



# EU Business Law

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# CONCEPT OF THE INTERNAL MARKET

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This lecture will comprise a general introduction to the theory and legal foundations of the European Union's commercial law. The following points will be examined in details:

- The concept of economic integration
- From a 'common' to an 'internal' market
- Concept of harmonisation

# 1. The concept of economic integration

## ***A) Types of economic integration***

federalist – functionalist

## ***B) Positive and negative integration***

## ***C) Levels of economic integration***

Free Trade Area – Customs Union –  
Common Market – Economic Union –  
Total Economic Integration

# 1. The concept of economic integration

**A)** After the Second World War, theorists concerned about two **types of integration**:

- a **federalist** approach: which meant a political union among its members.
- a **functionalist** approach: which covered cooperation only in one sphere of social life; the leading politicians of that time supported the idea of *economic integration*.

# 1. The concept of economic integration

**B) Jan Tinbergen** (1954) made a distinction between **positive and negative integration**:

- **Negative** integration denotes the removal of discrimination in national economic rules and policies under joint surveillance.
- **Positive** integration refers to the transfer to common institutions, or the joint exercise of at least some powers.

# 1. The concept of economic integration

**C) Béla Balassa** (1961) used the so-called **stage approach** to describe the level of economic integration:

- a) Free Trade Area:** tariffs and quantitative restrictions between the member states are abolished, but each country retains its own tariffs against third countries. No positive integration here.
- b) Customs Union:** tariffs and quantitative restrictions between members are also removed but members agree to apply a common level of tariff on goods entering the union from third countries. The latter is called common customs, or common external tariff. No positive integration here.

# 1. The concept of economic integration

- c) **Common Market:** to the free movement of goods within the customs union is added the free movement of the factors of production – labour, capital and enterprise. No positive integration here.
  - d) **Economic Union:** combines the suppression of restriction on commodity and factor policies, in order to remove discrimination that was due to disparities in these policies. Positive integration is present.
  - e) **Total Economic Integration:** the unification of monetary, fiscal, social and counter cyclical policies and requires the setting up of a supranational authority whose decisions are binding for the member states.
- In practice, negative and positive integration may go together.



## 2. From a 'common' to an 'internal' market

### ***A) Communities established in the 1950's***

sectoral integration – horizontal integration

### ***B) Reaching a common market***

standstill clauses – customs union – positive measures

### ***C) Reaching an internal market***

an area without internal frontiers

## 3. Concept of harmonisation

### Art 114 TFEU

“The European Parliament and the Council shall [...] 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.***”

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- BALASSA, B.: *The Theory of Economic Integration*. Richard D. Irwin, Homewood, 1961.
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# FREE MOVEMENT OF GOODS

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### **A. Definition of the Internal Market**

### **B. Free Movement of Goods**

## A. The Definition of the Internal Market – Relevant Provisions of the Founding Treaties in Force (TEU&TFEU)



### Preamble of Treaty on European Union (=TEU)

„[...] DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and **within the context of the accomplishment of the internal market** and of reinforced cohesion and environmental protection, and to implement policies **ensuring that advances in economic integration are accompanied by parallel progress in other fields** [...]"

## Art. 3 TEU

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



## Art. 3 TEU

Art 3 TEU – as a general rule – establish the relationship between Internal Market and other policy issues:

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Art 3 TEU – as a general rule – establish the relationship between Internal Market and other policy issues:

- » Internal market & environment...
- » Internal market & social policy...
- » Internal market & economic policy...
- » Internal market & cultural policy...
- » Etc.

**→ Conflicts?**

## Art. 3 TEU

Art 3 TEU – as a general rule – establish the relationship between Internal Market and other policy issues:

- » Internal market & environment...
- » Internal market & social policy...
- » Internal market & economic policy...
- » Internal market & cultural policy...
- » Etc.

**➔ Art 3 TEU is an attempt to reconcile the possible variances**

### Art. 4 of Treaty on the Functioning of the European Union (=TFEU)

„[...] Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market [...]"

**→ *The question of competence***

### Art. 26 of TFEU

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.

**➔ Main fields of the Internal Market**

### The Four freedoms of the Single Market

- ➔ **Free movement of goods**
- ➔ Free movement of persons (right to establishment)
- ➔ Right to provide services
- ➔ Free movement of capital

## B. Free Movement of Goods



1. Establishing a Customs Union
2. Prohibition on customs duties and charges having equivalent effect
3. The prohibition on discriminatory internal taxation
4. The elimination of quantitative restrictions



### Specific Treaty provisions on free movement of goods →

1. **Articles 28-29 TFEU** establishing the framework rules of Customs Union (fundamental rules)
2. **Article 30 TFEU**: prohibition of customs duties and charges having equivalent effect
3. **Article 110 TFEU**: ban on discriminatory internal taxation
4. **Articles 34-35 and 36 TFEU**: prohibition of quantitative restrictions and the possible exceptions

# 1. Establishing a Customs Union (Articles 28-29 TFEU)



## Establishing a customs union (Articles 28-29 TFEU)

- goods from a third country shall be freely moved within the territory of MSs if the goods concerned
- a) have been passed the import formalities;
  - b) have been paid in import MS any customs duties or charges having equivalent effect;
  - c) must not have benefited from a total or partial drawback of such duties or charges.



## The meaning of 'goods'

**'Art Treasure I.' case** (7/68 Commission v. Italy):

→ *"products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions"*.

**'Wallonia Waste' case** (C-2/90 Commission v. Belgium):

→ *Wastes must be regarded as 'goods'*

**'Gemeente Almelo' Case** (C-393/92 Gemeente Almelo and others v. Energiebedrijf IJsselmij):

→ *electricity*

## The application of the free movement of goods provisions

- movement of goods **from a MS** to be sold **in another MS**
- goods in **transit through** one MS to be sold in another MS or outside the EC (266/81 SIOT v. Ministero delle finanze)
- **re-importation** and **parallel imports** of goods which are imported from one MS to another where they were produced or put on the market

### **2. Prohibition on customs duties and charges having equivalent effect (Articles 30 TFEU)**



## → Article 30 TFEU

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.

- » Duty? → obviously clear (incl. fiscal nat.)
- » charges having equivalent effect? →

→ **‘Art Treasury II.’ case** : Charges having equivalent effect include any pecuniary charge imposed on domestic or foreign goods **by reason of the fact** that they cross the frontier.

## → Article 30 TFEU

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.

- The article has **direct effect** ('Van Gend en Loos' Case)
- once a duty or charge has been held to come within the scope of these rules → immediately deemed to be unlawful → **there is no derogation, but:**

**'Interpretative exceptions' laid down by ECJ**



- **Charges made for an inspection** will not constitute a 'charge having equivalent effect' in so far as it can satisfy the following conditions:
- the inspection is mandatory under Community or international law (46/76 Bauhuis case)
  - **non-discriminatory** (87/75 Bresciani v. Amministrazione delle finanze dello Stato)
  - it is **in the interest of EU** and promotes the **free movement of goods**
  - the charge **does not exceed the cost of the inspection**
  - charge is **proportionate to the quantity** of the goods inspected and not their value or quality

## Free Movement of Goods

- Where a MS has levied a **charge for a service**, that charge will not be considered to be a 'charge having equivalent effect' if the following criteria can be fulfilled:
- the service rendered a **specific benefit** to the exporter and/or importer
  - the charge is **proportionate to quantity**, not value or quality, of the goods to which the service have been rendered
  - the charge does **not exceed the cost of the service provided**
  - both domestic and imported goods are treated alike (**non-discrimination**)

### → *Summary:*

- **Duties + charges** having equivalent effect are prohibited
- **No possible derogation,**
- But '**interpretative exceptions**' laid down by ECJ



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- WEISS, F – KAUPA, C: *European Union Internal Market Law*. Cambridge University Press, 2014 (ISBN: 9781107636002)
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- A single market for 21st century Europe, COM(2007) 725 final (available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0724&from=EN>)

### 3. The prohibition on discriminatory internal taxation (Article 110 TFEU)



## Free Movement of Goods

### → Article 110 TFEU

(1) 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**.

(2) 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.

- Para. (1) → **discriminative taxation**
- Para. (2) → **protective taxation**



- The core of this formulation → **'similarity'**
- **'Fink' case** (27/67 Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse) Goods coming within the same tax classification + physically similarity
- see also **'English beer' case** (170/78 Commission v. United Kingdom) → **'Wine v. Beer'**

*Cross-elasticity of demand:* as the price of the one rises in relation to the other, consumers will to some extent turn to the other with the lower price.

### → *Summary:*

- TFEU prohibits
  - *discriminative* taxation on similar products and,
  - *protective* taxation on competitive products
- **Article 110** → direct effect
- unlawfully imposed taxes **must be repaid**





## Sources & recommended literature

- WEISS, F – KAUPA, C: *European Union Internal Market Law*. Cambridge University Press, 2014 (ISBN: 9781107636002)
- MOENS, G – TRONE, J.: *Commercial Law of the European Union*. Springer, Dordrecht – Heidelberg – London – New York, 2010.

### **4. The elimination of quantitative restrictions (Articles 34-35 TFEU)**



## Free Movement of Goods

### → Article 34

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

### → Article 35

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

(→ Article 36 lays down the exceptions to Art. 34-35 we examine later)

→ ECJ's practice has significant importance in this field

## → *The meaning of quantitative restrictions*

- national measures which impose a **numerical limit** on goods of a specific type either **entering** or **leaving a domestic market**
- Often protective measures, but it is not (!) prerequisite
- not only **quotas** but also the **total** or **complete bans** on imports or exports (see '**Henn and Derby**' case 34/79 Regina v Maurice Donald Henn and John Frederick Ernest Darby)

## → *The meaning of measures having equivalent effect*

- laws, regulations, administrative provisions, administrative practices and all instruments issuing from a public authority including recommendations which have similar effect to quantitative restrictions
- **Examples given by Council's Directive 50/70:**
  - minimum or maximum prices specified for imported products;
  - less favourable prices for imported products;
  - lowering the value of the imported product by reducing its intrinsic value or increasing costs;
  - payment conditions different for imported goods;
  - conditions of packaging, composition, identification, size, weight etc;

## → *The meaning of measures having equivalent effect*

- laws, regulations, administrative provisions, administrative practices and all instruments issuing from a public authority including recommendations which have similar effect to quantitative restrictions
- **Examples given by Council's Directive 50/70:**
  - preference for the purchase of domestic goods as opposed to imports;
  - limiting publicity in respect of imported goods compared with domestic ones;
  - stocking requirements different between imported and domestic good; imposing on importers to have local agents

### → *The meaning of measures having equivalent effect - The ECJ's case law:*

- **‘Dassonville’ case** (8/74 Procureur du Roi v Benoît and Gustave Dassonville)

#### **Facts:**

- Belgium requires certificate of origin from exporting country
- Scotch Whisky – from UK/Scotland through France to Belgium
- Certificate needed from France not from UK/Scotland

## → *The meaning of measures having equivalent effect - The ECJ's case law:*

- **'Dassonville' case** (8/74 Procureur du Roi v Benoît and Gustave Dassonville)

### **ECJ's rationale:**

Measures having equivalent effect are

- All trading rules
- Directly or indirectly
- Actually or potentially
- Capable of hindering intra-community trade

← *'Dassonville formula'*

→ *Belgium laws violated ex-Article 28 TEC (=34 TFEU)*



### → *The meaning of measures having equivalent effect* - The ECJ's case law:

- **'Keck' case** (C-267-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard)

#### **Facts:**

- Keck selling French beer below cost
- Violates French law – cannot sell below cost

### → *The meaning of measures having equivalent effect - The ECJ's case law:*

- **'Keck' case** (C-267-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard)

#### **ECJ's rationale:**

- French prohibition purpose not to regulate trade, even though may restrict volume of trade → *selling arrangements*
- *Article 28 does not apply to measures which regulate "selling arrangements" → French law did not violate TEC (=34 TFEU)*

### →The ECJ distinguished in the Keck judgement between:

- 1) Rules relating to the goods themselves (its intrinsic qualities, like composition, packaging, presentation etc) which were caught by art 28 TEC (=34 TFEU)
- 2) Rules relating to **selling arrangements** (selling below cost etc) which, although they may affect the total volume of goods sold, remain outside the reach of art 28 TEC (=34 TFEU).

**→ The meaning of measures having equivalent effect - The ECJ's case law:**

***Summary:***

***The scope of Articles 34-35 TFEU after Keck:***

- The meaning of 'selling arrangements' → not defined by the ECJ
- The 'Dassonville formula' lost its importance
- Probably 'product composition' + intrinsic qualities are prohibited (→ articles 34-35)
- but 'extrinsic qualities' as 'selling arrangements' are not

## → Exceptions/derogations?

- The only internal market provision which refers to possible exceptions
  - 1) Exceptions to Articles 28-29 based on the ECJ's jurisdiction (→ '*mandatory requirements*')
    - 2) 'Legal derogation' from the provisions of Articles 28-29 provided by Article 30

### → *Exceptions based on the ECJ's case law*

**'Cassis de Dijon'** case (120/78 Rewe v. Bundesmonopolverwaltung für Branntwein)

#### **Facts:**

- Cassis de Dijon contains approx. 20% alcohol
- but the German rules have prescribed min. 25% for alcoholic beverages to be marketed as 'spirits/liqueurs' ← **protection of public health??**



### → Exceptions based on the ECJ's case law

‘**Cassis de Dijon**’ case (120/78 Rewe v. Bundesmonopolverwaltung für Branntwein)

#### ECJ's reasoning:

- Where absence of EC harmonisation, MS may take **reasonable** measures to prevent unfair trading → i.e. adopt a “***mandatory requirements***” (the effectiveness of fiscal supervision, the protection of public health etc.)



## → Principles based on 'Cassis' judgement

### **Mutual Recognition:**

There is no valid reason why, provided that goods have been lawfully produced and marketed in one MS, they should not be introduced into any other MS

### → ***If Cassis de Dijon has no hazardous effect to health in France → it must be accepted by Germany as well***

- Later confirmed in '**Nespoli and Crippa**' case (C-196/89 Criminal proceedings against Enzo Nespoli and Giuseppe Crippa);  
'**Woodworking Machines**' case (188/84 Commission v. France)





## → Principles based on 'Cassis' judgement

### **The Rule of Reason:**

Certain measures will not breach Art. 34 if they are **necessary** (proportionality) to satisfy **mandatory requirement** (objective justification) relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer → **The German measure concerning of Cassis was not necessary**

See for the later practice: '**German sausages**' case (274/87 Commission v. Germany)



## ***‘Legal derogation’ from the provisions of Articles 34-34 by Article 36***

### ***Article 36***

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.**

## *1. Exception on the ground of public morality*

- **'Henn and Darby'** (34/79 Regina v. Henn and Darby)
  - seizure of pornographic material protecting "public morality" ?
  - each Member State may determine the standards of public morality which exist within its own territory
  - But (!): MS can invoke Article 36 where **domestic goods are subject to equivalent prohibition (=non discriminatory)**

## *1. Exception on the ground of public morality*

- **‘Conegate’** (121/85 Conegate v. HM Customs & Excise)
    - seizure of ‘plastic love dolls’
    - equivalent prohibition internally in UK?
    - arbitrary discrimination? → yes.
- **Member State may not rely on Article 30 TEC (=36 TFEU) when its legislation contains no prohibition on the manufacture or marketing of the same goods in its territory**

### ***2. Exception on the ground of public policy and security***

- **‘Campus Oil’ case** (72/83 Campus Oil v. Ministry for Industry)
  - State owned oil refinery: Irish National Petroleum Company
  - Article 36 exceptions cannot be invoked to serve economic ends, but
  - “public security” rightly invocable ?
  - yes, State measure justifiable provided proportionate in nature



CAMPUS OIL



### ***3. Exception on the ground of protection of health and life of humans, animals or plants***

- **‘German Beer’** case (178/84 Commission v Germany)
  - product can only be marketed as “bier” where contents accord with requirements of German beer purity law
  - Bier cannot be restricted to German definition because consumers can be adequately protected in less disproportionate way by adequate labelling

### ***3. Exception on the ground of protection of health and life of humans, animals or plants***

- **‘German Beer’** case (178/84 Commission v Germany)
  - ECJ referred to other issues which can influence the deliberation in this matter:
    - 1) the presence of harmonising legislation
    - 2) The state of scientific knowledge



### ***4. Exception on the ground of protection of national treasures***

- **‘Art Treasure I.’ case** (7/68 Commission v. Italy):
  - ← see the elements of the case earlier
  - few cases on this ground of exceptions
  - But i.e. introduction of licence system could be generally justified.



### ***5. Exception on the ground of protection of industrial or commercial property***

- Industrial or commercial property (a.k.a. 'intellectual property')
- 'IPR' = 'IP rights'
- Complex legislative background and ECJ adjudication practice

## Sources & recommended literature

- CRAIG, P. – DE BÚRCA, G.: *EU Law: Text, Cases and Materials. Fifth Edition*. Oxford University Press, Oxford – New York, 2011.
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# COMMON COMMERCIAL POLICY

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- 1. Introduction**
- 2. The cornerstones of CCP: Articles 206-207 TFEU**
- 3. The effect of CCP on national commercial laws**
- 4. The system of measures under CCP regulations**
- 5. Trade Defence Instruments**

- **1. Introduction**

## *The EU's position in the world trade*

- EU members are 7% (490mill.) of world population  
➔ but provide about 20% of global import and export.
- EU is the worlds largest exporter (16,2%), and largest importer of goods (17,2%);
- EU is the first trader of commercial services (imports 24,2% and 26,3% exports).

## *The context of CCP with the internal market rules*

### →Article 20 TFEU

(1) The Community shall be based upon 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.

### *Context of CCP with the internal market rules*

- Customs union **ceases the autonomy** of MSs in the area of external trade relations
- Complete reform needed in this field in Hungary before acceding to EU
- In the position of the **simple executive** since 2004
- But: by having CCP, the 28 Members States can speak with one voice at an international level.



- **2. The cornerstones of CCP: Articles 206-207 TFEU**

### *Articles 206 TFEU*

"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."

## *Principles of CCP:*

- **Uniformity** (which can be derived from the uniform 'Customs Union')
- **Liberalization** of international trade (abolition of restrictions on international trade; lowering of customs barriers)
- *that all may have 'favourable effect' and cause 'harmonious development of world trade'* (← Targets of the CCP)

### ***Article 207 TFEU***

(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.

## **Measures of CCP:**

- changes in tariff rates,
- conclusion of tariff and trade agreements
- the achievement of uniformity in measures of liberalisation
- export policy
- and measures to protect trade etc.

← **non-exhaustive listing** (See Opinion No. 1/78, International Agreement on Rubber, [1979] ECR 2871)

## *Decision-making in the CCP*

### **The Commission:**

- responsible for the day to day administration of trade policy, not involving legislative acts or int. trade agreements, in consultation with the '207 Committee'; e.g. changes to tariffs, investigations in anti-dumping;
- represents EU in WTO;
- negotiator of international trade agreements;
- starts dispute settlement procedures under international trade agreements.

## *Decision-making in the CCP*

### **The Council and EP:**

- adopt jointly regulations in accordance with ordinary legislative procedure for taking the measures to implement CCP (e.g. Regulation on the common rules for import, regulations laying down anti-dumping measures and anti-subsidy)

### **The Council:**

- concludes international agreements

- **3. The effect of CCP on national commercial laws**



### ***Remaining competences of Member States?***

- ‘exclusive competence’ character of CCP  
→ ***Only the EU can act/lay  
down rules***
- ← ‘price’ of the Accession to the Customs Union and the single market which has many positive effects too
- ***But:*** Member States retain some implementing/regulatory powers within narrow compass

## *Remaining competences of Member States:*

- Competence to take **transposition measures**
- **Parallel competences**
- Special measures **outside the CCP**
- Special measures **approved by EC** (see the case of Hungary concerning the bilateral Trade and Shipping Agreement concluded in 1871 with Argentina)
- **'Actio pro communitate'**
- Exception under **Art 253 TFEU** (import and export of arms etc.)
- Exception under **Art 254 TFEU** (e.g. in the case of heavy public disturbances)
- **Common Market rules** with effect on CCP

### ***The obligations of the Member States:***

Apart from certain 'remaining competences', the MSs have to

- **ensure the compatibility** its legal order with the CCP; moreover
- **implement;**
- **apply** all the rules arising from CCP.

**→ From Hungarian point of view:**

- Relating to our accession, national foreign trade administration had to be transformed to be appropriate for the **efficient implementation** of Community law instruments of CCP

**→ function alteration**

### ***The accomplishment of the function alteration in Hungary:***

- A) Change of **legal ground** for foreign trade law in Hungary
- B) Harmonising the **trade-related international law obligations**
- C) **Modifications of the procedural background** of foreign trade law

### ***A) Change of legal ground for foreign trade law in Hungary***

- *Hungarian Act III of 1974 on Foreign Trade* had to be repealed
- *Hungarian Act XXIX of 2004 on the Accepted Amendments concerning the Accession:*
  - ➔ “the export and import of goods, services and rights representing material value and the transference of them through the Hungarian Republic can be restricted only in accordance with an international treaty”

## ***B) Harmonising the trade-related international law obligations***

- **Multilateral agreements** ('double-membership' in WTO etc.)
- **Bilateral agreements**
  - ➔ e.g. CEFTA had to be denounced
  - ➔ but our membership in the EU resulted in the accession of Hungary to several bilateral trade agreements (e.g. association agreement with the Republic of Turkey)

### ***C) Modifications of the procedural background of foreign trade law***

- new Customs Implementation Act
- Reorganisation of **Customs and Excise Guard**
- Establishment of the **Hungarian Commercial Licensing Authority**

- **4. The system of measures under CCP regulations**



### ***Main regulatory fields of CCP:***

- (a) Single import system
- (b) Single export system
- (c) International trade agreements

### ***a) Single import system:***

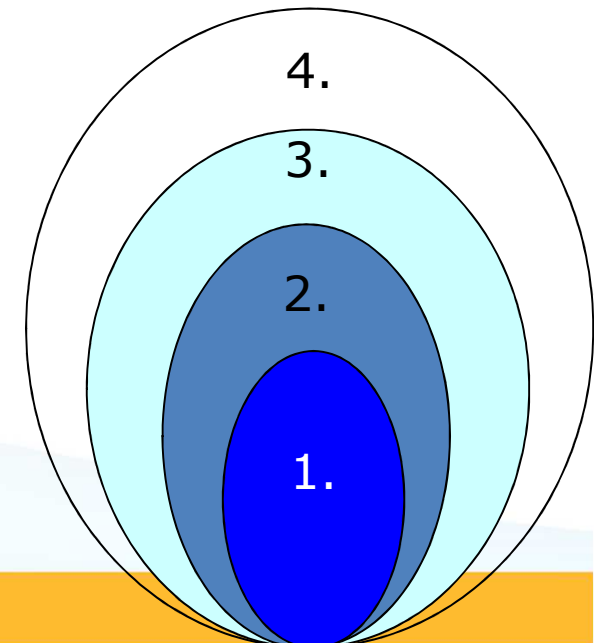
- ➔ the role of the international framework (GATT-WTO etc.)
- Community Customs Code (CCC)
- Common Customs Tariffs (CCT)
- autonomous protective measures of the EU against import causing damages (e.g. safeguard measures)
- against unfair trade practices (e.g. anti-dumping)

### ***b) Single export system:***

- ➔ significantly less regulations on export system than on e.g. the import regime
- export subvention (only limited applicability ➔ prohibited to apply on goods according to the GATT-WTO export regime)
- export restriction (e.g. regulation on the dual use products)

### *c) International trade agreements*

- → ‘concentric circles theory’
  1. **European Economic Area**
  2. **European Agreements**
  3. **Development association**  
(Cotonou Agreement etc.)
  4. Diverse forms of **trade and co-operation agreements**  
with countries in the Americas, Asia, Far-East etc.



- **5. Trade Defence Instruments**

- ➔ Single import system ➔ measures against unfair trade practices

## ***Main objectives of TDIs***

- Complementing the WTO Rules
- Protecting EU industry
- Protecting Consumers' interest
- Protecting Trade

## *Standard TDIs*

- Anti-dumping measures (AD)
- Anti-subsidy measures (AS)
- Safeguard measures
- Measures according to Trade Barriers Regulation (TBR)

## *Anti-dumping measures (AD)*

- In line with the **commonly used definition**, Dumping is often seen to relate to any cheap or below-cost imports (See differences with regard to Keck-case)
- But: its **legal definition** has a narrow-sense meaning laid down by the WTO law (GATT VI) and EU regulation
- ➔ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union



## ***Anti-dumping measures (AD)***

- The AD Regulation provides for the imposition of **anti-dumping duties** only when the following conditions are met:
  - **A) Finding of dumping:** the export price at which the product is sold on the EU market is shown to be lower than the price on the producer's home market
    - ➔ Dumping is the sale of a product for export at less than its normal value

**Dumping ➔ Sale price < Normal Value**

← normal value: profitable domestic sale prices OR cost of manufacture plus a small allowance for selling, general and administrative costs and profit margin, in the market where it is produced

## ***Anti-dumping measures (AD)***

- The AD Regulation provides for the imposition of **anti-dumping duties** only when the following conditions are met:
  - **B) Material injury to EU industry:** the imports have caused or threaten to cause damage to a substantial part of the industry within the EU, such as loss of market share, reduced prices for producers and resulting pressure on production, sales, profits, productivity etc.;
  - **C) Causality between dumping and injury**
  - **D) Interests of the EU:** the costs for the EU of taking measures must not be disproportionate to the benefits.

## *Anti-subsidy measures (AS)*

- AS measures only concerns imports from outside the European Union
- WTO rules determine the categories of unlawful subsidising practice (GATT VI and XVI)
- EU AS regulation provides for imposition of **countervailing duties** on goods which have been subsidised by the governments of non-EU countries and whose import into the EU causes or threatens injury to EU producers of the same product.
- ➔ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union

## ***Anti-subsidy measures (AS)***

- Similarly to AD procedure, 4 conditions must be met before countervailing duties can be imposed:
  - **A) Finding of the specificity of subsidy** (=subsidy must be specific in sense of the WTO rules): i.e. it must be an export subsidy, or a subsidy limited to a company, an industry or a group of companies or industries;
  - **B) Material injury to EU industry**: the import sales have caused or threaten to cause damage to a substantial part of the industry within the EU, such as loss of market share, reduced prices for producers and resulting pressure on production, sales, profits, productivity etc.;
  - **C) Causality between dumping and injury**
  - **D) Interests of the EU**: the costs for the EU of taking measures must not be disproportionate to the benefits.

## *Safeguard measures*

- ➔ GATT XIX and WTO Agreement on Safeguards
- ➔ Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (Common Import Regime)
- Free importation is the general rule (in accordance with the WTO's main principle of liberalisation)
- But: there are three general exceptions to this principle

- **A) General safeguard measures:**
  - That may be applied to imports that increase in such quantities and are made under such conditions as to cause or threaten to cause serious injury to the EU industry, provided there is a EU interest to do so
  - At the request of a MS or at the Commission's own initiative, an investigation may be initiated on the basis of which measures may be applied on a case-by-case basis
  - ➔ Industry may not directly request the introduction of these measures

- ***B) Surveillance measures:***
  - not an import restrictive measure
  - ➔ but system of automatic import licensing
  - Current surveillance measures under the EU regulation (common import regime)
  - ➔ concern mainly steel products

- ***C) Specific safeguard measures:***
  - Today less importance
  - E.g.: Quotas on imports originating in the People's Republic of China
  - ➔ concerned footwear, tableware and ceramics, but upon China's WTO accession the progressive removal of these quantitative restrictions by year 2005 was agreed



## ***Trade Barriers Regulation (TBR)***

- ← previous measures defensive (and mostly protective) instruments
- → It has become necessary to create trade policy instruments aimed not only at protecting the EU market but also at **opening third country markets**.
- → TBR offensive measure
- → an instrument of commercial offence to open third country markets by eliminating obstacles to trade for the benefit of EU exporters
- Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

## *Trade Barriers Regulation (TBR)*

- TBR gives the right to EU industries to lodge a complaint
- ➔ Commission initiates to investigate and evaluate whether there is evidence of violation of international trade rules resulting in adverse trade effects.
- The result is that the procedure will lead to either a **mutually agreed solution** to the problem or to resort to **dispute settlement**.
- Broad scope of TBR: applies not only to goods but also to some extent to services and intellectual property rights (when the violation of rules concerning these rights has an impact on trade between the EU and a third country).

## ***Trade Barriers Regulation (TBR)***

- Wide range of obstacles to trade or trade barriers is covered by the TBR:
- ➔ "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action."
- In this context **international trade rules** ➔
  - primarily those established under the auspices of the WTO and laid down in the Annexes of the WTO Agreement.
  - However this definition also covers other international agreements and bilateral agreements between the EU and a third country.

## *Specific instruments*

- Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against **subsidisation and unfair pricing practices causing injury to Community air carriers** in the supply of air services from countries not members of the European Community
- Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on **trade in seal products**
- Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the **international trade in rough diamonds**
- Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the **WTO Dispute Settlement Body** concerning anti-dumping and anti-subsidy matters

### ***Figures about EU use of trade defence instruments (as of 30/06/2017)***

- 94 provisional and definitive AD measures and
- 13 provisional and definitive AS in force
- 36 investigations (including reopenings and cases where provisional measures were imposed) were on-going
- ← 16 new investigations were initiated (AD+AS+Safeguard)
- 8 definitive measures were imposed (of which 1 anti-subsidy), involving imports from 4 countries and covering 6 products (E.g.: stainless steel tube and pipe butt-welding fittings; heavy plate; hot-rolled flat products of iron; lightweight thermal paper; concrete reinforcement bars etc.)
- No definitive safeguard measures were imposed

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# FREE MOVEMENT OF WORKERS

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- The measures on the free movement of workers affects the individuals probably in the most direct way.
- This lecture provides with an overview how this system is structured, broadening the scope of it from the economically active to the economically inactive persons.



## FREE MOVEMENT OF PERSONS



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graph TD; A[FREE MOVEMENT OF PERSONS] --> B[Free movement of workers]; A --> C[Freedom of establishment];
```

Free movement of workers

Freedom of establishment

## A) Definition of **workers**:

- the essential feature of an employment relationship, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (Case 66/85 Lawrie-Blum).

## B) Key provisions

Art 45 TFEU:

- 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

## B) Key provisions

- it shall ***entail the right***:
  - to accept offers of employment actually made,
  - to move freely within the territory of Member States for this purpose,
  - to stay in a Member State for the purpose of employment in accordance with the provisions of that,
  - to remain in the territory of a Member State after having been employed in that State.

## B) Key provisions

### C) Limitations of the free movement of workers:

- ***justified*** on grounds of
  - public policy,
  - public security,
  - or public health,
  - national provisions of employment in the public service (Art 45 TFEU).

## D) Directive 2004/38/EC

**D) 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:

- a) Right to move and right of residence for **up to three months****
  - all Union citizens have the right to enter another Member State by virtue of having an identity card or valid passport.

### b) Right of residence for **more than three months**

- either be engaged in economic activity (on an employed or self-employed basis);
- or have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay.

## D) Directive 2004/38/EC

### c) Right of **permanent residence**

- Union citizens acquire the right of permanent residence in the host Member State after a five-year period of uninterrupted legal residence, provided that an expulsion decision has not been enforced against them.



## D) Directive 2004/38/EC

- d) Restrictions** on the right of entry and the right of residence
- Union citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health.

### **E) Regulation (EU) No 492/2011** on freedom of movement for workers within the Union:

#### **a) Fundamental measures**

- any person from a EU Member State has the right to take up gainful employment on the territory of another Member State;
- no national legislation may limit offers of, access to, and pursuance of employment by European citizens from other Member States, except if related to the linguistic knowledge required by reason of the nature of the post.

### **b) Exercising an occupation and equal treatment**

- the Regulation prohibits any discrimination between domestic workers and those from another Member State, concerning:
  - working and employment conditions (e.g. remuneration);
  - social and tax advantages;
  - vocational education and retraining;
  - collective or individual agreements;
  - membership to trade unions and the exercise of rights attaching thereto.

### c) Workers' families

- the children of a European worker who is or has been employed in another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State.

### 3. Rights of the Union citizens

Art 20 TFEU:

- a) the right to **move and reside freely** within the territory of the Member States;
- b) the right to **vote** and to **stand as candidates** in elections to the European Parliament and in municipal elections in other Member State;
- c) the **protection** of the **diplomatic** and **consular** authorities of any Member State in third countries;
- 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.

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# FREEDOM OF ESTABLISHMENT COMPANY LAW

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The lecture on company law consists of two main parts:

- How free movement provisions affected companies established under national law
- Reflecting the more interconnected national economies, EU introduced its own types of companies



## Art 49 TFEU

### Freedom of establishment includes:

- the right to take up and pursue activities as **self-employed persons** and
- to set up and manage **undertakings**, in particular **companies** or **firms**

## Art 54 TFEU

- Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be **treated in the same way as natural persons** who are nationals of Member States.
- “**Companies or firms**” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

## 1. Companies established under national law

### Case 81/87 **Daily Mail**

- Union law confer ***no right*** on a company ***to transfer its central management*** and control to another Member State

### Case C-212/97 **Centros**

- forming a company for the purpose of ***avoiding minimum amount of share capital*** is ***covered*** by freedom of establishment

## 1. Companies established under national law

### Case C-208/00 **Überseering**

- where a company exercises its freedom of establishment in another Member State, that **Member State** is **required** to **to recognise the legal capacity**

### Case C-210/06 **Cartesio**

- Member State of incorporation can **prevent** a company from **transferring its seat** to another Member State

## 2. EU types of business entities

### 2. EU types of business entities

#### A) European Economic Interest Grouping (EEIG)

- the purpose of the grouping is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills
- an EEIG cannot employ more than **500 persons**
- an EEIG must have at least two **members from different Member States**

#### B) European Company – *Societas Europaea* (SE)

- there is provision for **four ways of forming** a European Company: merger, formation of a holding company, formation of a joint subsidiary, or conversion of a public limited company previously formed under national law
- the SE must have a **minimum capital of EUR 120 000**

## 2. EU types of business entities

### C) European Cooperative Society – *Societas Cooperativa Europaea* (SCE)

- it contributes to the development of the **cross-border activities** of cooperative societies
- the founder members shall draw up the statutes of the SCE **in accordance** with the provisions for the formation of **national cooperative societies**

### D) European Grouping on Territorial Cooperation (EGTC)

- an EGTC is **made up** of Member States, regional authorities, local authorities and/or bodies governed by public law, as the case may be
- an EGTC may be entrusted with implementing **programmes** co-financed by the Union or any other cross-border cooperation project with or without Union funding

# Sources and recommended literature

- KACZOROWSKA, A.: *European Union Law*. Routledge-Cavendish, London – New York, 2008.
- MOENS, G. – TRONE, J.: *Commercial Law of the European Union*. Springer, Dordrecht – Heidelberg – London – New York, 2010.



# FREE MOVEMENT OF CAPITAL

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This lecture deals with the free movement of capital measures; how they function and what are their relation to other free movement provisions, particularly, to the free movement of goods. The following points will be examined:

- Key provisions
- Liberalisation of capital movements
- Exceptions to the free movement of capital



- all restrictions on the **movement of capital** between Member States and between Member States and third countries shall be prohibited;
- all restrictions on **payments** between Member States and between Member States and third countries shall be prohibited (Art 63 TFEU).

## Case 7/78 **Regina v Thompson:**

- under the system of the Treaty, means of payment are ***not to be regarded as goods***;
- silver alloy coins which are legal tender in a Member State are, by their very nature, to be regarded ***as means of payment*** and it follows that their transfer (***monetary transfer***) does not fall within the provisions on the free movement of goods.

Cases 286/82 and 26/83 **Luisi and Carbone:**

- the physical transfer of bank notes may **not** therefore be classified as a **movement of capital**, where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of **goods or services**;
- payments for the purposes of business, education or medical treatment **cannot be classified as movements of capital**, even where they are effected by means of the physical transfer of bank notes.

## 2. Directive 88/361/EEC

### Liberalisation of capital movements – Directive 88/361/EEC

- the Directive is based on the principle of ***full liberalisation of capital movements***;
- “***capital movements***” are understood to be all the operations necessary for the purposes of capital movements;
- this includes direct investments, investments in real estate, operations in securities and in current and deposit accounts, and financial loans and credits;
- “***safeguard clause***”: the Commission may authorise that Member State to take ***protective measures***; the protective measures relate to the capital movements, and shall not exceed six months.

### Exceptions to the free movement of capital:

- the Member States maintain the right:
  - 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;
  - 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 financial institutions, etc. (Art 65 TFEU).

## Case C-54/99 **Scientology**:

- in France, prior authorisation is required for every direct foreign investment which is 'such as to represent a **threat to public policy [and] public security**', **without any more detailed definition**. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required;
- such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 63 TFEU. That being so, this system is **contrary to the principle of legal certainty**.

## 4. Directive 2006/123/EC

- Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
- Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Union

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# FREE MOVEMENT OF SERVICES

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# Right of Establishment and Services – Delimitations

## 1. Distinction between the two freedoms

### ***C-215/01 Schnitzer →***

(1) The ECJ held that the requirement for entry on the trades register of the host MS must neither delay nor complicate exercise of the rights of persons established in another MS (entry should be automatic without administrative expense etc.)

(2) The fact that a service was provided over several years did not necessarily, and certainly not on its own, mean that an undertaking was established in another MS.

## Right of Establishment and Services – Delimitations

### 1. Distinction between the two freedoms

#### ***C-109/92 Wirth →***

The Court held that a teaching or enrolment fee, which pupils or their parent must sometimes pay under a national education system, does not constitute remuneration if the system is essentially **financed out of public funds**.

## 2. Beneficiaries the two freedoms

### a) Natural persons

#### **292/86 Gullung →**

- A lawyer, who was a holder of both French and German nationality, was allowed to rely on his German nationality in France and thereby rely on EC law, whereas he could not have done this as a French national in France.
- If a national of a Member State has double nationality, the nationality most favourable to the exercise of his/her right of establishment/provision of services will be taken into account.

# Right of Establishment and Services – Delimitations

## 2. Beneficiaries the two freedoms

### **b) Legal persons → Art. 54 TFEU (ex 48)**

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

# Right of Establishment and Services – Delimitations

## 2. Beneficiaries the two freedoms

### b) Legal persons

#### **C-172/98 Commission v Belgium →**

•The Commission challenged Belgian laws, one requiring a minimum of one Belgian national to be involved in the administration of a non-profit-making association and the other requiring three-fifths of the members of a non-profit-making association to be of Belgian nationality, in order for the legal personality of an association to be recognised.

## Right of Establishment and Services – Delimitations

### 2. Beneficiaries the two freedoms

#### b) Legal persons

#### **C-172/98 Commission v Belgium →**

- *The Commission argued that the Belgian laws were in breach of Article 12 EC because nationals of other Member States were among the persons to whom the Belgian laws applied.*
- The ECJ held that Belgium was in breach of Article 12 EC and confirmed that nonprofit-making associations are within the scope of Community law.

## Right of Establishment and Services – Delimitations

### 3. Discrimination and reverse discrimination

#### **136/78 Auer I. →**

• M Auer, a national of Austria, obtained a diploma as a veterinary surgeon in Italy. Subsequently, he moved to France where he acquired French nationality. In France when he applied to the professional body for veterinary surgeons to be allowed to practise in France, his application was refused. At that time the implementation period for Directive 78/1026/ EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine had not expired.



### 3. Discrimination and reverse discrimination

#### **136/78 Auer I. →**

•As a result, on the grounds of Article 43 EC his qualification was not recognised in France. However, once the transitional period for the Directive expired, Mr Auer reapplied. The French court refused to recognise his qualification, considering it as “inconceivable” that Mr Auer, a French national by naturalisation, should be treated more favourably than French nationals by birth who were holders of French diplomas.

## 3. Discrimination and reverse discrimination

### **136/78 Auer I. →**

- The ECJ held that although the Directive was not implemented into French law, once the transitional period had expired Mr Auer was entitled to rely on the unimplemented Directive, taking into account that the terms of the Directive were clear, precise, and unconditional.

## Exceptions and justification of national restrictions

- a) Accession Treaty
- b) Free movement of persons provisions
- c) Exercise of official authority
- d) CJEU case law: general interest, e.g.:
  - Protection of the reputation of national markets
  - The requirements of the rules of professional conduct and the good administration of justice
  - The protection of consumers, holders of intellectual property rights, the environment, a particular language or culture etc.

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# SERVICES DIRECTIVE – MUTUAL RECOGNITION OF DIPLOMAS AND QUALIFICATIONS

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- Importance: services constitute around 70 % of the EU's GDP (see previous lecture)
- But several barriers:
  - requirements regarding local residence of management,
  - special licenses, requirements for additional diplomas,
  - local professional insurance,
  - constraints on the use of home country inputs,
  - the necessity to fully apply all local labor laws (even for temporary services) etc.

- Bolkenstein proposal: the objective of the proposal “is to provide a legal framework that will eliminate the obstacles to the freedom of establishment for service providers and the free movement of services between the Members
- Two specific types of obstacles to trade in services have been identified:
  - “when a service provider from one EU country wishes to establish himself in another EU state in order to provide his services”
  - “when a service provider wishes to provide a service from his Member State of origin into another Member State, particularly by moving to the other Member State on a temporary basis.

- ➔ achieving genuine internal market, in order to that, ther main regulatory aspects:
- *Right of establishment*: the proposal called for administrative simplification measures, particularly involving the establishment of "single points of contact,,
- *Free movement of services*: the proposal called for country of origin (CoO) principle with certain derogations. According to this principle a service provider is subject only to the regulations of the country of origin
- *Consumer protection*



- Adopted in 2006
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market
- in force since 27th December 2006
- Implementation period: until 31th December 2009
- Free movement of services: “the right of providers to provide services in a Member State other than that in which they are established”.
- services providers are subject to regulations and requirements of the country of destination and not of origin.

- If access to provision of services is subject to compliance with any requirements it should respect the principles of
  - non-discrimination,
  - necessity (the requirement must be justified for reasons of public policy, public security)
  - proportionality (the requirement must be suitable for attaining the objective pursued).
- Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact:

- (a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;
- (b) any applications for authorisation needed to exercise his service activities.

- Excluded sectors:
  - electronic communication services (being covered by other directives),
  - transport services, including urban transport, taxis and ambulances as well as port services,
  - financial services (such as banking, credit, insurance and re-insurance, etc.),
  - audiovisual services,
  - gambling activities (including lottery and betting transactions)
  - social services in the areas of housing, childcare and support to families;
  - taxation matters, those activities that are connected with the exercise of an official authority in a member state (including notaries) and
  - public and private healthcare services provided by health professionals to patients, including pharmaceutical services.

# Mutual recognition of diplomas and qualifications



## Mutual recognition of diplomas and qualifications

- The main limitations on the exercise of the right of establishment/ the right to provide services
- Article 53 TFEU: empowers the Parliament and the Council to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of national provisions concerning the taking up and pursuit of activities as self-employed persons

## Mutual recognition of diplomas and qualifications

- Directive 2005/36/EC on the recognition of professional qualifications (last amended by Commission Implementing Regulation (EU) 2015/983)
- It does not apply to matters covered by specific directives e.g. Directive 2006/43/EC on statutory auditors
- Covers also the recognition of a lawyer's qualifications, but:
  - Directive 98/5/EC → right of establishment of lawyers
  - Directive 77/249/EEC → services provided by lawyers

## Mutual recognition of diplomas and qualifications

- Directive 2005/36/EC
  - ➔ applying to all nationals of a MS pursuing a regulated profession in a Member State other than that in which they obtained their professional qualifications
  - Territorial scope: EU + European Economic Area (EEA) countries and Switzerland (under certain conditions)
- introduced a mutual evaluation of national professional regulations and a transparency exercise:
  - screening the entry restrictions to professions
  - analysing their necessity.



## Mutual recognition of diplomas and qualifications

- Temporary mobility:
  - this scheme allows professionals to work in another EU country on the basis of a declaration made in advance
- Establishment in another EU country: the directive lays down rules for professionals who want to establish themselves as
  - an employed or self-employed person;
  - on a permanent basis;
  - in a country where they didn't obtain their professional qualification.

## Systems of recognition of qualifications

- *Automatic recognition* → for professions with harmonised minimum training conditions (i.e. nurses, midwives, doctors (general practitioners and specialists), dental practitioners, pharmacists, architects and veterinary surgeons);
- *General system* → for other regulated professions such as teachers, translators and real estate agents;
- *Recognition on the basis of professional experience* → for certain professional activities such as carpenters, upholsterers, beauticians etc.

# Mutual recognition of diplomas and qualifications

## Automatic recognition

- professionals must apply to the authority that oversees the profession in that country, providing proof of their qualifications.
- The authority:
  - acknowledges your application within 1 month of receiving (and asks you for missing but necessary documents)
  - assesses your qualifications, and decide whether to grant your application within 3 months
- Right to appeal to the court in the respective country.

# Mutual recognition of diplomas and qualifications

## General system

- The host country recognises qualifications:
  - when the worker's level of professional qualification is at least equivalent to the level immediately below (very close to) the level required in the host country
  - to workers whose profession is not regulated in the country of origin but who have worked full-time in that profession for two years
- But host country also may impose measures such as an adaptation period of up to three years or an aptitude test under certain conditions

## **Recognition on the basis of professional experience**

- Professionals working in the craft, commerce or industry sectors
- ➔ automatic recognition, or
- ➔ mutual recognition
- authorities of the host country find significant differences between the training acquired in the country of origin (including professional experience) ➔ requiring to complete a traineeship or aptitude test

## European professional card (EPC)

- amendment of the Directive 2013/55/EU (applicable from 18 January 2016)
- allows interested citizens to obtain recognition of their qualifications more simply and rapidly through a standardised electronic procedure
- based on the use of the internal market information system (IMI)
- → electronic certificate
- implemented in the first wave for nurses responsible for general care, physiotherapists, pharmacists, mountain guides and real estate agents.

## Database of regulated professions

- it provides information on regulated professions in all EU countries, EEA countries and Switzerland
- Statistics on professionals moving abroad, on temporary mobility etc.
- Interactive map.
- Available at: <http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=homepage>

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# SERVICES DIRECTIVE – MUTUAL RECOGNITION OF DIPLOMAS AND QUALIFICATIONS

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## Art 49 TFEU

### Freedom of establishment includes:

- the right to take up and pursue activities as **self-employed persons** and
- to set up and manage **undertakings**, in particular **companies** or **firms**

## Art 54 TFEU

- Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be **treated in the same way as natural persons** who are nationals of Member States.
- “**Companies or firms**” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

## 1. Companies established under national law

### Case 81/87 **Daily Mail**

- Union law confer ***no right*** on a company ***to transfer its central management*** and control to another Member State

### Case C-212/97 **Centros**

- forming a company for the purpose of ***avoiding minimum amount of share capital*** is ***covered*** by freedom of establishment

### Case C-208/00 **Überseering**

- where a company exercises its freedom of establishment in another Member State, that **Member State is required to to recognise the legal capacity**

### Case C-210/06 **Cartesio**

- Member State of incorporation can **prevent** a company from **transferring its seat** to another Member State

## 2. EU types of business entities

### 2. EU types of business entities

#### A) European Economic Interest Grouping (EEIG)

- the purpose of the grouping is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills
- an EEIG cannot employ more than **500 persons**
- an EEIG must have at least two **members from different Member States**

#### B) European Company – *Societas Europaea* (SE)

- there is provision for **four ways of forming** a European Company: merger, formation of a holding company, formation of a joint subsidiary, or conversion of a public limited company previously formed under national law
- the SE must have a **minimum capital of EUR 120 000**

## 2. EU types of business entities

### C) European Cooperative Society – *Societas Cooperativa Europaea* (SCE)

- it contributes to the development of the **cross-border activities** of cooperative societies
- the founder members shall draw up the statutes of the SCE **in accordance** with the provisions for the formation of **national cooperative societies**

### D) European Grouping on Territorial Cooperation (EGTC)

- an EGTC is **made up** of Member States, regional authorities, local authorities and/or bodies governed by public law, as the case may be
- an EGTC may be entrusted with implementing **programmes** co-financed by the Union or any other cross-border cooperation project with or without Union funding

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# EU COMPANY LAW

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With the establishment of the internal market, national competition laws needed to be amended. The aims of the EU's competition law are:

- maintaining the open and unified internal market
- economic efficiency in the marketplace
- protection of consumers and smaller firms

These can be realized with provisions applying to undertakings and to the Member States.

## ***1. Applicable to undertakings***

- A) Prohibition of cartels
- B) Prohibition of abuse of a dominant position
- C) Merger control

## ***2. Applicable to Member States***

- A) Public undertakings (+ undertakings with special rights)
- B) State aids

## 1. Competition law provisions applying to undertakings

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### A) Prohibition of cartels – Art 101 TFEU

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

## 1. Competition law provisions applying to undertakings

### **Exceptions – 2 positives, 2 negatives**

- a) contributes to promoting technical or economic progress,
- b) allows consumers a fair share of the resulting benefit
- c) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- d) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

### **Exemptions – by Commission legislation**

# 1. Competition law provisions applying to undertakings

## B) Prohibition of abuse of a dominant position – Art 102 TFEU

- 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.

*E.g.:*

- imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets to the prejudice of consumers.

## 1. Competition law provisions applying to undertakings

### C) Control of proposed mergers

- to avoid the negative impacts of particular companies' mergers on the internal market, the European Commission previously controls them according to Regulation (EC) No 139/2004;
- concentrations which meet the turnover thresholds of the Merger Regulation (different sums from EUR 25 million to 5 billion), must be **notified** to the Commission within a week of the conclusion of the agreement;
- such concentrations may not be implemented before the Commission takes a **clearance decision**

## 2. Competition law provisions applying to Member States

### A) Public undertakings and undertakings of special or exclusive rights

- **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
- 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, of the particular tasks assigned to them

## 2. Competition law provisions applying to Member States

### B) Aids granted by States

- 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.
- Certain aids **shall be compatible** with the internal market – **by virtue of law** (e.g. aid having a social character)
- Certain aids **may be compatible** with the internal market – **the Commission decides on it** (e.g. aid to facilitate the development of certain economic areas)



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# EU INTELLECTUAL PROPERTY LAW

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- The lecture examines how the unified internal market has affected national intellectual property regimes, and which are the EU's legal responses to these challenges.

- Industrial rights
  - patent
  - utility model protection/utility patent
  - plant variety protection
  - protection of /industrial/ design
  - topography protection of semiconductors
  - trademark
  - geographical indication protection
- Copyright
  - authors' right
  - related/ neighbouring rights

## 1. Intellectual property rights and the free movement of goods

- one of the exceptions to the prohibition of quantitative restrictions and measures having equivalent effect is the **protection of industrial and commercial property** (Art 36 TFEU)
- but the exercise of industrial and commercial property is restricted by the doctrine of **exhausting of rights**

### Case 78/70 **Deutsche Grammophon**

- the exclusive right is **exhausted** when the objects reproduced are marketed abroad by the holder of the right or by a third party under a licence which is also valid for the national territory

### Case 15/74 **Centrafarm**

- the patentee has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into **circulation for the first time**

## 2. Intellectual property rights and competition law

- agreement between the owner of that industrial and commercial property and the manufacturer might be incompatible with Art 101 TFEU;
- that kind of agreements cannot depend on various national laws, since it would jeopardize the uniformity of EU law.

### Case 56 and 58/64 **Consten and Grundig**:

- the Court differs between the **existence** of the absolute territorial protection and the **exercise** of national industrial property rights;
- according to Art 345 TFEU The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership;
- but Treaty provisions do not exclude any **influence** of Union law **on the exercise** of national industrial property rights



## 2. Intellectual property rights and competition law

### **Exemptions from the application of Art 101 TFEU by the Commission – e.g.:**

- Regulation (EC) No 772/2004 on the application of Article 81 (3) of the Treaty (now Art 101 (3) TFEU) to categories of technology transfer agreements;
- Regulation (EC) No 2659/2000 on the application of Article 81 (3) (now Art 101 (3) TFEU) of the Treaty to categories of research and development agreements.

### 3. Harmonisation of intellectual property rights

#### A) Trade mark

- harmonisation of ***national trade mark rules***: sign of which a trade mark may consist, grounds for refusal of a trade mark, etc.
- ***Community trade mark***

#### B) Copyright

- only certain aspects of copyright protection have been harmonised, for example, the terms of copyright, the protection of computer programmes, etc.

#### C) Design rights

- harmonisation of ***national design rules***: condition and term of protection, restriction of rights, etc.
- ***Community design***

#### D) Enforcement of intellectual property rights

# Sources and recommended literature

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# WRITING AND CONCLUDING CONTRACTS – INTRODUCTION TO COMMERCIAL NEGOTIATIONS

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1. Terminology and structure
2. Main/optional terms and elements
3. Negotiating a sales contract

## 1. Terminology and structure



## Preliminary question: Agreement vs Contract?

	Agreement	Contract
<b>Definition</b>	An arrangement (usually informal) between two or more parties that is not enforceable by law.	A formal arrangement between two or more party that, by its terms and elements, is enforceable by law.
<b>Validity based on</b>	Mutual acceptance by both (or all) parties involved.	Mutual acceptance by both (or all) parties involved.
<b>Written form</b>	No.	No, except for some specific kinds of contracts, such as those involving land or which cannot be completed within one year.
<b>Legal effect</b>	An agreement that lacks any of the required elements of a contract has no legal effect.	A contract is legally binding and its terms may be enforceable in a court of law.

## Special Terminology and Formulation

- Using of formal, legal English
- Plain, concise and short formulation
  - “Parties agree to ..... “
- Mostly active wording:
  - „This provision applies if...”
- Passive formulation as exception:
  - “Agreement, made by and between Party-1 and Party-2”



## Special Terminology and Formulation

- Using of „shall” and „may”
  - “Party-1 shall invoice Party-2 the overall flat fee”
  - “This Agreement may be terminated at any time”
- Use of abbreviation
- Concrete/specific words instead of abstract/general description
- Generally, third person singular and present tense (“The Buyer agrees to pay the fee/price”)

## Special Terminology and Formulation

- There is a trend in legal writing: the gender neutral formulation
  - Avoiding gender-based pronouns (repeating the noun, alternating he and she, passive voice etc.)
  - Using of gender neutral terms (when convenient, eg. Chairperson etc.)

## Special terms/formulations commonly used in contracts

- |                                    |   |
|------------------------------------|---|
| → <b>To annex</b> = To attach      | → <b>To possess</b> = to have             |
| → <b>At a later date</b> = later   | → <b>Subsequent to</b> = after            |
| → <b>At the present time</b> = now | → <b>Sufficient number of</b><br>= enough |
| → <b>By reason of</b> = because    | → <b>Until such time as</b> = until       |
| → <b>To cease</b> = to end         | → <b>To utilize</b> = to use              |
| → <b>To commence</b> = to begin    | → <b>Vice versa</b> = conversely          |
| → <b>To donate</b> = to give       | → <b>Whereof</b> = of which               |
| → <b>Pari passu</b> = equally      | → <b>Whereby</b> = by which               |
| → <b>Per annum</b> = a year        |   |
| → <b>Portion</b> = part            |   |

## Structure

**Preamble, opening section**

- 1. The specification of the Products (Deliverables)**
- 2. Ownership, Title and Risk of Loss (force majeure)**
- 3. Fee (Services/Products)**
- 4. Payment Schedule**
- 5. Warranty Length**
- 6. Limitation of Liability (Consequential Damages)**
- 7. Hard Cap Clause**
- 8. Term**
- 9. Termination for Convenience**
- 10. Assignment**
- 11. Governing Law, Forum, Venue or Jurisdiction**

### **2. Main/optional terms and elements**

### **3. Negotiating a sales contract**



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<http://www.freecontracts.org/>



# THANK YOU FOR YOUR ATTENTION

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