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EUROPEAN UNION LAW

A CURA DI

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EU LAW

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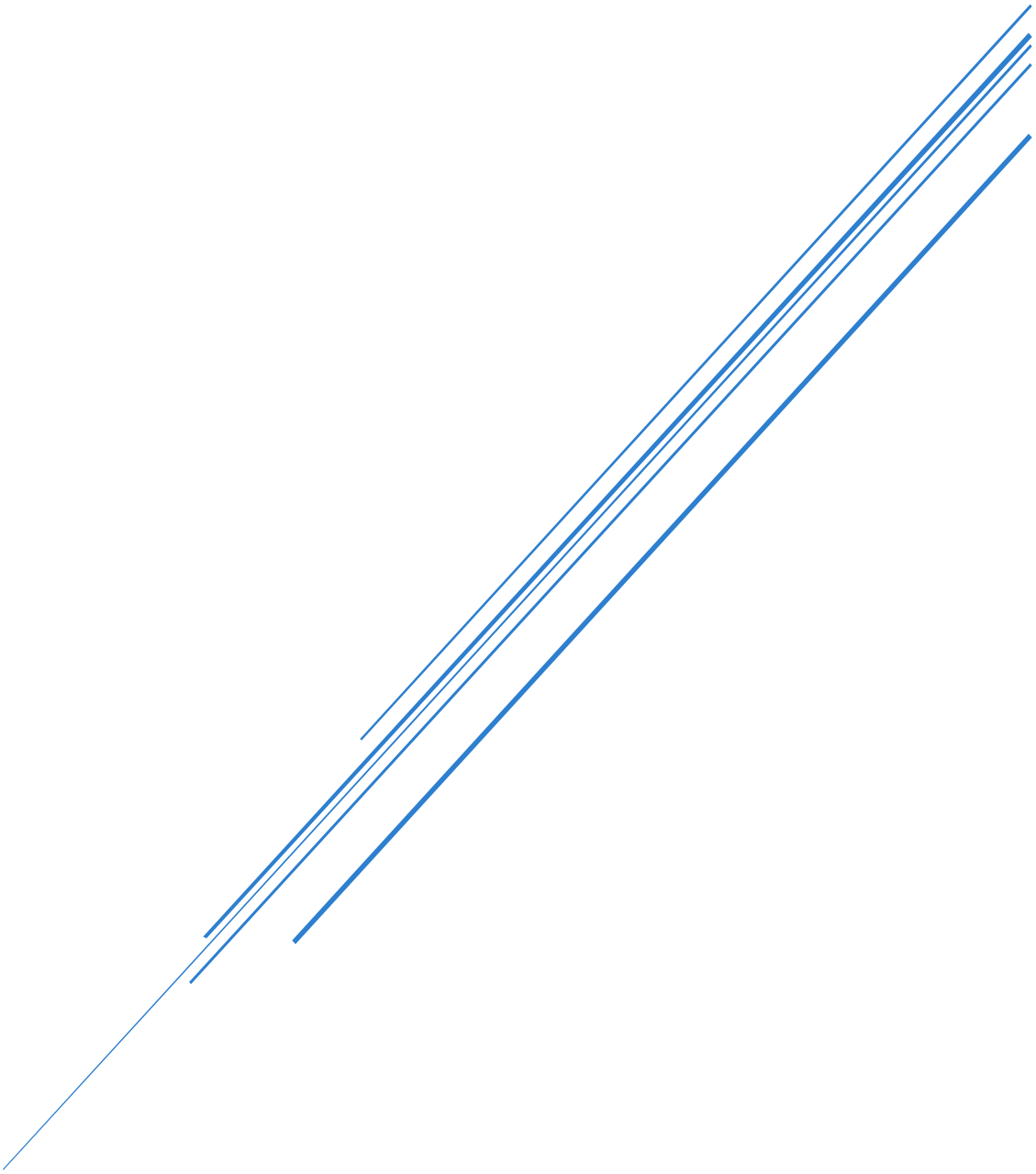

A cura di Francesco Muciaccia

INSTITUTIONAL EUROPE

EUROPEAN INTEGRATION: THE HISTORY OF EU

The WW2 left our continent in a feeling of dismay, with the hope and the need for reconstruction, and the idea of building institutions capable of assuring peace. The founding of the *United Nations*, in 1945, and the drafting of the *Universal Declaration of Human Rights,* in 1948, are worth mentioning, but focusing on Europe, in 1949, it was established the **Council of Europe**, first example of *regional* European integration; in fact, the Council of Europe, which is still in existence, is not an EU institution, but, similarly to the UN, it was founded in order to grant peace, justice, international cooperation, unity, …, values that can be seen in the **European Convention of Human Rights**, whose application is still guaranteed by the *European Court of Human Rights* (in Strasbourg, again, not an institution of EU, not to be confused with ECJ, a EU institution in Luxembourg), as the first to protect human rights at a supranational level, with the faculty of a single person to bring a case before an international court (such a modern feature). The Council of Europe, anyways, was and still is an international organization, started with ten countries, and now being composed of forty-six.

The ECSC and the Euratom

Alongside the Council of Europe project, the idea of European **unification** started to spread, and in 1950 with the **Schumann Declaration**, a key step forward was made in that idea. The idea of Schumann and Monnet was, in fact, to make a European community gradually, with concrete ideas an actions, in order to eliminate secular ideological conflicts (such as the one between France and Germany, and to make peace last in the Old Continent (*Neo Functional Theory of European Integration*). In 1951, the *European Coal and Steel Community* (**ECSC**) was established; the two most important materials (coal for energy and steel for weapon) fell under a common direction, by the decision of France, Germany, Italy and BENELUX, which *renounced* to their sovereignty on the management of coal and steel in order to **avoid a new war**. Thus, there was the need of institutions, and power of **enforcement** was given to a *Commission* (the ancestor of the current).
Not only coal and steel, because after WWII a similar concern was related to **atomic energy**, so that in 1957 the **Euratom** was founded, with the belief that atomic energy should be only related to *peaceful purposes*.

The EEC

The underlying thinking of ECSC and Euratom is exceptionally fine: **interlocking** economies not just to make war difficult, but also *inconvenient*. The importance of economy led Italy, Germany, France, Netherland, Belgium and Luxembourg to ensure that *factors of productions* could move freely, founding the *European Economic Community* (**EEC**), with the **Treaties of Rome**, in 1957 (enforced in 1958). Reading the latter, especially the Art. 2, it is possible to find the objectives of EEC. First of all, the EEC treaties establish **permanent institutions** (Commission, ECJ, Council, Assembly), formed by parliamentary delegation of National MPs (only in 1979 we will have the first direct election). Those gave themselves a **law-making power**, *taking directly* binding decisions, and to ensure that States would never ignore their European obligations, they created an **autonomous system of enforcement** (the European Commission had, and have, the power to bring non-compliant States before ECJ). A crucial decision was made in the application of **preliminary reference procedure**, on the model of Italian and French systems: the treaties indicated a *law-based* system, in which the ECJ would give *one and authentic* interpretation of European law, with the possibility of internal courts to ask questions to ECJ related to interpretation. Moreover, the EEC treaties represent the successful consecration of the *functionalist approach*, limiting and defining the competences of each institution, which would act only with powers conferred by treaties (**principle of conferral**).
The main focus of EEC was to create a **new legal framework**, in order to establish a **common market**, on four main cornerstones:

- **Customs Union**: the member states undertook not to put **tariffs** on the goods circulating within the territories, also prohibiting *quotas* or *measures* that would have the same effect.
- **Free movement of factors of production**: goods, services, capital, and workers started to move freely, realizing the **economic efficiency**.
- **Common competition policies and State-aid laws**, under control of the Commission, to avoid single states to help their own companies, and preventing collusion between companies.
- **Common commercial policies** with third Countries.

Four cornerstones that evolve in the **Four Freedoms of EEC**: *goods, workers, services and establishments*, with the treaties completely against any form of discrimination based on nationality in respect of the four freedoms.

Time for pointing out: *Van Gend en Loos*

The ***Van Gend en Loos*** (**26/62**) ruling is considered one of the most important in the whole European legal history. To create a common market, the idea was to *eliminate* custom duties (in Italian, **dazi**), but always gradually; in fact, the Art. 12 EEC committed the States not to introduce new ones. In the 60s, however, the Netherlands increased duties on chemical products and the Van Gend en Loos company questioned its validity. Also the Dutch court agreed that the increasing was against the Treaties, but it was then time to understand the **validity** of them. The Dutch government argued that the Treaties of Rome were just *international treaty*, and the only form of enforcement was based on the infringement procedure by the Commission, and this view was partially sustained by Belgium (that was a matter of *national constitutional law*) and Germany (EEC represent just *international obligation*. On the contrary, Van Gend en Loos and the Commission thought that the provisions of the treaties had **direct effect**, and there was nothing to be interpreted by national courts. The ECJ, in answer, established thus a **new legal order**. The ECJ, hence, did not proceed in an international law manner (consenting different applications and without ensuring uniformity), but underlined that the European institutions are endowed with sovereign rights, who applications **directly affects the citizens**. The Treaties of Rome do not just speak about states, but also about people, so the aims of them are to ensure the same treatment to citizens. Thus, people were to be directly benefited by the Treaties: European law was not domestic law, neither international law, but it was (and is) a *new legal order*, whose first pillar is the **direct effect**.

Principle of supremacy: Costa v. Enel

As one can imagine, the domestic courts have not reacted very positively to the advent of a new legal reality to which the **hermeneutic monopoly** was granted. A fundamental case has been **Costa v. Enel**, decided by the Italian Constitutional Court (14/1964), and then by the ECJ (**6/64**). Mr. Costa challenged a bill by ENEL, the only energy provider in Italy, considering that the Italian Law, authorizing such a monopoly situation, was incompatible with the EEC Treaties. Theoretically, since the nationalisation of ENEL was subsequent EEC Treaties, they should have succumbed (*lex posterior derogat priori*), but this was not the case. In fact, Italian Const. Court, considered the case under international law, seeing just the possibility of international liability of the Italian Republic, but nothing that could deprive the conflicting Italian law of its effects. The Tribunal of Milan, however, did not agree, a made a **preliminary reference** to ECJ, while the Italian Government suggested that the dispute did not concern EU law, because the Milan tribunal only had to apply domestic law, eventually admitting just the infringement procedure. Again, anyways, ECJ stipulated a fundamental feature: the **Principle of Supremacy** of EU Law; not only are individual rights granted by the treaties, but also an **obligation** for national courts to apply European law. It is impossible for the principle of successive law to apply in relation to the EEC Treaties, since this would lead to a situation of non-uniformity. In short, if domestic law contradicts EU law, the national courts must apply the European law. In other words, the value of the treaties lies in the obligations that the member states have, since the member states **have given up part of their sovereignty to European law**.

A series of historic events: from 70s to Covid-19

After the EU Law taking precedence over that of its member states, EU integration has had to overcome considerable challenges. The main debate saw the advocates of a **deeper integration** (with the idea of a *federalist Europe*, for the *United States of Europe*) against supporters of an essentially **economic integration**, far from politics. The most significant steps of EU integration were consequential to moments of crisis in the continent; except for the fall of the Berlin Wall (1989), it is the war in Yugoslavia, the economic crisis off 2008, the Brexit, and the Covid pandemic.

The first challenge comes in the 70s, when a **big recession** hits the West and interrupts EU integration, in favor of a **protectionist tendency** of individual states.. For a few years, then, integration stalled, until the **Luxembourg compromise**, which allows member states to disobey EEC policies in case of vital interests at

risk. The ECJ, thus, needed again to intervene, creating the fundamental principles of the internal market: **mutual recognition, broad and teleological interpretation of discrimination**.
Anyways, in 1973 UK, Ireland, and Denmark joined the EEC, and in 1975 the Trevi Group was founded to make common cause on security. It is then 1979 the time of the **first direct election** of the European Parliament: citizens are direct stakeholders of the European policies. After the joining of Greece, Spain, and Portugal, **White Paper** (1985) and **Single European Act** (1986) marked the first treaty modification, introducing the ***Qualified Majority Voting*** in the Council: differently from other international relations, in Europe unanimity was no more necessary, avoiding an eventual dictatorship of minorities.
EU integration restarted after the fall of the Berlin wall, and the unification of Germany in 1990: Germany would become the *biggest* member state, ex-soviet states were ready to join, and an extraordinary **European Council** was held in Dublin, in order to solve disputes between *federalists* and those who wanted just an *economic union*. And here is the **Treaty of Maastricht** (1992) that created the **European Union**; "a new stage", states the preamble, with a bug **federalist push**, but with the principle according to which decisions were to be taken *as closely as possible to the citizen* (**Principle of Subsidiarity**), as some states (UK above all) did not want the creation of a European Superstate.
For the first time ever, the EU integration was purposely limited, granting the **principle of democracy**: any states which would want to enjoy EU has to be based on it. Then, the EU started to be consider a place in which necessarily *fundamental rights* are granted and, finally, the Treaty affirms that EU could use all the **necessary means** to achieve its objectives (*Principle of residual competence*).
The Treaty of Maastricht led EU to go beyond mere *economic integration*, and EU, absorbing EEC, ECSC and Euratom, was linked to the idea of a **European Community**, as the ***first pillar*** of EU. Thus, the Treaty started to consider also the *monetary union*, the *European citizenship,* and the *democratization of institutions* (European Parliament became at the same level of the European Council in the legislatures). But two more fields became necessary, and the EU ambitions changed, adding two more pillars:

- ***Second pillar***: **Common Foreign and Security Policy**, based on an *intergovernmental method*, deciding by ***consensus***, without possibility of intervention of ECJ, and with small involvement of EP and CE.
- ***Third pillar***: **Cooperation of Freedom Security and Justice**, between areas of **civil law**, **criminal law**, and **asylum politics**.

Member states started to go further economic features, taking an interest in the social aspects. Now on it is possible to see the **Multi-Speed Europe**: EU evolution could not stop because of few dissenting member states, so that Denmark, Ireland and, above all, UK could ***opt out*** (or opt in if satisfied).
In 2000, the **Nice Treaty** made *institutional amendments*, and it was proclaimed the **Charter of Fundamental Rights of the European Union**. After considerable debate, something similar to a *European Constitution* is reached, with the **Treaty of Lisbon** (2007, in force since 2009), in which we found the *Treaty of European Union* (**TEU**), the *Treaty on the Functioning of European Union* (**TFEU**), and the **Charter of Fundamental Rights**. From here, major crises hit Europe, from the economic crisis, to Brexit, through covid, and new challenges related to conflicts between Russia and Ukraine and between Israel and Palestine.

EU INSTITUTIONS

From the above, it is possible to outline the basic characteristics of EU. Firstly, one of the key features is the **intergovernmentalism**, with national governments that take decisions based on *consensus*, considering also the domestic constitutional requirements. Secondly, we have to cite the **supranationalism**, also referred as the *community method*; as we said, EU is not just an international cooperation. Whilst there is the presence, of course, of international treaties, the member states **confer power to institutions**, not exclusively made by representatives of the government: no unanimity, impossibility oof being outvoted, a directly elected parliament, and a commission as an independent body, plus a Court sitting at a supranational way.
Before starting analysing institutions (beside ECJ), take this scheme as a *vademecum*:

- **European Council** is formed of the *heads of States and Governments*, providing **political impetus** to the EU, thus deciding the direction of powers.

- **Council of the EU** is made of member states representative at a **ministerial level**, and it decide about budget and co-legislation.
- **European Parliament**, directly elected by *Europeans*, acts as a **co-legislator**.
- **European Commission** is made of *independent* officials, and pursues the **collective interest of the EU**, with wide powers (sanctioning, initiate legislation, ect.).

Anyways, EU institutions and EU member states are founded on the principle of **democracy**; we may now take in consideration Art. 10 TFEU, which express the principle of **direct democratic accountability**, meaning that the members of EP should take in consideration that citizens are *directly represented* in it. But how can the European Council be legitimate though? The same article takes in consideration the **indirect democratic accountability**, meaning that those representatives are *themselves democratically accountable at a national level* (even if there are still doubts due to the fact that in the Council there is a lack of transparency – not public sessions – and it can block decisions of the EP).

European Council

The **European Council** is regulated by Art. 15 TEU, which describes it as the institution that shall provide the EU with the *impetus* for its development, deciding the priorities, and the political directions (***body of political direction***). The participants of the European Council are the Heads of State or Government, with the *president of the Europen Council* (now, Charles Michel), and the president of the Commission. When the political directions have an external influence, the High Representative for Foreign Affairs should take part too. If the treaties do not establish otherwise, decisions are taken **by consensus**. Practically, meeting every six months, the Europen Council sets the political *agenda* for the EU. Mainly, we should remember that it is **not** a legislative body.

The European Council finds regulation in the Treaty of Lisbon, which established also the figure of the **President of the European Council**. He is elected by the European Council itself with a qualified majority for *two and half years*, renewable once. The president chairs and drives the work of the body, ensuring continuity with Commission President and General Affair Council, also building consensus among leaders. After European Council meetings, he has the duty to report everything to the European Parliament too.

Council of Ministers of the EU and the High Representative for Foreign Affairs

The **Council of Ministers of the EU** is regulated by Art. 16 TEU. The participants are representatives of each member state at a ministerial level, who **commit their government** and vote. The Council has different configurations according to which subject is considered (e.g. if the matter is economy, we will have the *Economic and Financial Council*; **ECOFIN**). Anyways, we do not see any regulations of all the configurations of the Council of the EU, except for:

- *General Affairs Council*, which prepares the works of the European Council and co-ordinates the works of the Council of the EU in its different configurations; it is composed by *ministers for Europe*.
- *Foreign Affairs Council*, which is composed by the foreign affairs ministers, and chair by the High Representative for Foreign Affairs, dealing with EU external actions.

The Council has a *6-months rotating chair* given to a member state minister (now, it is Hungary's turn). The main feature of the Council of the EU is to act as **co-legislator** together with the European Parliament. It also approves the budget of the EU with the EP, it enters into international agreements with the EP, and it coordinates the economic policies of the member states.

The European Council usually votes with a qualified majority voting, *on a proposal by the Commission* or *by the High Representative*. The **QMW** is special: 55% of member states, representing at least the 65% of population; it is present also a **blocking minority**, made of at least 4 member states, representing at least the 35% of the population. It is extremely rare that the proposals do not come from Commission or HR, but if so, the QMV raises at 72% of member states, representing at least the 65% of the population.

In parallel with the institutions we are analysing, there are some which have considerable influence but which are not covered by the Treaties. The first is the **Eurogroup**, which meets the day before ECOFIN meetings in the presence of all finance ministers, the vice-president of the Commission, the president of the ECB and the president of the Eurogroup. It is a controversial body, because it decides secretly the direction to be taken

officially at ECOFIN. Similarly, it operates the *Eurosummit*, which is however related to the European Council, whose participants, the chairman of the committee, the European parliament and the Eurogroup participate. The problem with Eurogroup is that it is not an EU institution, and therefore the ECJ cannot intervene.
The **High Representative for Foreign Affairs** (now, Josep Borrel) is regulated by Art. 18 TEU, and he is responsible for *Common Foreign and Security Policy* and for **external relations**. He is also *de iure* vice-president of the Commission, and he chairs the Foreign Affairs Council. The HR is appointed by the European Council by a QMV with an agreement with the Commission president (***double hatted figure***, with enormous power in European Council and in the European Commission).

European Parliament

The **European Parliament** is directly elected since 1979, and it is composed of **701** members. The EP is located both in Strasbourg (for a plenary session once a month) and Brussels (to be more in touch with other EU institutions). Both the *passive franchise* (to be voted) and the *active franchise* (to vote) are granted to *every eligible EU citizens regardless of where he/she lives* (**transnational democracy**)
MPs are elected according to *national rules*, but the Treaties specify that the representation has to be **proportionate**. Member states are seated according to a ***digressively proportional representation***: each state has a minimum of 6 MPs and a maximum of 96 MPs. Doing so, there is not the risk of being under-represented or over-represented.
The greatest role of EP is to function as a ***co-legislator***; the European Parliament has to agree on everything to pass a piece of legislation. We can actually say that EU has quite a *bicameral system*: Council of the EU and Parliament must agree on the *same draft* to make a law pass. As we said, the EP too approves the EU budget, proposed and administered by the Commission. Moreover, it is the European Parliament that **elect the President of the Commission** (whose name is proposed by the European Council). The EP also approves the European Commission *as a body* and can make it *resign as a body*. Finally, the EP has *supervisory powers*, including the possibility for the EP to **trigger** the proceedings provided by Art. 7 TEU, against a member state, when there is a serious risk of violation of Art. 2 values of persistent and serious breach thereof. Last but not least, it is the EP that analyse the *petitions* put forward by citizens (*Citizens' initiative*).

European Commission

The **European Commission** is regulated by Art. 17 TEU. The EC is a **supranational institution** (not executing the will of single states), and it pursues the interest of EU. It monitors the correct application of EU law, and it can start *infringement proceedings* against a member state in front of the ECJ. It also executes the budget of EU and directs the external relations and representation.
The European Commission has a **President** (now, Ursula Von der Leyen) and it is made of a college of **27 Commissioners** (including the president). As we mentioned, the European Council proposes a candidate, decided by QMV (actually, usually by consensus), who gets elected by the European Parliament with majority voting. Then, the Council of the EU (*General Affairs composition*), at the instigation of the Commission President, proposes the *list* of commissioners (and each state gives a list of up to three people). President elected and Candidates get **auditioned** by the European Parliament, which will finally vote on the Commission as a body. After that, the Council of the EU formally appoints the European Commission by QMV.
Since 2020 (*Santer commission scandal*), the President has also the possibility to **request the resignation of a Commissioner**; moreover, the President is responsible for setting the Agenda of the Commission.
By its side, the *College of Commissioners* has a complex internal structure; the President is assisted by a close circle of *eight* **Vice-Presidents** (*three* of which are **Executive VP**, and one sits *ex officio* being the HRFA). Commissioners have to be *independent experts*, with a mandate of **5 years**. They can actually be *removed* with **EP motion of censure**, **resignation**, **inability to fulfil the conditions for the job**, **serious misconduct**, **resignation requested by the President**.
The Commission has the *monopoly* over **legislative initiative**, and also a significant *political role*, setting the EU agenda. Finally, it has an important **executive role** (enacting European norms, managing budget, negotiating with third countries, delegating EP and Council, etc.) and **supervisory role** (overlooking the correct application of EU Law; which is actually contested, because the Commission is both the investigator and the sanctioning body).

To conclude, we may now understand if the European Commission is a *democratic* or a *technocratic* institution. In theory, it has to be consider a **technocratic institution**; when it was created, the idea was to have a technocratic commission, and not a political one, and the Parliament was not even involved in its appointment. Nowadays, however, the EP is involved, because the EC is a *mix*: it surely is technocratic, but he has a lot of *political influence*. The question is, thus, whether the European Commission is democratic or not; it is actually not democratically elected, but it is anyway approved by a *democratic body*, which is nevertheless somewhat constrained (*take it or leave it*): EP cannot make a single commissioner resign and the Commission represents EU and not citizens. We can say that European Commission is not *as democratic as* normally governments are, and neither it is *indirectly accountable* (as Councils, accountable to their national Parliament). In short, born technocratic, distant from the citizens, it is now a completely *political body*, pushing for a *federal state*.

EU COMPETENCES

Speaking about **competences**, we mean the *power to act*. Member states have what is called the **inherent competence**; as they are sovereign States, they can act in every field; on the other hand, EU is based on the **Principle of conferral**, so it only has competences that the member states *conferred* upon it. The reason of principle of conferral can be found in the very basis of EU, the *internal treaty*. Following the functionalist approach, a group of states consensually yield some of their sovereignty to a supranational institution.
Thus, under the **Principle of Conferral**, if a competence is not conferred, the EU cannot act; moreover, the **objectives** have to be *compatible* with the overall objectives of the Treaties. Sometimes, the treaties confers a competence **explicitly**, but not always: it can also be **implicit**. In those cases, there is competence because it is *necessary to achieve on of the aims of the Treaties*.

Type of competence

Deeply analysing the types of competence, we mention the **Art. 2 TFEU**, which states that EU competences can be:

- **Exclusive**: *only the Union* may legislate and adopt legally binding acts. The member states have renounced to their **sovereignty** in those fields, so they can act *only* in fields and to the extent that the EU empowered them). **Art. 3 (1) TFEU** specifies that EU has exclusive competence in ***customs*** *union*, ***competition*** *rules*, ***monetary*** *policies*, *marine biological resources,* and *common* ***commercial*** *policy*. Then, **Art. 3 (2) TFEU** confers exclusive competence to the EU for *international agreements* when:
  1. Its conclusion is provided for in a *legislative act* of the Union.
  2. It is *necessary* to enable the Union to exercise its competence.
  3. Insofar as its conclusion may affect common rules; this is what is called the **ERTA Principle**. If an international agreement affects common rules, the EU must have exclusive competence (otherwise, the choices of a single state could impact on internal rules, and thus on other MSs).
- **Shared**: as the most important competence, the EU can adopt legally binding acts, being considered that the member states shall exercise their competence if the Union has not, or it decided to stop doing it. Thus, both MSs and EU have competence, but the former can only when the **EU has not act** (***Principle of Pre-emption***) or decided to cease exercising its competence. Whilst the exclusive competences result in a "closed list", the rule is that if the treaties give the EU a competence which is neither exclusive nor co-ordinating or supporting, **it is shared** (**Art. 4 TFEU**). The *shared competences* are a lot: *internal* ***market***, ***social*** *policy*, *economic-social-territorial* ***cohesion***, *agriculture and fisheries*, ***environment***, ***consumer*** *protection*, ***transport***, *trans-European* ***network***, *energy*, *area of* ***freedom***, ***security*** *and* ***justice***, *health matters*, *research*, ***technological*** *development*, *space*, and *humanitarian* ***aid***. In these fields, EU can introduce legally **binding** acts, including **harmonising legislation**.
  Coordinating and Supporting: these are the competences when EU *coordinates* and *supports* the acts of the MSs, **without harmonizing the matters** (thus, the EU cannot impose anything). Policy areas in which EU has such a competence are described by Art. 6 TFEU, and they are *protection an*

improvement of ***human health***, ***industry***, ***culture***, *tourism,* ***education***, *youth, sport, civil* ***protection***, and ***administrative*** *cooperation*.

- **Art. 5**, finally, provides a *non-defined* competence; member states can coordinate their **economic policies**, considering that the Union has to coordinate the employment policies and the social policies of the MSs. In theory, they are not *shared competence* (no possibility of harmonizing), neither *coordinating* nor *supporting* competences.

A separate analysis is needed to comprehend the competences in the **common foreign and security policies**; as we said, the Treaty of Maastricht underlined them as the *second pillar* of EU. In fact, member states were jealous of their foreign policies, and they had decided to function as a *non-supranational* institution, so that EP, Commission, and ECJ are not involved. Also after Lisbon, the EU has competence to *define and implement* common foreign and security policies (**Art. 2 (4) TFEU**), but only in the **limits** of **Title V TEU**. Hence, this competence is really special; as in an *intergovernmental* model, policies are decided by consensus **directly by MSs**, and the EU cannot adopt legislative acts in that field (no direct effect). Moreover, the ECJ can act only in those cases that *affect individuals*, as stated by **Art. 24 TEU**. Anyways, there is space for a *residual* competence of EU, as permitted by **Art. 352 TFEU**. If action by EU prove *necessary* to attain one of the **objectives of the Treaties**, the **Council**, acting *unanimously* on a proposal of the **Commission**, consented by the **European Parliament**, shall adopt the *appropriate measures*. There is, thus, space for something the drafters of the Treaties have not even imagine. Only with unanimity, and with the consent of EP, action in that field of the EU are possible. However, the Commission **must alert** the National Parliaments, which have the possibility to *object* (as we will now see talking about *subsidiarity*). In this way, it is assured that the residual competence is used only when it is **strictly necessary**.

Subsidiarity and Proportionality

Once the EU has a competence, *whether* it should act? And *how*? **Art. 5 TEU** states that the answers can be found in the two key principles of **subsidiarity** and **proportionality**.

Starting from the *principle of subsidiarity*, it is not sufficient for EU to have competence (except the exclusive ones) in a field to be able to enact policies: they also **must be required**, as actions at local level would not be capable of achieving the same aim. We can make an example; if the EU has competence in the environmental protection, according to the principle of subsidiarity, it would not be appropriate that the EU decide how to collect rubbish, whilst at local level it would be more adequate. On the contrary, if we speak about emissions, in order to conserve the internal market too, the EU should act to prevent the possibility of inequality between MSs, being *more efficient*. Moreover, Art. 5 TEU speaks about **National Parliaments**, which must ensure the principle of subsidiarity: once the EU regulates something, the MSs cannot longer do it. Therefore, why do we need principle of subsidiarity? Remembering the **Treaty of Maastricht**, it has been enacted during a debate related to the balance of an *ever-closer Union*, with the principle according to which the decisions should be taken **as close to the citizens as possible**. Moreover, there were concerns about an *over-centralized* Union, with the EU institutions and the ECJ doing too much in every field. This has been called the ***spill-over effect***: the idea of preserving internal market could lead to whatever measure the EU would like to adopt. Later, in 2004, there has been a new debate on whether the principle of subsidiarity could really be better checked by a Court such the ECJ; actually, the ECJ would not be comfortable telling political institution that they were wrong, but political European institutions always decide as for the principle of subsidiarity. The ECJ was thus considered not a reliable judge on subsidiarity, and the idea was to control political institutions through other political institutions: the **National Parliaments**. Art. 12 TEU specifies their competences; in fact, the NPs contribute actively to the good functioning of EU, ***being informed*** by the institutions of EU, and by seeing that the principle of subsidiarity ***is respected***. The formal role of NPs is actually proclaimed by the **Protocol 2 on subsidiarity**: National Parliaments need to be informed of a new legislation comping up, so the Commission is **obliged** to send the draft to all the MSs parliaments. In the *preamble*, the draft must state *how* the proposal complies with subsidiarity (and proportionality). Then, the National Parliaments have **8 weeks to object** (but just on subsidiarity grounds, never on proportionality), issuing their own assessment on why EU actions is not more effective than the local one, and thus not needed. Well, 8 weeks are not that much: it is a brief period, NPs have a lot of work to do and, besides the decision, they should communicate with other parliament because

1/3 of NPs are needed to initiate the objection procedure. Moreover, each Parliament has to make *two votes*, favouring the bicameral systems like Italian one. Now:

- If *at least 1/3* **object** the proposal on subsidiarity ground, the Commission has to **give reasons for maintaining** (*duty to review*). This is called the ***Yellow Card Mechanism***.
- If *at least half* **object**, it **must be reviewed**; actually, this does not mean that the proposal has to change, In fact, the Commission should give a *reasoned opinion* on why subsidiarity is satisfied. Anyway, the Commission should also *alert* the legislators: if it decides not to withdraw, the ball passes to EP and Council, which have to consider if the principle is respect or not, and to decide to **abandon** the procedure (55% majority in Council, or simple majority in EP).

But where is the ***Red Card Mechanism***? How can parliaments just stoop the proposal? Actually, considering the *indirect accountability* of the Council, we understand that it is exceedingly difficult for a minister to vote differently from his own parliament. If many parliaments have expressed their opposition to a proposal, it is almost impossible for it to pass. The Commission, fully aware of this mechanism, withdraw its draft before the proposal reaches the Council. However, many argue that having control over subsidiarity alone is insufficient. In fact, National Parliaments can only express an opinion on the effectiveness of a EU act, but they cannot comment on the proposal itself, nor if they consider that it respects the balance between the interests at stake (the *principle of proportionality*, now in analysis).

Moving to the **Principle of Proportionality**, it tells us *how* a legislation is drafted. As stated by **Art. 5 (4) TEU**, the action undertaken must be *proportionate to interest pursued*. Each time a regulation is passed, someone's right is limited, and EU should act in the way the least rights are limited. Moreover, as stated by the Treaties, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Proportionality is truly relevant in cases concerning fundamental rights: for example, thee ECJ *annulled* a legislation for breaching the proportionality principle; it was the *Data Retention Directive*, which required the retention of personal data for two years. The Court (C-594/12 or *Digital Rights Ireland Ruling*) identified a huge burden for providers and a potentially wide invasion of the privacy. The provision was *too broad*, not sufficiently *detailed*. Clearly, as the case show us, conversely from the subsidiarity principle, the proportionality can be controlled by a Court, and the NPs are not considered necessary.

An example during Covid-19

Before concluding, we must give an example to understand the importance of EU competences. In 2020, after the Covid-19 crisis, a conspicuous injection of cash was necessary because of the financial incapacity of the most affected MSs. Thus, the Commission formalized it with the ***Recovery Instrument***. It knew what it need to dot, but it could not, because the EU did not have competence on the subject of issuing debt and redistributing policies. So here is how EU acted. The EU needed three pieces of legislation: one to authorise the funding, the other to establish *where* the money should be allocated, and the last *how* it should be done:

1. ***Own Resources* decision**: the Council of the EU, at *unanimity*, authorized the borrow of 750 bn euros. The decision had to be ratified by each National Parliament, and the EP was consulted
2. **EU Recovery Instrument**: the Commission relied on **Art. 122 (2) TFEU** (*Emergency assistance to a MS*), and the Council decided on the allocation of the money (the EP was only informed).
3. **EU Recovery and Resilience facility**: the EP was not excluded, because the recovery and resilience facility had to be enacted (according to Art. 175 (3) TFEU) by *Ordinary Legislative Procedure* (that we will see, but now it is sufficient to know that it makes intervene both the EP and the Council).

There was not an explicit competence of the EU, but involving all decision-makers led to the Recovery Fund.

LAW-MAKING IN THE EU

We have seen how, when, whether or not the EU acts, and it is time to focus on the **instruments** the Union has, starting from the *sources* of EU law, and understanding the *decision-making process*. As stated before, the EU made a **new legal order**, based on TEU and TFEU, but (even if it formally failed) it can be seen as a *constitutional order*, with various sources, with a clear **hierarchy**:

- ***Primary sources*** are the *Treaties* (TEU and TFEU), *Charter of Fundamental Rights* (Nice, 2000), and *General Principles*. Between them there is no hierarchy, they are **horizontal**, with the same legal value, even if it is the COFR that condition the wat the ECJ interprets other provisions. Moreover, ECJ *cannot annul* treaty provision and other primary sources, because it derives its power by them themselves. Indeed, the MSs have given a part of their sovereignty to the EU, and the Treaties defines the sources and the limits of EU. For General Principles, it is important to read the **Art. 6 (3) TFEU**, understanding that primary sources determine *what* can be done at EU level and how.
- ***Secondary law*** is the legislation of EU, divided in several types (regulations, directives, and decisions), in the respect of Art. 289 TFEU.
- ***Delegated acts*** are adopted when a legislative act give powers (so, *delegates*) to the Commission to adopt a specific act ***within the limits*** of the delegation (Art. 290 TFEU; it is the same that happens with decreti legge and decreti legislativi in Italy)
- ***Implementing acts***, mostly adopted by the Commission, can be needed for very technical directives, which have to be implemented with new scientific discoveries. As for delegated acts, the Commission should respect the limits, or the implementing act is consider invalid (Art. 291 TFEU).

Legal instruments

Art. 288 TFEU provides different legal instruments:

- **Regulations**: they are *binding* in their entirety. When a regulation is adopted, it is **directly applicable** in all MSs, without any filter between EU and citizens. Being a legislative instrument, it cannot be addressed to individuals, but it always have ***general application***. As stated in Variola Case (34/73), the Regulation not only does not need an implementing, but an implement **must not be adopted** by national authorities; otherwise, citizens could think that it represents just a feature of domestic law, hiding its nature of EU law; beside this, the principle of supremacy should always act, even if a national law is approved later, and it has to be clear that the regulation is a EU act. Whereas this means that Regulations are *legally complete*, this does not mean they are *factually complete*: in some cases they need execution at national level (e.g., criminal procedures).
- **Directives**: they are *binding* as to the result to be achieved, but they leave discretion to MSs on the form and method to achieve it (the National Parliament will *ratify* the directive). Directives are less intrusive than regulations, complying more with Principle of Subsidiarity. The MSs have just a **duty to enforce** the directive *by a given date*, and a failure to do it is *automatic sufficiently* serious breach of EU Law (*Francovich liability*).
  Normally, NPs reproduce certain provisions of the directive, and then give *details* more specifically.
  Usually, directives are addressed to all MSs, but it is possible that a directive is addressed to *single* Member States. Anyway, directives have *direct effect*, so a citizen can rely on it even if its nation has not yet implemented it.
- **Decisions** are usually *administrative* acts, that mat be addressed to one or more MSs, but also to individuals. Obviously, this is an exception, and decisions can also be of general application, but the rule is that (different from the two other legally binding acts, Reg. and Dir.) decisions are binding *only* to the addressee.
- The other two types of acts the EU can adopt are **Recommendations** (from the EP) and **Opinions** (from the Commission). They are *not* legally binding, and cannot be challenged before a Court; anyways, they are commonly used.

Ordinary Legislative Procedure

How in practice legislation is made? The main legislative procedure used is the ***Ordinary Legislative Procedure***, as known as **OLP**. Actually, there are *Special* LPs (for example, the one seen for the Recovery fund), that could provide for different majority or different roles of the institutions. Anyway, the Treaty of Lisbon established and standardized the OLP, that *shall be applied*, unless otherwise specified.
The OLP is a ***co-decision*** procedure; the Commission makes a proposal, and the European Parliament and the Council decide. The Commission's powers are immense, however, and it may even **withdraw** a proposal if it

feels that EP and the Council have amended it too much. In addition, there is also a popular initiative in Europe; at least 1 million citizens and 1/4 of the Member States can ask the Commission for a proposal. Once these quorums have been reached, however, the Commission has only a **duty to respond**, not to act.
In any case, the co-legislative procedure provides for **constructive dialogue** between the **EP** and the **Council**, since both must eventually agree on the same text. In the OLP, unanimity is not required, and the mechanisms of **QMV** already seen operate. In practice, the Commission sends the **final draft** to the council, to the EP and to the National Parliaments (these, as seen, monitor compliance with the subsidiarity principle, and will possibly **object**). At this point, the EP adopts a **position** (votes in favour or against), and if the Council then *approves the EP's position*, the act is **approved**. On the contrary, if the Council does not approve, it adopts *its own position* which is then sent to the EP. To avoid legislation dying in the Brussels halls, if the EP does not *expressly reject* the amended draft (nor approve it) for **three months**, the act is considered **approved**. If, on the other hand, the EP rejects the act by a majority vote, it is not adopted. If, on the other hand, the EP proposes amendments by **majority**, the amended draft is sent to the Commission (which checks that the amendments are *coherent*) and to the Council. The Commission and the Council then give their *opinion* on the amendments. If the Council **agrees** within **three months**, the act is **approved**. If, on the other hand, the Council *does not agree*, then it goes to a *Conciliation Committee*, convened within 6 weeks and composed of 28 representatives of the Council, of the EP, and 1 representative of the Commission. Within **6 weeks**, they must find a **joint text**. In practice, however, negotiations take place much earlier (**Trilogue**), and the representatives of the three institutions decide on a common text well before it is formally done (very efficient, less democratic).

CONSTITUTIONAL EUROPE

THE EFFECTS OF THE EU LAW

We have to start from two key principles, which are the **direct effect** and the **principle of supremacy**, general principles and pillars of EU. Both of them, as we said, are derived from *Case Law* of ECJ; speaking of Van Gend & Loss, we have seen that ECJ established *direct effect* because EEC established a **new legal order** and individuals needed to rely on EU law in front of national courts (*invoke EU rights directly*). The **direct effect** can be defined as the ability for an EU provision to be invoked directly in front of a national court, without the need of transposition into national law. Moreover, speaking of Costa v. Enel, we have understood that EU law take precedence over conflicting national law: this is the *principle of supremacy*, and without it the effect of EU law would be different from a MS to another; anyways, there are some national courts (such ours…) that drew boundaries on this principle (*Teoria dei controlimiti*). Moreover, in the Simmental Case (106/77), it was stated that national courts have to disapply the contrasting law, giving precedence to EU law, granting its full effect. Thus, *supremacy* grants individuals a remedy against violation of EU law and ensures uniformity.

Direct effect: not just an "effect"

It is not always possible for an individual to invoke direct effect: it depends on the *legal source*, and also on the *characteristics* of a rule. First of all, we have to differentiate between **Vertical Direct Effect** (which is the ability to invoke EU law against a State) and **Horizontal Direct Effect** (which is the ability to rely on EU law against a private party). As stated in the title, direct effect is something *specific*, not just an effect (EU law has effect even if it is not direct, as we will see with *indirect effect* and *Francovich liability*).

To have direct effect, a provision has to:

1. *Grant a **right***
2. *Be **clear***, so not ambiguous nor obscure
3. ***Unconditional***, without conditions attached
4. ***Sufficiently precise***, in order to ascertain a right

We should move on with a case: ***Defrenne 43/75***. Ms. Defrenne was a flight attendant in Belgium, who invoked the application of Art. 119 CEE (now, 157 TFEU) for the equal pay of men and women. The case became a huge debate: UK, for example, stated that art. 119 was *too general*, not fulfilling the 4 conditions of direct effect. The ECJ stated that treaty provisions can have **HDE** if conditions for direct effects are satisfied; whilst the UK gave a very literal interpretation, the ECJ used a ***teleological interpretation***. They interpreted the norm to achieve the aim embodied in the provision: equal pay for men and women, and so, the obligation of equal pay was *directly* applied. Moreover, the ECJ has been imposing the direct effect not only to the private flight company, but also on *National Courts*, which should be ensuring the link between EU law and national law. To conclude: when a *right* is provided by EU law, national courts have a ***treaty mandated duty*** to give effect to it.

It is not always easy to understand VDE and HDE, but, we have to remember that it depends on the provision at stake: e.g., free movement of goods has always VDE.

Defrenne Case gave us an explanation of Treaties in the panorama of direct effect, and we now move on to *regulations* and *decisions*; **Art. 288 TFEU** affirms that **regulations** are *directly applicable*, and, simply, if condition of direct effect are satisfied then regulations could have both VDE and HDE. For **decisions**, that we remember are binding on the addressee, can have direct effect only if condition are fulfilled. Not a big deal…

Here is the big deal: Directives and Direct effect

Directives are binding on the *results to be achieved*, and MSs decide how to achieve it (directives need *implementation* by MSs, through legislation that transposes EU law to National Law). It is inevitable that MSs are left with discretion and here is the big deal: what if a directive is not implemented, or improperly implemented? How can citizens invoke their EU rights? The answer is in a case: ***Van Duyn v. Home Office 41/74***. Ms. Van Duyn, from the Netherlands, reached UK to work in the Scientology Church, and was rejected due to the preoccupation of UK on such a controversial organization, justifying the action for restriction on public policy ground. UK, thus, was not excluding the woman for her behaviour, but just because on the dislike on the organization. Van Duyn argued that the directive was not respected, and the ECJ was asked if and individual can invoke a directive not implemented in a MS. UK, with a *textual argument*, affirmed that, because

Art. 288 TFEU (at those times, art. 189) differentiate between Regulations, Directives, and Decisions, it is evident that the legislator, issuing a directive, intended that the directive should have an effect other than that of a regulation. Obviously, ECJ did not agree: what would be the point of having directives, binding for MSs, that cannot be relied on by citizens? Here is another *teleological argument*: if directives could not be invoked, what would the ratio of *Preliminary Reference*.
As stated by **Art. 267 TFEU**: it is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between MSs and individuals. Well, how a directive can have direct effect?

Condition for a directive to have DE

First of all, to repeat, **Art. 189 TEU** states that directives are binding *as to the aims* to be achieved in a *certain amount of time* but leave **discretion** to MSs on *how* achieve them. In practice, a directive, in the last provision, establishes a **due date** for the MSs to implement it (that varies from **2 years** and **5 years**, depending on complexity of matters). The directive **only displays effects *after* the time limit expired**: until that moment, directives have no effect. Anyway, this does not mean that MSs are not restricted: National Parliaments **cannot** adopt legislations that could *frustrate the aims* of the directive. Well, the first question that we should to ourselves is: *has the time limit for transposition expired*? If not, there is no effect, and no direct effect!
Furthermore, **after expiration**, the direct effect is possible only if the MS **has not implemented** the Directive or has done it **incorrectly** (and the reason is that EU does not want citizens to rely on contrasting norms).
Moreover, directives must fulfil the same criteria of regulation: *clear, precise,* and *unconditional*. Thus, not all provision of a directive can be *directly effective*
However, be aware that **if a MS take positive actions** (do something active…), the Directive ***cannot have direct effect*** (e.g., the MSs should create a fund for compensating victims of sexual discrimination; in this case, direct effect is excluded).
Finally, the directive can be invoked *only* **against a State** (or one of its *emanations*…we will see); thus, directives ***cannot have HDE***.
We should also say that **vertical situations** occur only when an individual bring a case *against* the State, and not vice versa (that would be an horizontal situation). Moreover, the ECJ established the ***estoppel argument*** in the Ratti Case: the Italian prosecutor wanted to rely on a Directive *against* Ratti, that Italy had failed to implement. The principle thus states that the MS cannot rely on its own failure to refuse to grant some rights, and Mr. Ratti was free. This principle has become the centre of the debate in the *Marshall Case* (**152/84**). This is a case involving gender discrimination on the pension front. The *estoppel argument* works in cases of state involved, and MS. Marshall worked in hospital. The reasoning was then that the hospital can be considered part of the state (remember ***emanation*** of State?). The ECJ then aimed, among its criticisms, to **expand the concept of state**. It was discussed that identical situations also occur in the private sector, creating considerable discrimination. Anyway, making the notion of State *broader and broader*, today, we refer to State for the police, for regional authorities, for fiscal authorities, ect. Consider the **Case Foster** (c-188/89): Ms. Foster was employed in a British Gas corporation that has been privatized; was she in a HDE or VDE situation? The ECJ argued that, because of the fact that gas is a public utility, the case is in a *vertical situation*. Maybe, this is too much, and some just states: why can't all directives be directly applicable and stop?

Vertical vs. Horizontal Effect: General Principles

The distinction between VDE and HDE was really criticized, especially from **Advocates General**: if we interpret the *emanation* of state broader and broader, horizontal and vertical is a distinction without any sense. An important case has been the **Faccini Dori** (C-91/92); at the time, a directive provided for the right to withdraw from contracts at a later date without additional costs, and that was exactly what Faccini Dori wanted to do. As the situation was horizontal, the directive was not intended to have direct effect, but Faccini Dori asked the ECJ for this. **Advocate-General Lenz** spoke on this point, arguing that the case was an opportunity to remove the unnecessary distinction between vertical and horizontal situations. According to Lenz, it was necessary to include in the direct effect branch also *horizontal situations*, since the maintenance of the distinction gave rise to random results, and arbitrary decisions, as well as *discrimination*. Lenz concludes that directives are always directed at the Member States, and all the more does the idea of horizontal situation make

no sense. Moreover, Lenz argued that ECJ not always is so formal in applying EU law (e.g., Defrenne case), due to the high usage of teleological arguments.
ECJ ignored the arguments proposed, maintaining the distinction, reaching a controverse conclusion. We have to remember that **fundamental rights** were recognized as *general principles* by ECJ, and then codified with the Treaty of Lisbon. Even if the Charter is made for being applied to EU institutions, the ECJ started to apply it to MSs *when* ***implementing*** *EU law*. As clarified in the **Mangold case** (c-144/04), whilst a directive cannot apply in a horizontal situation, the **general principle can**. More precisely, *if* there is a general principle (now, a *fundamental rights* of the Charter) that could be applied in a situation, *and* this situation falls in the scope of a directive, *then* the general principle can apply in horizontal situation. As we understand by reading **Art. 51 CFREU**, it is not possible to have any discrimination *in introducing, applying*, and *interpreting* EU law. We can say that, since ECJ did not want to give horizontal effect to directives, they produced this principle.

Vertical vs. Horizontal Effect: Consistent interpretation or *Indirect effect*

When a directive is *neither* directly effective, nor supported by a Charter provision, the ECJ came up with the **duty of *consistent interpretation***, or just **indirect effect**. National courts, applying EU law, must, *insofar as possible*, **interpret national law consistently with EU law**, even if there is not direct effect: EU law always takes precedence, and it must be given effects as much as possible. Also when the provision of a directive has no direct effect, national courts have to consider if *any provision* of the national legal system can be interpreted to give effect to EU Law. Again, ECJ gave a broad interpretation to this duty (*insofar as possible*). Moreover, due to the fact that indirect effect is a duty of NCs, it can be used both in horizontal and vertical situations.
Anyway, when considering a **directive**, this duty is applicable *only* **after the time limit** to implement the directive has *expired*. We have also *two limits* of this duty:

1. NCs should *not provide* a ***contra legem*** interpretation; Courts have an **outerlimit** to not *go against* the legislation.
2. NCs should guarantee that indirect effect/consistent interpretation is **never used to aggravate Criminal liability**.

Direct effect: a resume

Before concluding, let us sum up what we have said:

- **Treaties**: if a provision of them is sufficiently *clear*, *unconditional*, and *precise*, it may have both and horizontal and vertical direct effect
- **Regulations** and **Decision**: potentially they have both horizontal and vertical direct effect, with same conditions
- The **Charter** and **General Principles**: potentially they have both horizontal and vertical direct effect, *insofar* the situation falls within the scope of EU law
- **Directives**: direct effect *only in vertical* situation, and reliable on *indirect effect*.

Francovich liability

We should now understand what happens if a directive is intended to gran a right, but it is not *directly effective*, or we are in a *horizontal situation*. Here is **Francovich liability**. Francovich is an important case, in which Italy had not implemented a directive, according to which MSs should have created a fund to protect employees in case of employer's bankruptcy. Mr. Francovich remained without his wages just because Italy failed to implement the directive. The direct effect was impossible, because it was a case of horizontal situation and, moreover, the directive was not unconditional, presuming actions at state level. Italy, thus, made a *preliminary reference* to the ECJ, which decided that Italy **had to pay damages**. But how? In the Treaties we cannot see any *State Liability*, but the Court stated: the effectiveness of the Community rules and the protection of the rights which they grant would be **weakened** if individuals were unable to *obtain redress* when their rights are infringed by a breach of Community law of which a **Member State is responsible** (*principle of non-contractual liability of EU institutions*). The ECJ, with a teleological interpretation, established a general principle: a redress is due for breaches of EU Law made by MSs. To justify the State Liability/Francovich

Liability, the Court defined it as *inherent* with the Treaties, but with three conditions (as result of cases ***Brasserie-Factortame III***):

1) The provision **must be intended to confer rights**.
   In the case *Factortame III*, Spain had just joined EU, and fishing vessels could fish everywhere because of *free movement*; UK prevent Spanish fishermen to go into British waters, and three cases were brought to ECJ. A directly effective right (to not be discriminated for nationality) was at stake (we can say that Francovich Liability is useful *also* in direct effect cases), but fishermen suffer an economic loss for the period in which UK, liable, would not permit them to work.
2) The breach of EU law, in order to have State Liability, **must be sufficiently serious**.
   In the case *BT* (c-392/93), ECJ established criteria to understand this "sufficiently serious of the breach" (when MSs have ***manifestly disregarded*** their limits of discretion). Thus, the **BT Test** states:
   i. The Court has to consider the *clarity* and the *precision* of the rule infringed (maybe it leaves more discretion than usual)
   ii. The Court must consider if the infringement was **intentional** or **involuntary** (and thus non-liable)
   iii. The Court should consider if the infringement was **excusable** or **inexcusable** (maybe a recent provision has not a strong interpretation, whilst a secular Case Law is impossible to misunderstand)
   iv. It is possible that EU institutions ***contributed*** to the maintenance of national measures contrary to EU law. In fact, MSs must notify their implementing legislation to the Commission in some cases, and if the Commission says nothing MSs are in *bona fide impression*.

   Such criteria are *non-exhaustive*, because they always underline that MSs are at fault or not, considering the discretion. The rule is that the **mere breach of EU law might lead to Francovich**, and the non-implementation is *automatically* a sufficient serious breach, and MS will be automatically considered liable of *Francovich Damages* (if the other two conditions are fulfilled).
3) There must be a **casual link** between breach and damage.
   When a MS correctly implement a directive, there cannot be any liability. Anyways, it is for **national law** to determine the *existence of a casual link*: that is what we call **National Procedural Autonomy**.

So, Francovich Liability can be accorded against States (and not privates) …but who is State? We have to reconsider the *emanation* of the State, with the widely broad interpretation of the ECJ.
Being, finally, more precise on National Procedural Autonomy, EU law is applied at national level, and the rules of procedure to ensure Francovich Liability are determined by national law.
National Procedural Autonomy, anyways, is based on two principles:

A. **Equivalence**: a claim in the EU law must no be less treated than a claim in national law, so procedural rules must not treat EU rights less well than national ones.
B. **Effectiveness**: national rules of procedure do not deprive EU law of its effectiveness.

Francovich Liability, thus, can solve the inequality inherent to the absence of horizontal direct effect, even if obtaining compensation is different to be able to exercise a right.

THE ECJ

Let us now look at the **European Court of Justice**, separately from the other institutions. **ECJ** (also referred to as CJEU) is composed by *two* Courts:

- The **General Court**, which is a *first instance* court. **GC** has a bigger composition, because it must have *at least one* judge per MS (nowadays, they are *two* for MS). GC is competent for some **direct action:**
  i. *Actions for **annulment*** of an EU act brought by a **person**
  ii. *Actions for compensation for **damage*** caused by **EU institutions** or their **staff**

  GC is competent in disputes between EU and its staff too. GC's decisions can be **appealed** before *Court of Justice*, only on a **point of law** (in Italian, *giudizio di legittimità*), and if the appeal is agreed the case is sent back to GC, which decide considering CJ's ruling.

- The **Court of Justice**, an *higher court*, made of *one* judge for MS and **11 Advocates General** (they are judge who *advise* the CJ. When a case reach CJ, it is assigned to a ***Chamber*** (or to the *Full Court* if it is particularly important) and to *an AG*, who gives an **opinion** (not binding, but often followed by judges).
  CJ, above all, deals with requests of ***Preliminary Rulings*** (**Art. 267 TFEU**), so when a NCs asks a question about EU law's interpretation. As we said, CJ is the court of appeal for GC, and it is also competent for **direct actions**:
  i. *Actions for **annulment** of an EU act* **only** brought by a **MS** or **institutions**
  ii. ***Infringement procedures*** started by the Commission against MSs, when they fail to fulfil EU law's obligations, imposing *financial penalty* (in case of ***twofold failure***)
  Moreover, CJ dedicates itself to *opinions*, by MSs or institutions,, regarding the compatibility of an international agreement (e.g., **Opinion 2/13**, on the joining of EU to ECHR).

As we said, ECJ is located in **Luxembourg**, and the *working* language is French (whilst the *official* languages are all those of the Union).

PRP: the Preliminary Reference Procedure

Although it has been mentioned several times, it is time to observe how the **Preliminary Reference Procedure** works. The answers can be found in **Art. 267 TFEU**. First of all, the CJ has *jurisdiction* to give **preliminary rulings** regarding *interpretation* of the Treaties, and *validity and interpretation* of acts f the institutions, bodies, offices, or agency of EU. If such questions are raised before ***any court*** *or* ***tribunal*** of a MS (if considered that the question is necessary to give judgment), that court or tribunal may request the CJ to give a ruling thereon. If, moreover, such questions are raised in a case pending before a court of a tribunal or a MS, *against whose decisions there is* ***no judicial remedy*** (under national law), that court or tribunal has to **bring the matter before the Court**. Finally, is such questions are raised in a case pending before a court or a tribunal of a MS, ***regarding a person in custody*** (jail), the CJ **has to act with the minimum of delay**.
Well, even if it is obvious, we should always remember that ECJ can *only interpret* the Treaties, and never *annul* them, whilst *every EU act* (secondary) can be annulled. Anyways, as stated by Art. 267 TFEU, **any national court** *may* ask the ECJ for a *preliminary ruling*, if such question is necessary to solve the dispute; beside, if it is raised before a Court (or Tribunal) whose decision is *not appealable*, the PRP is **mandatory**.

PRP in practice

Imagine two individuals arguing in front of a national court, and it turns out that there is a **relevant provision of EU law**; if there is *no case law* regarding it, and the NC is a **first instance court**, it *may* raise a doubt over the **validity** or the **interpretation** of EU law. In fact, ECJ has ***hermeneutic monopoly*** over EU law, and it only ECJ to determine and interpret Union norms (and that is also why last instance court are **obliged** to raise a PR). Once the case is under ECJ's jurisdiction, the *registrar* (in Italian, "cancelliere") verifies that similar cases had not been already decided (if yes, he resends it to the NC, namely the ***referring court***). If not, the President of the Court assigns the case to a ***Chamber*** (if the case is really relevant to the *Grand Chamber*), made of 3-5 judges; the case is also sent to an **Advocate General**. Now, parties make pleadings and are heard before the Court, whilst the AG gives an ***opinion***, sending it to the judges (who can absolutely reject it; it is common, anyway, that, even if ECJ does not reject AG's opinion, lots of *compromises* are needed. This is because ECJ does not allow ***dissenting opinions***, and thus mediation is needed). Then, the ECJ gives a ***ruling***, just interpreting only EU law, and **never** national law or the facts of the case), and it sends it to the referring court, which is **bound to it** (under penalty of *Francovich Damages*). Now, the case is ruled by NC, and **never** by ECJ; if the ECJ was not sufficiently clear, the NC *refers again*.
Moreover, if a party argues that a provision of (secondary) EU law is **invalid**, the only institution that can annul it is the ECJ; thus, if NCs think that the party has a point, they **have to** refer to CJ. This is because of the *principle of legal certainty*; as stated in the **Foto-frost case**, it is impossible to have a *diffuse judicial review*. Thus, the power to invalid an act resides *only in ECJ's hands*.

PRP in detail

Let us make a numbered list:

1) A NC stops the proceedings and **refers a preliminary ruling request** to the ECJ.
   This first point needs to be explained clearly. As we noted, *lower* NCs are treated differently from *highest* NC; whilst a lower court *may* (or ***may not***) submit a preliminary request, the highest court is **obliged** to do it. Well, as asked in **CILFIT case**, what if the last instance Court *already know* the answer; actually, Art. 267 does not specify if last instance Court may not refer in case the ECJ has already ruled, and a *second* PRP would be useless and a waste of time/money. The ECJ found a solution: the fact that a party asked for a PRP is *not enough* to compel the national judge to do it; national courts can be seen as **gatekeepers** who verify if there is an actual doubt or not. More precisely, as stated in *CILFIT*, a last-instance court has the **duty** to refer to ECJ, but they may *refrain* (**as an exception**), in case:
   - The question is **irrelevant** to the actual case
   - Of ***Act éclair*** (*clear act*): there is no doubt, because the norm is clear and unambiguous
   - Of ***Acte éclairé*** (*cleared act*): ECJ's case law on the same issue is available
2) If the request is *admissible*, parties are invited to **send written submissions**
3) The **Commission** (and, potentially, other MSs) *intervene* (no other third party can)
4) Often, an **oral hearing** is held in Luxembourg
5) The AG submits an **opinion**
6) The ECJ issues its **ruling**

Concluding on the *value* of PRP, as we said, the **referring court is bound to the ruling**. Moreover, due to the fact that EU law system is a ***case-law-based system***, the rulings of ECJ have a **precedential value**, thus, other institutions and MSs shall interpret EU law in light of the new ruling (*legally authoritative value of ECJ's rulings*).

However, even if *very rarely*, the ECJ can **refuse to give an answer** (*order of inadmissibility*), when:

- The preliminary reference **lacks essential information** about the facts of the national proceedings
- The issue is **purely hypothetical** or **irrelevant**
- The Court has **already ruled** on that issue
- The Court **lack jurisdiction** (remember Common Foreign and Security Policy)

Enforcement of EU law

In order to make sure that MSs *comply* with their obligations, the EU has the **decentralized EU law enforcement**: *national courts* are the **guardians** of the correct application of EU law. But how? Well, with:

- ***Direct effect*** of EU provisions (see Van Gend & Loss)
- ***Indirect effect*** (or *duty of consistent interpretation;* see Von Colson)
- ***Member State liability*** for *sufficiently serios* breach of EU law (see Francovich)

This is not enough: in fact, the Treaties give also the ***Infringement Procedure***, through which the Commission brings proceedings against MSs before the ECJ (**Art. 17 TEU**). Well, if the Commission is the "watchdog", **only the ECJ** can *decide* if there is a breach or not. In practice, if the Commission thinks that an MS has failed to *fulfil its obligations*, it shall deliver a **reasoned opinion**, *after* giving the MS the opportunity to *submit its observations*. If then, the State does not comply with the opinion within the ***period*** set by the Commission, the Commission *may* bring the matter before the ECJ (**ART. 258 TFEU**). Thus, we can look at the infringement procedure as a *dialogue* between parties, with *different powers*; in fact, the Commission has **discretion** on starting or not the procedure, being not obliged to deal with every single violation of EU law (and this could lead to political decisions); moreover, the Commission just *may* bring the case before the ECJ. However, there is not an investigation unit, so the Commission detects violations relying on ***individual's complaints*** (with **no** rights to force the Commission to go to the ECJ), ***press***, ***another MS***, an ***MS's failure to notify the implementation of a Directive***. Anyway, the Commission has always discretion on bringing the case in front of the Court, and the procedure can be sum up in **4 stages**:

1. ***Pre-continuous stage***: the Commission gives the MS the opportunity to reach an *informal solution*
2. ***Formal notification***: with a public letter, the Commission ask the MS to answer by a *deadline*

3. ***Reasoned Opinion***: if the MS does not give an appropriate response, the Commission issue it, setting the *grounds for infringement*, giving a new deadline to remedy
4. ***Referral***: if the MS still does not comply, the matter is referred to the ECJ

As we can see, *two* problems emerge from this procedure; firstly, it is an ***highly discretionary*** institute, leaving space for political reasons to let the Commission start it; secondly, even if the Court ascertain the violation, it **cannot impose sanctions** (the ECJ follows just a *declaratory mechanism*). To solve the latter problem, with the Treaty of Maastricht, it was introduced the **Art. 260 TFEU**, with the new *Pecuniary Penalty*. In fact, the Commission has to specify the amount of *penalty payment to be paid* by the MS, which is considered appropriate. Anyway, this penalty procedure can be so long, taking more than two years. Thus, the Treaty of Lisbon added point 3 to the article, stating that *in case of* ***failure to transpose*** a Directive, the Commission can ***immediately*** seek a pecuniary penalty. The Court cannot *exceed* the sum proposed by the Commission, but obviously it is the ECJ to decide it, considering the **seriousness** of the breach, its **duration**, and the **deterrent effect** the sanction can have.

Stop and reflect: a summary

So, here we are: the EU legal system is founded on the *interaction* between national and EU law; doing so, the PRP is fundamental, giving the **direct line** of communication between NCs and ECJ. In order to ensure the sustainability of this system, the ECJ has elaborated two key *constitutional principles*, which are the **direct effect** and **supremacy**. So, in this sense, ECJ created a *new legal order*, in which individuals have rights directly enforceable in front of NCs, ensuring **uniformity**. In this way, the two principles also ensure a **diffuse scrutiny** over MSs observance, and individuals becomes **agents of the EU**. This, with *Francovich Liability*, reduces the injustices of the distinction between VDE and HDE, and also **pushes MS to comply**. In the end, the Commission also have infringement procedure, eventually requiring to impose a fine.

Judicial Review

We should now understand the case of a **provision** of EU law that is *invalid*. Well, **judicial review**, as part of every constitutional and democratic system is based on the ***principle of legality***: *any act* must be compatible with the **hierarchically superior** norms. To absolve this principle, every legal system has mechanisms to **review** the legality of an act before a Court. Thus, we will understand, in the EU, *which types* of act can be challenged, *by whom*, in front of *which court*, and *on which grounds*.

First of all, we should understand what Standing does mean: *standing* is the right to go to a Court in order to ***act and challenge*** an act of authority; it is the ability to *go and stand* in front of a Court. **Art. 263 TFEU** tells us about the ***actions for annulment of EU acts***, the **only** way that an individual have to challenge an act, before the GC and then the CJ in appeal. In fact, NCs do not have the power to annul EU law, as it is a monopoly of ECJ.

Well, *who can act*? There are rules for the three main institutions (Council, EP, Comm.) and for MSs, others for *Special* institutions (*es.* ECB), and others *private parties*. There is also a **time limit** (of 2 months) to act, starting from the enactment of that provision. Anyway, before that the ECJ (as all courts in the world) determine the validity of the act, it should determine if the action is ***admissible***, understanding if the challenged has been made *in the time limit*, if the claimant has *legal standing*, and if the act *can be reviewed.* If the answer is yes, in all three questions, then the Court start to analyse the ***merit*** of the case.

The *first part* of **Art. 263 TFEU** states that the only act that **cannot be reviewed** are *recommendations* and *opinions*, as they are not legally binding. Moreover, *challengeable acts* are those adopted by institutions that are **listed** in the article (Cou., Comm., EP, ECB, EC, agencies…). Furthermore, if we ask *what kind* of acts can be challenged, the Art. 263 tells that one can *only challenge* those acts **intended to produce legal effects** *vis-à-vis third parties*.

The *second part* of **Art. 263 TFEU** lists the **grounds** upon which acts of EU can be *challenged*. Further, it presents the ***Privileged Applicants***, which are MSs, the Council, the Commission, and the European Parliament; they are named *privileged*, because the Art. Does not require *any* qualification to establish standing, what we call the **inherent standing** (in other words, such applicants *always have* a legitimate interest to bring an action).

The *third part* of **Art. 263 TFEU** is dedicated to the other applicants, which are those *special categories* of EU agencies, such as ECB, Committee of the Regions, and Court of Auditors. They are considered ***Semi-privileged Applicants***; unlike the privileged ones, not in any case, but *only* in order to **protect their own prerogatives** they can challenge EU acts.
The *fourth part* of **Art. 263 TFEU**, obviously, relates on *individuals and companies*, as ***Non-privileged Applicants***, which have to *establish* standing, so they have to demonstrate their *interest in acting* to access the Court, and to have their case heard. But *when* does an individual have standing? In order to avoid the overwhelming of the system, and ensuring the legality, the Art. 263 TFEU divides acts in different types:

- Acts are **addressed** to a person/company; it sufficient for an individual to go before the ECJ, not needing to prove anything. As for the principle of legality, *anyone* must be able to challenge an act that identifies him/she/it specifically. This is common for act of the Commission, addressed to companies in the matter of *competition law*.
- Acts are of **direct and individual concern** to a person/company
- **Regulatory acts** of direct concern, and not in need for implementing measures

The *concern* in the Judicial Review

Well, if the act is *not addressed* to the applicant, he must **prove to have an interest** to bring the action (so, to have *standing*). The EU *limits* challengeable acts into those that are of ***direct* or *individual* concern**:

- **Direct concern**: the EU measure *affects* the applicant's position **directly**, and there is *no discretion* by any implementing authority. For having *direct concern*, it has be a **relationship** between the *act* and the *individual*; moreover, and more than anything, there has to be ***no discretion*** of any implementing authority. For example, a directive always leaves discretion to the MSs, so the applicant may challenge the national implementation act before an NC, because he is considered *not directly concerned* by the directive. Anyway, if that legislation *obliged* the MSs to do something, then there is no discretion (e.g., imposing a fine to subject who makes X), all the individuals (in the example, fined) are *directly concern*. To explain the principle, the ECJ used the case ***International Fruit*** (1970): the EU, in order to protect European farmers, limited the imports of apples; the MSs would communicate the number of licenses given to international traders, but the limit was actually decided by the Commission. Thus, International Fruit Company challenged the act, because it was *directly concerned*. In other words, **direct concern** *simply* requires looking at ***where the decision has been taken*** (who the act is *ascribable to*).
- **Individual concern**: the individual has to be in a *special* situation, unlike other person/company. Individual concern was not defined in the Treaties, and the ECJ derived it from a very *restrictive* interpretation in the case ***Plaumann*** (in 1963, that will give the name of *Plaumann Test*, still applicable). In particular, Germany requested to the Commission to suspend duties on clementine coming from extra-EU. The Commission refused, *addressing its decision to Germany*. Plaumann Co. (importer of clementine) was unhappy, but the decision was not addressed to Plaumann, rather to Germany, and thus to *any* producer (no direct concern). So, when Plaumann wanted to challenge the decision of the Commission, it had to *prove* its concern. The Court, now, gave a **test** to understand if Plaumann was *individually* concerned or not: there is individual concern when a decision affects (individuals or companies) by reason of **certain attributes**, which are **peculiar** to them, *or* by reason of **circumstances** in which they are **differentiated** from all other persons, *and* by virtue of these factors **distinguishes them individually** just as in the case of the persons addressed. Thus, it must be proven that an act affects someone as if he was the **only individual** affected. This is just an adaptation of the *principle of legality*: if you are addressed, you can challenge; if you are not addressed, but the decision defines precisely the addressees identifying you, *de facto* you are addressed, and you can challenge. Well, the ECJ, in Plaumann, did an *extremely narrow* interpretation, holding that this is the ***only*** possibility for an individual to challenge an act if he is not addressed; the claimant has to prove that he is in a *closed class of individuals,* being affected in a special way. For example, in ***Codorniu*** case (1989), a regulation established norms for the production of a particular wine; Codorniu was the Spanish company that has been the *only* producers of a wine, so it was considered *individually concerned*.

It is not that easy: practically, if someone is not addressed, it is very difficult for him to challenge the act, and it becomes almost *impossible* if the act is of general application (Reg. and Dir.) …maybe it is not that good!

Plaumann test is not the best…

The Plaumann test has been **widely criticized**, because it is *too narrow*, and excludes too many people, especially in those cases of diffused interest (e.g., environmental protection), in which it is quite impossible to establish a *closed* class. Some scholars also stated that Plaumann test does not respect the **Art. 47 CFREU**, which establishes the *effective judicial protection*.

First of all, the Court answered the criticisms saying that changing interpretation would mean to change treaties, something ECJ cannot do, but, as we said, Plaumann test *is not in any treaty* (so the argument has been criticized even more). Secondly, the Court stated that in any case the solution for an individual could be the PRP, making the NCs as ***gatekeepers***, thus making a preliminary check if the case deserves to be brought at EU level. If *anyone* could go to ECJ, privates like business companies would *always* do it, overwhelming the system. Anyway, a problem has raised using this kind of reasoning, in the **UPA** case: a Reg. prohibited fishing of a certain kind; it was self-implementing, providing criminal liability for any breach. As there was no implementing act, the only way for an individual to bring the Reg. in front of a Court would be **breaching it**, risking of criminal liability: hence, there is no way to challenge an act like that, and *unlawful act* could survive.

On the matter, **AG Jacobs** wrote a fundamental *opinion*: once the preliminary route is not available, individuals are **deprived** of an effective judicial remedy; the idea that PRP can solve the problems of individual concerns is **not true**. In fact, the PRP is not controlled by individuals, but by Courts, being actually a dialogue among them, depending on them. Thus, AG Jacobs proposed to reconsider the notion of individual concern, proposing an ***alternative***: a person is individually concerned by EU Law where, by reason of **particular circumstances**, the measure has a ***substantial adverse effect on his interest***. Well, well, but what does *substantial* mean? And does *any adverse effect* count? AG Jacobs admitted the doubts, but ensure the Court that with case-laws, the problem would be minimum. Before UPA, another case arrived to ECJ (***Jego-Quere***): a Reg., self-implementing, with no criminal liability, but with the same problems as UPA; there was no possibility of PRP for the applicants. The **General Court**, anyway, *changed the standards*, broadening the Plaumann test, allowing privates to challenge a generally applicable act: perfect, all done!...Well, no. In fact, in UPA, the ECK ruled the opposite, and that is why AG Jacobs proposed the solution (that was already reached by ECJ in Jego-Quere, and then abandoned without a particular reason).

Anyway, the two cases presented has been ruled just before the constitutional drafting of the *Treaty of Lisbon*, and there was already the idea that PRP was not always functioning. Thus, **Art. 263 TFEU** was integrated by a *third* possibility of challenge: individual can challenge against a ***regulatory act*** which is of *direct concern* to them and does ***not entail implementing*** measures. Thus, in a similar case, the applicant will just have to prove the direct concern, and not also the individual. Anyway, the drafters did not define *regulatory* act, and two interpretations has been raised: (I) *any self-implementing* act is a **regulatory act**, (II) **regulatory act** is an *administrative act*, which is self-implementing. The solution has been given in the ***Inuit*** case (2011): more in agreement with the second, a **regulatory act** is an act adopted without OLP, because the ordinary legislative procedure comes from a democratic debate, in which the interests of concern parties have been already heard.

Later, in ***Telefonica*** case, ECJ clarified the meaning of ***not entailing implementing measures***: the ECJ argued that this concept refers *not only* to EU implementing measures, but also to *national* implementing measures.

However, the problem of UPA has not been solved; but should it be? In every legal system it is difficult to challenge legislation, balancing judicial protection with effective and democratic decision-making; moreover, ensuring judicial protection is not only up to the ECJ, because also MSs shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Maybe, it would be better that the rules of standings were changed by the MSs, ensuring PRP concretely.

Grounds and Standards of Review

All right, when you are sure you can go before the ECJ, you must persuade the Court that that act is **unlawful**. How? On different ***grounds***: *lack of competence*, *infringement of essential procedural requirements*, *infringement of treaties*, *infringement of the rule of law* (fundamental rights, principle of proportionality, legitimate expectations), and *misuse of powers*.

For the ***standards*** of review, the rule is: the wider the discretion of institutions, the **less intensive** the judicial scrutiny is.

THE CHARTER OF FUNDAMENTAL RIGHTS

It is time to talk about **Fundamental Rights**, something particularly important for EU legislation, because if EU law is not compatible with fundamental rights, it can be *annulled*.
When the Treaties were created (ECSC, EEC, Euratom) there was not any mention of Fundamental Rights, because the three communities were supposed to be completed by a **political community**, in which FRs would be considered; with the failure of the European Defence Community (due to the contrary vote of French Assembly), any political community would not come to existence; therefore, in those treaties FRs were completely unmentioned. A problem immediately arose because of the historical context; in a post war Europe, with NCs very mindful of FRs, and with the EEC with law-making powers, there was the fear of having legislation which *violated Fundamental Rights*. This kind of problem was enlarged by the Principle of Supremacy, with the possibility that such unrightful law would take precedence over national constitutions.
With ***Stauder*** and ***Internationale*** case, the ECJ clarified that, despite the lack of written fundamental rights, they were considered **general principles** of the EU. Moreover, the ECJ specified that it would have referred to common constitutional traditions of MSs and to the **ECHR**. In fact, all the MSs had signed the European Convention of Human Rights and, equally to any other international treaties signed by MSs, the ECJ would take it in account. Moreover, even if the EU was not yet part of ECHR, the ECJ never went **below the standards** of the ECHR, considering it the *absolute minimum applicable* in the EU for FRs. Furthermore, as the member states were very close with the fundamental rights theme, any situation where the ECJ would not protect fundamental rights would lead to the NCs' non-application of the principle of supremacy (as happened in the ***Taricco*** case). Thus, the development of Fundamental Rights as *general principles* happened through case-law of ECJ, but also political institutions were aware: already in 1977 (Stauder and Internationale) the European political institutions clarified that they **agreed with the case-law**, and they considered themselves *bound* by FRs, even if this was not codified in the Treaties. From that moment, in every Treaty revision FRs were cited; Maastricht introduced **Art. 2** on the *core values* of the EU, and in 1993, the **Copenhagen Criteria** for accession were established by the EC: MSs should respect the values of Art. 2, and so the FRs. With the Nice Treaty, MSs signed the **Charter of Fundamental Rights of the European Union**, given full legal value in Lisbon, where MSs let EU institutions to *accede* the ECHR.
But why the need of *expansion* of fundamental rights? The rule is simple: the more you expand the competence of EU, the more urgent becomes to have an **effective wat to protect individual FRs**. Moreover, there was a disconnection between was EU made *externally* and *internally*: EU is a really powerful international actor, always including in agreements the "Fundamental Rights Conditionality Clauses); conversely, in the EU, it did not use the same standards, because of the lack of the Charter. Anyway, in the 90s, there has been a debate between the sustainers of the CFREU and the sustainers of ECHR; eventually, EU ratified ***both***, in 2000 with the Treaty of Nice, and in 2007 with the Treaty of Lisbon. As **Art. 6 TEU** states, the Charter is treated as *primary law*, having the same value of the Treaties. From the article, it is clear that the Charter is not supposed to extend the competences of the Union: the Charter is not a document upon which a piece of EU legislation can be based. Art. 6 TEU also provides how the Charter should be interpreted, again because of the anxiety of MSs that the Charter could be used in an "expansive" way. Lastly, the Union ***recognizes*** FRs, and do not *establish* them, because they exist by themselves, and are not positively established by the Treaties. But Art. 6 continues: EU should *accede* ECHR (as it will do), and the *case law* are safeguarded; thus, if there is a fundamental right that the ECJ had recognized, but it is not codified in the Charter, it is ***still existing***.
To conclude, how did we get to the Charter? The Council, in 1999, provided the ***Cologne Mandate***, for the drafting of it, specifying that the rights to be included were the ones of the ECHR, of the common constitutional traditions, and rights relating only to Union's citizenship. The drafting body was revolutionary: for the first time, we had a **Convention**, not intergovernmental, but made up of representatives of both EP and NPs.
As for the *structure* of the CFREU, it adopts the so-called ***horizontal approach***, so that all FRs can only be effective only if they are enjoyed as a *whole*. The Charter also rejects any kind of hierarchy, since FRs are only separated between civil and political v. social, but on the same level. Rights are grouped in relation of the *six*

values (**dignity, freedom, equality, solidarity, citizenship, and justice**). The Charter ends with four *Horizontal Provisions*; it distinguishes between Rights and Principle; it always have some *explanations* because of the interpretations of ECJ, or ECHR, or NCs.

The Horizontal Provisions

And here we are to the **Horizontal Provisions** of the **CFREU**, so the rules that tell *when* and *how*:

- **Art. 51**: which provides the ***Scope of Application***, deeply examined in the sequent paragraph.
- **Art. 52**: which provides a **general imitation clause** to the Rights of the Charter; whereas in the ECHR each right also contains a clause that regulates its limitation, in the Charter every right can be limited under Art. 52. Thus *any* FR can be limited to a certain extend (but the one not to be *tortured*). Any limitation needs to be **prescribed by law** to respect the **essence** of the right limited, and it needs to be **necessary** and **proportionate** to the meet of the objectives of general interest of the EU. Art. 52 (2) mentions the EU Treaties, stating that, if a Right of the Charter corresponds to rights in the Treaties, it shall be exercised ***under the conditions*** and the ***limits*** defined by those Treaties. The Charter actually refers mostly to the EU citizens' rights, since they existed *before* the Charter. Moreover, Art. 52 (3) specifies that the Charter can never fall *below* the protection provided by ECHR (working as a ***safety net***): Art. 52 does not apply in the same wat to each right of the Charter; instead, it will be interpreted more or less narrowly according to the protection given by ECHR (therefore, the fact that all rights of the Charter may be limited by the same provision is true, but not in the same *way*). Art. 52 (3) also specifies that the EU can provide for *more extensive* protection (but this leads to problems in horizontal situations – between privates). In 2007, with the push of UK, 4 paragraph has been added to Art. 52:
    - *Art. 52 (4)*: if a Charter right corresponds to a common constitutional tradition, it must be given the ***harmonious interpretation*** (actually, even scholars do not know what this means)
    - *Art. 52 (5)* provides a crucial distinction between *Rights* and *Principles* (not existing in 2000, and therefore left to the interpreter in practice); **principles** need legislation to be given effect, while **rights** have free standing, and can be enforced against the EU legislature, and against MSs. Principles, on the other hand, are used to *interpret* EU law and challenge the validity of it (but not of National legislation).
    - *Art. 52 (6)*: **national law** and **practices** have to be taken in *full account*. Some rights of the Charter explicitly refer to national law due to the competence issues between EU and MSs.
    - *Art. 52 (7)* clarified the **explanations** to the Charter, which need to be given ***due regard*** (that means all-or-none…).
- **Art. 53** mentions the *relationship* between the Charter and **other** fundamental rights Charters. Well, Art. 53 is an example of an unsuccessful drafting: it shows the anxiety about the Charter being a document that might become an *accelerator* for competence creating by the EU. The article gives the impression of the Charter being piece of legislation at an **intermediate** level, at the same level as other sources of FRs, and seems to call into question the *principle of primacy* (remember Costa v. Enel: EU law always has primacy over national legislation and national constitutions). So, does this mean that MSs' constitutions can *take precedence* over the Charter? Come on! The art. 53 basically does not mean anything, and the national constitutions would apply only when the EU has not competence (well, the Art. 53 was not that necessary actually). This was made clear in ***Melloni*** case: Mr. Melloni was condemned *in abstentia*, because he was staying in Spain; Italian authorities issued an European Arrest Warrant, and Mr. Melloni argued that it did not comply with the Spanish Constitution. ECJ noticed that Art. 53 CFREU states that EU law can be subject *only to its own constitutional principle*…and Mr. Melloni went to jail, as simple as that.
- **Art. 54** *prohibits* the **abuse of rights**, so using a right for purposes that it was not intended to.

After the Charter, rights became more visible to the citizens, but as a result, the Preliminary References about FRs are overwhelming the ECJ. Apart from the fine words, the Charter has made it clear that all rights contained in it are *always applicable* (and it is not like this). In the reality, it is an extremely **complex** document, to be read alongside explanations, common constitutional traditions, ECHR…what a mess!

The scope of application: Art. 51 CFREU

Art. 51 CFREU is the most complex provision of the Charter; it regulates the ***Scope of Application***, so *when* does the Charter applies and *for whom*. Firstly, the provision differentiate between the application of the Charter *to the EU* (which is **absolute**) and *to the MSs* (which is **qualified**). Moreover, it is interesting to notice that the article cites the *principle of subsidiarity*, even though it is not dealing with law-making. The reasons are again related to that anxiety we have mentioned before.

However, the most crucial point is indeed the distinction on the application between EU and MSs. As for the **EU institutions**, the obligation *is not qualified*: FRs of the Charter must apply to **any act** they issue, so that any EU act respects fundamental rights. This means that legislative acts, executive acts, decisions, acts in the international arena, and even non-acts of the EU are subject to the Charter. The ECJ, anyway, made a step below in **Kadi I**: after 9/11, a UN Security Council resolution was enacted, in order to freeze the assets of suspected people of being related to Al Qaeda. Every state, without considering FRs, could block the wealth of any suspect. Mr. Kadi (a rich Saudi Arabian) argued that, beside its right to **property**, also his right to an **effective judicial remedy** was violated, since he had not been given evidence on which his inclusion in the UNSC list was based. The case went before the GC, where the Commission argued it was not its fault, because the EU regulation related to the UNSC resolution was just and *implementation* of it, so that GC had not jurisdiction on it. The CJ, on the contrary, stated that as the EU was actually a *proper constitutional system*, it always had to be bound to the respect of fundamental rights, even when implementing international law. Hence, the Court stated that **there cannot be a gap**: the EU cannot use international law to avoid FRs scrutiny, and this applies across *all of the actions* of EU. As clarified in ***Ledra Advertising*** (related to European Stability Mechanism, a parallel treaty outside EU contexts), every EU institution is always bound by fundamental rights, regardless of the capacity in which it was acting.

What is more difficult is understanding *when* and *how* the Charter applies to **Member States**. First of all, the EU is *not* a human rights organization, and the EU is a system based on *conferred powers*, and it does not have a general fundamental rights competence. In this context, *all* the MSs have **their own system** of FRs protection and, to complicate things, all of them are bound by **ECHR**. It would be easy if there were a *neat separation* between legal sources, which told us when apply X and when apply Y…but it is not like this. There is a huge *overlap* between National and EU law, also relating to fundamental rights; well, what happens when EU law related to FRs *overlaps* with National laws on the same subject. For example, just consider all of that competences that EU have in criminal law, asylum, immigration, which are fields where human rights plays a crucial role. Moreover, MSs are jealous not only of their "codified" fundamental rights, but also of their *hermeneutic monopoly* about them. And here is **case law**, reached by ECJ even before the Charter, stating that EU fundamental rights are relevant in *two cases*:

1) *When the member state is **implementing secondary law*** (e.g., a directive). When a National Authority makes a choice based on the *degree of discretion* the EU act has left, it is **bound by the Charter** (*delegation theory*: the State is acting upon the instruction of EU), *as well as* by its own **National Constitution**.
2) *When a member state issues an act that **limits the free movement rights*** (that, as we remember are directly effective and take precedence over conflicting law). Member States can only limit Free Movement Rights in **circumstances prescribed** by EU law, in a way that is *consistent* with the EU Constitutional principles: whenever a MS is limiting a free movement right, then the National Authority has to comply with the EU fundamental rights.

   Some problems arose in ***Carpenter***: Mr. Carpenter, an English man, married Mrs. Carpenter, from Philippines, who *overstayed* her VISA. British immigration laws are really strict, and so the woman had to go back to her country, being separated from her family for at least six months: the Carpenters decided to appeal, and they could do it on *Human Rights Act* (the British law that gives effect to ECHR), or use an ingenious argument before the ECJ. Since HRA was unfavourable for them, they used the latter: even if the case was a domestic one, Mr. Carpenter worked in other MSs, and appeal on the right of *Free Movement of Services*, arguing that with his wife in the Philippines, their children and his work would have problems. Invoking EU Fundamental Rights, they were cover by the EU umbrella: direct effect, supremacy, Charter. In the end, the ECJ admitted the woman to remain in UK. What is crucial is that, claiming FRs at EU level, one can have significant *procedural advantages*,

whilst with National Fundamental Rights Charter, one should wait for a preliminary reference in front of the Constitutional Court (*questione di legittimità costituzionale*, in Italy), without those advantages. Another significant case has been the ***ERT*** one, related to restrictions of license of broadcasting in Greece, and thus on *Free Movement of Goods*.

Generally, when Fundamental Rights are applied to *national law*, they might have an **enhancing effect**, meaning that the *highest standard* between EU fundamental rights and National law should prevail (with the only exception in criminal law). More problems arose in horizontal situations, when the strengthening of someone's right determine someone's else **loss**, as cleared in *Viking* and *Laval* cases, that we will analyse talking about Free Movement in general later.

EU and ECHR

ECHR is not part of EU law, even if it is used as the *minimum* standard applicable; moreover, the EU is *not part* of the European Convention of Human Rights. The **Council of Europe**, as we said, is **not** part of the EU and its main instrument is the ECHR, enforced in Strasbourg by the *European **Court** of Human Rights* (ECtHR), and not by the ECJ in Luxembourg. Whilst EU is not, **all MSs** are parties of the ECHR, so that the ECHR is considered the *public law* of Europe, being also our safety net, because states may go *above* the ECHR, but *never below it*. Further, before an individual can go before the ECtHR, he has to *exhausted* all the domestic remedies in existence. Anyway, what happened if the EU breaches the ECHR? When MSs *implement* EU law, they have discretion, and everything is fine, since ECHR applies to implementing MSs. The problems arise in those cases in which MSs have *no discretion*, and every relevant choice has been made at EU level; ECtHR **cannot review EU acts**, and this might lead to a gap in FRs protection. Art. 53 CFREU mentions the ECHR as the *minimum standard applicable*, but this does not give ECtHR jurisdiction, nor it guarantees that the ECJ would not make a more restrictive interpretation, nor it guarantees that a national tribunal would ask a preliminary reference…the safety net could be compromised at EU level, since EU could potentially fall *below the standard*. Such problems were clarified in ***Matthews*** case, about a woman in Gibraltar who could not vote for EP since a *collective act of MSs* (primary law) denied it. Ms. Matthews found a breach of the Protocol of Democracy ECHR, but UK argued that it could not be the case, since ECtHR had no jurisdiction. Anyway, ECtHR considered UK and *all* the other MSs in violation of the Convention. ECJ was aware of the issue and was very careful not to depart from the ECHR standards. Even if Art. 52 and Art. 53 CFREU impose ECHR as a minimum standard, the problem has not been solve, due to the *lack of jurisdiction* of ECtHR over EU act. Within time, the ECtHR moved to a more intense scrutiny: the adoption of an act at EU level does not exonerate the Court of Strasbourg of jurisdiction, because it is always the MSs who are acting, even if through EU law. So here is the ***doctrine of equivalent protection*** (EU is considered as granting equivalent protection of HRs as the Convention), working as a rebuttable presumption, so that the claimant can prove it wrong:

A. *When the ECJ **cannot exercise jurisdiction*** (over primary law, as in *Matthews*, or areas like as the *Common Foreign and Security Policy*). In those cases, the ECtHR will assert its own jurisdiction
B. *When, in the actual case, **EU protection is manifestly deficient*** (when EU has gone below the standards). This doctrine was established in the ***Bosphorus*** case.

To conclude, **Art. 6 TEU** provided for an *obligation to accede* ECHR, so why EU not done it yet? After the Lisbon Treaty, the Commission starting negotiations with Council of Europe, requesting an opinion to ECJ (Art. 218 TFEU). With **Opinion 2/13**, ECJ affirmed that the draft agreement was incompatible with the Treaties because of *institutional problems* and lack of consideration of the *principle of mutual trust* between MSs. Negotiations restarted in October 2020, and we will see…

THE RULE OF LAW CRISIS

We now conclude the theme of constitutional Europe with an interesting feature: the **Rule of Law crisis**. We should immediately get that the EU **has no general** competence in the field of Fundamental Rights (even if it has sectoral competence in some fields, such as *discrimination*): this means that there is no general power of enforcement in fundamental rights! Moreover, the EU has its own catalogue of rights (CFREU), that surely applies to EU acts/institutions, and also to MSs but ***only when they implement EU law***: Thus, the Commission cannot bring proceeding for violation of the Charter unless is also a violation of another piece of EU law.
When we look at Art. 2 TEU, we notice the *values* of the EU, and in those there is also the **rule of law**; at the same time, Art. 4 (2) TFEU states that the Union shall respect the equality of MSs before the Treaties as well as their **national identities**. Therefore, the vision of a Union founded on values common to all MSs, but which preserves their diversity and constitutional individuality, is that the EU values represent a limit to diversity that MS have agreed; anyway, often, the Art. 4(2) is used as a *defensive mechanism*. But why do values matter? The **interconnection** between MSs requires common values to be *enforceable*, leaving aside moral issues, considering also that internal market could not function if national institutions are not accountable and democratic. Moreover, what over MSs do is increasingly relevant if those MSs have a say in matters beyond they borders, and how MSs deal with FRs is crucial in certain fields (Asylum, co-operation in civil matters, etc.). Finally, it would be inconsistent to have *values and requirements for entry* in the EU, but no enforcement once a state becomes a MS.
Well, the problems seem to be prevented with **Art. 7 TEU**. On a reasoned proposal by *one third* of MSs, by the EP, or by the Commission, the **Council** acting by majority of 4/5 of its members, after obtaining the consent of the EP, may determine that there is a *clear risk of a serious breach* by MSs of the values of Art. 2. Before making such determination, the Council shall hear the MS, and may address recommendations to it, acting in accordance with the same procedure. The Council, then, shall regularly verify that the grounds on which such a determination was made continue to apply. In this way, the EU can **censor** MS for a clear risk of a serious breach of fundamental values. This is what is called the ***preventive mechanism***, presented by Art. 7 (1) TEU. But it is not it. We also have the ***sanctions mechanism***, referred to Art. 7 (2) and (3) TEU. Firstly, the European Council, acting by *unanimity* on a proposal by 1/3 of the MSs, or by the Commission, after obtaining the consent of the EP, may **determine** the existence of a serious and persistent breach by a MS of the values of Art. 2, after inviting the MS to submit its observation. Then, where a determination under 7 (2) has been made, the **Council** acting by a *qualified majority*, may decide to **suspend certain of the rights** deriving from the application of the Treaties to the MS, including the *voting rights* of the representative of the government in the Council. Doing so, the Council shall consider the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the MS in question under the Treaties shall in any case continue to be binding on that State.
Some problems arose also for Art. 7, since the majority required allows for *blocking minority*, worsening the rule of law crises by effectively sheltering MSs (if rule of law backsliding in two MSs, Art. 7 is paralysed. Moreover there is no definition, nor objective mechanism, but just a **political measure**. Finally, the Commission has not enforcement action, and the ECJ has a very limited role, eventually reviewing the procedural requirements stipulated in Art. 7 TEU. But we have some solutions to the *lack of effectiveness* of Art. 7. First of all, FRs enforcement should be promoted by secondary legislation. Then, we should consider Art. 19 (1) TEU: MSs must provide remedies to ensure effective legal protection. Further, we should cite the Portuguese Judges case of the ASJP (*Associacao Sindical dos Juizes Portogueses*): obligations under 19 (1) to ensure that national bodies which may rule on questions of application or interpretation of EU law meet the requirements of judicial independence (as stated in Commission v. Poland). In 2020, it was issued the *Rule of Law conditionality* Regulation (2020/2092), for the payment of funds conditional upon rule of law compliance. And finally, we should mention the potential effect of Art. 2 TEU, now protagonist of the pending case Commission v. Hungary C-762/22.

SUBSTANTIVE EUROPE

CITIZENSHIP

When the European project started, only *Economic Free Movement* was considered, so that people were able to move as workers, service providers, and self-employed. In the Treaty of Rome, thus, there was a link between *movement* and *economic activity*; the ECJ started to interpret this broader and broader, admitting in this system also *service recipients*, so who was an economic actors *passively* (e.g., a tourist). Therefore, Nationals of MSs could move only as they exercised an economic activity, or as they did it to receive a service. **Art. 45 TFEU** provided for the *Free movement of workers*, **Art. 49 TFEU** for *Free movement of establishment*, and **Art. 56 TFEU** for *Free movement of services*. Anyway, until the 90s, rights in EU law were still linked to the exercise of an economic activity, and in fact, during the 80s, there has been a huge debate on the exclusionary effects of this "**market citizenship**" (if you cannot work, you are excluded from the right).
In 1990, the EEC introduced three Directives, presenting, for the first time, the right to **reside** in another MSs, even for the non-economically active people, including *students*. These three directives were the ***General Residents Directive***, the ***Pensioners Directive***, and the ***Students Directive***. But wait! The right to reside was conditioned by two features: possessing ***sufficient resources*** and having a ***comprehensive health insurance***. Indeed, MSs did not want EU migrants to become a *burden* for the State and, since the main expenditures are related to health, having a comprehensive health insurance sheltered the State to pay for the migrants' healthcare. For the sufficient resources, the MSs did not wanted that migrants needed an income support too. Well, even if the Directives granted free movement also to non-economically active citizens, the right was limited, without any "cross-border solidarity": *you could move just if you could afford it.*
In 1992, the **Treaty of Maastricht** change the terms midway, and the EEC became something different: the **European Union**, with the new concept of ***European Citizenship***, hoping for a *feeling of belonging*. In fact, **Art. 20 TFEU** establishes a sort of *dual citizenship*, as it must not replace the national one, because Europe is not a federal state, and EU citizenship is something unique: whilst citizenship is usually linked to the idea of Nation-State, the EU citizenship goes *beyond* and creates a **supranational citizenship**. Art. 20 TFEU continues: EU citizens have the right to **move and reside** *freely* within the territories of MSs; they have the right to **vote** and to stand as *candidates* of the EP, and in **municipal elections** in their MS of residence, under the same conditions as nationals; they have the right to enjoy the protection of the **diplomatic and consular authorities**; they have the right to **petition** the EP. This is impressive…well, no: paragraph 3 of Art. 20 TFEU states: "*These rights shall be exercised in accordance with the conditions and the limits defined by the treaties and by second legislation*". Everything is about this last paragraph, in order to understand how we can conceptualise a supranational citizenship, by definition not linked to a territory.

Case-Law in citizenship matters

Three key cases come to our aid, which helped to define the concept of European citizenship and its effects:

- ***Martinez Sala***: Ms. Sala was a Spanish national living in Germany regularly under national law. In 1993, she had a baby and applied for child-rasing benefit, but Germany denied them because of the lack of valid residence permit for the benefit. The German NC, however, asked for a preliminary reference on two basis:
    1. Whether she was a worker for purposes of EU law, and if so if she would have been entitled to *equal treatment* in relation to welfare provisions. It could be case of indirect discrimination on ground of nationality, since Germans did not need a residence permit to get the allowance. Anyway, the ECJ did not considered this theme that much…
    2. Whether she had the right to equal treatment *anyway*, for being a **European Citizen** (Art. 18 TFEU prohibits discrimination on grounds of nationality). So, the question was if the introduction of EU citizenship meant that Ms. Sala fell within the scope of the Treaty and could claim her right for the benefit.

  The ECJ answered positively; Ms. Sala was a Union citizen, and was lawfully present in the host MS, and she could claim the right to *Equal Treatment*. In other words, a **lawfully resident** union citizens have a right to equal treatment to nationals of the host MS.

- ***Grzelczyk***: Mr. Grzelczyk was a French student in Belgium; due to his tuition, he always worked, but the University told him to stop do it to concentrate on his studies. He then asked for the MINIMEX (a Belgian economic measure for minimum income support), and Belgium excluded him. Grzelczyk claim that was a **discrimination** on grounds of nationality, and his case fell within the scope of EU. He stated that, if Ms. Sala was able to claim equal treatment, he also was an EU citizen, and he should have been able to claim his MINIMEX. Belgium, on the other hand, argued that citizenship is subject to limits and conditions, contained in the directives we cited before, and if the student had not sufficiently resources and comprehensive health insurance he would become an unreasonable burden for Belgium. Well, both arguments were convincing, but the ECJ held that Union citizenship is a **fundamental status**, so as to establish the outmost importance of the principle of equal treatment in every case the union citizen is a *reasonable* burden for the host state (otherwise, the residence can be *terminated*). This created an undesired effect: if you are lawfully resident than you can access benefits, but if you access benefit, and then become an ***un****reasonable* burden, you lose your residence. Grzelczyk case, in fact, many Union citizens refrained from applying for benefits.
- ***Baumbast***: Mr. Baumpast was a German citizen living in the UK got his first residence status as a worker, but then his company failed, and started to work for a German company in China and Lesotho, so that he could not be protected by Art. 45 TFEU (he was not working in a MS anymore). Anyway, he had his family in UK, but, in 1996, British authorities **refused to renew** their permit since he was not a worker of UK or EU anymore, and his health insurance was not comprehensive, covering health expenditures in Germany and not in UK. Mr. Baumbast claimed he was protected by **Art. 21 TFEU**, arguing that it had direct effect and so, even though he missed the comprehensive health insurance, his right to reside in the UK directly derived from the Treaty. Neither in Martinez Sala, nor in Grzelczyk the ECJ stated that Art. 21 had direct effect, but they did so in in Baumbast, since he granted a right in a clear, precise, and unconditional way. So, the Mr. Baumbast's right to reside did actually come directly from the Treaty. Art. 21 TFEU provides for the right of free movement and residence, subjected to the limitations and conditions from secondary legislation, but such conditions and conditions must be interpreted accordingly to the *Principle of Proportionality*. The idea of UK to denying the right to stay to a person who had never applied for any welfare provisions, who was considerably wealthy, who had children in their education and a wife, was brutally disproportionate, so the Court upheld his right to reside. So, after Baumbast, once a right coming from the Treaty is recognised, even if one did not fulfil the conditions set out in the Directives, he could have had the right to reside in case the denial was *disproportionate*.

Overall, Union citizenship is a very difficult concept, still problematic. Such system might have effect of threatening the domestic welfare state, since it is completely funded at national level. More and more, it is *perceived* that EU citizens might threaten the viability of national welfare states; in fact, one of the reasons of Brexit was that some Brits (above all, Nigel Farage) though that European "migrants" came to the UK to abuse of their system.

Directive 2004/38

With works culminating in 2004, the EU enacted the **Directive 2004/38**, tiding up the matter, and codifying the case-law as it was when the directive was written. The Directive presents **who is entitled** to reside in a MS other than that of nationality, provides for the **right of equal treatment** and **family reunification**, and details who can be **excluded from the territory** of the host state. The directive only applies in relationship between the citizen and the host state, not regulating the one between the citizen and his *own* state (even if there are cases in which it applied to it).

Who the Directive applies to? **Art. 2** specifies who is **protected** by it, that is **Union Citizens**: all citizens of MSs are Union citizens, so that EU citizenship is determined by reference to national law; **only MSs can determine who are their own citizens**. Further, whilst EU citizenship does not interfere with the decision to *grant* citizenship, it might affect the possibility of the MS to **withdraw** citizenship: when a State does it, it also take away EU citizenship from the person at stake. Linked to this, there is a phenomenon of MSs *selling* their citizenship, and Malta and Cyprus are now facing intense scrutiny by European Commission. Art. 2 also protects **family members** of the EU citizen.

Art. 3 gives us the *material scope* of the application of the Directive; it applies to the extent to which the migrant is relying on the directive *against a MS* ***other*** than the one of its nationality. In fact, the main aim of the directive is to codify the **right to reside**, inherent in national citizenship. The ECJ has also held that the reasons for moving between two MSs are **immaterial** to the enjoyment of the rights conferred, and this is crucial: in certain cases, citizens move from on MS to another just to benefit from the *family reunification regime*, as it is more extensive in the EU law than in domestic one. The Court also found that some rights provided by the Directive apply in cases of **circular migration**, arising when a person goes to another MS and comes back after having exercised free movement rights. Anyway, the Directive does not apply in *mere internal situation*, and for it to have enforcement a "border being crossed" is necessary.
A fundamental case of circular migration has been the ***Surinder Singh*** one: a British-Indian couple that had moved to Germany wanted to come back in the UK. The wife was British, so there was no problem, but the husband was Indian, and UK refused to give him a residence permit, on the ground that the Treaty did not apply to its own nationals coming back in UK: according to the Brits, the treaties applied only to foreigners, and not to British citizens. The Court did not agree: Ms. Singh had the same rights as any other EU national going to the UK and, otherwise, the citizen concerned would be **deterred** to go to another MS if, coming back, he had not the same rights, when his spouse and children were not also permitted to enter and reside. Thus, Mr. Singh could *derive* from his wife the right to reside, and the UK would not be able to impose stricter conditions.
In theme of rights contained in the Directive, it *does not confer rights*, but it simply **details** the rights conferred to Union citizens. It is, firstly, inherent in the right of *free movement*, so that a EU citizen, without any *visa*, an enter and exit and EU country. Secondly, the **family members** of the Union citizen have a right to entry and exist, *derived* from the exercise of the main right holder. If the family members are third-country nationals, they might need a visa, but they have also the *right to obtain it*.

The Right to Reside

The *Directive 2004/38* regulates the **right to reside** and the **right to equal treatment**. Doing so, the Directive codifies the case-law of the ECJ, adopting an ***incremental approach***: the more you stay in a country, the more integrated you become, the more extensive right may be enjoyed. This approach is clear seeing that the Directive offers *three types* of residence in the EU:

- The ***short-term*** residence, **up to three months**, is regulated in Art. 6. That is what common EU citizens experience when they travel around EU; crucially, it has no conditions. For the first three months, the EU citizen has nothing to do but having a **valid ID/Passport** for entry. A *short-term* residence can be **terminated** only if the EU citizen becomes an *unreasonable burden* for the state, but expulsion can never be an automatic consequence of recurring to social assistance in the host MS (*principle of proportionality*). Also job-seekers can have short-term residence; after the first three months of staying they are fully protected only if they are still looking for a job and have a genuine chance to fine one.
  The reason why short-term residence is not subjected to conditions is because the host State has *very few duties*, **not being obliged** to *confer equal treatment* in relation to social assistance: in only three months, you cannot establish any link with that community.
- The ***medium-term*** residence, **from three months to five years**, is provided by Art. 7. The right to medium-term residence is *conditional* either upon being ***economically active*** (worker or self-employed), ***economically independent*** (pensioner or wealthy), or a ***student***. As it was before the Directive, in the latter two cases, the Union citizen needs to have *sufficient resources* and *comprehensive health insurance*. In relation to pensioners, the comprehensive health insurance is provided by the MSs of *last affiliation* (***social security coordination***). In the case of students, the double requirements is asked with *lighter* evidence of resources. If these conditions are met, the Union citizen can legally reside in the host State.
  We shall go deeper in the criteria of **economical independence**, that actually implies both having sufficient resources and a comprehensive health insurance; this is to balance the right of free movement with the need to protect national *welfare*. However, to enhance the right to free movement, the Court has held that resources may be **provided by someone else** (for example, by the parents of the new-born EU citizen because of *ius soli*). Further, in ***Baijratari***, the ECJ specified that resources acquired with *irregular work* are considered sufficient resources.

From 2010, the Court have started distinguishing *good* and *bad* EU citizens, as evident in ***Dano***, in which ECJ changed interpretation of EU citizenship provision. Ms. Dano was a Romanian citizen living in Germany; she had a child and asked for child support benefit; if the Court had restated the *Baumbast caselaw*, it would looked if she met the conditions set in the directives and, if not, it would have anyway looked at her personal circumstances on the basis of principle of proportionality. The Court did something new, imposing to **check** if Ms. Dano had sufficient resources; if not, then she would not have been covered by Art. 7, falling outside the scope of EU law (with a completely different argument than the one used in Baumbast). The Court, thus, stated that if **blank letter conditions** were not satisfied, then Citizens fell out of the scope of the Directives and possibly of the Treaties. Further, the ruling was full of *preconceptual* arguments, stating *either* you meet the blank letter conditions of the Directive, *or* you are outside the scope of EU law. Dano case was important also for Brexit citizens: anyone who was resident in the UK or in the EU either demonstrate to meet the conditions, or they fall outside the Withdrawal Agreement of Brexit, treated as *third country nationals*. So here is the ***economically independent trap***: the Directive, in Art. 7 provides for the *right to reside*, and, in Art. 24, provides for the *right of equal treatment*. Those who are considered economic independent are not excluded from the right to equal treatment, but, since they have to satisfy the conditions, they cannot claim equal treatment in relation to **welfare provisions**, because it would mean they are not economically independent, and their right to reside would be terminated.

Art. 24 (2) of the Directive imposes *two* limitations to the right of equal treatment:

a) *Work seekers* are not eligible for welfare benefits. However, when moving, they bring with them their national income support for the *first three months*.
b) *Students* are covered with the principle of equal treatment in many fields, **but** the *maintenance grants*. The Court, anyway, made caselaw so that students are entitled to bring their national maintenance aid with them.

- The ***permanent*** residence must be granted **after five years of lawful residence**, as stated by Art. 16. Union citizen, thus, no longer has to satisfy any condition. In ***Ziolkowski*** the Court specified that it is *only* residence pursuant to Art. 7 that counts, excluding national law: in order to be considered permanent resident, you have to demonstrate that you have been *economically active* or *economically independent* for five years. If one has been granted a residence permit under national law (maybe because he married a national citizen) he has **no rights under the Directive**. Once the status of *permanent resident* is gained, the right to reside is *unconditional*, having full right to equal treatment without the need to fulfil any conditions, as a fully **assimilated person in the host society**. Anyway, the status *can be lost* through absence of **two consecutive years**. Moreover, the right to permanent residence *also* applies to **protected family members**, with a right derived from the permanent resident's one. In conclusion, economically active citizens might acquire permanent residence *earlier* than five years in some cases (e.g. reaching pensionable age before five years).

Family members

And here we are with ***family members***. The Directive divides them in ***protected*** and *other* family members. Starting from the *protected family members*, they are:

- The **Spouse**; in *Coman*, the ECJ clarified that the term is gender neutral, considering also spouses of same sex, even if the MS does not recognize same sex marriage
- The **Registered Partner**, recognised as family member *only* if the host state recognizes him/her. This is a discrimination for same-gender relationship (differently from the spouse).
- The **Descendants** if *under 21* or *dependant* (it is for NCs to decide whether one is dependant or not)
- The **dependant relatives in ascending lines**, excluding those of students.

The protected family members are treated *same as a Union citizens*, including the right to entry, reside, work without visas and equal treatment. The protected family members enjoys the same rights as the main right holder, but these rights are not autonomous, but ***derived*** from the right-holder; thus, if the latter leaves, then the family member loses the right. This can be problematic, so the Directive finds some exceptions in Art. 12 and Art. 13:

a. A **child** of migrant can retain his/her rights when *in education*, and the other parent can retain his/her rights if their children are still in education
b. In case of **death** of the spouse or of the registered partner, as long as the marriage has lasted at least *one year of residence in the host State*, the spouse or the registered partner can retain his/her rights
c. About **divorce** and **domestic violence**, the divorced partner can retain his/her rights if the marriage has lasted **three years**, of which *one* in the host state. He/she can also retain residency rights in cases of *domestic violence*. In this field, an important case was ruled: the ***NA case***. NA was a Pakistani woman, married with KA, a German national; they moved to the UK, where he worked, and had two children. Unfortunately, NA was victim of domestic abuse by KA and when she decided to report to the police, KA immediately departed to Germany. One year later, KA started the proceedings for divorce, obtaining custody of the children, but the UK denied her right to reside there because her ex-husband was no longer working in the state. Dramatically, the ECJ confirmed this: she should not have been protected, since her husband had already left. Thus, the ECJ used a controversial argument: the partner can just say "if you denounce me, I go away, and even if we divorce, you no longer have residency rights". NA, because she had children in education, fortunately managed to claim her derivative rights from them, but this caselaw is simply awful.

As for **other family members**, they are those who are *dependant*, or are members of the household, or require the personal care of the Union citizen. Art. 3(2) also includes partners in *durable relationship*. In relation to them, the host MS has only a **duty to facilitate** entry and residence, treating them a bit better than normal immigrants. Nonetheless, the host state might always *deny* the right to entry and reside, and the directive does not specify which rights *other family members* are entitled to, and no caselaw is available.

Limitation to the right to reside

All Union citizens can enter a MS **without formalities** except for valid passport or ID. The Union citizen, when arrives in another MS, may be asked to **report** his presence, or to **register after three months**; these formalities are not constituent of the rights, so not complying with them can just lead to an administrative fine, having not impact on rights.

As for **limitations** to the right to reside, they are listed in the Treaty provisions in relation to economically active citizens, and in **Art. 27** of the Directive. A EU citizen can be **refused entry** or **reported** only on listed grounds, such as *public policy*, *public security* and *public health*. When the MS wants to deny entry or kick someone out, it has to respect the procedural requirements of **Art. 20/31** of the Directive: a *decision* is needed, the State has to *clearly state* the reasons under those decisions, and the *right to judicial review* must be respected. In particular:

- The *public **health*** derogation can be invoked only in relation to the diseases listed by the WHO, and *only for the first three months* of stay (after them, either you have already spread the disease, r you have caught it there)
- As for *public **policy*** and *public **security***, the ECJ has hermeneutical monopoly over their interpretation. The Directive, with **Art. 28** provides that public policy and security can be invoked *only* in relation to the personal conduct of the individual. In ***Bonsignore***, an Italian resident in Germany accidentally killed his brother; the police accepted it as an accident, but the German authorities wanted to deported him making it a deterrent for migrants. The ECJ ruled that states **cannot invoke public policy derogation to have general deterrent effect**, and the authorities have to demonstrate the genuine, present, and serious threat to on of the fundamental interest of society. Here, the principle of proportionality is fundamental; the burden is on the State to justify that kicking someone out is both necessary and proportionate (as stated in ***Bouchereau*** case), considering personal circumstance, and full application of the Charter. It has also been ruled that ***custodial sentences*** cannot lead to automatic deportation (happening with third-country nationals). Further, States cannot impose a permanent ban on re-entry (***Calfa*** case): people can change, and the threat must be present and not just theoretical. Once *permanent residence* is granted, moreover, the Union citizen can *only* be deported on serious ground; after **10 years** of residence, deportation is possible *only* on the base of imperative ground of *public security*.

Ruin Zambrano Doctrine

Whereas the transnational element of citizenship is not as meaningful as we though it could have been, there is a **parallel development** in caselaw, so innovative: the ***substance of the right*** doctrine. Union citizenship is *additional* to national citizenship and, because of its transnational dimension, the provisions of EU citizenship do not apply in *purely* internal situation (no crossing borders). In theory, thus, national citizenship is left **unaffected** by EU law, and MSs remain free to determine their own immigration law from third countries. Well, in theory…in ***Ruin Zambrano***, a Colombian family reached Belgium to seek asylum, which was denied. Belgium issued a non-refoulement order, so that Mr. Ruin Zambrano could not work. Because Belgium had *ius soli*, his children were **Belgian**, but if the man could not work he would be forced to go away, out of the EU, bringing his children with them, so that they would be **deprived of their Union citizenship rights**. Belgium argued that EU citizenship was not relevant, being a purely internal situation. The ECJ stated that it should be a matter for the MS since no border was crossed, but the MS has an *outer limit* to its discretion when the act would **deprive** the right of its ***substance***: if the children were forced to go, their rights would be limited, not being able to benefit from their EU citizenship. In practice, this imposes limits to the possibility to *deport* third-country national parents of Union citizens. MS were not happy of this ruling, because the Ruiz Zambrano Doctrine both told the MSs ***how to treat*** *their own citizens* and *interferes with the power to* ***regulate migration*** *from third countries*. With time, the ECJ applied the RZD to situations in which the third country national parent has been in jail, really further interfering with **national sovereignty**. Moreover, the Court held that RZD does not apply only to minors, but also to **people of age**. In other words, MSs and the Court have to look at whether the person would have *no real choice* but to follow the expelled person.

The other interesting development that makes EU citizenship revolutionary is the decision of ECJ to **apply** Union citizenship in another *purely internal situation*: the **withdrawal of national citizenship**. In ***Rottman***, an Austrian citizen living in Germany acquired the German citizenship, but he had to give up his nationality of origin. It then emerged that there was a European Arrest Warrant pending on him, so that Germany withdrew his citizenship: Rottman was stateless. The problem was: can Germany deprived Mr. Rottman of **EU citizenship**? The German government considered it a purely internal situation, but ECJ disagreed, because withdrawing national citizenship, the State was also withdrawing EU citizenship. The *principle of proportionality* applied, and as in Ruin Zambrano, the decision of Germany was depriving the person of enjoying the **substance** of his rights. The point was made even clearer in ***Tjebbes***. In Dutch law, a person with dual nationality no longer residing in the Netherlands would after 10 years exercise the option to remain a Dutch national. When the Canadian claimants found their Dutch nationality withdrawn, they argued that also their EU citizenship was withdrawn. It was therefore a matter covered by EU law: primacy and supremacy, proportionality, and Fundamental Rights. Again, the Dutch government considered it as purely internal situation, but ECJ disagreed. After Ruin Zambrano, depriving nationals of nationality, the MSs deprive them also of EU citizenship, so it has to be proportionate, respecting FRs, and there is also other criteria: the State has to look if the second nationality was acquired voluntarily or automatically; the State should look at whether the Country in which the national concerned is living is *safe* or not, and if it would be easy to come and visit EU from them. Finally, the State must be aware of **children's best interest**: in Tjebbes, minors could not exercise the option of Dutch citizenship, neither reach the Netherlands autonomously.

EU citizenship is so **innovative**, and EU law really interferes in the relationship between the States and their nationals. States keep having their discretion in respect, but the European element of **proportionality** is always around the corner.

THE INTERNAL MARKET: THE CORNERSTONE OF EU

The **internal market** is the most important aspect of EU law, constituting the most important *body of norms* and *caselaw* of the ECJ. The **Art. 3(3) TEU** defines the *internal market* as an **objective** of the EU; in fact, European integration started as an *economic integration*, and IM has always been the fundamental element of it. At **Articles 3** and **4 TFEU** (first part of the TFEU, among the *general principles*), we see the *competence* of the Union in the internal market. **Art. 3 TFEU** states that EU has *exclusive competencies* in the establishment of **customs union**, **competition rules**, **monetary policies**, and **common commercial policy**.

But these competences are *tangential and related* to the IM; if we talk about internal market in the strict sense, **Art. 4 TFEU** provides for **shared competencies**, and thus the application of the *Principle of Subsidiarity*, and the *principle of proportionality*. Moreover, **Articles 26** and **27 TFEU** tell that internal market not only is an objective of EU, but also a ***policy area***; indeed, Art. 26(2) defines the internal market as an **area without internal frontiers** and barriers, where we have *free circulation* of the four factors of production: **goods, persons, services** and **capitals**. Art. 27 qualifies the previous article, providing for ***derogations***: the Commission, when proposing a measure, should consider the **differences** in the economic development of MSs, proposing some *adjustments*, and if these are derogations of **Free Movement**, they must be *temporary*.
The **internal market** is one of the most advanced forms of *economic integration*, but it is not the only one; we can in fact rank other forms in order of *integration* (from the less integrated to the most):

1) **Free Trade Area**: a space without *customs duties* (charges on the import on certain goods) or *quotas* (quantitative restrictions), so that goods are free to move. In a FTA there are no barriers, but there is not a common external tariff, since participating States are free to have their own external policy with third countries.
2) **Customs Union**: an FTA *with* **common external tariff**.
3) **Common Market**: not only goods, but ***all factors of production*** have *Free Movement*. The European Common Market was in fact established by the Treaty of Rome in 1957.
4) **Economic Union**: with complete unification of *monetary* and *fiscal* policy. Thus, we have a **single currency**, and a Central Monetary Authority (in EU, we have the ECB). Well, the real peculiarity of the European **Economic and Monetary Union** (**EMU**), introduced in 1992 by Maastricht Treaty, is its *asymmetry*, because we still do not have *fiscal centralization* (every MS has a national fiscal policy).

Looking at the history of this economic integration, the first experiment was the **ECCS** (Treaty of Paris, 1951, as proposed by Robert Schumann), with the idea to overcome the Franco-German disagreement. The second experiment was the **EEC**, established by the Treaty of Rome, with the creation of a Common Market, a *free, fair and equal* one. Later, a common *competition law* and *common economic policies* were provided, with coordination of the Council. Economic integration can be reached in two ways: the first if **Negative Integration**, in order to *remove* barriers (physical – customs – or non-physical – national rules). The Treaties now provide **clear prohibitions** to obstacle free movement of goods, persons, services, and capital, with provisions capable of having ***direct effect***. The problem of NI is its *deregulatory approach*: if we continue to remove rules, we will end up without rules! Thus, NI needs also the other way of reaching economic integration: the **Positive Integration**, so the replacement of national rules with **European rules and standards** (i.e., the *harmonization* of national laws). Some problems arose in the 70s and the 80s, with a **stagnation an inaction**, since the positive integration was really difficult to achieve. Indeed, the adoption of such harmonization required the **unanimity** of the Council, and it was hard for MSs to reach such agreement. This is why the European Council, in 1985, asked the Commission to find a solution: in fact, the **EC** proposed the *White Paper*, which contained a new approach to harmonization, using negative integration as more as possible, and positive one in limited cases (e.g., *health*, *safety*, ect.). The White Paper also identified a deadline for the achievement of a properly functioning IM, on **December 1st, 1992**. In 1986, the EU adopted the *Single European Act*, endorsing the conclusion and the findings of the White Paper, constituting the *internal market* as an **ongoing task** and a **goal to be achieved**.
Well, but what is precisely internal market? The **Treaty** establishing the European Community (pre-Lisbon, post-Amsterdam), in **Art. 2** presents different instances and interests the internal market should pursue (some of them look oxymoronic – high level of employment and competition). Thus, we can find **different instances** of modern *welfare capitalism* (e.g., need for social protection coexists with convergence of economic performance), but it is not a clear definition, but rather an **ideal compromise** between different economic visions: there is much of the *dirigiste French economy* and some of the *ordoliberal German tradition*. We can, anyways, find a greater definition in the ***Schul*** case, where internal market is consider a synonym of **national market**: internal market is a **space without internal barriers**, which not only enterprises, but also private persons can benefit from.
To overcome the inaction of the 70s and the 80s, we were saying, the *White Paper* and the *European Single Act* offered a remedy to it; the Act introduced a **new dynamic definition** of internal market (today, in **Art. 26 TFEU**) as an *ongoing task*; further, a major institutional reform provided for a new **law-making procedure**

(the OLP, with Art. 114 TFEU, see above), to adopt harmonization measures with a Qualified Voting Majority (**QMV**; no more unanimity). Thus, the internal market started to be of interest of the European Parliament. The Art. 114 TFEU was recognizes as a **residual clause**, representing the legal basis for provisions in sectors that are not specifically covered by other provisions. However, the possibility of using Art. 114 TFEU was **limited**, in several rulings, and one of the most important is the ***Tobacco Advertising***. The EU adopted a Directive on the basis of Art. 114 TFEU, with the aim of harmonizing national legislations concerning advertisement of tobacco products. Germany challenged the Directive, for being adopted under the **wrong legal basis**: the MS argued that the Directive did not concern the improvement of the conditions of establishing the *internal market*, but just the proception of human health. The ECJ, the, annulled the Directive. Thus, there must be a **genuine improvement** of the functioning of the internal market, to justify an harmonizing directive.

INTERNAL MARKET: GOODS

It is now time to analyse the **Free Movement of *goods***. As we understood, the internal market is a borderless space in which FM is ensured; but it is also an *instrument* to achieve higher political objectives, and then, it can be consider the ***highly competitive and social market economy***, since the IM is not only about competition, but also about social protection and well-being of citizens. Imagine the case of Piat, an imaginary Italian car manufacturer, that ask its Government to reduce the import of cars from other nation. Maybe, the Piat would ask for *customs duties* on the other car manufacturer (*quotas* or quantitative restriction) on import; or again *discriminatory taxation*. In the Union, there is no space for this: **Art. 34/37 TFEU** regulate quotas; **Art. 28/30 TFEU** regulates custom duties; finally, **Art. 110 TFEU** regulates discriminatory taxation. Thus, the TFEU imposes the removal of fiscal barriers, creating a custom union, with a common custom tariff (*positive integration*), prohibiting custom duties, or similar charges (*negative integration*). Art. 110 TFEU prohibits discriminatory taxation, and Art. 34 TFEU bans *quotas* (quantitative restriction). As part of the positive integration, we should mention the **harmonization**, since the EU has competence to adopt legislation to matters which affect common market, and the ECJ clarified this in the infringement procedure *Commission v. Italy* **7/68** (known as ***Art Treasury***), stating that as long as a good can form the object of a commercial transaction (so **can be valued in money**) it is covered by Free Movement of **goods**.

Customs duties

Art. 28 TFEU created a *customs union*, with both an **internal** (MSs' territories are *free from customs duties*) and **external** (*common customs tariff*) dimension. All customs duties, or charges having similar effect, are **forbidden**. Then, customs duties are charges, taxes, imposed on goods by reason of *having crossed* an international frontier, only because of their *entry*. It is more difficult to define **charges having equivalent effect** (*CHEE*); they discriminate between national and imported products, even if they are not *formally* customs duties. The ECJ clarified all in ***Statistical Levy*** (or *Commission v. Italy* ***24/68***): CHEE are any pecuniary charge which is imposed unilaterally on domestic or foreign goods by reason of the fact they crossed a frontier. The **size** of the fee is irrelevant, and so is the **purpose** of it; the ECJ stated that it does not matter if the charge has protectionist effect or not, or if its discriminatory or not. To understand if a charge can be considered as a CHEE, we should consider (I) if it is imposed on **goods** that are *object of trade*, and (II) if it is imposed **by reason of the fact they cross a frontier**. No other element is relevant. **Art. 30 TFEU**, in this sense (stating what we just said) is different, since charges that are covered by it can **never be justified**. We have to exceptions, that are considered not justifications, but cases that fall outside the scope of Art. 30:

A. Charges imposed as a **consideration for a *specific service***: if a charge is imposed as a *remuneration* for a **specific** service rendered to the importer or the exporter, the charge falls out the scope of application of Art. 30. In ***Bresciani***, the ECJ specified that the service must benefit the *specific* trader, and not just a general public nor a class of importers/exporters (e.g., an health inspection is good for the entire community, so it cannot be charged on the trader for a specific service). The charge must **reflect the cost of the service**, and not of the good which is related to (*Ford Espana* case).
B. Charges imposed to **discharge obligations requested by EU Law**: in the example of health inspections, if such service is **required by EU Law**, and mandatory, its cost can be charged on the

trader. If the service is optional, it cannot (*Commission v. Belgium **314/82***). The charge must not exceed the cost of the service, as the Court stated in ***Bauhuis***, and the service should facilitate *free circulation* of goods.

Further, a fee can be considered as a CHEE regardless of the **public authority** that imposed it; thus, even if the addresses of Art. 28 are, formally, MSs, the provision applies also to **local and regional authorities** (*Carbonati Apuani* case, and *Legros* case).

As for the **consequences** of a violation of Art. 28 TFEU, if a fee is unduly charged, then it must be **repaid** to the trader, at the conditions of national law. National legislation must ensure that **unjust enrichment** of the reimbursed trader is *prohibited*: if a trader charged the consumer for that undue tax, then he will not be reimbursed. And the consumer? In Italy we say: si attacca! So the consumer is left with such burden.

Discriminatory and Protectionist taxation

Art. 110 TFEU prohibits ***discriminatory taxation***. The elimination of custom duties would be insignificant if MSs could discriminate between domestic and imported products with *internal taxation*. In the first paragraph of the article, we see a description of *discriminatory taxation* (taxation towards **similar products**), whilst the second one is addressed to *protectionist taxation* (taxation towards products that are **in competition**). The article prohibits both; however, MSs are **free to set** their preferred level of taxation, provided it is not discriminatory nor protectionist.

As for the *first paragraph*, it refers to taxation that *discriminates* between national and foreign products. To check if it does it or not, we should look at the **similarity** of the products, and also a **difference in taxation** that could lead to potential *discrimination*. The discrimination could come in two forms:

- ***Direct discrimination***, that can **never be justified**, because it is a *discrimination in law* based on the different origin of the goods. The discrimination can consist of **different tax rates** (e.g., X% on foreign products, X-1% on Italian products), but also cause by the **rules governing the tax system**. In *Commission v. Ireland*, the Irish tax system allowed Irish spirits producers to *differ* the payment of taxes, and foreign traders could not: the ECJ considered it as discriminatory.
- ***Indirect discrimination***, that is a *deferential* treatment based on a very particular criterion, **apparently neutral**, but affects import more than domestic goods. We must look at the **practical effect** of the measure; imagine a rule that imposes a gradually increasing taxes on small cars up to 16 HP, and then a flat rate tax for bigger cars from 16HP on. It becomes *indirect discriminatory* if domestic producers makes only small cars (as it happened in ***Humblot***). Indirect discrimination, contrary to the direct one, **can be justified**: a different treatment could be lawful if it is based on **objective factors**, and is aimed at achieving **legitimate public policy interests**. In *Commission v. Greece*, Greece introduced a tax based on the cylinder capacity (objective criterion), in order to impose heavier taxes on luxury goods; since the imposition did not impact particularly on imported goods, the ECJ upheld the Greek decision.

To understand if a tax is *discriminatory* or *not*, the Court provided for a **test** in *Commission v. Denmark **106/84***. Belgium imposed **higher taxes** on wine made from grapes, and lower on wines made from other kinds of fruit; here is the test:

1. In order to assess the discriminatory nature of this **discriminatory taxation**, the Court verified if the two wines were ***similar***, and they were, because of their characteristics and the meeting of same needs. It is important *not to focus* only on the current consumer preferences, because they are obviously shaped by taxes. Moreover, there must be **domestic production** of the taxed goods at issue (otherwise, a comparison would not be possible).
2. Are there **difference in taxation**? Wine made from grapes bore a higher fiscal burden than the same quantity of wine made from fruit.
3. Can the different taxation be **justified with reasons legitimate**? Denmark tried to justify the discrimination using some socio-economic consideration, because without the taxation Belgian producers of fruit-wine would be dead in the market. The ECJ considered this aim by its nature protectionist, and Denmark was going on the opposite route of the EU. Denmark had so to apply the same tax rate.

As for the *second paragraph*, Art. 110 TFEU regulates taxation on goods in *competition*: **Protectionist Taxation**. If the products are not similar, higher taxation might be still prohibited if there is a competitive

relationship between them, and the tax is protectionist in nature. The State, in a similar case, is giving and advantage to domestic products, by shaping the consumers' preferences. Two products are *in competition* when there is a **degree of substitution** within them, so that consumers may switch from one to the other. A good example is the relation between *beer* and *wine* (*Commission v. UK* 170/78): the two products meet identical needs; anyway, the consumers' habits are not particularly relevant, since they are *dynamic*. Established such relationship, we have to check whether taxation has ***protectionist effects***: if there is no domestic production of similar or competing goods, the tax **cannot have a discriminatory/protectionist effect**, and Art. 110 TFEU does not apply. The Court clarified everything in *Commission v. Denmark **47/88***, when the Commission sued Denmark for an high tax on cars registration, but Denmark did not have any domestic car manufacturer. Therefore, the Court held there was no scope for application of Art. 110 TFEU. Well, when assessing the conditions for applying **Art. 110 (2)** TFEU, the mere existence of a difference in price is not relevant in itself, and we need to understand if the different taxation **affects consumers' behaviour**.
If the Art. 110 TFEU is breached, the MS must **eliminate the discrimination** or **remove the protectionist effect**; further, MSs must *repay charges* that have been unlawfully imposed.
Well, what are the relationship between Art. 30 (which applies on charges imposed on goods just because they cross the borders – and charges do not apply to domestic goods) and Art. 110 TFEU (which apply *both* to domestic and foreign goods)? These two articles are **mutually exclusive**: only one can be applied at time. Thus, every time a charge is at stake, we should look under which article's scope it should fall; problematic can be those situations in which it is not easy to **distinguish between charge** under Art. 30 TFEU and Art. 110 TFEU (e.g., *para-fiscal charges*: a MS imposes a tax on both domestic and imported goods, but the State reimburses them to domestic producers). Well, if the charge is **totally reimbursed** we should use Art. 30 TFEU; on the contrary, if the charge is **partially reimbursed** we should use Art. 110 TFEU. And this is fundamental: Art. 30 prohibits CHEE in any case, whilst taxes under 110 TFEU might be lawful, but they need to be *equally applied* to everybody.

Quantitative Restrictions

In the world of market, we do not have only *fiscal* barriers, but also **non-fiscal barriers**, regulated in **Art. 34** and **Art. 35 TFEU**: they are ***quantitative restrictions*** to imports or exports and ***measures having equivalent effect*** (MHEE). Whilst fiscal barriers have *monetary value*, non-fiscal barriers consists in measures with other effect; so, they are **mutually exclusive**, and it is not possible to apply both Art. 30/110 TFEU and Art. 34/35 TFEU. **Art. 34** states that *quantitative restrictions* are prohibited for goods that **cross the border**: thus, purely internal trade is not covered by these provisions. The ECJ, anyway, has been flexible in the interpretation of *cross-border*: a hindrance to a **potential** cross-border trade can come within the scope of application of the FM provisions. **Art. 36**, moreover, considers some *derogations*, making a list of possible justification of quantitative restriction (public policy, public security, health, life, national treasures, ect.). The ECJ then extended this list with some **other requirements** (*mandatory requirements doctrine*; see below). These derogations cannot, *in any case*, be used as **arbitrary discrimination**, so that a State cannot rely on them to make a restriction on trade. If such criteria are not met, **quantitative restriction are disallowed**.
As seen for fiscal barriers, we have not a definition of *MHEE*, but the last sentence of Art. 36 states that they might be measures that in practice *create arbitrary discrimination on trade* between MSs. The Court defined quantitative restriction in ***Geddo*** case, as they are all those *bans* on import/exports/goods in transit; thus, MHEE are quantitative measures, but *not formally* restrictions, as **total or partial restraint** of import/export/goods in transit. In order to give shape to MHEE, it was established the **Directive 69/50**, but the ECJ never used it that much, giving its own definition of MHEE in ***Dassonville*** (see below). In *Henn and Darby* case, the ECJ also stated that a **total ban on imports** of a certain good is *automatically* covered by Art. 34/35 TFEU, even if the trade of such goods is not allowed. Further, also **ban on *personal* imports** are covered by Art. 34/35 TFEU (*Rosengren* case). But is discrimination a necessary precondition for the MHEE regime to apply? The ECJ said no, because if Art. 34 covered only discriminatory measures, domestic production of the banned good would be always needed to trigger Art. 34 and 35. And here we are with *Dassonville*: two Belgians wanted to import Scottish whiskey bought in France; to do it, Belgium required a difficult-to-obtain certificate, and when the Belgian Law was challenged, the ECJ stated that **all trading rules** enacted by MSs *capable of hindering* directly or indirectly, actually or potentially, **inter-community trade** are **MHEE**.

Is not this definition *too broad*? The only that matters is its **impact** and **effects**. We understand that MHEE are **national rules**, that *obstacle* to intra-EU trade; this notion covers *actual* and *present* obstacle, but also **potential hindrances**, so that every national measure can be scrutinized on the basis of Art. 34, being irrelevant its *type*, *entity*, or *discriminatory nature*. Well, MSs were not happy about Dassonvile, being too beneficial for traders who could then on challenge many national laws just because they potentially had impact on cross-border trade. And here is the protagonist: ***Cassis de Dijon***, one of the most important case-law, which clarified that *indistinctively applicable rules* (so, not-discriminatory between imported and domestic goods) can caught under Art. 34 TFEU. A German grocery wanted to import a French liquor, that had a quantity of alcohol (16%) below the level that German law required as minimum (25%) for liquor in the market. The measure was not discriminatory, applying to both domestic and imported goods, but it was challenged, and the ECJ stated that obstacles to movement of goods resulting from *disparities* within national laws **must be accepted** *in so far as* those provisions may be recognized as *necessary* to satisfy **mandatory requirements** relating effectiveness of fiscal, supervision, health, fairness of commercial transactions or the defence of the customer. As a general rule (the ***Cassis Rule***), a product *lawfully* manufactured in a MS should be recognized as such also by other MSs, **unless** these MSs have *mandatory requirements* of public interest to apply **their** rules to the product, so that obstacles can be *justified*. The justification, of course, has to be verified by the ECJ, that in Cassis did not found any public interest (if not to get drunk…) to deny the import of the French Liquor.
Cassis is very important because of two main facts:

A. The Court introduced the ***Principle of Mutual Recognition***, since it is assumed that lawful product in a MS *comply* with regulation of another MS, but they must recognizes each other regulatory *standards*. This principle was necessary for negative integration, making less necessary to harmonize national legislations to achieve integration. At the same time, Cassis allowed for **regulatory diversity**, respecting *cultural traditions* and *increasing consumers' choice*.
B. The Court introduced **new exceptions** to Art. 34 TFEU, establishing the *mandatory requirement doctrine*: MSs can justify the impositions of additional rules on **public interest ground** other than those listed in Art. 36 (always take in mind that MRD can only justify *non-discriminatory* MHEE, whilst *discriminatory* MHEE can be justified only under Art. 36).

After Dassonvile and Cassis, several national rules were declared ***illegal barriers*** to FM, falling in the broad definition of MHEE, even if they were indistinctively applicable, and they radically impacted on the Commission's agenda too, as admitted by itself in *Communication on Cassis*.

Product Requirements

Well, according to ***Cassis***, indistinctively applicable rules falls within the scope of Art. 34 too (as MHEE) and must be *justified*. An example of such rules are **product requirements** (on composition, labelling, packaging, etc.), that are *not* directly discriminatory but need to be justified. Then, product requirements are **always** caught under Art. 24 TFEU, posing a double regulatory burden between different MSs and affecting intra-EU trade. So, the imposition of such requirements to imports must be **always justified**, if and only if it is indistinctively applicable, according to the ***mandatory requirements doctrine*** (see *Glocken* case).
After Dassonville and Cassis, the problem was an **uncontrolled** expansion of Art. 34; every national rule could potentially come under the scrutiny of the ECJ, also in terms of proportionality. Some scholars proposed to distinguish between rules regarding ***physical characteristics*** (size, composition, …) and on ***selling arrangements*** (marketing, …). We can understand, then, that there no clear boundaries as for to what extents MS could regulate; but the ECJ embraced this distinction, considering the critiques on two landmark cases:

- ***Cinéthèque***: a French legislation prohibited the trade of videocassettes of films within one year, in order to encourage the cinematographic production, affective the trade only indirectly. The French rule was caught by the ECJ under the scope of application of Art. 34 TFEU but considered acceptable and proportionate the justification by France.
- ***Sunday Trading***: a British rule banned Sunday trading to limit working hours and protecting workers. B&Q (a company) challenged the prohibition, arguing that it reduced the sales also of imported goods. The rule was caught under Art. 34 TFEU, but the ECJ deferred the proportionality test to the national courts, making different cases being decided differently. This case concerned also the *rationale* of FM: remove discriminatory barriers or promote economic freedom? Maybe the ECJ went too far…

Anyways, the ECJ embraced the distinction in ***Keck***, case in which two guys sold some products at lower price than the actual purchase price, and this was prohibited by French law. The Court affirmed that **product requirements** are in principle always caught under Art. 34 TFEU unless they are **justified** on *public interest grounds* (according to Art. **36 if discriminatory, or on MRD if not); *certain* selling arrangements**, beside, when non-discriminatory, **fall outside** the scope of application of Art. 34 TFEU. Instead, if they are directly or indirectly discriminatory (e.g., total bans on advertisement), they fall under the scope of Art. 34 TFEU. But how can we define selling arrangements? And which of them benefit of Keck? In ***Familia Press***, an Austrian law banned the trade of magazines with price competitions. Price competitions is a selling arrangement, but the rule affected also the content of magazines, so that the rule is also about product requirements, automatically under Art. 34 TFEU, and so needing justification. Keck, then, did not solve anything, and **AG Jacobs** argued that it put too much emphasis on the type of rule, and not on *its impact*; the AG proposed also an alternative test, based on the **substantial hindrance** of the rule, but obviously the ECJ ignored it.
Even another test has been introduced for the ***rules on use*** (on the modalities in which a product can be used), influencing consumers choice; if they **hinder market access** they fall within the scope of Art. 34 TFEU, and need to be justified (see *Commission v. Italy 110/05* or *Mickelsson Ross*).
Wait…what about **Art. 35 TFEU**? We did not forget it, since it bans quantitative restrictions (and MHEE) on ***exports***, but we do not have that much case-law, since it is in MSs' interest to develop export of their own goods. We can at least say that MHEE on exports are much more narrowly defined, since they are only *directly or indirectly discriminatory measures*: discrimination is thus necessary for Art. 35 TFEU, but in the case ***New Valmar*** its definition has been interpreted broadly, encompassing also the requirement that invoices had to be written in language of the country.

INTERNAL MARKET: WORKERS

As seen, Free Movement is also a peculiar aspect of **Union citizenship**, and all EU citizens enjoy the right to ***move freely*** within the Union; such right, however, depends on the situation of the person, being ***active*** or ***inactive*** (and these enjoy less protection, remember *Dano*). The definition of **workers** is given by **Art. 45 TFEU**, and in the first paragraph we can understand that freedom of movement for workers *has to be secured*, being one of the 4 fundamental freedoms of the internal market, absolving the *efficient allocation of resources*. Anyway, human labour has never to be considered as a *mere* factor of production, due to the emphasis of the **human aspect**, not strictly intertwined with economic activity of these people; the ECJ, thus, established that workers have access to several **benefits**, even if not properly connected to the economic activity provided.
Freedom of movement is assured by the ***principle of non-discrimination based on nationality*** concerning employment, remuneration, and any other condition related to work and employment. Hence, the worker has the right to *accept* offers, to *move freely* for this purpose, to *stay* in a MS for the purpose of employment, and to *remain* in the territory of a MS after having been employed there (Art. 45 (3) TFEU).
Art. 45 (4) TFEU gives then an exception, so that the provisions of Art. 45 cannot apply to **employment in the public service** (only in that cases it is possible for MS to discriminate among foreign and national workers).

Personal scope

As for the *personal scope* of Art. 45 TFEU, such technical definition cannot be established by MS. In ***Hoekstra***, then, the ECJ stated that worker cannot be defined according to national law, avoiding restrictive interpretation by the MSs. Thus, in ***Lawrie-Blum***, the ECJ held that the essential features of the definition of workers is a **remuneration** and a **relation of subordination**. But what for *part-time* workers? In ***Levin***, a British citizen living in the Netherlands saw rejected her application for a residence permit; the Court, anyways, stated that even if part-time works lead to low-incomes, part-time workers are workers, so they gained **equal access to social benefits**, creating something like a *transnational solidarity,* conversely than what seen in Union citizenship. The ECJ specified that free movement of workers pursues an important **political objective**, and it is not justified only by economic consideration, so that giving a narrow interpretation of workers (excluding part-time workers) would have been problematic, making Art. 45 *not proportionate*. But there is a specification: the activity of part-time workers must be **genuine** and **effective**, and not amount to a such small

scales as to be purely *marginal* and *ancillary* (see *Trojani* case). A landmark case has also been the ***Kempf*** one; Mr. Kempf was a piano teacher, giving few lessons a week. Because of his illness, he was not able to work, and he asked for a temporary social assistance benefit. The problem was if he could be considered a worker or not. This is kind of coincident to the "unreasonable burden" of Citizenship (see above), but Mr. Kempf was not a purely inactive citizens, always been self-sufficient, and just in the need of **temporary** assistance. Well, the boundaries between economically active and inactive are not always easy to draw. Think about the case of ***working poors*** (people who works full time but cannot be self-sufficient with their income); in this respect, the amount of the salary is **irrelevant**, and even the *form of compensation* is out of the scope of Art. 45 TFEU. In *Steyman* case, it was also held that even a person working in a religious congregation, which provides for his material needs, was a worker (remuneration can be also a non-monetary *do ut facias*/*do ut des*). What is important is that the activity is **genuine** and **effective**, and not purely *marginal* neither *ancillary*.
But we cannot forget the **jobseekers**, that are not mentioned in Art. 45 TFEU (but for the "right to accept work offers); indeed, the exclusion of the freedom to move to seek work would make Art. 45 useless (***Antonissen***). As stated in ***Commission v. Belgium*** and then codified in **Directive 2004/38**, jobseekers can **reside unconditionally** for the *first three months*, and for longer just if they demonstrate they have genuine chance to find a job. Jobseekers, anyway, do not have the same status of workers: according to **Art. 7** aforementioned directive, they are not workers, and they have to demonstrate to have **sufficient resources** to not become an unreasonable burden for the host state. Jobseekers, then, are partially excluded from the equal treatment (recently, in ***Alimanovic***, the ECJ extended the *Dano test* also to jobseekers). Currently, jobseekers, as inactive citizens, shall prove to legally reside under the conditions set by the directive.
The personal scope considers also two other categories: **employers** (able to challenge rules restricting their ability to hire EU workers) and **frontier workers, returning and circular workers**.
And what happens if someone ***lose*** his job? **Art. 7** states that former workers **retain their status** *if* they are:

a) **Temporarily** unable to work for sickness or accidents
b) **Involuntary unemployed** *after* being employed for **more than one year**, and registered as *jobseekers*
c) **Involuntary unemployed** *during* the **first twelve months**, and registered as *jobseekers* (the status of worker is retained for *no less* than six months)
d) **On vocation training**, if related to the previous employment of the jobseeker.

Retaining the "worker status" let the worker enjoy equal treatment and to have not to demonstrate sufficient resources.

Material scope

As for the *material scope* of Art. 45 TFEU, the workers have *the right to*:

- ***Move, enter, circulate*** within the host MS
- ***Take up*** employment
- ***Not to be discriminated on grounds of nationality*** (the Equal Treatment)
- ***Access the labour market***
- ***Family reunification*** (with equal treatment for children in education)

Focusing on *equal treatment*, we can say that it is the cornerstone of the internal market, since **direct discrimination** is always prohibited. According to Art. 45 TFEU, distinguish on grounds of nationality is *only* allowed in relation to employment in **public service** (in such work-sector, MS can reserve some spots to their nationals, but only if such post involves the **exercise of public law powers**, *and* there is a duty to **protect general interest** of the State).
Indirect discrimination is also prohibited, as we can see in ***O'Flynn*** case. An Irishman working in the UK applied for a grant offered for funeral expenses. The UK refused to accord the grant because the funeral took place in another country. The ECJ held that if a rule can be more easily satisfied by nationals, rather than non-nationals, it needs **justification**, satisfying both *necessity* and *proportionality*. An example of indirect discrimination is the rule with **residence requirement** (nationals can easily satisfy it). In general, any condition for employment that contains *territorial* or *language* requirements is likely to be indirectly discriminatory (and thus, it has to be justified by ***imperative reasons of public interest*** and comply with **FRs**).
What if a rule is neither directly nor indirectly discriminatory, but **discourage** or **hinder** movement or **affects** access to employments? To answer, we have the case ***Bosman***; Bosman was a Belgian footballer, playing in a

Belgian club. He wanted to play in France, but the transfer was not possible without a payment of a fee. The ECJ ruled that such rules were an **unjustified restriction** of FM right. The risk of *Bosman* is that any national rule regulating an employment relationship may fall within the scope of Art. 45 TFEU. The ECJ used the ***market access test***: rules neither indirectly nor directly discriminatory, but that affect access to the employments, or affects the workers' ability to move, are considered barriers covered by Art. 45, *unless* justified by imperative reason of public interest. The hindrance must be **real**, and not just potential or remote. Art. 45 TFEU was liable to have *vertical* direct effect; later, the Court recognized a ***semi-horizontal*** direct effect, against collective rules as in Bosman, due to their particular **collective nature**. In *Angonese*, the ECJ reached the conclusion that Art. 45 TFEU can have also *horizontal* direct effect, against privates.

ESTABLISHMENT AND SERVICES

Every EU citizen enjoys the fundamental right to move *freely* in the EU; however, economically *active* citizens enjoy more. The economically actives are also the ***self-employed persons***, covered by Art. 49 TFEU on the **freedom of establishment**, if they are based in another country, but contribute to the host country economic as *settled* persons. On the contrary, if they provide services *temporarily* they are covered by Art. 56 TFEU on the **freedom to provide services**.

Freedom of *establishment*

Art. 49 TFEU states that restrictions on the freedom of establishment of nationals of a MS in the territory of another MS **shall be prohibited**. Then *legal persons* ca have establishment in various MSs, setting up branches and agencies; further, *natural persons* can have separate activity in another country. Derogations are provided by **Art. 51 TFEU**, similar for the one of Art. 45 TFEU: if a service is connected *occasionally* with an **official authority**, and (**Art. 52 TFEU**), other possible derogations are admitted if justified on ground of public *policy, security*, and *health*.

Art. 49 TFEU is applied when and for:

- ***Self-employed*** *natural* and *legal* persons (*Corporate Establishment*) are **EU citizens**, that exercise an activity *outside* a relationship of subordination. In ***Jany***, a prostitute working in the Netherlands, who paid taxes, and rent into the landlord, was considered a self-employed worker.
- A ***cross-border*** situation is necessary, so the EU citizen must *move* to another MS exercising an activity there. The norm, anyway, applies also to *circular* and *returning* people. In ***Kraus***, a German national who studied in the UK wanted to come back in Germany using his academic title, but the German rules required a previous authorisation. He then successfully challenge the rule.
- Art. 49 TFEU has **direct effect**, applying in **vertical** and *semi-horizontal* situation, and also in **horizontal** situation but *only with discriminatory measures*. In ***Viking***, a Finnish ferry operated between Finland and Estonia, and the operator wanted to move to Estonia because of the lower wage level. Viking challenge the trade union action of striking, because it limited the *freedom of establishment*, and the ECJ ruled in favour of Viking and for *horizontal effect* of Art. 49. Anyway, the limits of Viking are not clear.

Art. 49 and Art. 56 (see above) are **mutually exclusive**, but both apply to self-employed citizens. The different is that the **freedom to provide service** applies to who *temporarily* move in another MS to provide or receive a service; the **freedom of establishment**, beside, applies to economic activities exercised on a *stable basis*. But it is not that easy, so that the ECJ gave a ***functional test***, so that you can be a service provider even with an *office* (so, stable) in another state. Fundamental has been the ***Gebhard*** case, in which the ECJ provided for the difference among Articles 49 and 56 TFEU. *Establishment* is the **participation** (stable and continuous) in the **economic life** of another MS, whilst *service* is provided on a **temporary basis**. In the same case, the ECJ stated that Art. 49 applies *not only* for discriminatory barriers, but also for **non-discriminatory** ones, so the scope of Art. 49 TFEU is really *broad*. Mr. Gebhard was a German lawyer, that moved to Milan and practiced there as a lawyer. Created his law firm, the Milan bar association stated that he cannot use the term "avvocato" like his Italian colleagues, because he was not in the Italian bar. The ECJ held that even if the requirements to practice as an "avvocato" *apply equally to nationals and foreigners* (non-discriminatory/indistinctively

applicable), they still may hinder Art. 49 and need *justification*: that rule was an obstacle to Gebhard's **right to establishment**. Therefore, national measures liable to **hinder** or **make less attractive** the exercise of Fundamental Freedoms must fulfil four conditions:

1) They must be *applied* in a **non-discriminatory** manner
2) They must be *justified* by **imperative requirements** in *general interest*
3) They must be *suitable* to attain the objective they pursue
4) They must *comply* with the principle of **necessity and proportionality**

But not every national needs justification in this sense, but **only those affect market access** (*requirements, certain qualifications, certification for purposes*). In ***Vlassopoulou***, a Greek lawyer practiced in Germany, and the authorization of being admitted in the German bar was denied because of the lack of a German examination (*necessary qualification*). The ECJ argued that even the non-discriminatory application of national qualification requirements can hinder the exercise of freedom of establishment: **automatic exclusion** of foreign persons not possessing that qualification is not admissible. MS should make a comparison between the *specialized knowledge and abilities* (possessed by the citizen, as certified in his diploma or certification) and the *qualification* (required by national rules). But the problem was eliminated by the **Directive 2005/36**, by which MSs harmonized their legislation on the subject, so that Gebhard and Vlassopoulou is now *residual*.

As for the *Public Service Proviso* (as seen for workers), according to **Art. 51 TFEU**, activities connected to the exercise of an official authority are *excluded* from Art. 49 TFEU: MSs can reserve certain professions to their national. For example, the Court held that advocates are not even occasionally involved in the administration of justice and so they *do not exercise* any official State authority; similarly, notaries are not covered by Art. 51 TFEU, even if for MSs they exercise an official authority. Well, Art. 51 has to be interpreted very *narrowly*.

As for the *material scope*, Art. 49 grant the **right to take up** and **exercise** an economic activity in another MS, both for individuals (*natural persons*) and legal persons. The Art. 49 also establishes the right to **have more than one** establishment in another MS, and also the **right not to be discriminated** on grounds of nationality (for natural persons) or of country of incorporation (for legal persons).

Well, when we have **direct discrimination**, it can be justified only through Articles 51 (official authority) and 52 (public health, policy and security). When we have **indirect discrimination**, it can be justified also by *imperative requirements of public interest*. When we have **non-discriminatory barriers** (*Gebhard*) they are covered by Art. 49 TFEU and need to be justified accordingly to the imperative requirements doctrine (and proportionality).

As said, companies too have the *right to establishment* in the EU, with more than one establishment; how can we determine the nationality of a corporate entity to verify possible discrimination? We have **Art. 54 TFEU**, so that legal persons have the same rights as individuals if (1) they have been ***lawfully formed*** according to the legislation of the MS, *and* (2) they have their ***registered office*** within the Union. We do not have harmonization of corporate regulation: there are MS (e.g., Italy) that adopt the *incorporation doctrine* (a company is covered by the legislation of a MS if it has registered there), and other (e.g., Germany) that prefer the *effective seat doctrine* (looking at the principle place of business). But we remember the **mutual recognition**: Italy will recognize a legitimately formed "German" company, and vice-versa (see *Cartesio* and *Inspire Act*). But wait! Companies have not the right to *move* the registered office or central administration to another MS while retaining *primary establishment* in the first MS. In ***Daily Mail***, the notorious journal wanted to move the HQ to the Netherlands to pay less taxes, continuing to establish primarily in the UK. The UK authorities refused the transfer, and the Court agreed: there was no need to invoke the freedom of establishment. Later in ***Centros***, the restriction to the right of establishment of a Danish company was imposed by the State where the company wanted to move (and not by the State of primary establishment). The Danish company wanted to establish in the UK to avoid the minimum capital required by Denmark, but mainly operated in Denmark through a *secondary* establishment. Danish authorities considered this an abuse of EU law, but the ECJ held that Centros could rely on Art. 49: it did not matter that and individual or a company chose a more favourable jurisdiction.

Freedom to *provide services*

And it is time to conclude. **Art. 56 TFEU** applies when the economic activity is exercised in *another* MS on a **temporarily basis**. Restrictions on freedom to provide services shall be *prohibited*. Also in this theme there is a **cross-border** element; both the Art. 56 and the subsequent refer only to the *provider* of the service, but the cross-border element regards also the **recipient** of the service, so who goes in another MS to *receive* the service. Moreover, the cross-border element is present when is the service itself to move. **Art. 75 TFEU** defines *services* as something that provide for **remuneration**, but not governed by the provisions of freedom of movement for goods, capital and person. The service, thus, needs to have a **commercial nature**, but the ECJ clarified that the *remuneration* does not have to come from the recipient of the service, but may also come from the State, or someone else (maybe the insurance), as clarified in ***Bond van Advereerders*** and in ***Kohll***. Later, in ***Grogan***, the ECJ limited such broad interpretation of remuneration: even if it is acceptable that the remuneration comes from a different source then the recipient, there must be an **economic element**, so the service has *commercial nature.* Grogan has been an interesting case in which a group of students distributed some flyers about clinics that performed abortion in the UK, and a group of Irish anti-abortion challenge this conduct. Termination of pregnancy is, actually, a service, but the group of student was not remunerated, so the service of information they were providing fell outside the scope of Art. 56/57 TFEU (then, obviously, they had the freedom of expression, but it is not our interest right now).

As said for the Freedom of Establishment, the Court specified that to establish whether the service provider has a *temporary nature*, the fact that the provider has infrastructure, offices, etc. does not mean that it is *established*, and this depends on link with host country. The Art. 57 TFEU then makes a *non-exhaustive* list of services, and we understand that the scope of definition of service is extremely broad.

Even if in the past the freedom to provide services was considered as *residual*, nowadays is the principal economic activity of the EU. Before moving on, consider that **two cumulative conditions** have to be fulfilled to benefit of Art. 56 TFEU: 1) the service is **remunerated**, *and* 2) there is a **cross-border** element (meaning that (I) the service provider moves to another MS where there are recipients; (II) the recipients of service move to another MS where there are providers; (III) the service itself moves to the MS where recipient resides. The cross-border element is fulfilled when the service providers/recipients are just *potential* – think about advertisement).

As for the **material scope**, the Art. 56 TFEU provides for the *right to move* in order to provide or receive a service, as confirmed also by Directive 2004/38 (a EU citizen can stay in the host Member for up to 3 months, also for services). We have also a right *not to be discriminated* on grounds of nationality: **direct discrimination** can be justified only by treaty derogations (public policy, security, and health); further, the Treaty provides for another exception, so when the service constitutes the **exercise of official authority**. As for **indirect discrimination**, that we have when a measure has a deferential impact on foreign operators compared to domestic ones, the measure can be justified not only with Treaty derogations, but also with the *imperative requirements of public interest* (it is always the same..). The proportionality test, obviously, applies. Prohibition of discrimination also covers ***social and tax advantages***: the ECJ derived this from Art. 18 TFEU in ***Cowan***, a case of a Brit that could not receive his damages because attacked in France.

The ECJ then expanded the scope of Art. 56 TFEU even more, through an *extensive* interpretation of the term **barrier**: *non-discriminatory* rules are caught by Art. 56 TFEU; any requirement based on residence, nationality or establishment is **illegitimate** for being the *very negation of that freedom*; these requirements can be justified only if they are **indispensable** for a legitimate aim. So, any requirement for providing a service might constitute a barrier (again, we see the justification needed for indistinctively applicable measures). With services, indeed, any requirement imposed by the host MS implies an **imposition of a burden** on providers from other MSs, and the provider already comply with the requirements of his State, so he risks to suffer from a *double* regulatory burden (again, here is the value of **mutual recognition**). Non-discriminatory barriers are prohibited not only when they impose a double burden, but also when they **restrict market access** (see *Webb* and *Sager*), and they will need again to be justified (***market access test***, again).

Well, we can distinguish between three types of rules that need justification under Art. 56/57 TFEU:

A. Rules that place a **double regulatory burden**
B. Rules that **hinder market access**
C. Rules that **prohibit a service** completely

And here is our last landmark case: ***Alpine Investments***. Alpine Investments was a company incorporated under Dutch law, specialized in commodities futures and operating in the Netherlands and other MSs. After many complaints, the Netherlands decided to prohibit their use of the selling technique known as *cold calling* (contracting individuals by phone without their prior consent) to offer investment in commodities. The Netherland justified this for consumer protection and for Dutch reputation. But the ECJ disagreed: the service must **not** be treated as "selling arrangement" as in Keck; also rules regarding selling techniques, which might restrict freedom to provide services, are caught by Art. 56 TFEU, and *need to be justified*.
We can see some *inconsistencies* in the caselaw. Consider the case *Carpenter* (see above…a lot): in that case there was not a problem of market access, and Mr. Carpenter could provide services in another MSs; yet it was used as a justification to rule in his favor. It emerges from caselaw that **market access** is considered as an *overarching principle*, justifying a lot of ECJ rulings on Free Movement; in *Bosman* restriction on Free Movement of Workers were considered to have an impact on access to employment market; in *Gebhard*, market access was the test used by the Court to assess a barrier to establishment. Thus, in the field of service, the market access test is once again the main way to scrutinize national regulations.
Everything we have seen regards the *negative integration* for the free movement of services, but we have also some *positive integration*, firstly with **Directive 2005/36**, consecrating the *mutual recognition*.

Our last Directive…

In 2006, it was issued the *Service Directive 2006/123*, with an extremely complicated background. MSs reached a compromise without a straightforward application of the **Country-of-Origin approach**; the final Directive codified previous caselaw on bot freedom of establishment and services, and listed some **prohibited requirements**, giving *criteria*. The Directive does not apply to some listed service. Further, for the establishment, the scope of application of the Directive is not as broad as for services, since for them to be restricted *all rules* must be justified. The Directive gave procedural and administrative simplification, ensuring legal certainty. For *freedom of establishment*, it states that **authorization requirements** must be non-discriminatory, justified by overriding reasons of public interest, necessary, and proportionate. Finally, for *freedom to provide services*, the mutual recognition approach was abandoned, and Art. 16 Directive reflect the difficult-to-reach compromise. There is a **general prohibition** of subjecting the activity to the authorization of the host MS; however, a host MS can impose requirements only if non-discriminatory, proportionate, and necessary to attain a legitimate aim. Art. 16 (3) Directive list *five* legitimate aims (public policy, security, health, environment, employment conditions), and MSs cannot use justification *other than these**.

*For the exam, we should not rely on the Directive, and rather use the fundamental case-laws seen.

Thank you!

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