevant. According to this Protocol, the qualified majority in cases in which not all the members of the Council participate in voting² is to be defined in the way laid down in Article 3 paragraph 3 Protocol: The qualified majority must comprise at least two thirds of the Council members representing at least 62% of the population of the Member States concerned. This last mentioned requirement is controlled only on the request of a member of the Council.

7

III. Voting rules after suspension of voting rights

As long as the voting rights of a Member State are suspended, the **qualified majority within the Council** is calculated according to Article 238 para. 3 lit. a TFEU or – if the act concerned is not adopted on the proposal of the Commission or the High Representative – according to Article 238 para. 3 lit b TFEU.

8 For the **time until 31 October 2014**, Article 3 para. 4 **Protocol (36) on transitional provisions** applies, too (see mn. 6 above).

9

IV. Majority of the European Parliament

In procedures under Article 7 TEU the European Parliament adopts its decisions with a **double majority**: it acts by a two-thirds majority of the votes cast, which must represent a majority of its component Members. The participation of Members of the European Parliament representing the Member State under control is not subjected to any restrictions.

¹ Cf. also Article 238 para. 4 TFEU.

² Cf. Article 238 para. 3 TFEU.

Article 355 [Territorial scope of the Treaties]
(ex Article 299(2), first subparagraph, and Article 299(3) to (6) TEC)

In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:

(a) the Treaties shall not apply to the Faeroe Islands;

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.

Bibliography: *Inglis*, The Union's fifth accession treaty: new means to make enlargement possible, CMLRev. 41 (2004), 937; *Gold*, Gibraltar: British or Spanish?, Routledge, 2005; *Sukis*, Subnational issues: local government reform, redistricting of administrative jurisdictions, and the Åland Islands in the European Union, European Public Law 2007 (13), 3, 379; *Weiss*, Greenland's Withdrawal from the European Communities, ELR 1985, 173.

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1

I. Subject matter

Article 355 TFEU is concerned with details of the territorial scope of the Treaties¹. It is in line with Article 52 para. 1 TEU, which defines the parties and thereby implicitly the range of the territorial applicability of Treaty provisions; for the Treaties ‘shall apply’ to the Member States, and consequently to the territories in which and for which the Member States can legally exert public functions.²

2 The provision of Article 355 TFEU does not keep the Union from restricting the territorial scope of its secondary law regarding certain matters or to enlarge its scope as far as this is permitted under public international law, for example adopting rules on the customs territory according to Article 3 Modernised Customs Code creating customs exclaves and enclaves.³

3 The provision does not apply to the European micro-States San Marino, Monaco and Andorra or the State of Vatican City. They are not Member States. Monaco is included in the French (and that means the EU) customs territory because of the customs union of the two States.⁴ There is a customs union between the EU and Andorra according to the agreement EU/Andorra of 28 June 1990,⁵ and with San Marino according to the agreement of 16 December 1991⁶.

The State of the Vatican City is exempted from all customs duties by an agreement concluded with Italy in 1930.

4 The **Euro** has domestic legal tender status in **Monaco, San Marino** and **Andorra**. These States have the right to issue a certain quantity of Euro coins. According to the monetary agreement between the European Union and the **Vatican City State** of 17 December 2009⁷, the Vatican City State is entitled to use the Euro as its official currency.⁸ The Vatican City State grants legal tender status to euro banknotes and coins.

5

II. Principles

1. State territory

It follows from Article 52 TEU that the Treaties are applicable in all of the Member States territory except for cases where certain matters are governed by specific provisions.

¹ See also Article 52 para. 2 TEU.

² ECJ Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECR I-6019.

³ Regulation 450/2008 laying down the Community Customs Code (Modernised Customs Code).

⁴ Customs agreement of 18 May 1963.

⁵ OJ 1990 L 374, 13.

⁶ OJ 2002 L 84, 43.

⁷ OJ 2010/C 28/05

⁸ In accordance with Regulations 1103/97 and 974/98.

The Treaties' sphere of territorial application therefore extends – according to the rules of public international law – to the **land territory** of the Member States including the inland maritime waters and the **territorial waters**, as well as the **space below the land surface**, as far as it is accessible by technical means, and the **air space above these areas**. In the case of extending the territorial waters the Member States must take account of the Union rules governing fisheries.⁹

The territorial scope of the Treaties depends on the States' **territory as it exists at the date concerned**. Only the Member States (not the EU) are competent to decide on geographical changes of the State borders.¹⁰ As a consequence, the territorial scope of the Treaties automatically extends over newly acquired territory of a Member State. This was the case when the German Democratic Republic acceded to the Federal Republic of Germany on 3 October 1990.¹¹ The EEC institutions merely provided for rules aiding a smooth adaptation. If, however, certain parts of a Member State's territory should only become exempted from the territorial scope of the Treaties (like in the case of Greenland) it will be necessary to amend the Treaties.

2. Applicability beyond State territory

The Member States are also bound by the Treaties in areas where they may exercise sovereign rights – even if only functional and limited rights – outside of their territories. Consequently, EU law is governing their activities within the **continental shelf regime**¹², as well as in their fisheries zones or **maritime exclusive economic zones** adjacent to the coastal territorial waters ("EU-Sea").

Finally the Treaties are relevant as far as the Member States may make use of their **legislative and administrative competences**, for example for sustaining fish stocks¹³ or preventing of maritime pollution¹⁴ or controlling greenhouse gas emission by an emissions trading scheme to aircraft operators concerning flights departing from or arriving at a Member State's airport¹⁵.

III. Special provisions and exceptions

1. French DOM, Azores, Madeira, Canary Islands (para. 1)

The **French overseas territories** (*'Département d'Outre-Mer', DOM*) Guadeloupe, French Guayana, Martinique, Réunion, Saint Barthélemy and Saint Martin are fully included in the territorial scope of application of the Treaties, as well as the **Portuguese territories** Azores and Madeira and the **Spanish** Canary Islands.¹⁶ However, the Council is authorized by Article 349 TFEU in view of the structural social and economic situation of these territories to **adopt specific measures** aimed at, in particular, laying down the conditions of application of the Treaties to those regions, including common policies;¹⁷ thereby the Council will take into account the special characteristics and constraints of

⁹ ECJ Case C-146/89 *Commission v United Kingdom* [1991] ECR I-3533.

¹⁰ See Article 77 para. 4 TFEU.

¹¹ See Article 10 Treaty on German Unity.

¹² ECJ Case C-347/10 *Salemink*, Judgment of 17 January 2012, not yet officially published.

¹³ ECJ Case 141/78 *France v United Kingdom* [1979] ECR 2923.

¹⁴ Case C-308/06 *Independent Tanker Owners* [2008] ECR I-4057.

¹⁵ Case C-366/10 *Air Transport Association of America*. Judgment of 21 December 2011, not yet officially published.

¹⁶ Case 148/77 *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787; Case C-163/90 *Administration des douanes et droits indirects v Legros* [1992] ECR I-4625.

¹⁷ For details: see Article 349 TFEU.

the **outermost regions** without, however, undermining the integrity and the coherence of the Union legal order.

11 **2. Non-European countries and territories associated with the EU (para. 2)**

The ‘overseas countries and territories’ listed in Annex II to the TFEU are objects of special arrangements of a so-called constitutional association as set out in Part IV of the TFEU (Articles 198 et seq. TFEU). They consist of **French, Netherlands and British territories**, and also of the autonomous **Danish territory of Greenland**¹⁸, which was separated from the territorial scope of the EC Treaty by the Treaty of Amendment of 13 March 1984.

12 The provisions of association have not yet become applied to (British) Bermuda.

13 The overseas countries and territories depending on the UK which are *not* listed in Annex II do not fall into the area of application of the Treaties (para. 2 subpara. 2).

14 **3. European territories under Member States external control (para. 3)**

(a) According to Article 355 para. 3 TFEU, the Treaties should be applicable to those European territories for whose external relations a Member State is responsible. This provision, which originally was meant to cover the status of the **(German) Saarland (under French protection), had already been obsolete** when the EEC Treaty was signed on 25 March 1957 because the Saarland had acceded to the Federal Republic of Germany as a ‘Bundesland’ (component State) with effect from 1 January 1957.

15 (b) After the accession of the UK to the European Community it was **Gibraltar**, a British overseas territory for which the Treaties became applicable under paragraph 3.¹⁹ There are, however, **exceptions** according to Article 28 Act of Accession 1972 concerning the **agricultural and fisheries policy** and concerning the **turnover tax**; furthermore Article 29 Act of Accession 1972 excludes Gibraltar from the **customs area** of the EC (now: Union). According to the ECJ judgment mentioned above, the exclusion of Gibraltar from the customs territory of the Union implies that the Treaty rules on **free movement of goods** are not applicable to it, neither are the rules on approximating the laws of the Member States pursuant to (now) Articles 114 and 115 TFEU. These exceptions are to be interpreted narrowly.²⁰

16 The **European Court for Human Rights** held that the UK had breached the right to democracy as guaranteed by Article 3 Additional Protocol to the European Convention on Human Rights when it excluded the citizens of Gibraltar from participating in the elections of the European Parliament.²¹ Thereupon the right to take part in **EU parliamentary elections** was accorded to the citizens of Gibraltar by the European Parliament (Representation) Act 2003; Gibraltar was added to the South West England constituency.

17 **4. Åland Islands (para. 4)**

According to Protocol No. 2 of the Act of Accession 1994, the provisions of the Treaties are applicable in Finland’s territory of the Åland Islands. However, existing regional restrictions concerning the regional citizen status, the right of establishment, the right to provide services²² and the law on turnover taxes and on excise duties and other forms of indirect taxation remain in force.

¹⁸ See also Article 204 TFEU.

¹⁹ Case C-30/01 *Commission v UK* [2003] ECR I-9481.

²⁰ Case C-349/03 *Commission v UK* [2005] ECR I-7321.

²¹ ECHR Application No. 24833/94, Judgment of 18 February 1999, *Matthews v UK*.

²² Case C-42/02 *Lindman* [2003] ECR I-13519: freedom of services.

Natural and legal persons of the Member States that are not regional citizens of Åland 18
enjoy equal treatment in relation to each other.

5. Various special provisions for further European territories (para. 5) 19

a) Danish Faeroe Islands

The Treaties do not apply to the Danish Faeroe Islands,²³ which enjoy far reaching autonomy.

b) Cyprus 20

(aa) According to the Treaty Concerning The Establishment of The Republic of Cyprus of 1960, the **UK Sovereign Base Areas in Cyprus** (military bases of Akrotiri and Dhekelia) remained under the sovereignty of the UK. These areas are British Overseas Territories²⁴ but do not form part of the European Union. The EU Treaties are not applicable to these areas, except to the extent as provided for in **Protocol No 3 of the Act of Accession 2003**.²⁵ This Protocol provides that the bases are partially included in the Treaties' scope of application – particularly meaning that they belong to the EU customs area – in order to keep the borders open between the UK bases and the other parts of the island so that the control of persons or customs controls can be avoided.

(bb) The application of **Union law is suspended** in those parts of the Republic of Cyprus 21
in which the Government of Cyprus does not exert factual control because of the establishment of the **‘Turkish Republic of Northern Cyprus’**.²⁶ This de facto regime is not recognized by any State except by Turkey. **Protocol No 10 of the Accession Treaty 2003** refers to it by using the term ‘Turkish Cypriot Community’. The Council of the EU may decide unanimously on the withdrawal of the suspension, and also on the terms under which the provisions of EU law shall apply to the line between these different parts of the island. Measures with a view to promoting the economic development are not excluded for any of these areas. In the event of a settlement of the conflict, the Council, acting unanimously on the basis of a proposal from the Commission, may decide on the necessary adaptations to the terms concerning the accession of Cyprus with regard to the ‘Turkish Cypriot Community’.

According to the **ECJ**²⁷, provisions in an Act of Accession which permit exceptions to 22
or derogations from rules laid down by the Treaty must be interpreted restrictively and must be limited to what is absolutely necessary in order to attain its objective. Therefore the suspension of the application of the *acquis communautaire* in the areas of the Turkish Cypriot Community does not preclude a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government but concerns land situated in areas not so controlled. Even more, the court of another Member State may not refuse recognition or enforcement of this judgment.²⁸

²³ See Article 355 para. 5 lit. a TFEU.

²⁴ See British Overseas Territories Act 2002.

²⁵ See Article 355 para. 5 lit. b TFEU.

²⁶ See Protocol No 10 to the Act of Accession 2003.

²⁷ ECJ Case C-420/07 *Apostolides* [2009] ECR I-3571.

²⁸ Applying Article 35 para. 1 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

23 c) **British Channel Islands and Isle of Man**

The British Channel Islands (Guernsey, Jersey and Sark) and the Isle of Man are subject to the Treaties only in so far as this is necessary to ensure the implementation of the special rules for these islands contained in **Protocol 3 of the Act of Accession 1972** (Article 355 para. 5 lit. c TFEU).

24 Such **special Union rules concern:**

- **customs matters and quantitative restrictions**, in particular those under the same conditions as they apply to the United Kingdom;
- the levies and other import measures concerning **agricultural products** laid down in Union rules and applicable by the United Kingdom;
- the **free movement** and observance of normal conditions of **competition in trade in these products**.

25 The rights enjoyed by the Islanders **in the UK** are not affected. However, the Islanders do not benefit from the Union provisions relating to the free movement of persons and services. The **authorities of Island territories** shall apply the same treatment to all natural and legal persons of the Union. This excludes measures by the Island authorities against a national of another Member State if the same conduct of a UK citizen would not give rise to such measures.²⁹

26

IV. Change of status

The status with regard to the EU of a Danish, French or Netherlands country or territory as referred to in paragraphs 1 and 2 may be amended by the **European Council** on the initiative of the Member State concerned. The European Council takes its decision unanimously after consulting the Commission (para. 6).

27 With regard to the status of **Mayotte** in relation to the EU the Final Conference of Lisbon agreed in its Declaration (No 43) that the European Council will take a decision in order to make this territory an 'outermost region' on the initiative of French authorities³⁰. The initiative is to be taken by notifying the European Council and the Commission that the evolution in the internal status of the island so allows.28 The Netherlands stated their own Declaration (No 60) that an initiative for a decision amending the status of the **Netherlands Antilles and/or Aruba** with regard to the Union will be submitted only on the basis of a decision taken in conformity with the Charter for the Kingdom of the Netherlands.

**Article 356 [Period of validity]
(ex Article 312 TEC)**

This Treaty is concluded for an unlimited period.

1 Just like the TEU, the TFEU has been concluded 'for an unlimited period'. There is no time-limit or any similar restriction on the Treaty's period of validity.¹ See, however, Article 50 TEU concerning the right of every Member State to leave the Union.

²⁹ ECJ Case C-171/96 Pereira Roque v His Excellency the Lieutenant Governor of Jersey [1998] ECR I-4607.

³⁰ See Article 355 para. 1 TFEU and Article 349 TFEU.

¹ See the comments on Article 53 TEU.

**Article 357 [Ratification and Entering into Force]
(ex Article 313 TEC)**

This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The Instruments of ratification shall be deposited with the Government of the Italian Republic.

This Treaty shall enter into force on the first day of the month following the deposit of the Instrument of ratification by the last signatory State to take this step. If, however, such deposit is made less than 15 days before the beginning of the following month, this Treaty shall not enter into force until the first day of the second month after the date of such deposit.

The **original predecessor of the TFEU was the EEC Treaty**, which was agreed upon at Rome in 1957 by – at the time – six Member States. The EEC was eventually established when all participating States had deposited their instruments of ratification with the depositary government.¹ It was the Italian Government that was chosen as depositary; hence the EEC and the Euratom Treaties were cited as the ‘Treaties of Rome’. This function of the Italian Government was upheld for the deposition of all the following amendment and accession Treaties.

Ratification means ‘the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty’². As a rule, the instrument of consent is signed by the Head of State or Government. The constitutional requirements referred to in Article 357 para. 1 TFEU are usually also concerned with the questions of parliamentary assent and holding a referendum.

The EEC Treaty entered into force on 1 January 1958, after Belgium, Luxembourg and the Netherlands had deposited their instruments of ratification. The corresponding provision regarding the Lisbon Treaty (2007) amending the original Treaty on European Union (EU) and changing the TEC to the Treaty on the Functioning of the European Union (TFEU) is contained in Article 6 para. 2 Lisbon Treaty. The Lisbon Treaty entered into force on 1 December 2009 after the Czech Republic had deposited its instrument of ratification as the last of (then) 25 Member States.

Article 358 [Treaty Languages]

The provisions of Article 55 of the Treaty on European Union shall apply to this Treaty.

Until the entering into force of the Treaty of Lisbon the provision on the Treaty languages was contained in both the TEU and the TEC. Now, Article 358 TFEU avoids this duplication of rules by referring to the provision set out in Article 55 TEU. This editorial link manifests the unity between both Treaties without giving up their character as individual pillars of the European Union.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have signed this Treaty.

¹ See Article 16 lit. b Vienna Convention on the Law of Treaties.

² See Article 2 para. 1 lit. b Vienna Convention on the Law of Treaties.

Done at Rome this twenty-fifth day of March in the year one thousand nine hundred and fifty-seven.
(List of signatories not reproduced)