

# EU Case Law Outline

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Note: All page references are from:

Craig, Paul, and Grainne de Burca. 2011. *EU Law: Text, Cases, and Materials* (5<sup>th</sup> ed.). New York, NY: Oxford University Press.

Further, particularly foundational cases are underlined. This is a personal subjective selection, and not one that is necessarily in accordance with the analysis provided by the above text.

### I. Direct Effect

#### *Van Gend en Loos* (1963), pg. 183

*Full reference:* Case 26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963], ECR 1.

*Summary:* Van Gend en Loos, a postal and transportation company, imported chemicals from Germany into the Netherlands, and was charged an import duty that had been raised since the entry into effect of the Treaty of Rome. Van Gend paid the tariff but then sought reimbursement in court (before the Dutch Tariefcommissie), alleging violation of Article 12 of the Treaty of Rome which prohibits new tariffs or customs on imports and exports being promulgated in addition to those already in place at the time of the Treaty of Rome's ratification. The Dutch Tariefcommissie sought a preliminary ruling from the ECJ regarding whether Article 12 of the Treaty of Rome directly applicable within member state territories, such that nationals of the states could leverage EEC law in domestic cases. The ECJ argued that based on the spirit and wording of the Treaty of Rome, EEC law was indeed directly effective in national legal orders. It argued that the Treaty of Rome constitutes "a new legal order of international law," whereby states have "limited their sovereign rights" and have agreed to establish common legal provisions that confers rights upon individuals "which become part of their legal heritage." Further, because Article 12 is a negative provision, it does not require positive legislative action on the part of the state, rendering it "ideally adapted to produce direct effects."

#### *Other Notes:*

Belgium and the Netherlands submitted written observations to the ECJ that contradicted its eventual ruling. Belgium argued that the question was one of Dutch constitutional law; the Netherlands argued that to find EEC law as directly effective would contradict the original intent of the state framers of the Treaty of Rome (p. 184).

Note that "direct effect" is similar with the principle in International law of treaties being (or not being) "self-executing" (pg. 186). Yet a self-executing Treaty provision does not necessarily confer individual rights on citizens, and thus the two concepts are not synonymous.

The requirement of EEC law provisions for them to produce direct effects, as articulated in *Van Gend*, is that they be “clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure. The subsequent development of direct effect saw the broadening and loosening of these initial conditions.” (pg. 186).

The ECJ has elsewhere interpreted Article 189 of the Treaty of Rome, which provides that a regulation “shall be binding in its entirety and directly applicable on all Member States,” to mean that Council and Commission regulations are also directly effective (pg. 190).

The direct effect of Commission directives is a more complicated matter. Article 189 of the Treaty of Rome notes that directives “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 forms and methods.” This suggests a lack of self-executability of directives, which often address topics where some degree of leeway in domestic incorporation is seen as necessary or arises out of a need to compromise on the substance of harmonization measures. The ECJ has held that directives may “in principle have direct effect,” that a lack of implementation by states would not be permitted, and that the validity of domestic implementing legislation would have to be evaluated by the ECJ on a case-by-case basis (pg. 192).

Excerpts of the ECJ ruling:

“the objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples.” (pg. 184).

“The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.” (pg. 184).

“The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation [...] The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.” (pg. 184).

“It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.” (pg. 184).

***Von Colson (1984), pg. 200***

*Full reference:* Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.

*Summary:* The case arose out of a preliminary reference seeking interpretation of the Equal Treatment Directive. Although the ECJ found that the plaintiffs' claim of unlawful sex discrimination was not sufficiently precise to guarantee the remedy they sought (appointment to a post), it nonetheless ruled that national legislation must be interpreted in light of directive provisions, even if those provisions do not have vertical or horizontal direct effect. This is the principle of "harmonious interpretation" or "indirect effect."

*Other Notes:*

Elsewhere, the ECJ has ruled that "an unimplemented directive could be relied on to influence the interpretation of national law in a case between individuals," suggesting that a form of horizontal 'indirect effect' applies, so long as the rights and obligations bestowed by the directive on the individual parties are new (pg. 210).

Excerpts of the ECJ ruling:

"Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the Directive" (pg. 200).

## **II. Supremacy**

***Costa v. ENEL (1964), pg. 257***

*Full reference:* Case 6/64 Flaminio Costa v. ENEL [1964] ECR 585, 593

*Summary:* Flaminio Costa was an Italian citizen who owned shares of an Italian electricity company and opposed its nationalization. In protest, he did not pay his electricity bill and was sued by the newly nationalized ENEL. He argued that the nationalization violated the Treaty of Rome. A preliminary ruling from the ECJ was sought by the Justice of the Peace of Milan. Although the ECJ ruled that the Treaty provision invoked by Costa did not have direct effect, it nevertheless took the opportunity to establish the supremacy of EEC law. The ECJ argued that the provisions of Article 189 would be meaningless if Community law did not trump conflicting national law, adding that the functional and uniform application of EEC law would be threatened if it could not gain precedence over conflicting domestic legislation. This case set a precedent for a recurrent strategy of the ECJ to achieve deeper integration while reasserting the supremacy of EU law: its primacy, and functional desirability, is derived from the need to minimize inconsistencies between the laws of the Member States.

*Other Notes:*

Excerpts of the ECJ ruling:

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply” (pg. 257).

“The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty” (pg. 257).

“The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called into question by subsequent legislative acts of the signatories” (pg. 257).

“The precedence of Community law is confirmed by Article 189, whereby a regulation “shall be binding” and “directly applicable in all Member States.” This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over community law” (pg. 257).

“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question” (pg. 257).

“The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail” (pg. 257).

***Internationale Handelsgesellschaft (1970), pg. 261***

*Full reference:* Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel [1970] ECR 1125

*Summary:* The Frankfurt-am-Main Administrative Court requested a preliminary ruling from the ECJ when Internationale Handelsgesellschaft, an import-export company based in Frankfurt, challenged the validity of Regulation No. 120/67, passed by the Council of Ministers three years prior. The Council regulation declared that a failure to export after obtaining an export license amounted to a forfeiture of the deposit unless the failure was due to force majeure (an extraordinary event beyond control). The company alleged that the Council regulation violated its right to economic liberty and freedom of action as enshrined in German Basic Law (i.e. the German Constitution). The ECJ took the opportunity to uphold the Council regulation and to imply that EU law is supreme over all national law – including constitutional law.

*Other Notes:*

This decision, and the ECJ's general stance exemplified therein, sparked tensions with the German Federal Constitutional Court that remain to this day. In general, most domestic constitutional and national courts continue to treat EU law as a 'superstatute' - as something that trumps domestic legislation, but whose authority continues to be derived from the national constitution itself (many national constitutions, including the French, German, Italian, and Polish ones, have provisions enabling some transfers of sovereignty to the European level) (pg. 256; 272; 282; 285; 295). In Britain the supremacy of Community law is treated by the courts as derived from the 1972 European Communities Act (ECA) (recall that Britain does not possess a written constitution) (pg. 293).

Excerpts of the ECJ ruling:

“The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.” (pg. 261).

***Simmenthal II (1978), pg. 263***

*Full reference:* Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629.

*Summary:* Simmenthal, the Italian respondent company, had imported cattle to Italy from France. At the border the company was charged for a veterinary inspection, which the company believed violated the Treaty of Rome. A preliminary ruling was sought by the Susa Magistrate, and the ECJ held that the action was indeed in violation of the Treaty. However, Italian fiscal authorities objected to repay the company, arguing that it was for the Italian Constitutional court, which had not heard the case, to adjudicate discrepancies between EEC and domestic law. The Susa Magistrate thus sought a second preliminary ruling from the ECJ asking whether domestic law conflicting with Community law could be disregarded without waiting for the proper constitutional authority (the Constitutional Court) to adjudicate the case. The ECJ forcefully held that all national courts have a duty to enforce Community law and need wait for the pronouncement of the official constitutional review authority to set aside conflicting domestic law. It also articulated in the case that all domestic law, whether enacted prior or subsequent to the entry into force of the Treaty of Rome, that conflicts with EEC law must be invalidated by domestic courts.

*Other Notes:*

Excerpts of the ECJ ruling:

“It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule” (pg. 263).

“This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary” (pg. 263).

“The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means” (pg. 263).

*Other Notes:*

Note that the *Simmenthal* decision “does not require the national court to invalidate or annul the provision of national law that conflicts with EU law, but rather to refuse to apply it” (pg. 264).

### **III. Precedent**

#### ***Da Costa* (1963), pg. 449**

*Full reference:* Cases 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31

*Summary:* The facts of the case are materially identical to *Van Gend en Loos*, and they are restated here. *Van Gend en Loos*, a postal and transportation company, imported chemicals from Germany into the Netherlands, and was charged an import duty that had been raised since the entry into effect of the Treaty of Rome. *Van Gend* paid the tariff but then sought reimbursement in court (before the Dutch Tariefcommissie), alleging violation of Article 12 of the Treaty of Rome which prohibits new tariffs or customs on imports and exports being promulgated in addition to those already in place at the time of the Treaty of Rome’s ratification. The Dutch Tariefcommissie sought a preliminary ruling from the ECJ regarding whether Article 12 of the Treaty of Rome directly applicable within member state territories, such that nationals of the states could leverage EEC law in domestic cases. In *Van Gend*, the ECJ answered in the affirmative and inaugurated its doctrine of direct effect. In *Da Costa*, the ECJ formally recognized the existence of its own precedent, a common-law construct largely unrecognized in the civil law world. The ECJ essentially noted that national courts are not obliged to refer cases implicating EU law if its settled case law already addresses the specific point – preliminary rulings would only be required if new facts or new questions were implicated in the case.

*Other Notes:*

Craig and de Burca offer one take on the significance of *Da Costa*: “The relationship between national courts and the ECJ was altered. It was no longer bilateral, where rulings were of relevance only to the national court that requested them. It became multilateral, in the sense that ECJ rulings had an impact on all national courts” (pg. 475).

Excerpts of the ECJ ruling:

“Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law – like the *Tariefcommissie* – to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case” (pg. 449).

“It is no less true that Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again. This follows from Article 20 of the Statute of the Court of Justice, under which the procedure laid down for the settlement of preliminary questions is automatically set in motion as soon as such a question is referred by a national court” (pg. 449).

“The questions of interpretation posed in this case are identical with those settled as above [in its restated *Van Gend* judgment] and no new factor has been presented to the Court. In these circumstances, the *Tariefcommissie* must be referred to the previous judgment [...] It should be noted that a study found a high rate of implementation of ECJ rulings: 96.3 per cent” (pgs. 450-451).

***CILFIT* (1982), pg. 456**

*Full Reference:* Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415

*Summary:* The plaintiffs were wool importers who alleged that Italian laws requiring the Italian Ministry of Health to conduct a health inspection of wool imported from outside the Community violated EU law, specifically Regulation 827/68. The Italian Ministry of Health, noting that wool is not contained in Annex II to the Treaty of Rome and is therefore excluded from being subject to the common organization of agricultural markets subject to EU regulations, argued that the question was so obviously resolved that no interpretative doubt could result, and urged the Italian Court of Cassation not to refer the case to the ECJ. The Court of Cassation believed this very logic to implicate Community law, and referred the question to the ECJ: Could a national court not refer a case to the ECJ, even if it implicates Community law, if it deems the answer to be clear? In *CILFIT*, the ECJ answered affirmatively and proclaimed its ‘*Acte Clair*’ doctrine: a national court can resolve a case concerning EU law without a preliminary reference only if it is

convinced that the answer is obvious (and would be obvious to the ECJ as well) and after having considered possible areas of complexity and ambiguity that may belie such a simple resolution.

*Other Notes:*

Craig and de Burca offer the following interpretation of the *Acte Clair* doctrine: “the effect is to leave ‘clear’ cases that fall within these conditions to the national courts. For such cases, the national courts operate once again as the delegates of the ECJ for the application of EU law. The ECJ can then utilize its time in resolving more problematic cases. The conditions in *CILFIT* help to ensure that national courts will not readily regard cases as *acte clair* unless they really are free from interpretive doubt, although it is doubtless true that national courts can interpret these conditions rather differently” (pg. 476).

Excerpts of the ECJ ruling:

“Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it” (pg. 456).

“However, the existence of such a possibility must be assessed on the basis of the characteristic feature of Community law and the particular difficulties to which its interpretation give rise [...] An interpretation of a provision of Community law thus involves a comparison of the different language versions [...] Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States [...] Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied” (pg. 457).

“In the light of all these considerations, the answer to the question submitted... must be that paragraph (3) of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community” (pg. 457).



## IV. Competence/Jurisdiction

**Germany v. Commission (1987), pg. 77**

*Full Reference:* Cases 281, 283-285, 287/85 Germany v Commission [1987] ECR 3203

*Summary:* Germany, joined by other member states, brought action against the European Commission for the requirements it set up for member states concerning the treatment of workers from non-Community countries. The Commission required the states to inform it of their measures concerning entry, residence, equality of treatment, and the integration of the workers in the sociocultural life of the country by arranging consultations with the states. Germany and other states challenged the measure as *ultra vires* – Article 118 of the Treaty of Rome, which concerns collaboration in the social field, does not expressly provide the Commission with the power to render binding decisions in the field. The ECJ articulated its doctrine of implied powers, common in many international and domestic legal traditions, noting that the explicit mention of an express power also creates implied powers insofar as they are necessary to effectively discharge the express power. Thus the Commission action was not *ultra vires*.

*Other Notes:*

Craig and de Burca provide a brief overview of the principle of implied powers: “While the notion of implied power is well known in domestic and international legal systems, its meaning is more contestable. Under the narrower formulation, the existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former. Under the wider formulation, the existence of a given objective implies the existence of power reasonably necessary to attain it. The narrow sense of implied power has long been accepted. The ECJ has also embraced the wider formulation” (pg. 77).

Notes on the division of jurisdiction/competence in the EU:

The Treaty of Rome, as amended by the 2009 Treaty of Lisbon, specifies which areas fall under the exclusive, shared, or limited/no competence of the EU.

The areas of exclusive EU competence, where only the EU is able to adopt legally binding legislation (unless it chooses, by its own laws, to delegate such authority to the states) are: customs union; competition rules for the functioning of the internal market; monetary policy for the Eurozone; the conservation of fisheries and marine resources under the common fisheries policy; and the common commercial policy (pg. 78). This includes laws protecting the EU’s “four freedoms” : free movement of goods, capital, services, and people (pg. 85; 582). Note that with the promulgation of the Lisbon Treaty providing a single legal personality for the EU, there is official legal recognition for the EU to accede and ratify international treaties and make an international agreement, possessing exclusive competence to do so “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” (pg. 79).

Areas of shared competence, where both the EU and the states are able to adopt legally binding laws, include: internal market laws; social policy; cohesion policy; agriculture and fisheries

(excluding marine biological resources); environment; consumer protection; transport; trans-European networks; energy; freedom, security, and justice; public health and common safety; research and technological development; developmental and humanitarian aid (pg. 83). Note that despite most features of the now defunct “Common Foreign and Security Policy” pillar (under the Maastricht Treaty, removed by the Lisbon Treaty) falling under the “shared competence” category, states have objected to granting the ECJ jurisdiction on most matters relating to foreign and security policy (pg. 27). Further, according to the Treaty text member states are allowed to act in these areas only to the extent that the EU has not or is unwilling to act; the EU thus maintains the benefit of pre-emption (pg. 84). Nevertheless, the principle of subsidiarity, inaugurated in the Maastricht Treaty and amended in the Lisbon Treaty, holds that “in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at the regional and local level, but can rather, by reason of the scale or efforts of the proposed action, be better achieved at Union level” (pg. 95).

Finally, for all other policy areas, including, inter alia, pensions, taxation, citizenship, military affairs, and education, states maintain exclusive competence or EU jurisdiction is so limited as to be practically non-existent.

Excerpts of the ECJ ruling:

“[I]t must be considered whether the second paragraph of Article 118, which provides that the Commission is to act, inter alia, by arranging consultations, gives it the power to adopt a binding decision with a view to the arrangement of such consultations” (pg. 77).

“In that connection it must be emphasized that where an Article of the EEC Treaty... confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task. Accordingly, the second paragraph of Article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultations. In order to perform that task of arranging consultation the Commission must necessarily be able to require the Member States to notify essential information, in the first place to identify problems and in the second place in order to pinpoint the possible guidelines for any future joint action on the part of the Member States; likewise it must be able to require them to take part in consultation” (pg. 77).

## **V. The Single Market: Free Movement of Goods**

### ***Commission v Italy (1968), pg. 613***

*Full reference: Case 7/68 Commission v Italy [1968] ECR 427*

*Summary:* Italy had imposed a tax on the export of artistic, historical, and archeological items, which it justified on the basis that the purpose of the tax was not to raise revenue, but to protect Italy’s artistic heritage. The Commission brought action against Italy on the grounds that the tax violated the Treaty of Rome’s Article 16, which prohibited customs duties on imports and

exports and charges equivalent effect between member states. The ECJ struck down the Italian tax, and noted that in similar cases it would not look at the intent/purpose of the tax, but merely its effect. If its effect was equivalent to customs duties/charges, then it would be prohibited, regardless of its benevolent intent unrelated to restricting free trade.

*Other Notes:*

Craig and de Burca note: “The peremptory force of [Article 16] would be significantly weakened if a state could argue that a duty or charge should not be prohibited because its purpose was in some sense non-fiscal in nature” (pgs. 613-614).

Further, “the general principle is that a Member State must repay charges that have been unlawfully levied, The procedural conditions for such repayment may be less favourable than those applying in actions between private individuals, provided that they apply in the same way to actions based on EU law and national law, and provided also that they do not make recovery impossible or excessively difficult” (pg. 619).

Finally, indirect forms of discrimination, as when foreign goods are taxed more heavily than similar domestic goods (even if an explicit differentiation based on national origin is lacking), have similarly been treated as prohibited by the ECJ (pg. 621). On occasion, the ECJ will accept a defense of the policy on the part of the state if it is based on an “objective justification” which, even if it disproportionately impacts foreign goods, may nonetheless be permissible (pgs. 623-624).

Excerpts of the ECJ ruling:

“In the opinion of the Commission the tax in dispute constitutes a tax having an effect equivalent to a customs duty on exports and therefore the tax should have been abolished, under Article 16 of the Treaty, no later than the end of the first stage of the common market, that is to say, from 1 January 1962. The defendant argues that the disputed tax does not come within the category, as it has its own particular purpose which is to ensure the protection and safety of the artistic, historic, and archeological heritage which exists in the national territory. Consequently, the tax does not in any respect have a fiscal nature, and its contribution to the budget is insignificant” (pg. 613).

“Article 16 of the Treaty prohibits the collection in dealings between Member States of any customs duty on exports and of any charge having equivalent effect, that is to say, any charge which, by altering the price of an article exported, has the same restrictive effect on the free circulation of that article as a customs duty. That provision makes no distinction based on the purpose of the duties and charges and the abolition of which it requires” (pg. 613).

“The disputed tax falls within Article 16 by reason of the fact that export trade in the goods in question is hindered by the pecuniary burden which it imposes on the price of the exported articles” (pg. 613).

***Commission v Germany (1988), pg. 618***

*Full reference:* Case 18/87 Commission v Germany [1988] ECR 5427

*Summary:* German lander authorities had charged fees on live animals imported into the country to cover expenses of inspections undertaken pursuant to Directive 81/399. The question that arose is whether these fees amounted to charges with equivalent effects to taxes and other customs duties, particularly given that they were implemented in order to give effect to Community law. The ECJ recognized an exception to its basic principle of invalidating such charges, and stated the four conditions that needed to be met in order for this exception to be validated.

*Other Notes:*

Excerpts of the ECJ ruling:

“Since the contested fee was charged in connection with inspections carried out pursuant to a Community provision, it should be noted that according to the case law of the Court... such fees may not be classified as charges having an effect equivalent to a customs duty if the following conditions are satisfied:

- a) they do not exceed the actual costs of the inspections in connection with which they are charged;
- b) the inspections in question are obligatory and uniform for all the products concerned in the Community;
- c) they are prescribed by Community law in the general interest of the Community;
- d) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 of the Treaty” (pg. 618).

“In this instance these conditions are satisfied by the contested fee” (pg. 618).

***Commission v United Kingdom (1983), pg. 628***

*Full reference:* Case 170/78 Commission v United Kingdom [1983] ECR 2265

*Summary:* The United Kingdom had levied an excise tax on wines that was five times higher than that levied on beer. The United Kingdom produces significantly more beer than wine. The question before the ECJ was whether the two goods were similar enough that the different tax rate for wine could no longer be objectively justified, and would instead be banned by Article 95 of the Treaty of Rome, which bans internal taxation on similar products meant to discriminate against those that are foreign-produced. The ECJ spent several years studying the competition between wine and beer, before taking the opportunity in this case raised by the Commission against the UK to rule against the UK provision: wine, particular cheaper, light wines, and beer are similar and substitutable enough that the UK tax favoring beer over wine violates Article 95.

*Other Notes:*

Excerpts of the ECJ ruling:

“As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It pointed out that, for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a Member State or a given region. Those habits, which were essentially variable in time and space, could not be considered to be immutable; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them.” (pg. 628).

“[T]he Court has come to the conclusion that, if a comparison is made on the basis of those wines which are cheaper than the types of wine selected by the United Kingdom and of which several varieties are sold in significant quantities on the United Kingdom market, it becomes apparent that precisely those wines which, in view of their price, are most directly in competition with domestic beer production are subject to a considerably higher tax burden” (pg. 629).

“It is clear therefore [...] that the United Kingdom’s tax system has the effect of subjecting wine imported from other Member States to an additional burden so as to afford protection to domestic beer production... Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typically produced domestic beverage” (pg. 629).

“It follows... that, by levying excise duty on still light wines made from fresh grapes at a higher rate, in relative terms, than on beer, the United Kingdom has failed to fulfill its obligations under the second paragraph of Article 95 of the EEC Treaty” (pg. 629).

***Dassonville (1974), pg. 639***

*Full reference:* Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837

*Summary:* Belgian law required that goods bearing a designation of origin could only be imported into the country if they were accompanied by a certificate from the government of the exporting country certifying the designation. Dassonville imported Scotch whiskey into Belgium via France but failed to provide the certificate, on the grounds that it would have been difficult to obtain for goods already in circulation in a third country (France). He was prosecuted in Belgium, and in Court argued that the requirement was equivalent to a quantitative restriction outlawed by the Treaty of Rome. A preliminary ruling was sought from the ECJ regarding whether the certificate of authenticity requirement could be considered a quantitative restriction. The ECJ, in this pathbreaking decision, struck down the Belgian law as indeed having an effect equivalent to a quantitative restriction prohibited by Article 36 of the Treaty of Rome, establishing a very broad and flexible understanding of equivalent effects.

*Other Notes:*

Note that for a measure to be seen as equivalent to a quantitative restriction, its intent is irrelevant: it is its effect that the ECJ proclaims to be determinative (pg. 640).

In the ECJ's case law, most of the provisions relating to quantitative restrictions address measures taken by the state; the Court has, however, broadly interpreted when an entity can be considered a state institution. In general, the ECJ has found that even if an institution is nominally private, if it receives a "measure of state support or 'underpinning'," the ECJ has treated the entity as a public one (pg. 646).

Excerpts of the ECJ ruling:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (pg. 639).

"Even without having to examine whether such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States" (pg. 639).

"That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties" (pg. 640).

"Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure equivalent to a quantitative restriction as prohibited by the Treaty" (pg. 640).

***Cassis de Dijon (1979), pg. 647***

*Full reference:* Case 120/78 Rewe-Zentral AG v Bundersmonopolverwaltung fut Branntwein [1979] ECR 649.

*Summary:* The applicant, a German importer, had been refused permission to import a fruit cream liqueur, Crème de Cassis, from France into Germany. Under German law, fruit liqueurs would have to have an alcohol content of at least 25 percent, whereas Crème de Cassis's alcohol content is approximately 15 percent. The applicant argued that the rule violated Article 30 of the Treaty of Rome, which bans quantitative restrictions, because it is a measure equivalent with formal quantitative restrictions. The ECJ sided with the applicant and took the opportunity to enshrine its principle of mutual recognition: absent a narrow list of health and safety exceptions, a product legally sold in one member state can legally be sold in all member states.

*Other Notes:*

Craig and de Burca offer the following analysis of the ruling: “*Cassis* affirmed and developed the *Dassonville* judgment. It affirmed paragraph 5 of *Dassonville*: [Article 30] could apply to national rules that did not discriminate against imported products, but which inhibited trade because they were different from the trade rules applicable in the country of origin. The fundamental assumption was that when goods had been lawfully marketed in one Member State, they should be admitted into any other state without restriction, unless the state of import could successfully invoke one of the mandatory requirements. The *Cassis* judgment encapsulated therefore a principle of *mutual recognition*” (pg. 649).

In some cases, discriminatory measures and restrictions can be justified under Article 36 of the Treaty of Rome, which permits justifications 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 archeological 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” (pg. 668). Unsurprisingly, the ECJ has “construed Article 36 strictly. Discriminatory rules will be closely scrutinized to ensure that the defence pleaded is warranted. They must also pass a test of proportionality: the discriminatory measure must be the least restrictive possible to attain the end in view. The burden of proof under Article 36 rests with the Member State” (ibid).

Excerpts of the ECJ ruling:

“Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer” (pg. 648).

“[Germany’s] line or argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products” (pg. 648).

“It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community” (pg. 648).

“It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty” (pg. 648).

“There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limits set by the national rules” (pg. 648).

## **VI. The Single Market: Free Movement of Workers**

***Angonese (2000), pg. 717***

*Full reference:* Case C-281/98 *Angonese v Cassa di Riparmio di Bolzano SpA* [2000] ECR I-4139

*Summary:* The plaintiff, Angonese, was an Italian citizen whose native language was German. He entered a competition to gain employment with a bank in Bolzano; the competition required participants to obtain an official certificate of bilingualism in Italian and German, which could be procured in Bolzano by city authorities after an examination administered only in that province. Angonese did not obtain a certificate and was prohibited from participating in the competition, despite his bilingualism. He argued that the requirement violated Article 48 of the Treaty of Rome, as modified by the Maastricht Treaty, providing for the free movement of persons in the Union. The ECJ held that the action was in violation of the Treaty, which precludes obtaining a diploma only issued in a particular province of a member state, for this is a burden that may make participation difficult for citizens living outside the province. In so doing, the ECJ went further than its free movement of goods jurisprudence: Treaty provisions concerning the free movement of persons would have horizontal direct effect, i.e. they would be binding on individuals and private entities and not just on public authorities. The ECJ in the case also combined free movement of persons provisions with protections against discrimination based on nationality, a strategy of linkage between the common market and fundamental rights frequently leveraged by the Court.

*Other Notes:*

Free movement of workers is one of the four fundamental freedoms in EU law. In general, its doctrine in this area is broad. States are not allowed to place restrictions on free movement of workers even if the workers are only employed part time or at minimum-wage levels and necessitating public assistance (States have often argued that this does not qualify as meaningful employment; the ECJ has always disagreed); and that restrictions cannot be made based on the worker's motive – so long as the individual is making a purposive effort at participating in a state's economic activity, the person cannot be precluded from setting up residence there (pgs. 721-722). So long as the economic activity “are capable of being regarded as forming part of the normal labour market,” the economic activity would qualify the worker for EU free movement protections (pg. 725).

Expulsion from a state is subject to strict scrutiny by the ECJ, but can occur when the individual has committed a serious enough crime that the state, after applying the principle of



proportionality, deems public safety concerns to outweigh the individual's free movement rights (pgs. 757-759). The bar for expulsion is particularly high for permanent residents, and the highest for minors of EU citizens and their family who have resided in the host state for at least 10 years (pg. 757).

Excerpts of the ECJ ruling:

“It should be noted at the outset that the principle of non-discrimination set out in Article 48 is drafted in general terms and is not specifically addressed to the Member States” (pg. 718).

“Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services” (pg. 718).

“Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, limiting application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application” (pg. 718).

“Such considerations must, a fortiori, be applicable to Article 48..., which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 [...] it is designed to ensure that there is no discrimination in the labour market” (pg. 718).

“Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48... must be regarded as applying to private persons as well” (pg. 718).

***Antonissen (1991), pg. 727***

*Full reference:* Case C-292/89 R v Immigration Appeal Tribunal, ex p Antonissen [1991] ECR I-745

*Summary:* Do free movement protections for workers under Article 48, as amended by the Maastricht Treaty, of the Treaty of Rome extend to those who are not currently employed, but seeking employment? This was the question before the ECJ in *Antonissen*. Antonissen was a Belgian citizen who had moved to the United Kingdom in 1984, and had been unsuccessful in his attempts to gain employment. He was convicted and imprisoned for a drug-related offense, and the Secretary of State subsequently decided to deport him. Following his appeal, the case was sent to the ECJ for a preliminary ruling, with the UK arguing that only Community citizens with documentation confirming employment were entitled to a right of residence in another Member State. The ECJ disagreed, and found that Article 48 protects all workers, including those that are actively seeking employment.

*Other Notes:*

As Craig and de Burca note, the ECJ's non-textualist, but instrumentalist, jurisprudence, shines through in *Antonissen*: "The ECJ examined the Article and identified its purpose: in this case, to ensure the free movement of workers. It then concluded that a literal interpretation of its terms would hinder that purpose. If nationals could move to another Member State only when they already held an offer of employment, the number of people who could move would be small, and many workers who could seek and find employment on arrival in a Member State would be prevented from so doing. A particularly interesting feature of *Antonissen* was the ECJ's statement that the rights expressly enumerated in [Article 48] are not exhaustive. This approach leaves the Court power to adapt the scope of the Article through interpretation, in accordance with the EU's changing social, economic, and political climate" (pg. 727).

Despite its ruling, individuals seeking employment, unlike the already employed, do not have equal protections under Article 48: they can be expelled from the state if they do not have prospects for finding work after a reasonable period of time has passed, and some social welfare provisions, like unemployment insurance, cannot be used by someone who has never participated in the state of residence's labor market (ph. 727).

The ECJ has articulated repeatedly that it, and not the Member States, is the final authority vis-à-vis defining what a "reasonable period of time" (in the context of the paragraph above), a "worker," and what distinguishes private from public sector employees (public sector employees are not subject to Article 48 free movement protections) (pg. 735). From the ECJ's perspective, a public employee is distinguishable from private employees in two ways: "(i) they must involve participation in the exercise of power conferred by public law, and (ii) they must entail duties designed to safeguard the general interests of the state [...] it seems that the two requirements are cumulative rather than alternative. A post will benefit from the derogation in [Article 48] only if it involves both the exercise of power conferred by public law and the safeguarded of the general interests of the state" (pgs. 736-737).

Excerpts of the ECJ ruling:

"[I]t has been argued that, according to the strict wording of Article 48 of the Treaty, Community nationals are given the right to move freely within the territory of the Member States for the purpose only of accepting offers of employment actually made [...] Such an interpretation would exclude the right of a national of a Member State to move freely and to stay in the territory of the other Member States in order to seek employment there, and cannot be upheld" (pg. 727).

"Moreover, a strict interpretation of Article 48(3) would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make the provision ineffective" (pg. 727).

"It follows that Article 48(3) must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the free movement of workers and that that freedom also entails the right for nationals of Member States to move

freely within the territory of the other Member States and to stay there for the purposes of seeking employment” (pg. 727).

***Metock (1942), pg. 742***

*Full reference:* Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241

*Summary:* Can family members of EU citizens, who are themselves not lawful residents of the EU member state (they may have entered the state illegally) make use of free movement provisions under EU law? In *Metock*, the ECJ replies in the affirmative. Four nationals of non-EU member states applied for residence in Ireland, on the basis that their husbands, who were not Irish residents but were EU citizens, were lawful residents in Ireland. The Minister of Justice refused their request on the ground that they failed to satisfy the condition of prior lawful residence under Irish law. The High Court of Ireland referred the case to the ECJ, seeking a preliminary ruling interpreting Directive 2004/38 on the right of EU citizens and their family members to move and reside freely throughout the Union. The ECJ found that free movement protections, and the Directive, are directly applicable to family members of EU citizens, regardless of whether they were previously lawful residents of a EU member state. As such, EU free movement law constrains the authority of states to regulate the initial entry of individuals into the Community.

*Other Notes:*

Excerpts of the ECJ ruling:

“In the first place, it must be stated that, as regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State” (pg. 742).

“Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on the rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State” (pg. 743).

“Consequently, the interpretation put forward by the Minister of Justice... that the Member States retain exclusive competence [...] to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected” (pg. 743).

“Indeed, to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they

do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them” (pg. 743).

“Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses” (pg. 744).

## VII. Fundamental Rights

***Stauder (1969)*** (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969CJ0029:EN:PDF>)  
*Full reference:* Case 29/69 Erich Stauder v City of Ulm [1969] ECR 419

*Summary:* In early 1969, European states faced a chronic case of butter overproduction. In an effort to increase the consumption of butter and alleviate the surplus, on February 12th, 1969, the European Commission adopted a directive “[authorizing] Member States to make butter available at a reduced price to certain categories of consumers who are beneficiaries under a social welfare scheme and whose income does not enable them to buy butter at normal prices.” The German translation of the directive stated that welfare recipients could “receive butter in exchange for a coupon issued in their names.” Germany responded to the directive by passing legislation issuing “detachable coupons with a stub which had, in order to be valid, to bear the name and address of the beneficiary.” This prompted Erich Stauder, a German citizen, to bring action in the Stuttgart Administrative Court. Stauder objected to the requirement that the coupon bear the beneficiary’s name in order to be valid, arguing that the provision violated his human dignity and equality before the law as specified in Articles 1 and 3 of German Basic Law. The Stuttgart Administrative Court requested a preliminary ruling from the ECJ on the matter. The ECJ found that the requirement that the coupons bear the beneficiary’s name was not required by the directive – it was a mistranslation of the directive’s text. The case represents the first time that the ECJ maintained that it would protect fundamental rights enshrined in Community law.

*Other Notes:*

Note that the Treaty of Rome did not contain any mention of human or fundamental rights protection. As a result and under mounting pressure from domestic courts concerned that the primacy of Community law would violate rights protected by domestic law, the ECJ had to discover such principles elsewhere, though it did not yet indicate their source in the *Stauder* case (pg. 362).

Excerpts from the ECJ ruling:

“Article 4 of Decision No 69/71 stipulates in two of its versions, one being the German version, that the States must take all necessary measures to ensure that beneficiaries can only purchase

the product in question on presentation of a ‘coupon indicating their names’, whilst in the other versions, however, it is only stated that a ‘coupon referring to the person concerned’ must be shown [...] In a case like the present one, the most liberal interpretation must prevail” (ECR 424-425).

“It follows that the provision in question must be interpreted as not requiring – although it does not prohibit – the identification of beneficiaries by name” (ECR 425).

“Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court” (ECR 425).

***Internationale Handelsgesellschaft (1970), pg. 365***

*Full reference:* Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel [1970] ECR 1125

*Summary:* This case is referenced again because in addition to suggesting that Community law must precede all forms of domestic law, it also expanded the reference to fundamental rights protections in *Stauder*. The Frankfurt-am-Main Administrative Court requested a preliminary ruling from the ECJ when Internationale Handelsgesellschaft, an import-export company based in Frankfurt, challenged the validity of Regulation No. 120/67, passed by the Council of Ministers three years prior. The Council regulation declared that a failure to export after obtaining an export license amounted to a forfeiture of the deposit unless the failure was due to force majeure (an extraordinary event beyond control). The company alleged that the Council regulation violated its right to economic liberty and freedom of action as enshrined in German Basic Law (i.e. the German Constitution). The ECJ, in upholding the regulation on the basis that it was not disproportionate, took the opportunity to elaborate on the source of fundamental rights protections it would protect: the constitutional traditions of member states.

*Other Notes:*

Although for the first time the ECJ discussed the source of fundamental rights protections in Community law, it remained ambiguous, noting that they are merely ‘inspired’ by member states’ constitutions.

Excerpts from the ECJ ruling:

“In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community” (pg. 365).

***Nold (1974), pg. 366***

*Full reference:* Case 4/73 Nold v Commission [1974] ECR 491

*Summary:* This was a direct action case where J Nold, Kohlen und Baustoffgrosshandlung, a limited partnership registered in Germany, argued that the terms of a Commission directive issued in December of 1972 “violate certain fundamental rights enshrined by the national Constitutions, and ‘received’ into Community law.” In essence, the plaintiff posited that if Community law was “inspired” by the constitutional traditions of member states, EEC regulation was bound to comply with said traditions. This required the ECJ to be more explicit about where it would locate the substantive rights it had sworn to uphold. The Court upheld the Commission directive, and then articulated that fundamental rights protections common to the constitutions of EU member states would be protected, along with any treaties on the protection of human rights to which the member states are parties (namely, the European Convention on Human Rights).

*Other Notes:*

The ECJ’s reference of the European Convention of Human Rights became explicit in later cases, though it almost always referenced the treaty by analogy and as a “source of inspiration” (pgs. 366-367).

Excerpts from the ECJ ruling:

“As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protections of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law” (pg. 366).

***Defrenne II (1976), pg. 858***

*Full reference:* Case 43/75 Defrenne v Sabena [1976] ECR 455

*Summary:* Article 119 of the Treaty of Rome, which enshrines provisions for equal pay of men and women, was originally included in the Treaty to alleviate French concerns that its strong devotion in domestic law to the equal pay principle would not disadvantage French businesses in the common market. Despite this economic foundation, in *Defrenne II* the ECJ argued that seemingly economic provisions like Article 119 also have an important social foundation. Gabrielle Defrenne was a flight attendant for Sabena, an airline company, and got paid less than her male coworkers. She sued, alleging that her unequal pay violated Article 119 of the Treaty of Rome. The ECJ first ruled that Article 119 had horizontal direct effect, and was thus binding on private parties as well as public authorities. It then argued that non-discrimination in pay served both the economic interests of states and the social function of the Community to further social progress.

*Other Notes:*

Craig and de Burca outline some of the challenges facing the implementation of *Defrenne II*, particularly its finding of horizontal and vertical direct effect: “Member States had avoided the implementation of the equal pay principle for years, eventually arguing unsuccessfully to the ECJ in *Defrenne* that the Treaty provision lacked direct effect. The Court ruled that [Article 119] had been directly effective since the end of the first stage of the transition period. Nevertheless, the ECJ was swayed by the arguments of the Member States on the serious financial consequences of such a ruling for them, and it declared that in view of the incorrect understanding of the Member States of the effects of this Treaty Article, due in part to the fact that the Commission had not brought earlier infringement proceedings against them, its ruling should have effect only prospectively. This meant that only those who had already brought legal proceedings or made a claim could rely on the Article in respect of pay claims for periods prior to the date of judgment. Prospective overruling of this kind by the Court has not been frequent, and the cases tend to be those in which there are considerable financial implications for the Member States or their industries” (pg. 859).

Excerpts of the ECJ ruling:

“Article 119 pursues a double aim [...] First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay [...] Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, it is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty” (pgs. 858-859).

“This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community” (pg. 859).

**Kadi (2008), pg. 374**

*Full Reference:* Cases C-402 and 415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351

*Summary:* This is a complicated and much referenced recent case where, inter alia, the ECJ asserted the autonomy of the EU legal order by proclaiming the supremacy of EU law over international law. But in the case the ECJ also articulated in fairly good detail its fundamental rights doctrine. In 2001 the EU adopted legislation to implement several UN Security Council resolutions promulgated in the wake of the September 11<sup>th</sup> attacks. The Legislation aimed to freeze the funds and financial assets of any person or entity associated with the Taliban, Osama Bin Laden, or Al Qaeda. The UN provided a list to this effect, and the applicants were included in it. They subsequently filed a direct action, arguing that the EU regulations infringed their

fundamental rights, particularly their right to property and their right to trial. The ECJ ruled in favor of the applicants, finding that their right to property and to a fair trial had been violated, and requiring the germane EU regulations to be annulled.

*Other Notes:*

Despite the ECJ annulling the EU regulations it found to have violated fundamental rights, it “decided that it would maintain the relevant Regulation 881/2002 in effect for three months, to allow the EU institutions time to cure the procedural breach and to re-list the applicants, which they duly did” (pg. 377).

According to Craig and de Burca, “what is most striking [...] is that the ECJ [...] [has] been much less deferential to the EU institutions, and even to international institutions such as the UN Security Council, when considering challenges based on fundamental rights” (pg. 377).

Excerpts of the ECJ ruling:

“It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system” (pg. 375).

“In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR [European Convention on Human Rights] has special significance” (pg. 375).

“It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty” (pg. 375).

“It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security [...] Those provisions cannot, however, be understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as foundation of the Union” (pg. 375).

“It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full 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, including of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations” (pg. 376).



“In this regard, in the light of the actual circumstances surrounding the inclusion of the appellant’s names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected” (pg. 376).

“Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr. Kadi, are mentioned in the list set out in Annex I to that regulation” (pg. 376).

“It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property” (pg. 377).

“It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled” (pg. 377).

***ERT (1991), pg. 384***

*Full reference:* Case C-260/89 Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas [1991] ECR I-2925

*Summary:* ERT was a Greek television and radio company who enjoyed exclusive rights under Greek law, and which sought an injunction against the respondents, who had set up their own TV station in violation of ERT’s exclusive rights. The Thessaloniki Regional Court referred the case to the ECJ for a preliminary ruling, to see whether the exclusive rights granted ERT violated the free movement of goods provisions and rights to freedom of expression protected under Community law. The ECJ held that granting exclusive rights did not per se violate Community law, but the case is significant for it extended the ECJ’s jurisdiction to the review of domestic statutes for compliance with fundamental rights (in previous cases, the ECJ had reviewed the compliance of EU law with fundamental rights).

*Other Notes:*

Excerpts of the ECJ ruling:

“In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the right of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Article 56 and 66 only if they are compatible with fundamental rights, the observance of which is ensured by the Court” (pg. 385).

“It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court” (pg. 385).

“The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security, and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights” (pg. 385).