

EUROPEAN INSTITUTIONS, LAW AND MARKETS 2

BIANCAMARIA RAGANELLI

Università degli Studi di Roma Tor Vergata

biancamaria.raganelli@uniroma2.it

**FROM THE PROHIBITION
OF DISCRIMINATION ON
GROUNDS OF
NATIONALITY**

**TO THE CITIZENSHIP OF
THE EU**

**EUROPEAN UNION
VERSUS
COUNCIL OF EUROPE
AND ECHR**

COUNCIL OF EUROPE

- It is an international organisation (separate by EU, same flag and anthem) promoting co-operation between all countries of Europe in the areas of **legal standards, human rights, democratic development, the rule of law** (system of rules regulating the public power in general) and **cultural co-operation**.

COUNCIL OF EUROPE

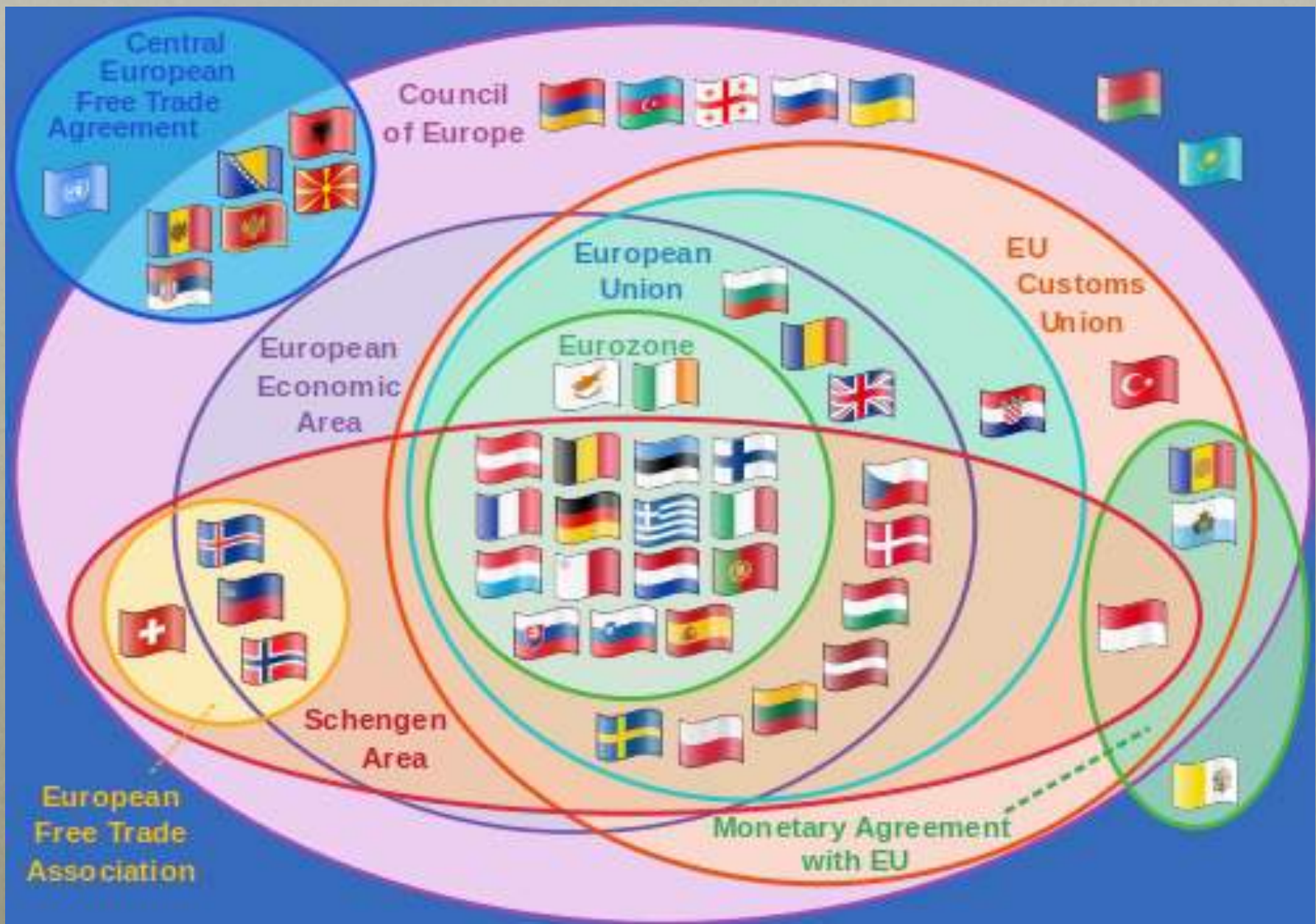
Founded in 1949
(TREATY OF
LONDON), has
47 Member States.

It is an entirely
separate body
from the EU.

Unlike the EU, the
Council of Europe
cannot make
binding laws.

SOME DISTINCTIONS

- 1) The **COUNCIL OF EUROPE** is not
 - 2) the **COUNCIL OF THE EUROPEAN UNION** (the "Council of Ministers") or
 - 3) the **EUROPEAN COUNCIL**.
- Last two belong to the European Union
 - They have shared the same European flag and anthem since the 1980s because they also work for European integration.



EU vs COUNCIL OF EUROPE

EUROPEAN UNION MEMBER STATES

- transfer national legislative and executive powers to EU institutions (E Commission,, E. Parliament, E Council in specific areas under European Community law.

COUNCIL OF EUROPE MEMBER STATES

- maintain their sovereignty but commit themselves through conventions (i.e., public international law) and co-operate on the basis of common values and common political decisions.

EU vs COUNCIL OF EUROPE

The **EUROPEAN UNION** could be seen as the smaller circle with a much higher level of integration through the transfer of powers from the national to the EU level.

Being part of public international law, **COUNCIL OF EUROPE** conventions could also be opened for signature to non-member states thus facilitating equal co-operation with countries outside Europe

DISTINCTIONS

- COUNCIL OF EUROPE
- EUROPEAN ECONOMIC AREA (Iceland, Liechtenstein, Norway, Switzerland): operates in parallel with the EU
- EFTA: European free trade association (Countries that in 1960 did not want or could not Join the EC). Switzerland, has not joined the EEA, but has a series of bilateral agreements with the EU, including a free trade agreement).
- EUROZONE: EMU

EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

- Formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*.
- It is an INTERNATIONAL TREATY to protect human rights and fundamental freedoms in Europe.
- Drafted in 1950 by the newly formed Council of Europe.
- Entered into force on 3 September 1953.
- All Council of European Member States are party to the Convention and new member States are expected to ratify the convention at the earliest opportunity.

WHY A REGIONAL SYSTEM OF HUMAN RIGHTS PROTECTION?

- It is a direct response to twin concerns:
 - 1) To avoid the possible serious human rights violations. The convention was inspired on the Universal Declaration of Human Rights.
 - 2) To protect the member states of the Council of Europe from “communist subversion”. A response to the growth of Communism in Central and Eastern Europe.

VALUES AND PRINCIPLES

Constant references to:

- **“values and principles that are necessary in a democratic society”.**
- Such principles are not in any way defined within the convention itself.

EUROPEAN COURT OF HUMAN RIGHTS

Established by the Convention.

- Any person who feels his or her rights have been violated under the Convention by a State party can take a case to the Court.

(A PERSON AGAINST A STATE)

- State parties can also take cases against other state parties to the Court, although this power is rarely used

(A STATE AGAINST ANOTHER STATE)

CONSISTENCY IN CASE LAW

- The **European Court of Justice** (LOUXEMBOURG) is treating the Convention as part of the legal system of all EU Member States in order to prevent conflict between its judgements and those of the **European Court of Human Rights** (STRASBOURG).

EUROPEAN UNION LAW

WHAT IS EUROPEAN UNION LAW?

HOW DOES IT WORK?

STARTING POINT: The EU acts through a **standardised system of laws** that apply in all member states enacted by European Institutions.

What is the European Union Law?

EU SOURCES: Types of EU law. Supplementary sources.

The enforcement of EU law: Domestic courts -ECJ

INSTITUTIONAL FRAMEWORK FOR LEGISLATIVE POWER

**European
Parliament**

**Council of
Ministers**

**European
Commission**

under the Treaties
may establish
secondary law to
pursue the objective
set out in the Treaties.

WHO IS RESPONSIBLE FOR APPLICATION OF EU LAW?

ENFORCEMENT

APPLICATION

COURT OF MS:

EU law is applied
and can be enforced
by the Courts of
Member States

EUROPEAN COMMISSION:

can take proceedings
against the Member
State under the EC
Treaty.

**WHO IS RESPONSIBLE
FOR INTERPRETATION?**

ECJ: INTERPRETER, JUDGE AND RULEMAKER

INTERPRETER

- the highest Court able to interpret European law.
- the final Court of appeal for any matter involving European law.

RULEMAKER

- ECJ CASE LAWS: general principles of law.
- Common law versus civil law

PRIMARY LAW

THE TREATY OF LISBON

- TEU + TFEU
- International Treaties between the EU Member States which sets out the EU's constitutional basis.
- They establish the various EU institutions together with their powers, procedures and objectives.
- EU can only act within the competences granted to it through these Treaties and any amendment to the treaties requires the agreement of every single MS.

TWO CORE FUNCTIONAL TREATIES

The **TREATY ON THE
FUNCTIONING OF THE EU**
(originally signed in Rome in 1958
as the Treaty establishing the
EEC), lay out how the EU
operates.

Attached
protocols and
declarations.
Amendments.

The **TREATY
ON THE EU**
(originally signed
in Maastricht in
1992)

Satellite
treaties
interconnected
with them.

TREATY OF LISBON

- The Reform Treaty: an international agreement
- Signed by the EU MS on 13 December 2007, and entered into force on 1 December 2009.
- It amends the Maastricht Treaty (**EUT**) and the Treaty establishing the European Community (**TEEC** or Treaty of Rome, later **TEC**) now renamed Treaty on the Functioning of the European Union (**TFEU**).

AIM

- The aim of the Lisbon treaty was
"to complete the process started by the Treaty of Amsterdam [1997] and by the Treaty of Nice [2001] with a view to

A) enhancing the efficiency and democratic legitimacy of the Union and to

B) improving the coherence of its action.

PROMINENT CHANGES

From unanimity to qualified majority voting in several policy areas in the Council of Ministers,

a change in calculating such a majority to a new double majority,

A more powerful European Parliament forming a bicameral legislature alongside the Council of ministers under the ordinary legislative procedure,

a consolidated legal personality for the EU

the creation of a long-term President of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy.

The L.Treaty also made the Union's bill of rights, the Charter of Fundamental Rights, legally binding.

TREATY ON THE EU

- Art. 1-5

ARTICLE 5

(EX ARTICLE 5 TEC)

- 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
- 2. Under the **principle of conferral**, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
- 3. Under the **principle of subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
- The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
- 4. Under the **principle of proportionality**, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
- The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

SUBSIDIARITY

- Defined in Article 5 of the Treaty on European Union.
- It ensures that decisions are taken as closely as possible to the citizen.
- The Union does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.
- It is closely bound up with the principle of proportionality, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties.

CONSTITUTIONAL THEORIES IN INTERNATIONAL LAW

DOMESTIC LAW *VERSUS*
INTERNATIONAL LAW

DUALIST APPROACH

- **INTERNATIONAL LAW VERSUS NATIONAL LAW**
- A State that requires a legislative act to incorporate an international Treaty into its legal order is said to have a dualist approach
- Traditionally U.K., Belgium, Germany and Italy

MONIST APPROACH

- INTERNATIONAL LAW BECOME PART OF DOMESTIC LAW
- States whose Constitution permits automatic reception of international law into its national law are said to exhibit a monist approach to international law.
- France and The Netherlands are traditionally monist States.

CONSTITUTIONAL THEORIES IN INTERNATIONAL LAW

DUALISM

International law (law between States) is separate by domestic law (law within the State) –

INTERNATIONAL TREATIES
ARE BINDING ON STATES
NOT IN THE STATES
EU LAW HAS NO DIRECT
EFFECT

Need to be validated by a special
parliamentary command.

MONISM

International law
become part of national
law

- AUTONOMOUS
LEGAL SOURCES
OF DOMESTIC
LAW
- International law is
incorporated via the
Constitution.

LEGAL BASIS

Art. 288 TFEU

- *To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*
- *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*
- *172 Consolidated Treaties*
- *C 83/172 EN Official Journal of the European Union 30.3.2010*
- *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*
- *A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*
- *Recommendations and opinions shall have no binding force.*

Art. 267 TFEU

ECJ power of interpretation in preliminary rulings

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;*
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*

QUESTION:

WOULD THE UNION
LEGAL ORDER PERMIT
DUALIST APPROACH
TOWARDS EUROPEAN
UNION ON THE PART
OF MEMBER STATES?

TOPICS

- RELATIONSHIPS BETWEEN EUROPEAN LAW AND NATIONAL LAWS
- DIRECT APPLICABILITY
- DIRECT EFFECT

TOPICS AND CASE LAW

1. DIRECT APPLICABILITY AND DIRECT EFFECT PRIMARY LAW

- VAN GEND EN LOOS (1963) - Reyners
- DEFRENNE v. SABENA
- FAMILIAPRESS v. BAUER

2. DIRECT APPLICABILITY AND DIRECT EFFECT SECONDARY LAW

- VAN DUYN v. HOME OFFICE
- FOSTER v. BRITISH GAS

3. NO HORIZONTAL DIRECT EFFECT

- FACCINI DORI v. RECREB
- FRANCOVICH

4. INCIDENTAL HORIZONTAL DIRECT EFFECT

- CIA SECURITIES v. SIGNALSON
- Unilever italia v. Central Food

5. INDIRECT EFFECT

- VON COLSON
- WEBB CASE

FIRST ISSUE

CLASSIC
INTERNATIONAL LAW
OLDS THAT EACH MS
CAN CHOOSE THE
RELATIONSHIP
BETWEEN DOMESTIC
LAW AND
INTERNATIONAL LAW

TWO
**CONSTITUTIONAL
THEORIES**
MONIST THEORY
VERSUS DUALIST
THEORY

**WOULD THE UNION
LEGAL ORDER
PERMIT DUALIST
APPROACH
TOWARDS
EUROPEAN UNION
ON THE PART OF
MEMBER STATES?**

SECOND ISSUE

**WHAT IS THE
RELATIONSHIP
BETWEEN THE
TWO ORDERS?
UNION ORDER
VERSUS
DOMESTIC/NATIO
NAL ORDER**

**EUROPEAN LAW
ESTABLISHES RIGHTS
AND OBLIGATIONS THAT
DIRECTLY AFFECT
INDIVIDUALS (ECJ: van
gond and loos)
A NEW LEGAL
ORDER**

DIRECT EFFECT of
European law in
NATIONAL LEGAL
ORDER
SUPREMACY when a norm
is directly effective, it is
supreme over the national
law

THIRD ISSUE: ENFORCEMENT AND REMEDIES

HOW WILL
INDIVIDUALS
ENFORCE
THEIR
EUROPEAN
RIGHTS?

NATIONAL
COURTS provide
effective remedies
for the enforcement
of EU law

EUROPEAN
ACTIONS: Direct
enforcement in the
EUROPEAN
COURTS

DIRECT APPLICABILITY

- **Direct applicability** talks about whether an EU law needs a national Parliament to enact legislation to make it law in a Member State.
- **EU Treaties and EU regulations are directly applicable.** They do not need any other national acts to make them into law. Therefore, once a treaty is signed or a regulation is passed in Brussels by the Council of Ministers it instantly becomes applicable in the member State.
- **EU directives are not directly applicable.** Directives in essence tell member states to do something therefore, when passed they need a piece of legislation to make them into national law.

DIRECT EFFECT

Direct effect refers to whether individuals can rely on the EU law before domestic Courts.

2 TYPES OF DIRECT EFFECT:

- **Vertical direct effect:** you can use EU legislation against a MS.
- **Horizontal direct effect:** you can use EU legislation against another individual.

VAN GEND EN LOOS CASE

ECJ STATEMENT

**EUROPEAN LEGAL ORDER
IS A NEW LEGAL ORDER**

**INDEPENDENCE OF EUROPEAN LEGAL ORDER FROM
CLASSIC INTERNATIONAL LAW**

FACTS

- Van Gend en Loos, a postal and transportation company, imported urea-formaldehyde from West Germany to the Netherlands.
- The Dutch customs authorities charged them a tariff on the import.
- Van Gend en Loos objected, submitting that the tariff was contrary to EC law.
- Article 12 of the Treaty of Rome (now replaced by Article 30 TFEU) stated: “ *Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.*”

FACTS

- Van Gend en Loos paid the tariff but then sought to retrieve the money in the national court (Tariefcommissie). This made a request for a preliminary ruling to the European Court of Justice, asking whether the then Article 12 of the Treaty of Rome conferred rights on the nationals of a member state that could be enforced in national courts
- **National court** argued: the importers were obviously not parties to the Treaty.
- **Advocate General** indicated that some provisions of the Treaty could have "direct effect" (that citizens could rely on them) but that Article 12 was not one of them.

CASE LAW

VAN GEND AN LOOS

EUROPEAN LEGAL ORDER IS A NEW LEGAL ORDER

- 1) European Treaties create rights and obligations directly on people
- 2) Individuals were subjects of EU law.
- 3) EU law would be **directly applicable** in the national legal orders.
- 4) It is to be enforced in national courts despite the parallel existence of an international enforcement machinery.



VAN GEND EN LOOS CASE, 1963

READ THE CASE

FROM THE CASE LAW FOLLOWS

DIRECT APPLICABILITY allows the ECJ to develop two fundamental doctrines of the European legal order:

1) DIRECT EFFECT

2) SUPREMACY (or primacy or priority)

PRINCIPLE OF DIRECT EFFECT

- Direct effect is the principle of European Union law according to which provisions of Union law may, if **appropriately framed**, confer **rights on individuals** which the Courts of MS of the European Union are bound to **recognise and enforce**.

ORIGIN AND EVOLUTION

- Not explicitly stated in any of the EU Treaties
- The principle of direct effect was first established in relation to provisions of those Treaties by the ECJ (**Van Gend en Loos**).
- **Direct effect has subsequently been loosened in its application and the ECJ has expanded the principle: it is capable of applying to virtually all of the possible forms of EU legislation.**

HORIZONTAL DIRECT EFFECT

- A Treaty norm invoked between private parties.
- Case law: **Familia express v. Bauer**.
- Interpretation of art. 34 TFUE: national law constituted an unjustified restriction of trade would have to be disapplied in the civil proceedings.
- Treaty prohibition covers public as well as private actions in free movement provisions.