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# 1 - INTRODUCTION

**A Decade (or more) of the EU in Crisis**

* *Since the mid/late 2000s the EU has been rocked by major and destabilizing challenges*:
* Five main challenges:
  + (1) The spread of Euroscepticism (early 2000s-)
  + (2) The Euro-crisis & its aftermath(2009-)
    - Austerity and its socio economic implications strengthened Euroscepticism.
  + (3) The refugee crisis (2014-)
  + (4) The Brexit crisis (2016-) & resurgent nationalism
    - Prime example of nationalism and how it has led to UK leaving the EU. Slogan was “take back control.” If we look at the agreement that was recently signed, we find it hard to find any win for the UK apart from sovereignty.
  + (5) The rise of illiberalism (long-term Europe-wide trend, but notably from 2010 in Hungary & Poland)
    - Political illiberalism
  + (6) **BONUS -** COVID – distribution of vaccine; burden/benefit sharing among member states
    - GdB: didn’t include it in the initial list b/c unclear how it will or has to do with illiberalism. Her initial response is that it had a galvanizing effect (a plus) for the integration project rather than a rocky start. But maybe when rubber hits road we’ll see other issues (equitable distributions)
  + (7) **BONUS -** External threats – Russia, China – do they build solidarity during the crisis?
    - Relations with China are more mixed. Challenge is more economic and digital.
    - On the whole, external threats strengthen internal cohesiveness

**Euro-skepticism**

* What is it? A term that refers to increasing skepticism about and opposition to European integration and to the European Union (& not just opposition to certain policies).
  + It’s not just opposition to a particular policy →
    - Because it’s supranational. Easier to dismiss because you have your political system. This LEVEL of government is illegitimate (seeming lack of democratic dialogue). Different from pointing to your own politicians. There’s a sense of distance/detachment from the institutions themselves. It’s less common within states. Not seeing its legitimacy at all.
    - Not just opposition to market policies or to austerity. You have these everywhere. This is opposition to the WHOLE entity.
* Began to manifest after the Maastricht Treaty on European Union in 1993
  + Big turning point. Moved from common single market to a political unit
* Rightwing and leftwing variants of Euroscepticism:
  + **Rightwing Variant:** Most dominant. EU seen (by conservative opponents) as being too interventionist, imposing regulatory burdens on industry, spreading labor rights.
  + **Leftwing Variant:** or seen (by leftwing opponents) as being pro-business (doesn’t care about people), spreading neoliberal capitalism and impeding more progressive domestic dipolicies.
    - Austerity measures fed this variant.
    - Examples: 5Star Movement; Labour Party portion that favored Brexit.
  + Both sides criticize the EU for being technocratic, concentrating supranational power, and undermining national governments & democracies
* These variants are also a reflection of the anti-globalist & anti-international times we find ourselves in.

**The Eurocrisis**

* Sovereign debt crisis that afflicted EU member states from 2009/10
* Several  member states – Greece, Ireland, Portugal, Spain, Cyprus -could not repay their govt debts or save their over-indebted banks without assistance & intervention from ECB & IMF
* Foreign lenders would not lend, and multiple member states had to be ‘bailed out’ with ECB/IMF loans, which included strict conditions (austerity)
* This cause **severe economic hardship** for the populations of these states, most notably Greece but also others, and greatly limited the freedom of action of their governments, undermining socio-economic values
  + Pain was felt by ordinary citizens
* It led to the near collapse of the Euro and to the risk of Greek exit
* **Rise in anger at EU/Euroskeptic views due both to the crisis and austerity**

**The Refugee Crisis**

* 2014-2018 (peaked in 2015 with the arrival of over 1million fleeing Syria)
* Large numbers of migrants and refugees came to the EU across the Mediterranean due to the war in Syria, as well as from Afghanistan, Iraq and other African & Middle Eastern countries
* There were many deaths at sea due to migrant smuggling on unsafe vessels
* Huge pressure was placed on EU states at the southern border – especially Italy, Greece & other member states refused to share the burden
* EU’s response focused on securing its external borders & outsourcing processing of refugees (& neglecting human rights), rather than reforming its refugee system
* Reactions:
  + Exacerbated opposition to the EU in frontline states (Greece, Spain, Italy) who bore the brunt of the costs (both economic and political) - **Inadequate burden-sharing**
  + Fed into anti-migrant discourse of right-wing parties.
    - In dealing with issues like the refugee crisis and ways in which it emboldened the far right that the EU itself has taken some of those positions and discourse of human rights has moved more to the right → exposes the flimsiness of rights protections that had been a basis of European identity

**Resurgent Nationalism in Europe**

* Brexit as the leading example: “taking back control”
  + Exemplifies idea of return to the nation state. Hard to point out concrete benefits other than the idea of sovereignty.
* **Economic nationalism** – pushing back against single market rules, against trade integration
* **Political nationalism** – e.g., calls for repatriation of powers from the EU to member states, reassertions of sovereignty against EU measures
* **Cultural nationalism** –emphasis on shared national history, language, tradition, ethnicity, shared national identity; resistance to immigration
  + Idea of Britain has always been different. “Awkward partner”
    - Important for the people who voted for Brexit (while political and economic was more important for the actual politicians)

**Rising Illiberalism**

* *Examples of illiberalism in EU*:
  + Orban & Fidesz party in govt in **Hungary** – an ‘illiberal democracy’
    - Committed to being an illiberal democracy. Alternative form of gov’t
  + PiS in government in **Poland** – undermining rule of law & rights
    - Significant control exercised over formerly independent institutions (courts, media, civil society, etc.).
  + Janŝa & SDS party in government in **Slovenia**
* Rising support for far-right parties all across the EU
  + These were formerly fringe
* **Borrowing by center-right parties of the discourse and policies of far-right parties**
  + **A shift to the right**
* *Features of illiberalism*: Anti-immigrant rhetoric, repression of civil society, harassment/silencing of critics, control of media, removal of political checks & balances, promotion of ‘family values’

**Other Challenges?**

* Covid:  distribution of vaccine;  burden/benefit sharing between Member States?
* External threats:  Russia, China – do they build solidarity or add to the crisis?

**Foundation/Creation of the European Union**

* 1952 → 6-member-state **European Coal and Steel Community**
* 1957 → 6-member-state **European Economic Community and European Atomic Community**
* 1986 → Single **European Act** (12 member states by this stage)
* 1993 → **Maastricht Treaty** created **political & monetary union**, **not only a single market** (15 Member states from 1995)
* 1997 → **Amsterdam Treaty**, strengthening supranationalism, preparing for enlargement
* 1999 → **Nice Treaty,** institutional changes for enlargement
* 2004 → ‘big’ enlargement from 15 to 25 member states,
* 2010 → **Lisbon Treaty** (by now 27 MSts, then 28 with Croatia, then 27 post-Brexit): important treaty that replaced the **failed 2004 Constitutional Treaty**

# 2- DEVELOPMENT OF THE EU

**Reasons for Integration - Why the EU?**

* NOTE: Reasons evolve, and the EU evolves with it.
* **Political** - *Goal* is post-war stability and peace, but the *means* are economic.
  + Reintegrate and neuter Germany
  + Draft EPC Treaty 1952 → Never ratified. It would have established the European Political Community (pretty similar to what Maastricht ended up doing).
  + **Council of Europe** - interdependence strengthens all states
    - Principal aim today is to protect human rights. Many more states in the Council of Europe than in the EU now (about 47 members vs. 26 members in the EU)
      * Russia and Turkey are examples of non-EU members
    - At the time, it wasn’t just a human rights organization, it was THE European political integration organization. Over time, it drafted human rights instruments (European Convention on Human Rights)
    - Formal link to EU → You need to be a member of the Council before you can be a member of the EU.
  + Venice Commission on Democracy
* **Security** - Challenge from the USSR was a big part of European integration (and why the US was behind it and funded it through the Marshall Plan).
  + Draft EDC Treaty 952 → Didn’t get passed. Defense against external forces.
  + Internal as well as external security today
* NOTE on **political and security** → Big political and security moves of the 1950s failed. We just got the Council of Europe as a political being.
* **Economic** – Political integration project took a back seat and **economic integration became the motor**.
  + Examples: ECSC 1952, EEC & Euratom Treaty 1957
* **Cultural reasons?** -  defense of ‘European values’
* **Current Reasons**
  + **Regional Force** -- Geopolitical & global positioning in a time of globalization. Creating a block in Europe which would then be a block on the global stage. Europe as a regional force. Loss of sovereignty at the national level, but finding power in the regional block.
  + Internal and external security - criminal justice, counterterrorism, judicial cooperation
  + **Addressing Globalization** -- A response to how society and interactions between peoples have changed over time.
* What other reasons might there be?
* What is the EU’s ‘raison d’etre’?
  + See above, but Interdependence strengthens all states, which straddles many of these reasons

**Visions of integration & Character of the EU**

* **Visions/Conceptions** (what *kind* of integration project):
  + **Functionalism** – Mitrany, & ‘spillover’ theory of neofunctionalism
    - An **effort to depoliticize the project of integration** and **just focus on function (steel production, prices of coal, etc.).** Don’t address things as political issues. Start small, get relevant actors engaging on those, and the rest will follow.
    - **Neo-functionalism**- It started out small (coal and steel), then we got the common market (which is a lot more).
  + **Federalism** – Monnet & political vision (**LOOKS A LOT LIKE THIS TODAY**)
    - Compared to Functionalism? Much more political vision than the technocratic functionalist vision. Idea of creating a different political entity instead of this pieced-together thing in the service of achieving peace
    - This was a means towards a bigger end (the ever-closer union).
    - **Opposition: A lot!**
      * Thatcher - Her early objection to federalism has come about again. Federalism was the “F” word for smothering national identity and sovereignty.
* Which of the above best explains the EU today?
  + **Post 1986 (more so post-1993 with Maastricht) → Starts to look a lot more like an explicitly political project (federalism)** with institutions that look very state-like.
* **Character of the EU**: international organization, regional trade area, (super)state, federation?
  + Would we even pick one? Is this question doomed to fail?
  + *Rosas* (author) - He argues that it’s a multi-level gov’t institution that has elements of all of the above. There’s no answer yet. People see different things and it depends on your perspective.
  + Gdb - Talks about it as an international organization, but it’s a very particular/unique one.
    - Why? Because it’s established by treaties between states under rules of international law (like IOs).
  + Regional Trade Area - **The EU is a single entity at least where trade is concerned** (this is not so for foreign policy, for example). States don’t have autonomous power for trade anymore. You could compare it to other regional trade areas around the world (eg: MERCOSUR), but this would only be a partial description of it.
* Which best characterizes the EU today?
  + The difficulty of characterization is what frustrates scholars (see discussion above)

**Theories & mechanisms of Integration** (explaining how it has come about - the drivers)

* **Theories** of integration (What are the *drivers* of integration)
  + **Bicycle Theory of Integration:** EU has to keep moving forward or it will collapse.
  + **Functionalist/Spillover**: Inherently dynamic. Integration is a process, not an end.
  + **Intergovernmentalism**:  It’s the member states and their respective governments that decide what happens. If national leaders don’t want it, it won’t happen. (This theory points to international organization characterization)
    - Examples: Council of Ministers & European Council (which are the intergovernmental institutions & elements)
  + **Supranationalism**: People in the supra national institution are driving the process more than the national leaders: There are three dominant supranational institutions:
    - Parliament, Court of Justice, Commission
* Do we need a theory of *dis*integration today? (Zielonka)
* Or of *differentiated* integration?
* Do the multiple crises the EU faces suggest it is disintegrating?
* **Mechanisms** of integration: a central role for law
  + (‘Integration through law’).  Has it withstood the age of populism?

**Creation & Expansion of the EU**

* **1952** 6-member-state European Coal and Steel Community
* **1957** 6-member-state European Economic Community and European Atomic Community  (1972 UK, Ireland & Dnmk)
* **1986** Single European Act (12 member states by this stage)
* 1993 **Maastricht** Treaty created political & monetary union, not only a single market (15 Member states from 1995)
* **1997** Amsterdam Treaty, strengthening supranationalism, preparing for enlargement
* **1999** Nice Treaty, institutional changes for enlargement
* **2004** ‘big’ enlargement from 15 to 25 member states, (failed CT)
* **2010** **Lisbon** Treaty (by now 27 MSts, then 28 with Croatia, then 27 post-Brexit): important treaty that replaced the failed 2004 Constitutional Treaty

# 3- DEMOCRACY, ILLIBERALISM, NATIONALISM & POPULISM IN THE EU

**Goals of this Class**

* To discuss & begin to understand:
  + (i) Why democracy (and the quality of democracy in the Member States) matters to the EU:  NB national-level and EU-level democracy
    - It’s in the EU Treaties, written in with TEU; A10, A2, A49 TEU
  + (ii) What democracy (and the quality of democracy) means in this context
  + (iii) What is the difference between democracy and authoritarianism?
  + (iv) What is the difference between authoritarianism and illiberalism?
  + (v) Can there be an illiberal democracy (esp. within the EU)?  Juxtapose with ‘liberal democracy’
  + (vi) What the term nationalism is used to signify, and what its relationship is with the EU (NB national-level and EU-level nationalism?)
  + (vii) What the term populism refers to & what its relationship is to illiberalism, nationalism, democracy (esp. within the EU)
* 2 questions to keep in mind (for the whole course)
  + (1) How might EU laws, policies & institutions have contributed to the rise of illiberal nationalism and related crises in the EU?
  + (2) How might EU laws, policies, & institutions be responding to and addressing the challenges of illiberal nationalism & related crises in the EU?

**Treaty on European Union**

* Article 2 TEU
  + *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*
  + These values are **common to the member states** (**this is an assertion**)
  + Thick conception of democracy + all the other elements around it. Some call this a **holistic concept of democracy** or **democracy +**.
  + Assertion? What about backsliding like in Poland and Hungary?
    - Article 7 - Provides an answer to backsliding. See below.
* Article 49 TEU – accession/enlargement
  + *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.*
  + Summary: Prospective countries need to have the same values as the member states (the value set out in Article 2)

**Article 7 TEU** (a response to backsliding problem)

* 1. *On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the* ***Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.*** *Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure….*
* 2.  *The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.*
* 3. *Where a determination under paragraph 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 Member State in question, including the voting rights of the representative of the government of that Member State in the Council…*
* Summary: Provides an answer for backsliding. Council acts by ⅘ members if there is a clear risk of a serious breach by a Member State to the values set out in Article 2. The Council may decide to suspend certain rights, including voting rights.
  + But, there’s no legal mechanism for expulsion.

**Article 10 TEU**

* *1.   The functioning of the Union shall be founded on representative democracy.*
* *2.   Citizens are directly represented at Union level in the European Parliament.*
* *Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.*
* *3.   Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.*
* *4  Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.*
* Summary: EU has to be working in a democratic way and states need to be democractic.

**What is democracy?**

* Found in the positive law of the four articles mentioned above (Articles 2, 7, 10, and 49)
* *Diamond*:
  + At a minimum (with a view to ensuring political freedom, popular sovereignty & equal rights) the country needs the below to be a democracy:
    - (1) regular, free, fair & competitive elections with full suffrage
      * That is, elections that are REAL, not staged
    - (2) More than one political party (pluralism)
    - (3) Alternative sources of information
  + Other dimensions necessary to guarantee/measure the quality of democracy
    - (i) The rule of law (requires independent courts & other independent institutions)
    - (ii) Civic participation (requires political freedoms & civic space)
    - (iii) Accountability (of government to citizens; and of branches of govt to each other)
    - (iv) Civil & political freedoms (association, expression, assembly, information, etc)
    - (v) Equal rights (non-discrimination, ethnic/racial, gender, & other forms of equality)
    - (vi) Pursuit of political & socio-economic equality ( & social rights)
    - (vi) Responsiveness to citizens
* How can Hungary and Poland get away with saying they’re democracies?
  + Democracy Index published by The Economist. Ranks countries as hybrid, flawed, and full democracies. You always get interesting results b/c democracy is a complex multidimensional concept. It’s not so easy to say that a country *isn’t* a democracy. In the gray zone (i.e., flawed democracies) there’s more to argue about.
  + A2 TEU doesn’t go into what composes a democracy

**What is Illiberal Democracy?**

* Missing elements:
  + Alternative sources of information
  + Not great protection of rights, checks and balances (very weak or missing in an illiberal democracy)
* *How does it differ from an authoritarian political system?*
  + By maintaining regular and ‘free’ elections (commitment to majoritarianism)
  + Authoritarian - Makes no promise of electoral accountability, popular rule. Guarantees stability,order, often welfare. What is missing is freedom and the idea of popular sovereignty.
  + Illiberal Democracy - Takes elements of authoritarianism but the government \*says\* it’s committed to ruling for the people and giving people what they want.
* *How does it differ from liberal democracy?*
  + No guarantees for rights (civil, political & other)
  + No protection for minorities,
  + No guarantee of non-discrimination  (ethnic/racial, gender, LGBTQ, etc)
  + No assurance of checks & balances, or of independent institutions
* *Why do many argue that an ‘illiberal democracy’ is not in fact a democracy? Is it an oxymoron?*
  + Without protection of these rights, we can’t say there are truly free and fair elections
    - But even in Hungary there are big protests, though gov’t control over the media and civil society is extensive
* Resende’s question:  Are Hungary and Poland examples of illiberal majoritarianism or of (creeping) authoritarianism?
  + Believes both of them are cases of creeping authoritarianism because they’re moving in a direction that you couldn’t reasonably say that the elections being held there are free and fair ones.
  + Hungary - Took measures so that courts couldn’t review the measures they added during a time. Prevented majoritarian element from functioning in the next election.

**Nationalism vs. the EU - are they antagonistic?**

* Nationalism - An idea, identity, or movement that promotes the interests of the nation, and advocates loyalty to the nation (generally above other groupings or entities): it can have political, cultural, historic, ethnic or other connotations.
* What is the relationship between nationalism and the European Union?
  + European Nationalism - Although there’s opposition to the EU, European nationalism does exist. Nationalism should also be able to coexist with the supranational identity of the EU. We saw this in the clips of the veteran statements: “I’m Scottish and I’m European”
    - Normal nationalism is still interested in EU integration. For example, Catalonia and Scotland still want to be part of the EU while having very strong domestic nationalist sentiments.
  + Loss of Nationalism - Kind of nationalism that is at odds with submerging yourself into the EU. Loss of sovereignty pits itself against supranationalism and is a challenge to European integration.
* *Where does* ***populism*** *fit in?* 
  + Populist rulers **claim to act on behalf of the ‘true’ people**, and often decry or resent mediating institutions between themselves and those they deem to be ‘the people’
  + **Majoritarianism, “representing the people”**
* (There can be illiberal populists as well as democratic populists; and illiberal nationalists as well as liberal nationalists – although many of Europe’s populists today are both illiberal and nationalist)

**Illiberal Nationalism in the EU**

* I.e. the variant of nationalism that is anti-international/global, anti-liberal (anti-rights), often populist, anti-institutional and sometimes anti-EU/Eurosceptic
* *What seems to be driving it?*
  + Bastasin (e.g., Italy, UK, France): ‘divergence’, not poverty or unresponsiveness
    - Argues that what’s driving illiberal nationalism is not poverty or unresponsiveness of democracy, but divergence (other set of identities, for example the divergence between urban and rural communities). Identities are seen as different and country’s values seem to be driven by cosmopolitan values (as opposed to more rural ones).
  + Krastev (CEEC) – post-1989 & 2004 EU accession
    - Argues that illiberal nationalism is a result of three factors:
      * (1) Emigration - the left behind/less mobile people were part of this divergence
      * (2) Ethnic Fears - fear of migration and ethnic diversity
      * (3) Resentment of EU interference - EU as a substitute of the USSR. Suddenly Brussels is running everything instead of Moscow.
* Two key questions for the remainder of this course as you learn about EU law and the way European integration has been shaped and promoted by law will be:
* (1) How might EU laws, policies & institutions have contributed to the rise of illiberal nationalism & related crises in the EU?
* (2) How might EU laws, policies & institutions be responding to and addressing the challenges of illiberal nationalism & related crises in the EU?

# 4 - POWERS OF THE EU: CONFERRED POWERS AND CREEPING COMPETENCES

**Key Treaty Provisions**

*Treaty of the European Union*

* *A(5) - principles of* ***conferral****,* ***subsidiarity****, and* ***proportionality***
* **Conferral** - Limiting principle - EU only has those powers (competences) that it is given through the treaties; there are no residual powers for it. Residual powers are left to MS. **Therefore, the EU can only grant/delegate a power that it has already been granted as an exclusive power.**
  + Related to fears about competency creep, loss of sovereignty
  + Relationship between competences and illiberal nationalism/Euroskepticism:
    - Argument that functions of the EU are constantly widening. A powerful EU and widening competences means a diminution in state power.
    - Brexit - Before referendum, the UK conducted an investigation into EU competences.
    - Idea of growth of EU powers comes up again and again from nationalist movements.
  + Competence growth → Happens with every single treaty. We call it “growth” and not “creep” because treaties are an open political choice (states have rejected treaties in the past)
  + Why “**creeping competences” fears** despite open political choice?
    - (1) Through treaty amendments -
      * Argument that even if amendments require unanimity from states, decisions at a national level can bypass the public. Idea is that elites go and decide and they don’t consider the real people.
      * Argument that once states accede, there’s no further input.
        + In MS that don't rely on referenda, might argue that the scrutiny just happens at the moment of accession and that's it.
      * Argument that we need repatriation of competences, but there’s no evidence that there’s been a diminution in power through the years.
    - (2) Through lawmaking that exceeds treaty limits - (by the EU legislative bodies - e.g., Art. 114 or 352 TFEU).
      * Example: Gun control measures in Czech case
    - (3) Through judicial activism - European Court of Justice is really powerful. It’s had a lot to do with the way European integration has proceeded.
* **Subsidiarity** - For areas that don’t fall within exclusive EU competence, the EU shall protect the ability of the Member States to take action and the EU will only be authorized to intervene when the objectives of an action cannot be sufficiently achieved by the Member States, but are better achieved at a Union level.
* **Proportionality** - Content and form of the EU shall not exceed what is necessary to achieve the objectives of the Treaty
* Principle not listed in Treaty: **Requirements of a legal basis for action**
  + The EU must enunciate a legal basis for whatever law it passes, but this has been read in by the Court. EU lawmakers must find in the treaties an appropriate power.
  + This prevents “creeping” competences
* Are the above principles political or legal (justiciable)?
  + They’re legal in the sense that they’re in the treaty, but the only one that is justiciable (makes a difference in cases) is proportionality.
  + **Conferral** - Seems like a legal principle, but rarely vindicated one. It’s only justiciable insofar as we can identify if we’re in an area where we can tell whether the EU has power.
  + **Subsidiarity -** Seems like both. Justiciable in the sense that it’s technically legal but doesn’t get treated as such in the case law, and never succeeds as a ground for review. Court just looks and sees whether the actor cited a provision. It has become a political idea to make institutions scrutinize themselves when they come up with laws. Generally, not very susceptible to legal action.
  + **Proportionality** - Only proportionality has really succeeded as a legal ground (makes a difference in cases). Courts have really weighed in on this.

*Treaty on the Functioning of the European Union (TFEU)*

* A(3-6) added by Lisbon Treaty in 2020
* A(3) - list of exclusive competences
* A(4) - list of shared competences
* A(6) - list of supporting, coordinating, or supplementary competences

*TEU vs. TFEU*

* **TFEU - More economic.** Taken up with internal market and flanking policies among that.
  + TFEU is what has been the formal version of the Treaty of Rome (previous EU Treat about the European Economic Committee - dictated what the EU was about for a long time).
  + More of the *details* and *functioning* of the EU.
  + Powers of the EU are set out in the TFEU.
* **TEU - More general constitutional ideas.**
  + Product of the Maastricht Treaty. Broader, newer, political union stuff. Many provisions were first drafted for Maastricht (when the change was happening from a more economic focus to a more political one).
  + *What purpose does the list of competences serve?  When was it drafted?*
  + *Is there a link between the rise of Euroskepticism and EU competences? Between Brexit and EU competences?*
  + *What is the relationship (if any) between theories of neofunctionalism/ spillover and the listing of EU competences in the Lisbon Treaty?*
* 2 General Functional Powers
  + A(26) – goal of internal market establishment/functioning together with:
  + A(114) – ‘approximation’ power to legislate for establishment/function of internal market
  + A(352) – ‘residual powers’ clause
    - What is the significance of these two clauses (amongst dozens of other Treaty provisions giving specific law making powers to the EU)?

**Czech Rep. v. Parliament and Council - 2019 Gun Control case**

* Case about EU competence, or about what the correct legal basis in the Treaty should have been for adopting the EU law (Directive aimed at gun control) being challenged
* Czech Rep. Arguments:
  + Directive has no legal basis under the TFEU (as it’s not about “the establishment and functioning of the internal market”) → it’s about antiterrorism/crime prevention. Without any other legal basis, it violates the principle of conferral.
  + A(84) TFEU excludes harmonizing laws in these areas across MS; this is a new Directive aimed squarely at crime prevention → this violates principle of conferral in A(5) TEU
  + Safety measures *could be* a proposal for an internal market, but the main point of TFEU is the internal market. This is unrelated to a market shortcoming.
  + Secondary objective of the internal market? No, the case law says that that the principal objective must be the functioning of the internal market.
* EU’s Arguments:
  + Acknowledging there’s more than one aim in “functioning of internal market.” Not everything is about keeping the goods moving, but also protecting risky movement (like in this case with guns)
  + Guaranteeing public security is a general interest recognized by EU law and is a valid law for adopting this.
  + A114 of TFEU (allows lawmaking on health, safety, environmental).
    - Allows to take into account new developments based on scientific fact (EU argues it’s doing this in this case).
    - Has been understood to be about eliminating obstacles to the internal market. Idea is to facilitate the internal market (not about getting to a border crossing and saying you can’t bring that gun in).
* Court: Sides with the EU. This is just a rebalancing of safety measures in past directive regulating internal market, so there is a legal basis in (A(114) - functioning of internal market)

# 5 & 6 - DIRECT EFFECT

**Overview**

* Significance of direct effect:
  + (i) practical effectiveness of EU laws
  + (ii) symbolic– EU law as domestic law not international law
  + (iii) engaging individual litigants and national courts in bringing EU law to life
* Why the vertical/horizontal distinction?  (e.g. Consider in US  constitutional law, the ‘state action’ doctrine; the  debate over ‘drittwirkung’ of rights in parts of continental Europe,  the problem of private freedom vs public responsibility (eg with how far discrimination law extends).
* Saga of Directives (what kind of EU law are they) & why different treatment from Regulations & Decisions?  Note the various workarounds developed by the ECJ: (wide interpretation of ‘state’; indirect effect/harmonious interpretation; non-substitution or ‘incidental’ effects;  *Francovich* liability etc).   But still: no ‘horizontal direct effect’ for Directives.
* General Principles & Charter:
  + Should (a) the Treaty approach (VG, Defrenne, Viking) apply?
  + Or should (b) the approach adopted to Directives apply?  ECJ gradually chose (a)

*Mangold*, *Bauer*, *Egenberger GPs & Charter provisions may have horizontal direct effect*

**Key Constitutional Doctrines and Features of EU Law**

* Direct effect
* Supremacy
* Preliminary reference procedure
* Fundamental Rights
* Respect for Rule of Law

**Basic Doctrine**

* What is it?
  + Capacity of EU law to be invoked and relied upon by claimants in both domestic and EU courts, and to confer rights on those claimants.
  + Idea that laws passed at the EU level become part of domestic law immediately.
* Why is it such a big deal?
  + The EU is made up of Treaties, and at least in the US, treaties aren’t self-executing documents. Contrast between EU Law and other international law. **The EU is different from international organizations first and foremost because of the doctrine of direct effect.**
  + In the US, international law is NOT the law of the land. International law doesn’t necessarily become national law in other systems.
  + The EU requires all member states to recognize direct effect.
  + International law leaves it up to the states to decide what the status of international law is within their domestic systems.
* From where is it derived?
  + Unspecified in EU treaties; first introduced by CJEU in ***Van Gend en Loos*** (1963)
    - Court says the European Union is a **new legal order.**
    - Big jurisprudential point introduced in a factually simple case about customs.
* What does it mean?
  + EU law can be relied on in domestic courts without the need for transposition by domestic law or approval by national legislatures.
  + EU treaties etc. automatically become part of domestic law
  + EU is different from other int'l orgs in part because this is self-executing
    - Questions in other jurisdictions about whether there is a need for transposition, whether it's part of the constitution AND can be invoked
* What made this doctrine become a reality?
  + Market case in an early market phase, which all members seemed to accede to
  + Sudden move, but a lot of people were working towards this (at least some political support for this). Not simply Court acting in a vacuum.
    - Smaller national courts don’t want to be seen as being the one to deny what their country agreed to join

**Van Gend en Loos and ‘integration through law’**

* Law isn’t just the object of integration, but the instrument of integration
  + Where blockage of political pathway was more serious, judicial route seemed like a good idea
* *Vauchez* (author) - Argues Van Gend came to be understood as cornerstone of European integration and part of a vision of ‘integration through law’
  + Integration through law. Idea that law isn’t the object of the integration, but it’s the agent and the instrument for achieving the integration. Fostering idea that YOU have legal rights and YOU are a citizen (fostering loyalty in PEOPLE to the EU). Shift your loyalty to the EU level, that law could do this.
* *Azoulai* (author) - Argues that changes in EU law reflect social and political developments. Law has integrated these developments.
  + Today we’re in a situation in which EU law and putting faith in law/courts seems like a completely inadequate response to the various political crises we have undergone. Narrative of law and integration is not really sustainable as it was.
  + Identifies three different stages of law and integration and recommends which one we need now:
    - 50s (federal vision of law as object and agent of integration);
    - 80s (centers individual rights and citizenship, socio-legal and constitutional approach);
    - Mid-2000s on (frustration with vision of legal integration; pushback against free movement, non reliance on law to address new crises like Euro/migrant crises; a need to rebuild relationship between law and justice in the EU)
* Background question: How, if at all, might direct effect connect to the rise in Euroscepticism (anti-EU), the resurgence of nationalism (economic, political or other) or the rise of illiberalism (limiting individual rights, anti-pluralism)?

**Significance of Direct Effect**

* Why so foundational to EU law?
  + *Van Gend* (‘63) vs. *Wightman* (2 years ago)
    - Extent of direct effect:
      * “*albeit within limited fields*“in Vand Gend and “*in ever wider fields*” in Wightman
      * Dramatically different understandings in both cases. VG was reassuring that it was within limited fields and Wightman gives the opposite reassurance.
    - How settled direct effect is in case law
      * “*new legal order*” - Van Gend
      * “*basic constitutional charter*” and “settled case law” - Wightman. You would never see the word “constitutional” in Van Gend. Wightman gives a very confident assertion of direct effect.
    - EU and international treaties
      * “*new legal order of international law*” in Van Gend. Court starts distinguishing it from international treaties.
      * “*unlike ordinary international treaties*” in Wightman. Court is saying that the EU legal order is UNLIKE most international treaties. It has mutated into something else.
  + Practical effectiveness - usable law in domestic courts rather than international law requiring international enforcement
* Has the “infant disease” disappeared? (the measles/immunity analogy)
  + Are we immunized? Has the disease of direct effect disappeared or not?
  + GdB: No, it is still argued and challenged as a doctrine. Applicability is still in question for many different types of EU law. However, it’s still a very powerful law and there’s not a lot of room for argument regarding treaties, regulations and decisions (and whether they’re directly effective). No argument in member states as to whether these are law.

**Forms and Instruments of EU Law**

* **Primary law**: These EU instruments are a form of constitutional higher law. Everything else has to conform to them. (technically this is a court-drawn distinction)
  + (1) EU Treaties
  + (2) General Principles
  + (3) EU Charter of Fundamental Rights - 2010
* **Secondary law**: Law that fleshes out the primary law. Must be drawn in conformity with primary law.
  + A(288) TFEU - legal acts of the Union; details binding effects of the following forms of law
    - (1) Regulations - legislation generally applicable
      * These are general laws, like federal legislation in the US.
    - (2) Decisions - individual administrative act
      * Addressed to parties, including states.
    - (3) Directives - legislation addressed to states
      * Tells states what kind of outcome they should reach and gives them discretion on how they should achieve the directive.

**Direct Effect of Different Forms of EU Law**

* (1) **Treaty Articles**
  + ***VG en Loos*** - Condition for Direct Effect - Direct effect where there’s a clear, unconditional, negative obligation requiring no legislative implementation or intervention by states
    - Negative obligation = For example, “no new customs duties” doesn’t need further clarification as opposed to “you shall implement XYZ” (positive obligation)
      * Is the negative vs. positive distinction relevant? Does it map out justiciability and non-justiciability?
        + This is an artificial distinction because even negative obligations impose positive actions on states. Here, the court in Van Gend was trying to limit the scope to not worry states too much.
    - Only EU provisions that satisfy the above get direct effect
    - GDB: is the distinction between negative and positive obligation artificial? maybe...
  + ***Reyners (Dutch lawyer in Belgium)*** - **even where legislative implementation is contemplated, the core obligation in a Treaty provision can have direct effect** (for example, no discrimination on grounds of nationality)
    - Law:Restrictions on freedom of establishment shall be prohibited and removed (in particular no discrimination on ground of nationality)
      * Does this require further implementation?
        + Maybe needs something else done in national law before it brings the aim of the law into effect.
    - **Court swept away the need for implementation due to the specific facts of this case.**
      * He had done all the right training in the Netherlands. All he had done wrong was that he was a Dutch national. Nothing else would prevent him from practicing.
    - Does this add anything to VG?
      * If on the facts it doesn’t need further implementation, like here, then it can be directly effective.
      * Implementation prong is expanded; even where prohibition on nationality discriminations might need some further implementation, if on the facts, the implementation itself isn’t required, we can go ahead and give Direct Effect.
  + ***Defrenne***- (***equal pay for stewardesses***) even where there’s ambiguity as to meaning of equal work or equal pay, core prohibition on sex discrimination (A(157) TFEU) has direct effect (even against a non-state actor)
    - Airline stewardess trying to invoke equal pay for equal work.
    - Argument that equal pay isn’t directly effective → Deciding what constitutes “equal work” can be a difficult determination.
    - BUT IN THIS CASE → (similar to Reyners) a provision can be broad/complex.needing clarification, but if in this case, doesn’t need clarification, then it can be directly effective.
      * Here, it was male and female stewards → easier determination; where a provision is broad/complex, but it doesn’t need more context, it can have direct effect
    - **Bottomline**: For direct effect, it doesn’t have to be a super clear rule that everything has been ironed out, we just need to know, around the facts of the case, how this is going to play out.
      * These cases provide an EXPANSION of direct effect.
  + ***Viking Lines*** - Horizontal direct effect. Whether you could invoke it between private parties (horizontal direct effect). Treaty articles can bind private parties.
    - Nec **Decisions** à Only Treaty provision on freedom of establishment (A(49) TFEU) can be directly invoked and enforced against domestic trade union (non-state actor)
    - Big controversy about using the treaty to undermine national labor law.
    - ‘MS shall ensure equal pay for equal work’, → BUT employers really are the ones who do this, so you need to be able to enforce it against employers too.
    - Direct effect as “justiciability”?
      * Needs to be at least not so fuzzy and not so clear and fuzzy that it can be seen in court.
  + SO: after all this…
    - Negative is gone
    - Clear and unconditional also seems to be gone (because if it’s clear and unconditional in the context of the facts of the case, then it’s gone)
* (2) **Regulations** → Shall have general application. It shall be binding in its entirety and **directly applicable** in all the MS.
  + Why would states be questioning the direct effectiveness of a regulation?
    - Whether it’s okay for states to transpose them. Can they alter the content of the regulation if it’s supposed to be directly applicable?
  + “**Slaughtered Cow**” case, Commission v. Italy
    - Can’t hide the fact that it’s an EU law (because it has special characteristics) and cannot change the content.
  + ***Amsterdam Bulb*** case
* (3) **Decisions** → Shall be binding in its entirety. A decision which specifies those to who it is addressed shall be binding only on them.
  + ***Grad***case → True that the language of decision doesn’t say anything about being binding. But it still is! They’re directly effective. They don’t need transposition and they confer rights.
* (4) **Directives** → Shall be binding, as to the **result** to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods. Leaves some discretion. Focus is on the result.
  + ***Van Duyn*** - Directive on free movement of works ‘vertically’ directly effective, even if it required some implementation. Was allowed to invoke free movement, but it’s contingent on UK’s decision on scientology.
    - There are exceptions to public policy and health to the free movement of workers. Exception needs to be based on personal conduct of individual.
    - Van Duyn was dealing with a UK exception where they can limit the freedom of movement (it was public policy)
      * She was a scientologist (considered a cult and banned/limited in many states)
      * Scientology wasn’t banned, but they didn’t want any more coming in.
    - Clear, precise, and unconditional or way too discretionary? Does direct effect kick in here even if there’s a discretionary public policy exception?
      * State can decide what it thinks is a cult.
      * BUT → As long as there are legal standards, there is ability for review, and this isn’t based on her individual conduct. There are scientologists working in the UK.
      * She was allowed by direct effect to invoke right, BUT UK allowed in the end to limit by their own decision on Scientology.
  + ***Inter-Environnement Wallonie*** - Timing of direct effect for Directives
    - Directives need to be implemented by states (opposite to regulations). They aren’t complete ad they stand and require implementation.
    - Allow for two years.
    - Direct effect doesn’t kick in until after the two years have expired.
  + ***Marshall*** - No horizontal direct effect. Directive about ages for retirement. Bringing case against her employer. Can you invoke against employer and not the state? Her employer was the health department, so it was deemed to be the state. **Court said directive didn’t impose obligations on private parties.**
    - ECJ decided that Directives do not impose obligations on private parties, but that they impose obligations on state bodies after the time limit for implementation of the Directive has expired. Once the time limit for implementation has expired, and the state has not implemented it (or has not implemented it properly) litigants can rely directly on the Directive to enforce it against the state.
    - **Way of pressuring state to implement directive** à b/c state would presumably want to avoid national court or ECJ (on a reference from a national court) deciding how obligation under the Directive should be implemented (instead of MS exercising discretion in implementation)
    - **Why?** Directives binding on each **MEMBER STATE** to which they’re addressed; Also, directives at that time didn’t have to be published, so there’s no way that private actors would know about them.
    - Way of pressuring state. Direct effect until MS uses your discretion to implement. When you implement form and method, MS gains back political power.
* More Directives (the nitty-gritty doctrine) - The below try to make directives as having as much effect as possible, but without overturning ***Marshall*.** Below case law enables directives to be invoked in all kinds of indirect ways without saying that anyone can invoke a directive anytime where the state hasn’t implemented or implemented properly. These are all moves the court has made to extend the scope of the state. **Directives *can* result in legal obligations on individuals (indirect effect). While the directive itself can’t impose the obligation, individuals that relied on the national action that was knocked out by direct effect can now be facing other legal obligations (in contract law, tort law, etc.)** These cases are a cheap way of keeping Marshall intact but getting around it.
  + **Indirectly Effective** = national courts need to interpret national laws in light of the Directive in order to achieve the result required.
  + ***Foster v. British Gas*** - broad conception of ‘the state’
    - All kinds of privatized entities can qualify
  + ***Wells***- Directive can result in indirect obligation imposed on individual
    - Directive itself can’t impose legal obligation, but it can say “well, State didn’t enforce the directive, which means they have to disavow X contract, which then injures someone”
  + ***Van Colson*** - principle of ‘indirect effect’ or ‘harmonious interpretation’
    - Obligation to interpret national laws in nat’l courts in line with Directives
    - Another sex equality case. Someone who didn’t get an interview because of sex.
    - She won in national court for discrimination on basis of sex, but under national law, she couldn’t claim reinstatement as a remedy.
    - She argued that she should get something because otherwise there is no remedy, and the Directive says that states must provide effective remedies.
    - Court said she could interpret other national laws, like tort law, that says you can recover losses incurred and damages. Interpret other parts of German law in light of the Directive.
  + ***Pfeiffer*** - principle applies to interpretation of all national law, not just nat’l law designed to implement the directive
  + ***Wagner-Miret/Pupino*** - contra legem interpretation is not required
  + ***Kolpinghaus*** - no interpretation which will retroactively increase criminal liability
  + ***Arcaro*** - no interpretation which would impose a civil obligation on an individual under a non-implemented Directive (no substitution effect, only 'exclusion' effect)
  + ***Francovich*** - An action against the state for liability for non-implementation of a Directive
  + ***Marleasing*** - indirect effect works horizontally and vertically (i.e. harmonious interpretation even in cases between individuals)
    - Under Spanish law, a company would have acted in a way in which it would have been declared null and void. Directive had been introduced to limit the ground under which a company could be declared null and void (they were harmonizing company law across states and Spain hadn’t implemented it. But the ECJ says you can still require the national law to be read in light of the directive. Can no longer interpret national provisions so widely, now interpret more narrowly like the Directive.
    - ECJ requires Spanish court to read Directive not yet implemented into Spanish law so as to narrow Spanish law

**Direct Effect of General Principles and EU Charter of Fundamental Rights**

* Should the Treaty approach (VG, Defrenne, Viking) apply? Or should the approach adopted to Directives apply?
* The below cases have generated great political repercussions; this has had a political backlash in a way that the Court imposing indirect effect requirements has not
  + Perhaps because these intrude more on ideas of the ‘sovereign core’ of each individual Member State; e.g., Egenberger limits the discretion given by national law to churches to decide scope of religious exemption
* Why has this area had a major pushback? Why isn’t doctrine of direct effect smoothly applied to general principles and the Charter?
  + We haven’t drifted far from Directives. In all these cases there’s a Directive. National law says something that conflicts with the Directive.
  + Instead of saying we don’t like your interpretation in the Directive, they say the Charter itself is directly effective and overrides. **Charter comes in and cuts through the particular choice of implementation of the MS**. Court uses a higher source of law to be directly effective against a private employer and reach a different result.
* General Principles:
  + Development of general principles has backfired and holding that they have direct effect.
  + ***Mangold****, Kukudeveci* - age discrimination; Directive on age discrimination not yet implemented, time limit not expired
    - GDB: what’s the point of a time limit if principle is just floating out there?
* EU Charter of Fundamental Rights - 2010
  + Do GPs and Charter provisions have HDE (bind private actors and not just the states)? Maybe!
  + AMS: Art. 27 of Charter, an unimplemented EU Directive on worker participation and conflict with French Labour Code
  + Egenberger: Art. 21 of Charter (non discrim on grounds of religion), Art. 4 of Dir. 200/79 on workplace discrimination allowing occupational exception for churches; German domestic law allowed religious insts. To decide on scope of exception
  + Bauer: Art. 31(2) of Charter on right to paid annual leave (for surviving relative where employee dies); EU directive on working time (conflict with German law on paid leave, where payment in lieu of leave only available for termination not death)
* *What are some of the implications of developing doctrines of direct/indirect effect?*
  + Effect on clarity and comprehensibility of EU law
  + Legitimacy of role of CJEU, especially as compared to other political institutions, nat’l laws, and institutions
  + Euroskeptical concerns about intrusiveness of EU law - see *Viking Lines*
  + Illiberal backlash against expansion of rights - see *Mangold*

# 7 & 8 - SUPREMACY OF EU LAW

**Origins of the Supremacy Doctrine**

* Idea of Supremacy came from the Court of Justice
  + Unconditional idea that EU law has supremacy over all National law
  + **Instruction to all national courts/governments/agencies that they do not enact or apply any law that is contrary to EU law**
    - This only applies to directly affecting EU law
* *Costa v. Enel,* 1964 - introduces the basic principle
  + Rationales: avoid discrimination → if EU law is applied differently in different MS, the spirit of EU law is violated; plus, if regulations are meant to be directly applicable but nations can nullify by passing their own law, the Treaty provision has no meaning
* *Internationale v. Handelsgesellschaft* 1970 - supremacy over all national law (including Constitutional law)
  + Recourse to national law to judge the validity of cwighommunity measures would be antithetical to the uniformity and efficacy of national law
* *Simmenthal* 1978 - supremacy over national law that pre-dates and post-dates EU law; also aimed at legislatures; directs national courts to apply the principle and not to apply conflicting national law
* Recent Clarification
  + *Poplawski,* 2019 - national courts must give immediate primacy over national law to laws that have direct effect, but not those which lack direct effect
    - **However: The doctrine of primacy requires national court to interpret national law in conformity with EU law regardless of direct effect**
    - **Brings in the harmonious interpretation principle as a first order principle**
* Non-binding declaration of EU law supremacy in the Lisbon Treaty
  + “Treaties and the law adopted by the Union on the basis of treaties have supremacy over the law of member states.” -> (purposeful?) Ambiguity over the law vs. over the constitutions
  + No supremacy clause in the treaty because it wouldn’t have passed

**C-585/18, AK case re independence of Polish Judiciary**

* Establishes principle of Harmonious Interpretation for conflicting domestic law
  + Seems to be another strong way in which the ECJ insists national courts should give effect to EU law, whether or not the EU law is directly effective

**Supremacy of EU Law Part II: Reception in the National Legal Orders**

* How do Member States give effect to the supremacy of EU Law?
  + Via “international cooperation” clauses in their Constitutions (e.g. Poland, Art 90 of the Constitution)
  + Via “Europe Clauses” in their Constitutions (e.g. France, Art 88-1 of Const. Germany Art 23 of Constitution)
  + By statute (as was the position in the UK pre-Brexit)
  + By adopting the “Europeanist” logic of the CJEU (Netherlands)

**Do Member states fully accept the supremacy of EU law as defined by the EU?**

* Countries are challenging it in subtle ways because they are concerned about loss of EU funds
* most countries say that supremacy come from their national constitutional law, however some national courts accept the logic of the CJEU that the EU is the source of the supremacy principle
* Governments, in a crude way, tend to accept the idea
  + But courts accept the idea to an extent, as a concept flowing from national constitutions

**Limits of National Acceptance of Supremacy of EU Law**

* Fundamental Rights
  + Respect for fundamental rights as part of the national legal order is a recurring theme of many constitutional courts
  + *Internationale Handelsgesellschaft, Solange cases*
    - Solange I - “so long as” EU doesn’t protect fundamental rights to the extent we do, we’ll enforce them
    - Solange II – Court did not surrender jurisdiction over fundamental rights. Just stated that so long as you do protect fundamental rights to a standard equivalent to that guaranteed by German constitution, we won't review your decisions on rights grounds
    - Recourse to national law to judge the validity of community measures would be antithetical to the uniformity and efficacy of national law
* Procedural limits
  + Some member states have stated that they accept supremacy *but* cannot set aside national law and that these questions have to go to another court first
  + CJEU does not accept this
    - *Simmenthal* (only constitutional court can review national law)
    - *Kunme* (res judicata: once a court makes a decision the case has been decided. Not really a challenge to EU law on any ground. The same litigant cannot open the same case again, but the national rule must be changed going forward
* Democracy
  + German and Czech Constitutional Court have said: If the power of the EU becomes so great that it threatens the vitality of national constitutional law they will no longer respect the import of EU law
* Competence
  + Kompetenz-kompetenz - Who has the power to say if the EU court has exceeded its competence?
    - **ECJ and National Courts both claim this right**
  + Focus on the fact that national courts find that some ultra vires acts exceed the scope of CJEU competences
    - **Maastricht Judgment** - German Supreme Court asserted its jx to review the actions of European institutions (including ECJ), to make sure they remain within limits of their competence and didn’t transgress constitutional rights of Germans.
    - **Honeywell** – Case articulates limits**.** Supremacy in Germany is based on A23 of the German Constitution, which is specifically concerned with the EU and allows for a transfer of sovereign powers.
      * German Supreme Court wouldn’t lightly conclude that the EU had acted beyond its competence and hence ultra vires. Said the CJEU must be afforded the opportunity to rule on the issue, and the claimant must show that the excess power was manifestly in violation of EU competence. (NOTE: This seems to be changing in Weiss and Gauweiler)
    - **Ajos** - Danish court refuses to apply CJEU ruling; general principle fell outside Danish Act of Accession
    - **Gauweiler** - German taxpayers argue that OMT decision subjects them to unlimited liabilities, violating their fundamental rights under German Const
    - **Weiss -** German Const. Court (BVerfG) declares QE program inapplicable in Germany for proportionality reasons → fear that this will give Poland/Hungary excuse to ignore when they see fit
* National Constitutional Identity
  + ***German/Lisbon* judgment**– Creation of an identity lock. Will present a difficult choice for German courts. It can take the lock seriously (coming into repeated conflict with the EU) or softly (and face the criticism that the lock’s bark is worse than its bite)
  + Article 4(2) TEU: The union shall respect the equality of Member State before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Prof. Kelemen Guest Speaker – **Constitutional Pluralism**

* **ECJ’s View** 
  + EU law has supremacy in cases of conflict b/w EU and national Law.
  + ECJ has Kompetenz-Kompetenx
  + “the law stemming from the treaty could not be overridden by domestic...
* National Constitutional Court’s View
  + ECJ is supreme only in areas where member states gave the EU competence.
  + EU can’t be granted powers that violate a member state’s core constitutional identity.
  + National constitutional courts have authority to decide.
* German court has been at the forefront of this
  + Solange I & Solange II
  + Evolution of this doctrine through time. Protect fundamental rights to a standard equivalent to that protected in Germany, then we won’t invalidate.
  + Germany barked but no bite. They reminded EU that they had kompetenz-kompetenz, but they never invalidated a treaty.
  + Weiss – QE program challenged at German constitutional court. German court invalidated an ECJ ruling that had upheld the quantitative easing program. Saying wrongly decided and that it had no effect in Germany.
* A pluralist solution?
  + Constitutional Pluralism – maybe we can resolve tension by not having one court have to have definitive supremacy over the other. Each constitutional order can acknowledge legitimacy of other court in own sphere, but no one asserts supremacy over the other.
  + Normative Case for CP à maybe it’s better instead of having one order assert superiority, preferable that they coexist and resolve through dialogue and accommodation.
  + Pragmatist case for CP à Since this conflict is insoluble, it’s better to fudge it by trying to have courts sort it out through accommodation and dialogue b/c otherwise you’ll reach a conflict that can’t be resolved (legal war of judges).
  + Case Against à ECJ says if you don’t give supremacy, poses fundamental challenge of whole idea of community law. States can just put new provisions into their constitution to trump it.
  + Case Against à it’s principle of supremacy and ECJ being judge of that that ensures equality of member states b/c otherwise gov’ts can put in place constitutional provisions and therefore pick and choose what rules they want to enforce.
  + Case Against à This is unsustainable. This conflict WILL come b/c some disputes can’t be finessed, and you need one referee to have a final say.
    - Proper remedies: Amend EU treaties, amend the country in question’s constitution, the nuclear option (withdrawal from the EU)
* Why autocrats love constitutional pluralism
  + CP, while intended with good, has been weaponized and used for nefarious purposes.
  + Allowing respectable courts (Germany) to challenge EU law, and now we have authoritarian gov’ts in EU who have captured their judiciaries and put in place
* Is it inherently dangerous? Or is it wise idea of coexistence of two legal systems?

# 9 - PRELIMINARY REFERENCES

**Article 267 TFEU: Two Dimension**

* Has become a very important channel for how EU law takes effect
* Some of the challenges from National Courts to EU Supremacy is through the preliminary reference procedure
* Vehicle for important conversations between the national legal order and the EU order
  + *AK case* from Poland was an example

Court of Justice of the European Union à **Questions that can be referred:**

* (1) The interpretation of the Treaties.
* (2) The validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union; (**if there’s any doubt about validity, they need to refer because a national court cannot rule on the validity of EU law)**
  + This a very broad jurisdiction ak
  + This is a very important source of power for the CJEU
  + These preliminary actions are distinct from actions for annulment, however when the court rules an act is not valid the implication is that it will be annulled
  + The Commission can also refer cases if a state acts badly
* National courts or tribunals that can refer (**discretionary**)
  + ALL NATIONAL COURTS
  + Necessary that body making the reference be a court or tribunal of the MS (doesn’t need to be the top court)
  + CJEU decides whether a body is a court or tribunal for these purposes:
    - Factors: whether it’s established by law, permanent, proceedings are inter partes (having or involving adverse parties), jurisdiction is compulsory, applies rules of law, is independent.
* National courts or tribunals that must refer (**mandatory**)
  + **Must -** Courts and tribunals “**against whose decisions there is no judicial remedy under national law**”
  + Also, if questioning validity of EU Law, must refer because CJEU has exclusive jx in this area.
  + Rationale: Prevent a body of national case law that is not in accordance with EU law.
  + Abstract Theory: Only bodies whose decisions are never subject to appeal
  + Concrete Theory: Whether the court or tribunal’s decision is subjected to appeal in the type of case in question.
    - *Costa* - Suggests that ECJ favors this theory.
    - Decisions of a national appeal court that could be challenged before a national Supreme Court didn’t come within A267.
    - If question concerning interpretation of EU law came before the Supreme Court, it **must** refer pursuant to A267 either when examining admissibility or at later stage

**Dimension 1: Making References, the national court perspective**

* Which questions can be referred?  Interpretation vs. validity of EU law
  + Most cases are on interpretation as opposed to validity (interpretation cases suggest a state wants to rely on it; validity questions mean a state wants to challenge the EU law at issue)
  + See *Fotofrost* on validity rulings – **national courts can’t rule EU law invalid**
    - National courts must rule on national law
    - CJEU has exclusive jurisdiction to rule on the validity of EU law
    - So if they have doubt about validity, they need to refer
  + What are litigants seeking from the national court with a ruling on interpretation of EU law?   A ruling on validity of EU law?
    - Court is usually reacting to litigants
    - Very often it is about making sure that national law is in conformity with EU law
    - Litigants really do not have control, it is a procedure that the National court must enact
      * It is not always easy for litigants to put pressure on the national court
* Which national courts may refer?
  + ALL national courts.  *Broekmuelen*,
  + This empowers judges at all levels to make references
    - I.e. Poland facing the destruction of judicial independence
    - As long as they are part of the domestic legal system it is a court
      * Even immigration courts
    - No private administrative bodies may refer
* Which national courts must refer?
  + *Cartesio* but cf *Da Costa, CILFIT,*
  + Court of last instance (Apex courts)
    - Appeals court
    - Highest court
  + In theory they are required to refer
    - Unless the point is super obvious and doesn't need to be reported on
    - Point of when a question is clear and obvious is contested
* Is there an EU law system of precedent?
  + Yes, these rulings by the CJEU are binding on everyone
    - It is a de facto system of precedent
  + *ICC*

**Dimension 2: Giving Rulings, the CJEU Perspective**

•**Article 99** of the Rules of Procedure

Reply by *reasoned order à* (relying on previously decided issues for which there is no reasonable doubt)

* Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order
  + This is a way to shorten the procedure
  + Courts are currently overloaded

**Dimension 2: Urgency and Expedition in the Preliminary Rulings Procedure**

•**Art 267( para 4**) TFEU Continued:

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

**EXPEDITED PRELIMINARY RULING PROCEDURE:**

Article 105 of the **Rules of Procedure** of the Court

1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules

**Dimension 2: When will the CJEU refuse to rule?**

* The liberal initial approach (approach used to be open and flexible - didn’t want to discourage litigants)
  + ECJ used to correct improperly framed references.
  + ECJ used to commonly reject claims that a reference should not be accepted because of the reasons for making it, or the facts on which it was based.
* The **CJEU asserts more authority over cases referred** à **Now the CJEU requires a clear explanation of why it’s. necessary** 
  + ***Foglia*** *1* - CJEU regards itself as having ultimate authority to decide whether a reference is warranted or not.
  + ***Foglia***2 - ECJ is the ultimate decider of its own jurisdiction.
  + These cases were about the primacy of control over A267 procedure and the nature of judicial hierarchy, involving EU and national courts.
  + ECJ is not simply a passive receptor, forced to adjudicate whatever was placed before it. It would assert control over the suitability of the reference.
* **Examples of refusals:** Cases where the CJEU has declined jurisdiction
  + (1) **Hypothetical** questions
    - Waste of judicial resources; unclear who the appropriate parties to the action should be or the relevant arguments; if they eventually become concrete, it may not do so in the same way it was envisaged by the court’s judgment on the hypothetical.
  + (2) Questions raised **not relevant** to resolution of the dispute
    - ECJ reiterated it had no jurisdiction to rule on questions that had no relation to the facts or the subject matter of the main action.
  + (3) Questions **not articulated sufficiently clearly**
    - This should be contrasted with cases where Court extracts the real question from an imperfectly formulated reference.
    - CJEU will not alter the substance of the questions referred to it.
  + (4) **Facts are insufficiently clear**
    - Insufficiently clear for the CJEU to be able to apply the relevant legal rules.

**Art. 267: Hierarchical or Cooperative Relationship (seems more cooperative)?**

* Court of Justice has become more involved in the procedure
* What is the ‘division or separation of functions’ between national courts and the CJEU in the preliminary reference/ruling procedure?
  + CJEU will not rule on (or query?) the facts of the case, or national law
  + National court will not rule on (in)validity of EU law (NB Gauweiler & Weiss/PSPP?)
* Can CJEU compel national court to refer?
* No
* Can national court compel CJEU to rule?
  + No
    - NB 2 references made in *Foglia*
    - Must be cooperative
* CJEU Guidance to national courts on how to make references
  + National court suggestions to CJEU as to the proper interpretation of EU law
    - Oftentimes the court follows it

**The General Court and Preliminary Rulings**

**Article 256 (3) TFEU:**

* The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.   [NB Not yet Activated]
* Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.
* Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

**National Constitutional Courts and Preliminary References**

The first preliminary reference from a national constitutional court to the CJEU was from the Austrian Constitutional Court in 2000 (after almost 50 years); the most recent one in January 2021 from Portuguese Constitutional Tribunal

Gauweiler was the first preliminary reference from the German Const Court (in 2013), now Weiss/PSPP (2020)

Taricco 2–preliminary reference from the Italian Const Court (in 2016)

Why were national constitutional courts so slow to make preliminary references?

* There was a concern about the effect about a ruling on national constitutional tradition
  + There is no appeal from the Court of Justice
* The concern for the multilateral effect of a referral to the CJEU that would dilute some peculiarities in national constitutional law

Is their current willingness to refer a sign of trust in the CJEU or a sign of warning/challenge?

* Seems that it is due to both events
  + Portuguese court has taken a collaborative approach to references and cooperation
  + *But* German Constitutional Court *Weiss* case was a culmination of the ever-growing mechanisms to bind the member states. German Court was asking for an explanation

# 10 - POLITICAL INSTITUTIONS

Political Institutions

* Main:
  + **Council of Ministers** – Presidency rotates every 6 months. It’s not really a proper presidency. It’s a 6-month chairmanship of the meetings of the council. They’re paired up in trios to provide geographic diversity. More than one state at a time collaborating in managing the agenda. Also, 6 months is too short. So, over time you can plan with your predecessor and your successor. It’s a trio of chairs.
    - Current Chair Country – Portugal (current), Germany, and Slovenia (current trio)
    - Rotation is a very important thing for MS. Ensures engagement of all member states. Sense of pride in leading the agenda.
  + **European Council** – Pres. Charles Michel (Belgian)
  + **European Commission** (EC) (most prominent person) – Pres. Van der Leyen (German).
  + **European Parliament** – Pres. Davis Sassoli (Italian)
* Secondary – why referred to as secondary? No law/decision-making power. They INPUT into the legislative process. They get consulted sometimes (some type of legislation).
  + Committee of the Regions
  + European Economic Social Committee
* Others?
  + Court of Auditors – Supervisory body. No high-profile presidency. They elect one from their own members for 3 years.
  + European Investment Bank
  + High Representative for Foreign and Security Policy – This is a “President” and it has its own institutional role aside from Council and Commission.
    - Pres. Josep Borell (Spain)
  + European Central Bank – not a political one, but a monetary one. Sticks to a very narrow mandate.
    - Pres. Christine Lagarde (French)
  + Court of Justice (ECJ plus General Court)
    - Pres. Koen Lenaerts (Belgian) – pretty high profile, despite normally court personnel being quite invisible. He’s becoming an exception to this.
  + Agencies (40+) – A ton of them. Advisory and input into policy, implementation, and monitoring (similar to administrative state in US). None of them are really strong decision-making bodies. The ones that do make decisions that are very circumscribed in their mandates.
    - FRONTEX – policing frontiers
    - European Food and Safety Agency
* Original 6 countries still dominate in the presidencies of these institutions.

**Council of Ministers**

* **Composition & Selection** – National ministers but depends on the subject matter of the council. The relevant ministers from the various member states. Composition changes. It’s plucked from time to time and meeting to meeting from the cabinets of member states. What makes it more stable is that there’s a bureaucracy supporting it in Brussels.
  + Strange that it’s an EU body b/c identity is national but when they go to the council meetings, they need to act for the interests of the EU body.
* **Powers** – Two main powers
  + (1) Lawmaking: Signs off on the laws that are made.
  + (2) Budgetary: Does this with another institution.
* **General Role** – Coordinating positions of member states and reaching a common EU position.
* **Constituency/representation** – It acts on behalf of national governments (it’s meant to). Supposed to be representing the national interest, but it has to bring each national interest in line with the others.
* **Change over time** – Less than other institutions. Same roles since the beginning. But now it has to share powers, act together with other institutions. Had more power when EU was smaller. It now shares control.
* **Supranational or intergovernmental**? – Intergovernmental.

**European Council** (it’s missing from the diagram Prof. dB gave us – why? Textbook describes it as the most important institution; it’s the overarching political leadership of the EU; wasn’t part of original institutions – came into being b/c there was an absence of high political leadership in the EU even if you had Council of Ministers; big issues (foreign policy, new member states, euro crisis, Russia) needed more coordination of important policy that wasn’t spelled out in the treaty; meets 4-times a year)

* **Composition & Selection** – heads of state & gov’t of the member states.
* **Powers** – Mostly leadership role. To the extent that it has decision making power, it’s in foreign policy.
* **General Role** – overarching leadership
* **Constituency/representation** – similar to council, but more so than council, you get some pro-EU pro-integration agendas coming out of EC meetings. Often have eye on bigger picture over their states. Seen in Macron and Merkel relationship in this space. They meet to set new agendas for Europe and give it more of a political vision.
* Change over time -
* Supranational or intergovernmental?

**European Commission**

* **Composition & Selection** – Nominated by states, President is “chosen” by European Council taking account of Parliament election results, approved by Parliament and appointed by European Council.
  + One commissioner per member state. (27)
  + Some initiatives to reduce size (didn’t work) à Ireland rejected Lisbon Treaty. It was conciliatory measure so smaller states wouldn’t lose their representation.
  + A lot of states like the one commissioner per state even if the greater size leads to less effectiveness. People like having someone there that represents their country in at least some diffused way.
  + States put forward their own nominees. All states look at each other’s nominees to approve, then put forward to European Commission and then Parliament for package approval. Accept them all or accept none. But de facto Parliament has exercised real power. They say they won’t approve the package unless you remove ABC commissioner because XYZ. Parliament now has real power of scrutiny.
  + Commission president is chosen really by heads of state and they put this person to the European Parliament. The CHOICE of the person is made by the heads of state, member states. They have to take account of the results of the EP. Instead of Commission being a technocratic/expert body that does its own thing, it’s connected more to the outcome of the EP elections. There are parliamentary groupings in EP and the **President should correspond to the majority party.** (it’s currently the center right party) You need to reflect that majority in the selection of the European Commission president.
* **Powers** – Initiation of legislation, making delegated legislation, supervision and enforcement of EU law, competition authority, international negotiation, agenda-setting and policymaking.
  + Does a lot. Hard to describe. By end of course you’ll have better sense.
  + MANY
  + Unlike Council and Parliament that have simple/straightforward powers, EC is KEY in law-making process. Almost exclusive power of **legislative** **initiative** (they get the first mover advantage). Then it has to send proposals to Council and Parliament.
  + They also delegate lawmaking power.
  + Enforcement & supervision of EU Law – “guardian of the treaties” – acts together with the Court in terms of monitoring enforcement of EU law.
  + Trade negotiator
  + Accession of member states – Commission negotiates accession.
  + Agenda setting & policy making – come up with MAJOR direction/plans.
  + Commission is an octopus.
* **General** **Role** – Promotion of the common European interest
* **Constituency/representation** – Doesn’t really answer to political constituency. Answerable to European Parliament & “peoples of Europe” – they need to identify and promote the common European interest. It’s an EU actor.
* **Change over time** – Expansion of power of other bodies (Parliament and European Council and “comitology” committees) have curbed Commission. Has to work with others much more/sharing of functions.
* **Supranational or intergovernmental**? – VERY supranational.

**European Parliament** (easy one we can leave aside)

* Composition & Selection – now direct elections
* Powers – lawmaking & budgetary
  + More power to EP doesn’t really address the democratic deficit argument.
  + Shares two crucial powers with Council (lawmaking and budgetary).
  + Also assents to new members and treaties.
* Constituency/representation – citizens of the EU
  + Political base is directly elected (as opposed to the Council of Ministers). Broad citizenry electorate. Proportional representation. EP has quite a degree of legitimacy and shares
  + But remains low profile in member states b/c they are elected among people from their own state. People aren’t super sure what the EU parties are. Complex chain and makes.
* Change over time? –
* Supranational or intergovernmental? –

**The Democratic Deficit of the EU** (more prominent after the enlargement/empowerment of the Maastricht treaty – reached crescendo during the Euro Crisis – b/c who was acting to save the Euro? An unaccountable group of central bankers. Policy decisions, imposing austerity)

* **Crucial catchall -** Unresponsiveness to citizenry/electorate à There’s an elected parliament and council of ministers, but it is not broadly responsive to citizens in the way you get in national democracy (where you vote them out). EU is a big monster of institutions – how do you even go about changing them? Kicking people out? Hard to change policy. Weakens domestic democracy.
* Executive Dominance (& bypassing national parliaments)
  + Undermines
* Distance from citizenry/electorate – Also Brussels is super far
* Complexity/Opacity – non-transparence
* Economic v. social integration imbalance – economic strong and social not strong
* Reduction of judicial review/control? – ECU is too friendly to ECU and not national courts
* Inadequacy of response to the rise of undemocratic illiberalism in member states?

**Democratic Deficit Continued**

* Input vs. output
  + Input – most important. How you make the democracy; how you choose your representatives; having a say in your gov’t through voting.
  + Output – if country isn’t succeeding in delivering on the goods; welfare’ etc. it matters but you don’t see it mattering as much outside of times of crisis.
    - In EU, output has been more important than input.
* National vs. international comparator in assessing “democratic quality”
  + Rankings. Are these the appropriate indicators for an international organization like the EU?
* Demoi-cracy? European peoples and not a European people
  + National democracy vs. European unit
  + Should we think about it as a conglomeration of different states that operate together democratically
* Representative or Participatory Democracy? See

**Article 10 TEU**

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. **Every citizen shall have the right to participate in the democratic life of the Union.** Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union

**Article 11 TEU**

1. The institutions shall, by appropriate means, **give citizens and representative associations the opportunity to make known** and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out **broad consultations** with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. **Not less than one million citizens** who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.
5. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

[15 minute explainer video on European Institutions](https://www.youtube.com/watch?v=CwzXi6niHW8)

11 - Court of Justice

**Structure of the CJEU**

* Began as European Court of Justice (of Coal and Steel Community) in 1952
* Court of First Instance created in 1988, renamed later asGeneral Court
* Staff Tribunal created in 2004 but abolished in 2017, and merged with General Court
* Currently two levels of jurisdiction: General Court and CJEU

**Sources of Jurisdiction of CJEU**

* **Preliminary references (Art. 267 TFEU)**
* **Direct Actions** for annulment (ex: Czech gun case), failure to act brought by Member States or EU institution (Article 230 TFEU)
* **Enforcement** actions brought by Commission or MSt against another MSt (Art. 258-9 TFEU)
* **Opinions** on compatibility of international agreement with EU treaties
* **Appeals** from General Court

**Sources of Jurisdiction of General Court**

* **Direct actions** for annulment, etc. brought by private parties (i.e. not an EU institution or a member state) against EU acts & EU institutions
* Actions for **damages** (tort/contract) against EU institutions
* Actions brought by member states against the Commission
* Preliminary references? **JURISDICTION NEVER ACTIVATED**
* Staff and contractual disputes concerning EU institutions & employees/agents
* Actions against/appeals from certain EU agencies (e.g. intellectual property bodies - EU IP Office Community Plant Variety Office etc.)

**Selection, Appointment & Independence**

* Who nominates? What kinds of Nominees? How many? (ECJ v. Gen Ct.)
  + 1 judge/MS, appointed by common accord of MS
* Who appoints?
* What procedure (Art. 255 TFEU Panel)
* Length of tenure? - 6 years
* Guarantees of independence?
* Style/Methodology of court - single judgment; no dissents
* Role of Advocate General (11 - 5 plus 6 rotating since UK exit)

**Power/Authority & ‘Success’ of CJEU**

* How has the CJEU become such a powerful and authoritative institution?
* Why have its rulings been (largely) accepted by national courts and member states?
  + Rosas & Amati – certain aspects of the treaty can’t be amended (general principles, rule of law)
  + Court is dependent on cooperation of national courts – European Judicial Network; the Court takes seriously its practical need to cooperate and keep good relations with national courts
* Why have its powers not been curtailed? (See Kelemen on the ways in which its powers might have been curbed but ultimately have not been)
  + On the whole, Court’s powers have always been expanded; it’s jurisdiction has been extended to basically every area except national security and foreign affairs...but Court has assigned itself some authority if MS exercise foreign affairs powers in a way that encroaches on EU law; don’t encroach into trade
    - GdB: Kelemen overstates something; it’s true that it’s not easy for them to backtrack, but states have actually extended the power of the Court, which took unanimity, too
* For the most part, its powers and jurisdiction have been continually expanded and enhanced with each set of Treaty changes

**Backlash in the Era of Crisis?**

* Has the CJEU been the subject of any backlash? How might backlash manifest?
* Does Euroscepticism extend to scepticism of the court?
* Can/Should the CJEU respond to backlash? In judgements? In ‘networking?’ Extra-judicial writings?
* Might the court be part of the solution in an era of crisis rather than a future cause of contestation? How?
* Might it be part of the problem? How?

Exercise -

1. Any examples where CJEU was part of the problem/exacerbating illiberalism/nationalism/Euroskepticism?

* Supremacy/direct effect
  + Danish Ct; even when ECJ issues general guidelines on HR, still some backlash
  + Rift between national const courts and ECJ
    - ECJ may have actually soothed rule of law issues
  + GdB: but these doctrines have been around a while, and pushback has only happened more recently, so is it the doctrines themselves --> maybe it's the lack of nuance and willingness to compromise later
* 'package deal' of these 3 problems
  + Nationalism/Euroskepticism
  + But Germany has pushed back at times, so illiberalism might be disentangled
* Preliminary reference
  + GDB: harder to show how it's worsened illiberalism in the same way
* General principles
  + Mangold: coming up with these general principles outside of treaty provisions can give the impression of CJEU overreach
  + GdB: an unwritten principle
* Euroskepticism
  + Preliminary references strengthens lower courts, but it might mix up the national hierarchies of national courts
  + Harder for this group to come up with how the Courts exacerbate illiberalism; harder to draw a causal line

1. Any examples where it might be the solution to stem the tide?

* Incorporation of rights jurisprudence into EU case law
  + Entirely court developed; CJEU has drawn on ECHR's framework, it's formed the backdrop for drafting CFR
    - This could have drawn backlash as a court creation, but it was responsive to national courts wanting protection for constitutional rights recognized in EU law
  + ECHR as a floor and not a ceiling
  + The issues that have come up haven't been about the articulation of rights per se
* If Rule of law is about even application, CJEU as a harmonizing feature contributes to legal certainty
  + If Illiberalism includes disregard for majority rights, incorporating rights jurisprudence; if it's also about consolidating power in one central executive, majoritarianism, then CJEU also seems relevant in terms of PR system
* Direct effect
* Preliminary reference system
  + Interference with national judicial hierarchy, but in combating illiberalism, the preliminary reference system combats measures that undercut independence since a reference can come from any level of the court system

# 12 - ENLARGEMENT

**Sydorski**

**Article 49 of the Treaty on European Union**

* *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account*.
* *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements*

**Accession Criteria (Copenhagen Criteria)**

* The Treaty on European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform.
* Certain criteria must be met for admission. These criteria (known as the Copenhagen criteria) were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.
* They are:
  + stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.
    - NOTE: For EU accession negotiations to be launched, a country must satisfy the first criterion
  + a functioning market economy and the ability to cope with competitive pressure and market forces within the EU;
  + ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'), and adherence to the aims of political, economic and monetary union.

**Sydorski’s presentation (major points)**

* Why join?
  + Economic themes - Common market, Common agricultural policy, labor mobility
  + Geostrategic calculations
  + Political considerations - ‘symbolic stamps of approval’ for some; entrenching democratic values into political culture
* Why the urge to enlarge
  + Development of European unification
  + Incumbents interested in raising economic influence - more markets, cheaper labor, fewer tariffs
* How?
  + Law of accession is underdeveloped compared to other areas
  + Council must agree unanimously to open negotiations
  + Until you tick every box for entry, you tick no boxes
* Copenhagen accession criteria
  + Political criteria: stable institutions, democracy, rule of law, HR/minority protections
  + Functioning market economy
  + Ability to take on obligations of membership

**Reading #1 - G Verheugen, Enlargement  2000: Too Much too Soon? (Crisis of EU  Enlargement,  2013)**

* 2004 and 2007 enlargement rounds criticized for quick pace and lack of preparation.
  + States that joined in the last decade struggle with complex problems.
* Post-communist countries had to build up modern democracies, functioning market economies and efficient administrations without much guidance.
  + Most countries → this transformation isn’t complete and economies are fragile (below average levels of EU wealth)
* We could question problems of countries that joined in 2004-2007, but their problems don’t stand out from the crowd (Greece, Portugal, Ireland and Spain also have serious problems and they joined before).
  + Only a few EU countries today are well functioning democracies with healthy economic patterns, efficient administrations and vibrant civil societies.
* The EU currently faces an **identity crisis** brought about by a number of reasons:
  + **(1) Political** - EU was often seen as “Western Europe” but the fall of the USSR unveiled a forgotten part of the continent that claimed to be “Europe” as well. Uneasiness from Western Europe regarding this forgotten part. This uneasiness materialized into the development of a set of **criteria** that each country had to fulfill to join the EC. (Copenhagen Criteria)
    - **Power to judge the criteria was a powerful weapon -** Final judgment of this criteria rested solely on the EU. Judgment on this criteria took place on an administrative level in hope that it would remain objective. This gave officials strong say on the details of the whole enlargement process and a high level of political influence over these countries.
      * Croatia suffered greatly as the first country required to pass this new procedure. They only complained privately because they feared losing goodwill of the Commission.
    - New criteria approach was meant to ensure best possible preparation for EU membership, but in reality the enlargement process now lacks strategic orientation and now functions in a very procedural way.
  + **(2) Economic:** Needs of most advanced countries govern EU integration. This came to light when more advanced countries pointed to Greece’s economic weaknesses when it wanted to join in the 70s. But the Commission quickly forgot about this and determined that financial assistance from the EU was necessary and sufficient to help countries catch up.
    - BUT → Recent crisis in the euro zone showed that this policy approach hasn’t functioned in most cases and that the internal market, considered advantageous to all countries participating, produces winners and losers.
    - **Universal EU legislation for internal market**
      * EU legislation for common rules in the internal market has aggravated the problem of different economic development levels within the EU
      * EU legislation has not replaced national ones, but stands alongside it as a complex set of regulations at the national and EU level.
        + Rapid expansion of EU rules in areas like tax, health, environment, social affairs, and energy followed the internal market concept.
        + These are expensive to comply with.
    - **Common Currency** - Introduction of the Euro eliminated another instrument of competitive adjustment (the exchange rate). EU countries don’t have many tools left to deal with competitive issues. Wage setting still is possible, but it’s limited by different cultures and languages.
      * Very hard for underperforming countries attract investment with different economic policies at the national level.
  + **(3) Nation-State Culture** - It’s much stronger in the EU than anybody expected after so many years of integration.
    - While the nation-state gives its population a feeling of national identity and belonging, the EU does not.
* This identity crisis explains the **EU’s uneasiness with enlargement**.
  + The EU has no idea how to cope with an even larger number of countries.
  + It’s an illusion that EU membership creates more homogeneity among its members, which is one of the reasons why the EU is so reluctant with Rregard to Turkey’s EU aspirations.
  + Instead, the EU has seen an increase in cultural and economic social diversity.
  + The concept of different integration levels inside the EU is also re-emerging, but it is very opposed by traditional supporters of “more Europe” (more homogeneity supporters.
* **Bottomline:** EU can’t overlook increasing diversity and the integration and enlargement model of the last 20 years won’t work. **Recommendations:**
  + **Politically** - The EU needs to shift approach and focus on integration of different peoples (as opposed to trying to make them all Western European)
  + **Economically** - The EU should give up striving for homogeneity and allow more flexibility for all present and future member states. (Example: US internal market tolerates a lot of different taxation and environmental legislation and is considered a competitive and innovative environment).
    - Member states should revisit all rules to determine whether individual ones hamper or support their most urgent development needs.
    - Result could be that countries might not apply every piece of legislation, or only do so partially in the long run.
  + **Flexibility in accession negotiations** - While the EU should sustain position on democracy, human rights, and rule of law, it should enhance focus on promoting real development needs (rather than assume that the transposition and proper application of EU rules will do the trick).

**Reading #2 - P. Ludlow, Hard Won but Vital?  EU Enlargement in Historical Perspective (Crisis of EU Enlargement, 2013)** (Paul-Winston) (note, this is in the same doc as Verheugen)

**A Constant Issue**

* Enlargement was a constant issue for the European Community since its first meeting in 1958
  + However, it has never been easy or seen as wholly positive
  + Oftentimes member states have strongly objected to the ascension of new members
  + Similar concerns have been voiced about what new members would bring:
    - Institutional paralysis
    - Unacceptably high budget concerns
    - Floods of cheap migrant labor
    - Dangerous threats to existing policy priorities
    - Slow down and complicate the operation of the EU

**Why Enlargement**

* Three broad reasons why applicants want to apply:
  + Economic
    - Greater commercial access
    - Cost of exclusion is high
      * Especially so in the agricultural sector where protectionism is high within the EU
    - Potential subsidies
    - Labor mobility
      * Countries with surplus labor could send them elsewhere
      * Improve predicament of nationals who work in an EU country
  + Geo-strategic considerations
    - Security concerns about Russia to the East
    - Greece feared the threat from Turkey
  + Belief that EU membership would provide a declining state a path back to the European mainstream/Consolidate fledgling democracies

**The Difficulties of Saying No**

* Accensions have been so successful due to the EU’s goal of unifying Europe
  + Original countries viewed their task as ‘building Europe’
* Tendency to resort to objective criteria when evaluating accession requests
* Enlargements has developed its own momentum as it has progressed

**Reading #3 - J Pehe, Successes and Failures of EU Enlargement (2011)** (Alex) (Done)

**Successes**

* EU provided guidance and incentives to post-communist countries, which inspired rapid institutional changes from communism to democracy, staving off the threat of backsliding into authoritarianism
* Rapid modernization
  + Market economies
  + Trade agreements
  + Efficient political institutions

**Failures**

* Speed of transformation outpaced the willingness of citizens to accept the new regime, there is a noticeable lack of democratic culture in post communist countries
  + Led to populist success and resurfacing of nationalist passions
  + Also led to unwillingness of eastern political elites to look for compromises or respect compromises once they had been reached
* Relaxed attitudes led to fiscal irresponsibility
* Western outlook fails to see past the facade of democracy

**Process of Accession (3 Stages)**

* **Courtship**
  + EU “sober approach” - does not want to lower standards for new members vs. “nationalist passion” of new countries that believe they are exceptional
  + Leads to eastern countries resisting efforts of EU to modernize and introduce democratic norms
* **Accession**
  + EU provides ongoing guidance to candidates, which was helpful but criticized by these countries
    - Provided an early warning sign of the conflicts to come
* **Gaining Membership**
  + Proved more complicated than many expected
    - Populism led to prevailing attitude that, as new members, eastern states did not have to agree with everything from brussels
    - Concepts of sovereignty, national interests, democracy and globalization are fundamentally different than old guard.

**Lessons Learned**

* In the future, EU should prevent the repetition of decision making paralysis caused by the previous wave of enlargement
* In the future, offer of EU membership should be strictly tied to meeting all criteria of democracy and market reforms

**Reading #4 - Note on Macedonia & EU Enlargement** (Matthew)

* Short piece from Slovak and Czech ministers concerning North Macedonia/Albanian accession
  + Their perspective: EU isn't here to determine right or wrong on issues of history, language, identity
  + Focusing on these issues makes accession less palatable to candidates; need enlargement that is straightforward and based on measurable criteria

# 13 - FUNDAMENTAL RIGHTS

**The Origins of Human Rights in the EU**

* 1952 - Draft European Political Community Treaty, ECSC
* 1957 - EEC Treaty (Only Art. 119 on equal pay)
* 1970 - 1992 - case law of the ECJ on ‘general principles’ are they invented by the court?
  + See **Stork/Geitling**
  + **Stauder**
  + **Internationale Handelsgesellschaft**
  + **Nold**
  + **Hauer**

**Political Approval of the Development of EU Human Rights Law**

* 1993 Maastricht Treaty (TEU) - Art. 6
* 1997 Amsterdam Treaty - Art. 7 TEU
* 1999 Nice Treaty 7 drafting of Charter of Fundamental Rights
* 2007 Fundamental Rights Agency
* 2010 Lisbon Treaty - **binding Charter**, **accession to ECHR mandated**, Art. 2 TEU added

**Sources of EU fundamental rights.** à Basically, the **Charter**, **ECHR** and **general principles**

Art. 6 TEU

* 1. The Union recognizes the rights, freedoms and and principles set out in the Charter of Fundamental Rights of the EU of 7 Dec. 2000, as adapted at Strasbourg on 12 Dec. 2007, **which shall have the same legal value as the Treaties.**
  + **The provisions of the Charter shall not extend in any way the competencies of the Union as defined in the Treaties …**
* **2.** The Union shall accede to the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Such accession shall not affect the Union’s competencies as defined in the treaties.
* 3. Fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute the **general principles of the Union’s law.**

**EU Charter of Fundamental Rights and Freedoms**

* Why was it drafted?
  + It seems a bit superfluous...but it’s in part a ‘showcase’; big accessions about to happen, high period for integration, so we want to make sure we put our liberal credentials out there
  + This wasn’t intended to create anything new, they thought these were things that had already been done, but this consolidates them
* What does it add to the ‘general principles’ of EU law?
  + up
* What does it add to the existing European human rights instrument (the ECHR)
  + CFR updates, incorporates all provisions of the Convention (largely civil and political rights), and incorporates social and economic rights with them
* Strengths/advantages of the Charter?
  + EU can now develop its own distinctive human rights case law
  + CJEU is very interested in its own autonomy and exclusive authority over human rights law; it guards its own authority and autonomy
* Weaknesses?
  + Some of the provisions (esp. Economic and social rights) are weakened by ‘in accordance with national laws and practices’...
  + Part 7 horizontal clause define scope; needs to fall within scope of EU law to get remedy from ECJ; otherwise you need to go to Strasbourg court
  + ‘Wooly’ language; principles are to be regarded differently than rights (basically since they’re not justiciable/don’t create new rights)...but which is which?
    - AMS/Bauer say principles, but Court hasn’t treated it that way...

**Scope of application of EU Fundamental Rights à Has expanded over time**

* External application of fundamental rights - e.g. accession, conditionality, trade conditionality, GSP
* Internal application
  + a) to the EU and its institutions
    - See Hauer
    - Kadi - (are UN Security council regulations to be reviewed for compliance with EU human rights law??)
    - Digital Rights Ireland - b) to the Member States within the scope of application of the treaties (recall Bauer on the horizontal application of the Charter)
  + b) To the member states within the scope of application of the treaties
* **Trend of gradual development**: (the doctrine) à **ECJ ruled that not only were fundamental rights binding on EU institutions, but also on MS when they acted within the scope of EU law.** 
  + **Ealy cases à** When EU laws implicate fundamental rights themselves, they should be evaluated according to the ECHR/Charter
  + **Later cases à** 
    - When MS chooses to **derogate from EU laws** (*see ERT*), they are **still bound by EU fundamental rights law**.
    - If MS violates fundamental rights, the EU can now restrict other rights (e.g., economic, *see Schmidberger, Omega*)
  + **Recent cases à** When fundamental rights are within the **general scope of EU law**, all situations are governed by EU law (*See Akerberg Fransson*)
    - Lots of litigation around what falls under “general scope”
* Key Question: **Why has the court gotten away with expanding the scope over time?**
  + CJEU says it is just interpreting the past
    - Supported by the fact that lawyers were able to cite earlier formulations of human rights law to incorporate into new documents
      * E.g., when Lisbon treaty was enacted, they said the memorandum of Human rights could have a strong interpretive role in adopting new standards of Human rights
* However, there is so much political energy for other issues, things are not rosy enough to make human rights agreement (accession to the charter) a priority.

**Scope of application of EU Fundamental Rights to the Member States**

* ***Rutili, Wachauf -*** When implementing EU law
* ***ERT -*** when derogating from EU law, MS are still bound by HR law (English scientology case→ are you treating English and Dutch scientologists the same)
* ***Schmidberger, Omega*** - fundamental rights as a justification for restriction other EU rights
* ***Akerberg Fransson*** - Within the scope of EU law/ all situations governed by EU law, states are bound by array of rights (Charter, general principles, ECHR, int’l law)

**Human Rights-Based Challenges: Member State Action**

* Introduction
  + **ECJ ruled that not only were fundamental rights binding on EU institutions, but also on MS when they acted within the scope of EU law.**
  + Charter’s provisions are binding on the MS as well.
  + Application of EU fundamental rights review to MS remains contentious (b/c not always clear when MS are acting within the scope of EU law + MS hesitant to idea of CJEU determining standards of human rights to be applied to them)
* **Situation #1** - **MS as agents** of the EU **when implementing and applying EU measures**
  + ECJ said that when MS are applying provisions of EU law which are based on protections for human rights, MS are bound by the general principles of EU law.
  + When MS are implementing or applying EU measures that are based on, or reflect, fundamental rights, their action can be scrutinized by the CJEU to ensure minimum rights guaranteed by EU law.
    - E.g., returning asylum seekers to a MS encountering systemic deficiencies in which they are likely to face inhuman or degrading treatment.
* **Situation #2** - **MS derogating** from EU rules or **restricting** EU rights
  + MS are sometimes permitted to derogate from or restrict EU rules on public policy or other grounds.
  + ECJ declared it had duty to ensure MS adequately respected EU fundamental rights when they adopted measures derogating from EU law.
  + So, jurisdiction of general principles even extends to situations in which MS is trying to derogate from EU law.
* **Situation #3** - MS action “**within the scope of EU law**”
  + Court uses **broader interpreta**tion than what the Charter actually requires.
  + Charter → “MS only when they are implementing Union law”
  + Court → “when they act within the scope of EU law”
    - Insists they’re not extending the scope of application of EU law.
    - “Applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter”
    - If **EU law is generally applicable to the case**, then the Charter will also be applicable, and the CJEU will review compliance with its provisions.
* Situations falling outside the scope of EU law
  + Court has no jurisdiction to review MS compliance with the Charter in situations which lie beyond the scope of EU law.
  + Hard to predict which situations lie outside and which inside.
  + “Outside the scope”: (for sure, based on the case law)
    - pre-Charter cases are outside and not caught by general principles of law.
    - National legislation adopted in the exercise of an exclusive national competence, which grants workers in certain circumstances more extensive protection than that provided under EU law.
    - MS’s refusal to grant a permit to a family member of an EU national who doesn't satisfy the conditions of residence set by EU legislation.
    - MS’s refusal of legal aid to an individual under provisions of national law even where main proceeding for which legal aid was sought concerned EU law.
    - MS’s definition of what constitutes a “special non-contributory cash benefit” for the purposes of EU rules on coordination of social security (since EU doesn’t define the national scope of such benefits)
* Horizontal application of the Charter
  + **General principles *can,* in certain circumstances, have horizontal direct effect.**
  + *Certain* Charter provisions *can* have horizontal direct effect.
    - CJEU willing to accord HDE to Charter rights, even where relevant Charter right is less detailed than a directive that covers the same terrain.
    - Certain willingness by
    - Unclear how many Charter rights have both HDE and VDE

**An Evolving Relationship: The EU and the ECHR**

* Accession by the EU to the ECHR
  + Possible accession has been part of integration debated since the 70’s
  + However, EU now has its Charter of Fundamental Rights which is partly modelled on the ECHR + fairly extensive “domestic” human rights system of its own → raises question as to why accession is still desirable today.
  + Concerns behind possible accession:
    - (1) EU continues to encounter criticism of its human rights role and skepticism as to whether commitment is genuine
    - (2) CJEU should not act as a parallel European Human Rights Court, but should leave this task to the ECtHR, a court that was specifically entrusted by the MS of the Council of Europe with monitoring compliance with ECHR.
    - (3) CJEU’s extension of its jurisdiction to review national laws for compliance with fundamental rights raises potential conflict b/w pronouncements of the two european courts on similar issues.
    - (4) Desirability of being able to challenge acts of the EU before the ECtHR is the strongest argument in favor of accession. Would mean that CJEU would no longer be the final arbiter of the compliance of an EU action with human rights.
* Indirect review of EU acts by the ECtHR in the absence of accession
  + Complaints cannot be brought directly against the EU before the ECtHR.
  + ECtHR has accepted *indirect* complaints against EU acts when they are brought against one or all MS.
* Mutual influence of the CJEU and the ECtHR in the absence accession
  + Despite potential for conflict, there has, however, been a desire by both Courts to avoid conflict and desire to show a degree of deference towards one another on similar questions arising before them.

**Article 51 Charter of Fundamental Rights:**The provisions of this Charter are addressed to these institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union Law

***Commission v. Poland* (**independence of the judiciary - Art. 47 Charter) – **seems to talk about “under the scope of EU law”**

* Commission challenging Poland’s lowering of the retirement age for judges
* Poland is arguing that national rules challenged in the present action cannot be reviewed in light of Art. 19(1) TEU and Art. 47 of the Charter
  + Saying that the national rules called into question have no link with EU law
* Court’s findings:
  + Art. 49 TEU states that for any European State to apply to become an EU member states commit themselves to uphold common values referred to in Art. 2 TEU
  + EU is based on the rule of law
  + Article 19 TEU gives concrete expression to the value of the rule of law affirmed in Art. 2 TEU
  + Art. 19(1) TEU states that member states are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law
  + National law to lower the retirement age and to allow the president of poland to extend the period of certain judges beyond that retirement age is a violation of its obligations under the second subpragraph of Art. 19(1) TEU

***Commission v. Hungary*** (Restrictions on funding NGOs - Art. 12 Charter)

* Hungarian ‘Transparency’ law (basically aimed at making NGO activities harder)
* Hungary measure must comply with Charter
  + Transparency Law limits freedom of ass'n and respect for private/family life and personal data protection
    - Subjecting them to negative declarations, making it more difficult to be funded etc. are going to be seen as interference/limitation on right to freedom of association - paragraph 114
  + Law limits funding, requires publication of names and addresses of donors in some cases
  + Hungary says this isn't personal data and this doesn't discourage association; plus, these are public persons (HA!)
    - Fine, but public figure definition is to be defined narrowly
  + Not sure, but I believe this is one of the cases where Hungary has ignored CJEU and tried to implement anyway, so Commission is instituting penalty payment proceedings

**Questions**

* Why did the EU initially not have a bill of rights in its founding documents?
* Why did the Court of Justice hesitate for over a decade before acknowledging/introducing human rights as a source of EU law?
* Is there any significance to its use of the label ‘fundamental rights’ rather than human rights?
* What legal difference, if any, has the adoption of the EU charter of Rights and its binding effect following the lisbon treaty made?
* Has the introduction of a doctrine of fundamental human rights had any effect, negatively, in exacerbating some of the challenges? (e.g. Euroscepticism, illiberalism, Brexit, migration)
* Or Positively, in responding to some of them? Rule of law, Poland, Hungary Etc.

# 14 - FUNDAMENTAL RIGHTS II

* Outline
  + Charter as a Sleeping Beauty à Charter in some ways is already in existence but it’s hard to get it to be applied.
  + The nature of backsliding v. the Charter à Show how backsliding touches many different aspects of Charter and it can be contrasted with how Charter is really applied to situation. Argument that there’s more potential in the Charter to do more about backsliding than is actually used.
  + MS-level illiberal tendencies as a Prince’s Kiss? à
  + EU-level tools: towards Charter traction? à Charter can be used at EU level and impact the way EU legislation is being translated. Backsliding translates at the composition of EU level. Need to address backsliding at the EU level itself.
* Charter as Sleeping Beauty
  + Applying it at EU level is easy and applying it at MS level is hard.
  + This is where most of the energy is spent. Clarify what scenarios are covered by the wording that it can only be applied at member state level when union law applies.
  + What is the point of the Charter of Fundamental Rights? Where does it add value?
  + Various EU and national policy instruments to promote Charter application
    - Explaining where it adds substantive value – one way of waking up sleeping beauty
    - Explaining when it applies nationally – another way “ “
    - Dilemma – expertise in the above is split. Need to marry these two types of expertise.
    - In many member states these two types of expertise remain separate.
  + Yearly political discussion b/w EU institutions
  + Gradual judicial development by the ECJ
* Nature of Backsliding v. the Charter
  + Autocrat’s Playbook:

**The Nature of backsliding v. The Charter**

* The Autocrats’ playbook
  + Taking over courts, starting at the top
  + Taking over public media
  + Silencing public intellectuals and NGOs
  + Undermining independent institutions, like NHRIs
  + Tilting electoral rules and tampering with elections
  + In short: Clear political and legal strategy to consolidate and entrench power
    - In that sense, backsliding is a bit of a misnomer, as it lacks a subject: it is a concerted assault on liberal democracy)
* **This is relevant for the charter because it specifically mentions that independent institutions should be used to enforce human rights**
  + **I**n that sense, the playbook has had quite a large impact on the charter in a broad sense
    - **Upshot**: the potential for the charter to push back on the playbook is much greater than is currently being used.

**Backsliding as the Charter’s “Prince”**

* Because of backsliding, there’s more impetus to start developing HR protections
* Polish judges; C-619/18 (2019); 37-59;71-97; 124
  + Commission’s angle (A19(1) TEU & A47 CFR)
  + Charter applied next to EU obligation
    - Is the test as of par. 79 a Charter-based test?
    - Does A47 CFR add something in substance to A19 TEU?

In the meantime, on the ground..

* In PL: Neo-KRS, CT, Supreme Adm. Court, 2 Supreme Court Chambers captured, Muzzle Law introduced, non-courts asking preliminary questions (par 45 & 55)
* Outside PL: NL Court blocks suspects’ transfers (par 43)

Hungarian NGOs; C-78/18 (2020); 40-97; 98-142

* Commission’s angle (A63 TFEU; A7, 8, 12 CFR)
* Charter applied next to/after EU obligation
  + A7, 8 & 12 CFR test undertaken after A63 TFEU test
  + Innovation re. 12 CFR
  + Does the CFR test substantively add to free mvmt test? (e.g. par. 141) (see also AG, calling for “integrated test”)
* Commission has started case re. non-compliance!

In the meantime, on the ground..

* CEU left country, public media, NGOs, judicial reforms

**EU-Level tools: towards Charter Traction?**

* **(**Remember: EU-level=easy, MS-level = hard)
* Regulation 1141/2014 on funding EuPP
  + Design & practical effect vs Charter proofing
  + Reforms announced
* Horizontal CFR compliance obligation EU funds
  + Potentially powerful too, next to e.g. the general regime of EU budgetary conditionality

# 15 - BREXIT AND LEAVING THE EU

**Waves of Enlargement vs Single Exit?**

* 1962 → Algeria gained independence from France. We don’t consider this an exit of a member state.
* 1985 → Greenland was part of the EU as part of Denmark. Left because of fishing rights.
* 2009-2010 → Fear that Greece would exit from the Eurozone.
* 2012 → St. Barthelemy. Territory of former colonial power (France) with close relationship to former colonial power.
* 2020 → UK exit – This is the only REAL exit from the EU.

**Article 50 TEU**

* Governs exit, just as Article 49 TEU governs accession
* Was added only in 2010, by the Lisbon Treaty
* What was the position on exit from the EU prior to 2010?
  + Wish to exit would have followed general rule of **detracting from an international agreement**. We see this discussed in the Wightman case. Exit would have been covered by international law generally.
* Is the law of exit more extensive than the law of enlargement (per Sadurski)?
  + Enlargement law - Very thin (there’s a lot of negotiation and policy involved as opposed to a lot of pre-established law)
  + Exit law - Article 50. There’s no practice around it yet apart from what happened with the UK. There’s not a lot of law and almost no precedent.

**Text of Article 50**

* *(1) Any Member State may decide to withdraw from the Union* ***in accordance with its own constitutional requirements****.*
* *(2) A Member State which decides to withdraw* ***shall notify the European Council*** *of its intention. In the light of the guidelines provided by the* ***European Council, the Union shall negotiate and conclude an agreement with that State****, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union* ***by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament****.*
* *(3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that,* ***two years after the notification*** *referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
* *(4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*
  + *A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
* *(5) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49*.
* Summary: State makes a domestic constitutional decision to withdraw. Then, has to notify the European Council. European Council will set guidelines.
  + The EU is to negotiate and conclude an agreement with that state (setting up arrangements for withdrawal, future relationship of state with the EU).
  + It’s negotiated in the way international treaties are gone into by the EU.
  + Council acts with a qualified majority (more than a simple majority – 55% of member states and 65% of population) with consent of the European Parliament.
  + 2 years after notifications is made:
    - If no agreement state automatically departs, unless European Council decides to extend the time for negotiation.
    - Extension was used multiple times with Brexit.

**Case 621/18, Wightman, judgment of the CJEU of Dec 2018** – Fabi

* EU Law - A. 50 requires that MS wanting to withdraw notify the E. Council. Exit agreement is negotiated. MS can revoke notification if it changes its mind within 2 years.
* Petitioners (Scots, some UK MPs, some EMPs) wanted to unilaterally revoke UK’s notification to withdraw before the 2 years. Effect = UK would remain in EU
* Council and Commission’s Argument: Right revoke isn’t unilateral (doesn’t only belong to the MS that made notification). Otherwise, MS would enjoy a right to withdraw w/o time limit (they could revoke, notify again, and trigger a new 2 year period). This renders A. 50 ineffective. A. 50 should be interpreted as allowing revocation, but only with unanimous consent of the E. Council.
* CJEU’s Decision: **The right to revoke is completely unilateral and it belongs only to the MS that gave the intention notification.** A MS isn’t required to make the decision of withdrawal in concert with other MS or other EU institutions. It’s the decision of the MS alone (in accordance with its own constitutional requirements)
  + Council and Commission’s argument would transform unilateral sovereign right into a conditional right subject to approval procedure.
  + “...for as long as a withdrawal agreement concluded between the EU and that MS has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU...that MS... **retains the ability to revoke unilaterally the notification of its intention to withdraw** from the EU, in accordance with its constitutional requirements.”

**The Wightman Case** (GdB will get to these slides later in the semester)

* Was it a hypothetical question?  (unsuitable for a preliminary reference?)
* NB the use of the expedited procedure
* Did the UK support or oppose a right of withdrawal of notice under Article 50?
* Who supported a right of unilateral withdrawal?  (para 37)
* Who supported a right of conditional withdrawal? Subject to which conditions?  (paras 37-42)
* **SUMMARY BY KENNETH ARMSTRONG** (Guest speaker) → Membership of EU is a voluntary act of sovereign states. You choose to join and choose to leave. Up until point of withdrawal, a member state can change its mind.

**Wightman Continued** (GdB will get to these slides later in the semester)

* How did the ECJ decide on the issue of a unilateral vs conditional right of withdrawal of notification? (para 58 & 73-74)
* Why did the ECJ mention the values on which the EU was founded? (para 62)
* What kind of interpretative approach or method did the ECJ use to interpret Article 50?  (para 47 et seq)
* How was international law (as opposed to EU law) relevant to its reasoning?

**Brexit** (GdB will get to these slides later in the semester)

* Why did a majority of the UK population vote to leave the EU?:
* Economic reasons (including EU immigration)?
* Cultural reasons (including EU immigration)?
* Historical reasons (Britain’s distinctive –imperial – history?)
* Rising nationalism?  (‘take back control’)
* Rising illiberalism?  (including anti-’other’; antipathy to regional   human rights accountability)
* Is the UK likely to seek to rejoin the EU in the future?

**Brexit Contd.** (GdB will get to these slides later in the semester)

* Why did it take almost four years from the time of the vote until the time of (provisional) departure in January 2020?
* And almost five years until the actual departure in January 2021?
* What law governs the relationship between the EU & the UK now?
* EU-UK Withdrawal Agreement 2020  (‘divorce’)
* Trade & Cooperation Agreement 2021 (‘future relationship’)
* (plus other treaties on sharing classified info, cooperation on nuclear energy, and multiple political declarations & guidelines)
* On the UK side:  multiple domestic laws governing the status of EU ‘retained law’ in the UK

**Kenneth Armstrong on Brexit through a Rule of Law Lens**

* Laws involved in Brexit:
  + (1) internal constitutional law of the UK,
  + (2) Article 50 (EU)
  + (3) general rules of international law (that tell us what happens when you leave an international agreement)
* Rule of law checklists for the withdrawal:
* Rule of Law Element #1: **Legality** of the withdrawal
  + Article 50 - makes the decision to leave in “accordance within constitutional requirements” so nested in law of state that wants to leave. In the UK, done by referendum, so there was a legal process by which we came to the decision to withdraw.
    - The EU is very reliant on the constitutional quality of the MS that is withdrawing.
    - But how agnostic can the EU be about the quality of that process?
  + UK Law - Some in the UK said Brexit was about getting out of this system, and that meant doing it all domestically.
  + International Law - Some wanted to do it mainly within Vienna Convention
* Rule of Law Element #2: **Supremacy of legislature over executive**
  + European Parliament must agree to withdrawal. .
  + Role of the UK Parliament has proved to be a tricky part of the equation and often risked withdrawal becoming disorderly.
  + When the UK PM tried to use strong executive power, a legal challenge was brought and ended up before the UK Supreme Court.
    - Argument was that the executive didn’t have authority to trigger Article 50 because it had been the UK Parliament that had allowed EU membership, the rights created could only be cut off by Parliament.
    - Statutory intervention for the PM to trigger Article 50 process was necessary.
* Rule of Law Element #3: **International agreements should be upheld**.
  + Article 50 didn’t tell us what to do if a member state changed its mind.
  + Local reaction to Brexit generated a lot of legal change.
  + Parliament is delegating a lot of power to the executive to be able to make changes to UK law.
* Why Brexit?
  + Maybe the UK couldn’t handle the EU’s legal discipline.
  + Worry about what other international obligations the UK might find too much. Should our worry be specific to EU membership?
* Critique to Armstrong’s argument:
  + Rule of law checklists are problematic because they can be too formal of a manifestation of legality rather than a deeper societal commitment to inclusive self-government made possible by and through legal means.
  + We could end up with authoritarian legality → relationship between democracy and rule of law are not reinforcing but coupled in a way to reinforce authoritarian systems.

# 16 - RULE OF LAW

**Emergence of Rule of Law as an EU Value**

* Wasn’t written in at the very start, even if it’s now been written in
* Pre-Maastricht
* **Article 164 EEC** (later amended and renumbered as **Article 19 TEU**)
  + “The Court of Justice shall ensure that in the interpretation and application of this Treaty **the law** is observed”
* ***Les Verts (1984)***:  **Origin of idea of rule of law.** Case involving campaign in EU Parliament elections. After elections, they were seeking to have electoral expenses reimbursed. There was a rule that this was only allowed if your party already had members in the EP. The Green Party didn’t have any.
  + Rule of law = **legality and access to review (and review being independent of political actors that adopted the measure.**
  + → Result in this case is that EU Parliament measures are subject to challenge
* ECJ determines ‘**effective judicial protection** = general principle of EU law
  + Binds the MS, not just the EU
  + Originally focused on access to justice rather than judicial independence

**Post-Lisbon Treaty Amendments**

* A(19) TEU - added “**MS shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law**.”
  + Not just the EU. Becomes a MS obligation as well.
* A(2) TEU - added respect for value of rule of law
* A(49) TEU - accession only for states respecting A(2) values

**Enforcement**

* A(7) TEU - Centerpiece; Mechanism to address infringements of rule of law (what to do when states start to backslide)
  + Reasoned proposal of ⅓ MS, EU Parliament, or Commission
  + ⅘ of the Council, on Parliament’s consent, can determine risk of serious value breach
  + Unanimous European Council, on proposal of ⅓ MS or Commission and consent of Parliament, can determine existence of serious and persistent breach
  + After determination, qualified majority of Council can decide to suspend certain rights, including voting rights in Council

**Article 7 TEU**

* (1) On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.  The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
* (2) The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
* (3) Where a determination under paragraph 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 Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.  The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
* (4) The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed

**Art. 7 as a ‘rule of law’ tool**

* But is it really the tool that was meant to react to violations of the rule of law?
  + A(7) considered the “nuclear” option applying to very serious and persistent breaches of the rule of law
  + Does not apply to occasional or minor risks
  + Very political procedure people are reluctant to use.
* 2017 - Initiated against Poland by Commission (“mandated” retirement age for judges - an attempt to dismantle the independent judiciary)
  + Even though Hungary was farther along in many respects; demonstrates that everyone is reluctant to even pull the first switch
* 2018 - Initiated against Hungary by Parliament – litany of anti-democratic/rights/rule of law concerns
  + No further action under A(7) because: of institutional reluctance for political confrontation; a desire to keep peripheral nations closer to the EU than Russia; view of rule of law issues as internal, lacking in externalities
  + We’ve never even reached the ⅘ Council stage yet
* What other tools exist for the Commission?
  + Commission can bring enforcement actions against MS (though they don’t love to)
* Who else can effectively intervene against Poland and Hungary with regard to violations of the rule of law?
  + Commission - enforcement actions against MS
  + MS can bring enforcement actions against MS (though again, only a handful of interstate cases - usually in trade cases rather than HR cases)
  + National Courts - preliminary reference on questions of EU law including compliance of national actors and national law
  + Private litigants - can challenge their own MS indirectly through preliminary references from other courts

**The Court of Justice**

* Who can bring actions before the Court of Justice against member states?
  + *Commission* – enforcement actions against MSts
  + *Member States* – can bring enforcement actions against MSts (Q: have they brought actions vs Poland or Hungary for rule-of-law issues?)
  + *National Courts* – preliminary references on questions of EU law including compliance of national actors and national laws – of their own member state and of other member states with EU law
  + *private litigants* – can challenge their own member states indirectly through preliminary references from national courts;

**Preliminary References Before the CJEU**

* ***Case C-64/16 (Associação Sindical)*** - reduction in salaries of Portuguese judges during financial crisis
  + CJEU didn’t think A(2) was enough, so they linked A(19)
  + **MS shall provide remedies to ensure effective legal protection + rule of law**
* Is the scope of this obligation limited in the way Article 51 of the Charter limits its scope of application?  (see paras 29, 37 & 43)
  + In this and Polish case, CJEU uses preliminary reference procedure as a lever; there's a limited obligation imposed for independence because every court capable of raising references must be independent.

**Commission Enforcement/Infringement Proceedings Before the CJEU**

* After this, Commission picks up on the ruling in ***Associacao Sindical***and begins bringing infringement cases based on A(2) and A(19) TEU
* ***C-619/18 - Commission v. Poland*** - “mandated” retirement age for judges
  + The Commission wanted to pressure the states not to put pressure on their judiciaries. Poland argued the organization of national judiciaries is not a matter of EU competence.
  + **Held:** Every national court is covered by the scope of EU Law through the preliminary reference procedure. There’s a limited obligation imposed by EU law and that is judicial independence. Any court that makes a preliminary reference must be independent.
    - No preliminary references to ECJ w/o judicial independence.
* ***C-791/19R - Commission v. Poland*** - (interim measures regarding judicial disciplinary regime
  + 5 MS gov’ts supporting Commission in main action (Dec. 2020)

**Other Commission infringement proceedings vs. Poland and Hungary**

* Commission has brought multiple other proceedings on rule of law and illiberalism against Poland and Hungary over past 2 years, including **urgent interim measures**

1. **Poland**: on the Constitutional Court, the new disciplinary Chamber of the Supreme Court (multiple cases), the role of the National Council of the Judiciary in appointments;
2. **Hungary**: forced early retirement of judges; civil society ‘foreign funding’ restrictions; forced closure of the CEU; non-compliance with EU refugee law (inhumane conditions in ‘transit zones’); criminalizing support for asylum-seekers;
3. Opening of **penalty payment proceedings** against Hungary in the ‘foreign funding of NGOs’ case, Feb 2021
   * GDB: judgments usually enforced, but not lately in Hungary or Poland; no shame for them thus far

**National Courts as Enforcers of the Rule of Law**

* How can national courts highlight rule of law problems? → Making preliminary references about judicial independence
* National judiciaries within illiberal states:
  + ***C-625/18 AK Case***, from Poland, on lack of independence of disciplinary chamber
  + Judge Csaba Vasvari (Hungarian) on his own independence as a judge (AG opinion forthcoming)
* National judiciaries within other EU MS:
  + ***C-216/18 LM (Celmer)*** - from Irish high court (Polish arrest warrant ultimately granted)
    - Judge couldn’t find much info on second step as to whether this WOULD affect him
  + ***C‑354/20 PPU and C‑412/20 PPU, L&P*** - from Amsterdam court (surrender to Poland on European arrest warrant refused)
    - His arrest had been publicized in Polish media and had become a political issue
  + German court questions Polish judicial independence in arrest warrant case

**Non-EU bodies as Enforcers of EU law (re: rule of law and HR)**

* Some examples (consider what they can add to EU action):
* Norwegian Court Administration rejection of cooperation with Poland on judicial programs (including suspending funding)
* European Network of Councils for the Judiciary (suspension of Polish National Council of the Judiciary from membership)
* Venice Commission of Council of Europe (opinions and statements cited & used by CJEU and by European Commission)
* European Court of Human Rights – multiple cases on independence of the judiciary communicated

**Financial Conditionality for Rule of Law Compliance**

* EU finally adopted budgetary legislation which includes **'rule of law conditionality**'
* Adopted as part of long-term budget, including Covid stimulus. Adopted under consent procedural requiring unanimous Council and consent of absolute majority of EP
* Conditionality provisions diluted by addition of interpretive declaration by EU Council after Poland and Hungary threaten to veto the budget
  + Declaration states that Commission will adopt guidelines for implementation of rule of law provisions; if an action for annulment of Regulation is brought, guidelines will be finalized after judgment of CJEU

# 17 - GUEST GIULIANO AMATO

* Majoritarianism as temporary platform for decision making
  + …but maybe not anymore
* Connection between majoritarianism and the rule of law
  + Liberal rights are the rights of the privileged
    - Amato: I defend community rights; illiberal rights also has a meaning that directly challenges individual rights
    - Orban was a liberal and has adopted the change in his electorate
    - Poland: conservative Catholicism as a bulwark against Communism
      * Reaction against Europe because these principles arrive through decisions of European courts
* Is this irreversible?
  + I don't know because I could not concentrate
  + GA: we haven't given enough room for national adaptation of the common rules
* Respect national identities more
  + GDB: but I think it's more than that; independence of judiciary isn't necessarily bound up in national values
  + GA: a political party was ready to pounce on the political reaction that people had
* Pandemic has been an opportunity for the EU to demonstrate how essential it can be when a problem that really everyone understands is common,
  + Problem that can be solved with unity, not by each state separately
    - But EU has failed to take advantage
    - Maybe its that liberal demo is only good in the good times?
      * He was getting skeptical, but now he is more optimistic

# 18 - COMMISSION ENFORCEMENT OF EU LAW

**The Actors and Functions of the Infringement Procedure**

* Actors:
  + **Member States** – enforcement role, assisting (loyal cooperation) role, joining proceedings as interveners, defendant,
    - Can bring actions against other Member States under 259
    - Assist by providing information in their role as defendant.
    - Member States can intervene on either side (defendant or Commission)
  + **Commission** - enforcement (which includes some strategic moves)
    - Commission is called the “guardian” of the treaties. Commitment to monitoring and ensuring the legal framework and that all the commitments within it are observed.
    - More like a prosecutor
  + **Court of Justice (& AG)** – ultimate determinant/decision-maker; but no pro-active role, passive role in considering cases; one mechanism in Commission’s strategy;
    - AG - They can set the tone for a case, but they don’t have as much power as the Court does.
  + **Ombudsperson** – monitors the Commission to make sure it's accomplishing its role.
    - Introduction of this role did a lot to discipline the procedure because the Commission has vast discretion.
    - We tend to think that the Commission is a good actor, but it can also be problematic (ignoring certain states)
    - Makes a big effort to respond to citizens’ complaints.
  + **Citizens** – notifying infringements to Commission (they can submit complaints); an alternative avenue to litigation/direct effect/preliminary reference
    - What about direct effect?
      * Citizens can act in parallel in national court.
      * Rejected Argument: There is a route for an individual citizen to pursue a complaint in national court.  Therefore, citizens don’t have a role in the Commission’s infringement proceeding. This is particularly true in cases that have a national limit. Can’t bypass that national time limit. (GdB said this was a very weak argument)
      * Court of Justice rejected the argument above. Infringement proceedings and preliminary references/direct effect are completely different things. These two rights that individuals have don’t have to infringe on each other. They have both rights.
    - Importance of citizen complaints?
      * The Commission is not an investigative authority. As a matter of resources, complaints from citizens are extremely important.
* Functions:
  + **Law enforcement** - Two forms:
    - (1) in the face of deliberate state defiance and
    - (2) management problems [Example: Italy and waste disposal problem. They didn’t want to deliberately be in defiance and have a bunch of trash. Was more of a regional problem, mal-administration, mafia, etc.]
  + **Dispute resolution and management**
    - Enforcement procedure might provide a venue for dispute resolution
  + **Citizen complaint channel**
  + **Accountability mechanism** - Procedure through which a lot of different institutions have held each other accountable (e.g., Ombudsman). The Court is also quite strict on the Commission as well (lots of cases where Court chastises the Commission for overreaching, underreaching, amount of evidence brought forward, etc.)

**Comparing Public and Private Enforcement of EU Law**

* Two ways of enforcing EU Law:
  + **PUBLIC -** Article 258 - public enforcement of EU law by the Commission (infringement actions)
  + **PRIVATE -** Article 267 - Preliminary references in cases brought by litigants seeking to enforce EU law before national courts
* What are the advantages and disadvantages of public vs private enforcement?
  + Private: (through preliminary references)
    - Incentives - Individuals feel the bite of whatever the law is
      * Private parties are incentivized to address problems the Commission might not (especially political subjects)
    - Cost-spreading
    - Knowledge - As the affected party, individuals have more information. Closer to the problem in a particular state.
    - Remedy - Might get a different remedy. The Commission’s remedy is just a declaratory judgment.
    - Active participation - Getting individuals more involved as EU citizens.
  + Public:
    - Non-individual grievance
    - Lack of standing
    - Targeting
    - Strategy
    - Experience

**Article 258 TFEU – COMMISSION ENFORCEMENT**

* Art 258 If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
  + Note: reasoned opinions are unpublished
* If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.
* Why does the Commission have such extensive discretion?
* Can the Commission choose to ignore certain breaches?
  + Yes...unclear if this is good or bad though
* Can the Commission bring an action for breach of a TEU provision and not just TFEU? (Art 2 values)
  + Yes
  + Example: Article 2 values. Commission can bring infringement proceedings under Article 2.
* Can the Commission drop proceedings against a state for political reasons? Should it?
  + It can and does (often); powerful tool, even if these quid pro quos are distasteful
  + Ex. UK didn’t want to sign onto Maastricht Treaty and negotiated all kinds of opt outs; Commission dropped case against a roadway in UK

**Article 259 TFEU - A broken political mechanism**

* *A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.*
* *[First] it shall bring the matter before the Commission.*
* *The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.*
* Consider:  Why are there so few inter-state enforcement cases?
  + States don’t like pointing the finger (fearing retaliation or knowing that they could be on the other end someday)
* What kinds of reasons would a state have to bring an enforcement action against another MS?  (France/UK beef war; Spain/UK re Gibraltar; Austria/Germany road toll; Slovakia/Hungary Presidential border-crossing question)

**Using Article 258 for Novel Types of Breach**

* **(i)** Using Art 258 against a national court for violation of Article 267: **failing to make a preliminary reference** – *Commission v France*
* Are there any problems/issues with using Art 258 for this kind of breach?
  + Seems a bit weird to hold state responsible for an independent court
* **(ii)** Using Article 258 against a state for **rule of law (RoL) violations**, e.g. undermining the independence of the judiciary or **undermining EU liberal values**– *Commission v Poland* (multiple cases): Art 2 & 19 TEU; *Commission v Hungary (*multiple cases)
* How effective have such Commission actions against Poland & Hungary been?
* Consider more generally some of the limits to the effectiveness of Article 258:
  + **Declaratory; no power to order a specific remedy; cases focus on specific breaches (not clusters);**
* Can interim measures (Art 278-9 TFEU) help?  (Polish ‘disciplining the judiciary’ measures)
* Does the Article 260 TFEU (pecuniary penalty) help to strengthen effectiveness?
* Would ‘systemic infringement’ cases help? (Scheppele et al)

**Theories and Models of Enforcement**

* Legalistic-sanctioning model  - objective, sharp, uninterested in subjective culpability
* Managerial-diplomatic model – discursive, ongoing, focused on helping to reach compliance,
* Which best fits the Articles 258-260 procedure?
* The pecuniary penalty, CJEU continuing to give judgment even after breach is remedied – these suggest legalistic-sanctioning model
* The extent of Commission discretion, the extensive pre-litigation procedure, confidentiality at early stages, suggest managerial-diplomatic model

# 19 - FREE MOVEMENT OF GOODS

**Free Movement of Goods**

**What is the single market?**

* Attempt to create a state that works as close to the territory of a single state as possible
* Very powerful rules
* Kind of scepticism in the UK that led to Brexit was more a reaction these market rules as opposed to an expression of illiberalism
* EU market is the four freedoms (this is our focus)
  + Goods
  + Persons
  + Services
  + Capital
* Prohibition on state aid to industry (subject to exceptions)
* Competition law and policy
* Rules on public procurement
* Single market regulatory harmonization and alignment
* Internal market is supported by the single currency

**The Four Freedoms**

* (1) Free movement of goods
  + Prohibition of customs and duties and of measures of equivalent effect - articles 28-30 TFEU with a single common external costumes tariff
  + Prohibition of discriminatory taxation: Art. 110-113 TFEU
    - Taxes are often grouped together with tariffs because they are both financial measures
    - More easily identifiable because there are only a few ways you can use financial means to restrict goods
  + Prohibition of quantitative restrictions and measures of equivalent effect: Art 34-36 TFEU
    - These are harder to define and identify than the other two
    - They can be more ambiguous
    - The court has defined them rather broadly
    - Often attached to sovereignty issues - public health, police powers, etc.
* (2) Free movement of persons - workers, students, citizens (self-employed - see under “establishment”)
* (3) Free movement of services and freedom of establishment
* (4) Free movement of capital

**Prohibitions on Customs Duties and MEE**

* Art. 30 TFEU: Customs duties on imports and exports and charges having equivalent effects shall be prohibited between member states
* Customs duties don't hold much difficulty - an amount you pay because a good crosses a border → these no longer exist since they’re so easily identifiable
* Measure of Equivalent Effect - ex. Inspection charge on animals crossing the border
  + Not a MEE if: there’s an EU Treaty requirement and the charge is proportionate, reasonable, etc.

**Discriminatory Taxation (Art. 110 TFEU)**

* Tax measure can only be identified as part as the general tax system
* If a tax is imposed on some product it must be imposed on the domestic product
  + If it is asymmetrical, than it is probably in violation
  + No internal taxation of any kind in excess of that imposed directly or indirectly on **similar domestic products** → no taxation of competing products that gives indirect protection to domestic over imported products
    - Focus on what is competing and what rates of taxation afford protection to domestic products
    - Ex: **Humblot** (French engine case); France doesn’t make 16-cylinder engines, so facially neutral tax affects only foreign produced engines
* States have a lot of autonomy on taxation
  + Some intervention with regards to goods
  + But states still have a lot of agency
  + Main restriction is that they cannot discriminate
  + Must be same for imports and exports
* What if a state taxes something that is not produced in that state but is imported, is it a violation?
  + They are not allowed to do that
* This is a financial charge that is part of the tax system
  + States dont have to justify it as long as it is not asymmetrical

**Quantitative Restrictions and MEE (equivalent effect)**

* Applies to exports as well (A35) ...but this is less of a focus since states aren’t likely to harm their own exporting industries
* Art. 34 TFEU
* What is a quantitative restriction
  + Quota
  + They can be justified
    - Emergency situations
    - It is very hard to justify a crude restriction
    - However a MEE is such a broad definition
  + Unlike customs duties/taxes, these measures are not fiscal or pecuniary
* Art. 34 is really directed to the state
  + Different than most treaties that also affect private actors
  + There is an unwillingness to make it horizontally effective
* Does A34 prohibit just state measures or private measures, too?
  + Fra-bo case - re: private tech standardization body (expansive definition of ???)
  + State is responsible for trade restrictive wholly private actions - (French farmers destroying Spanish strawberries)
    - ***Spanish Strawberries* -** French government was found to have violated Article 34 TFEU by not stopping French farmers from attacking and destroying trucks with Spanish fruit that was outcompeting French fruit.38 Such a general positive obligation to actively remove any restrictions to free movement caused by private indi-viduals)
  + Direct effect lesson: treaty rules can be enforced against private bodies
  + GdB: A34 is really directed at the state with free movement of goods --> state is responsible in French farmer case

**Defining a MEE**

* Framework: Dassonville (broad definition) → Cassis de Dijon (explains further, adds nuance to test) → Keck (reaction to overexpansion)
* Can be reduced to three cases
  + *Dassonville*
    - All trading measures which directly or indirectly, actually or potentially hinder interstate trade
    - This is very wide in targeting discriminatory measures
  + *Ireland*
    - Most case law concerns overtly discriminatory measures; Court here says ‘Buy Irish’ campaign encourages consumers to support domestic production
  + *Cassis* - consumer protection measure requiring higher ABV of liqueurs
    - Three takeaways from the case
      * Art. 34 covers indistinctly applicable as well distinctly applicable measures
        + just by virtue of being different, these requirements of ingredients, packaging etc. could create obstacles to trade
      * CJEU introduced the idea of mutual recognition
      * CJEU introduced the idea of mandatory requirements which could be involved to justify restrictions
    - How can neutral regulations be subject to these EU regulations?
    - Mutual recognition
      * We must be able to give mutual recognition
      * If a product is on the market in one member state, then we can trust it
      * Alleviates the problem of differential regulations
      * No reason not to allow things onto the market due to aesthetic differences
    - Obstacles themselves can be a problem
    - A positive obligation to give credence to goods in a member state
      * Presumes the EU’s ability to regulate standards
    - Widens the understanding of Art. 34
      * Burden of justification falls on the states
  + *Keck*
    - A rare revisitation of earlier case law - “contrary to what has been previously decided”
    - Narrowing it a bit and acknowledging that prior rulings were too broad
    - A very unusual acknowledgement of overreach

**Defining a ‘measure of equivalent effect to a quantitative restriction’**

* ***Dassonville***, (1974):   “all trading measures which directly or indirectly, actually or potentially hinder interstate trade”;  but the case concerned a discriminatory restriction  (requiring a certificate of origin)
* *Commission v Ireland* & *Commission v UK* – (souvenirs, indication of origin) :  Most case law in the early decades concerned overtly or intentionally discriminatory measures
* ***Cassis de Dijon***, (1979)  -  3 takeaways from the case: (i) Article 34 covers ‘indistinctly applicable’ as well as ‘distinctly applicable’ measures;   (ii) CJEU introduced the idea *of mutual recognition*, (iii) CJEU introduced the idea of ‘mandatory requirements’ which could be invoked to justify restrictions
  + Case confirms the breadth of the rule in Dassonville.
  + Even when the rule/regulation isn’t discriminatory on its face, these kinds of rules could create **obstacles to trade** (by virtue of just being different in different member states)
  + However, those kinds of obstacles to trade can be **justified** by mandatory requirements like consumer protections, fairness of transactions, environmental protection, health, etc.
  + So, even though Cassis is a very broad test for A34, these measures might be able to be justified on a broader set of grounds.
* ***Torfaen BC***, (1989) – Challenge to **“Sunday trading” restrictions**:  had the scope of Article 34 become too wide?
  + Rules saying that shops have to be closed on Sundays or that hours have to be limited on Sundays.
  + *Torfaen* - Sunday trading ***might*** hinder trade, but national courts will decide. Court gave no steer as to whether the measure is proportional or not.
    - Litigation spread out in the UK (on remand). Many different outcomes.
  + A34 is about protectionism - are Sunday trading restrictions even about protectionism (i.e., domestic vs. foreigner manufacturer disadvantage)?
    - Not really. Here, we’re starting to catch all kinds of regulatory measures that restrict commercial freedom that don’t necessarily have protectionist effects. It’s really just commercial regulation and no effect on imports vs. domestic goods.
    - Other examples: drinking age discrepancies
* ***Keck & Mithouard***(1992) – Revisiting CJEU’s earlier case law. Overruling?  See especially paras 14 & 18  “contrary to what has previously been decided”
  + Case represents a failure in trying to constrain litigation relying on A34.

**What did the *Keck* case decide?**

* **Bottomline:** Court says it’s **actual** or **potential**. If you **aim** to encourage protectionism, that’s enough. You don’t need to succeed in protectionism.
* That “in view of the increasing tendency of traders to invoke [Art 34 TFEU to challenge] any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case law on this matter” (Para 14)
* That the reasoning of the *Cassis de Dijon* case in relation to obstacles to trade should be interpreted as applying mainly to ‘product rules’ (that govern the requirements to be met by goods themselves) and not selling arrangements (Para 15)
  + Rules governing the **product** and not rules governing the way things are sold.
    - Product rule = protectionist
    - Why? Domestic production tends to line up with domestic regulation, so domestic manufacturers will by default be compliant with product rules, while foreign manufacturers won’t. Importers have a cost adjustment if they have to meet a second set of manufacturer regulations. This isn’t true for selling regulations (because they don’t have to adjust their products). This is what the EU wants to avoid in a single market.
* A different approach is necessary for ‘selling arrangements’ (that govern the way in which goods are to be sold) (Para 16)
* Rules which govern selling arrangements will not in future be considered to fall within the scope of Article 34 TFEU if they are neither discriminatory in law or in fact,  and if they *do not prevent access to the market* of goods from other states, *or impede them more than they impede the access of domestic goods* (Paras 16-17)

**Case law since Keck**

* What did the CJEU seek to achieve with the *Keck* ruling? Do you think it achieved this?
* When do selling arrangement rules have a differential impact?  Online sales restrictions?   Advertising rules?
* Rules on use?  Italy *towing trailers*, *Swedish Jetskis*
* What was the alleged MEE QR in the ***Austria v Germany***(road tax; rules governing transport)case?
  + Regulation that was challenged was a road toll in Germany. Every car had to pay this toll.
  + Why was it brought under A34?
    - There was a tax relief connected to this measure for Germans. Deliberately designed so that everyone pays a toll, but if your car is registered in Germany, you could get what you paid back through tax relief. Cars registered outside Germany wouldn’t get this tax relief.
  + What does it have to do with free movement of goods?
    - Trucks that transported goods on highways.
  + Did it fall within the Keck exception? (paras 113-15, 128-29) Why not?
    - Court held this was not a selling arrangement. Court reduced the rule in Keck to something very small → **If it isn’t a selling arrangement, the Keck exception doesn’t apply.**
  + **Main Takeaway:** Keck exception is really narrow now. It just covers selling arrangements. Now we’re back to a world in which usually rules are treated like product rules and you have to justify them to get away with them (purpose, proportionality, etc.)

**Summary of Article 34 post-Keck - A Roadmap**

* **Bottomline:** Once a regulation is caught by A34 → it HAS to be justified.
* Start with the Dassonville Analysis
  + The Dassonville definition provides a starting point: “all trading rules which actually or potentially, directly or indirectly hinder interstate trade”
  + ASK: Is it overt? Does it really get at imports?
* Overtly discriminatory measures are automatically caught by Art 34 (Comm v Ireland, ‘Irish souvenirs’ case etc)
* Rules which regulate the product directly fall within the scope of Art 34  (they generally impose a double/additional burden on imports) – per Cassis
* Rules which regulate the manner of sale (‘selling arrangements’) are generally presumed to be outside the scope of Art 34 (since they don’t impose a double/additional burden on imports)....
  + *unless* they discriminate in law or in fact, or
  + *unless* they prevent access to the market of a state or impede it more than for domestic products – per Keck
* Rules which are neither product rules nor selling arrangements fall within the scope of Art 34 if they impede access to the market of a state – ‘Swedish Jetskis’, Italian motorcycle trailers (Commission v Italy); road/infrastructure us (Austria v Germany)
* If a national rule falls within the scope of Article 34, it can still be justified either under Article 36 or (if it is an indistinctly applicable, nondiscriminatory measure) in accordance with a ‘mandatory requirement’

**Justifying Restrictions on the Free Movement of Goods : Option 1 for Justifications  - Article 36 TFEU**

* Article 36 – exhaustive list of Treaty-based exceptions: only these grounds can be used
  + The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of **public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property**. Such prohibitions or restrictions shall not, however, constitute a means of **arbitrary discrimination or a disguised restriction on trade** between Member States.
* Can be used to justify overtly discriminatory measures
* From the *Campus Oil case*
  + “35. It is true that, as the Court has held on a number of occasions, most recently in . . . (Case 95/81, *Commission* v *Italy*), Article 36 refers to matters of a non-economic nature. A Member State cannot be allowed to avoid the effects of measures provided for in the Treaty by pleading the economic difficulties caused by elimination of barriers to intra-Community trade.”
* Just because you have a ground to put forward doesn’t mean it will automatically be justified. The rule CANNOT
  + (1) be arbitrarily discriminatory
  + (2) invoke an economic ground as a justification for a restriction of the free movement of goods

**Justifying restrictions on the free movement of goods:  Option 2 for Justifications - the ‘mandatory requirements’**

* From *Cassis de Dijon (1974)*: Open Ended Restrictions
  + Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy ***mandatory requirements relating in particular to* the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer**.
* Other examples:  *Torfaen (coordinating working hours)*, Schmidberger *(protecting freedom of expression)*,  *ADBHU– environmental protection*
* Mandatory requirements → apply to rules that don’t discriminate specifically (**non-discriminatory rules**)
  + Mandatory requirements can be pleaded to justify indistinctly applicable/non-discriminatory measures, but not usually to justify discriminatory ones; whereas Article 36 grounds can be pleaded to justify directly discriminatory measures (so long as they are not arbitrarily so)

**Conditions which justifications (under Art 36 or *Cassis*) must satisfy:**

* (1) Must not be arbitrarily discriminatory - *Conegate* case on pornography (no importation, but not banned domestically)
* (2) Proportionality –
  + “appropriateness” of restrictive measure
    - ASK: Is there a connection between the measure and its stated aim?
  + no less restrictive means:
    - BUT → court could also decide that the measure is too restrictive even if there’s no less restrictive measure available.
    - *Scotch Whisky:* who decided in this case if the national measure was necessary? See para 56
      * Minimum price automatically came within the scope of A34 because it clearly affected imports. Court kicked it back to the referring court to decide, but it did provide a very strong suggestion as to how it should be decided.
      * Recommendation: Excise tax would be less restrictive and it would serve the public health better.
      * Scottish courts decided to go the other way anyway.
  + Evidence-based - *Deutsche Parkinson (pharmacy sales of prescription   meds):* who decided in this case if the national measure was   necessary? See paras 45-46
* (3) Legitimacy of the aim – grounds listed in Art 36, and others
  + NOTE: Protecting the economy → NOT LEGITIMATE
* Absence of harmonizing EU legislation on the matter gives MSts greater discretion
* National exceptions to the FMG must (since 2008) be notified to the Commission

**Remaining Questions**

* What  are  the  virtues  of  the  basic  *Dassonville*  approach  adopted  by  the  Court  to  MHEEQR?    What  are  its  drawbacks?   Has the *Keck* modification of the case law helped or not to clarify the scope of Art 34?
* Why  does  it  matter  what  legal  test  the  Court  uses  to  determine  whether  a  national  regulatory  measure  constitutes  a  MEQR,    given  that  states  can  still  rely  extensively  either on  public  policy  grounds  or  ‘mandatory  requirements’  to  justify  such  regulatory  measures?

# 20 - FREE MOVEMENT OF WORKERS

Outline for class

1. Article 45 TEU:  **who is bound** by it – on whom are obligations imposed?  Vertical/Horizontal – public/private?

2. Article 45:  **who gains rights & what rights**? Who is covered by the term ‘worker’?

3. Who decides **who is a worker**?  EU law/legislation/CJEU? Member States?   What is ‘genuine economic activity’?

4. **What does Art 45 TEU prohibit**? Discrimination? Direct and indirect? Non-discriminatory obstacles to free movement?

5. What **restrictive measures can be justified** under Art 45? Public policy, security, health;  What is ‘public service employment’?

6. **Which family members** of workers are covered? What are their **rights**?  What about **non-EU national** workers in the EU

A45 TFEU

1. Freedom of movement for workers shall be secured within the Union
2. Abolition of any **discrimination based on nationality as regards employment**, remuneration, and other conditions of work and employment
3. Entails right, subject to limits justified on public policy, security, or health grounds:
   1. To accept job offers
   2. Move freely within MS territory
   3. Stay in MS for employment purposes
   4. Remain in territory of state after employment, under certain conditions
      1. **Provision 3 justifications are very narrowly circumscribed**
4. **Doesn’t apply to public service employment**
   1. This is a big cutout; like a 4th justification

To whom does A45 TFEU apply? Who is bound?

* Does it apply to only the state and to state actors? No - there is HDE (Bosman, Angonese)
  + This is one way in which the 4 freedoms are not the same: free movement of goods had one or two cases (Spanish strawberries), but court hasn't moved toward saying A34 is horizontally DE (Fra-bo) - competition law covers that
  + But A45 extends to orgs that have a sort of collective bargaining power; more like A141 on equal pay in the *Defrenne* case
    - *Angonese* - A45 applies to bank's recruitment processes
* Why is A45 horizontally effective when A34 is not?
  + GDB: Angonese technically this isn't about collective rules, so it's a bit different; **but this case begins to recognize that even if you abolish state restrictive measures, private discrimination can have the same effect as public discrimination**
* GDB: thinks the same argument could be made of A34; but employers in this situation do have more power over employees than does the state, and is harder to detect than are public rules with discriminatory effects
* *Bosman* - applies to international sporting ass'ns who make collective rules regarding employment
* *Angonese* - indirect discrimination might be justified if you need the skill for the job

Who is a Worker?

* No definition in the Treaties → left to CJEU
* Definition matters; workers really have the strongest status under these laws
  + Under direction of another
    - Distinction between self-employed and employed
  + Genuine, effective economic activity,
  + For which you're paid - (*Lawrie-Blum*)
    - Capacious understanding of remuneration - doesn't need to be a full salary, could be in kind payment
* Are low wage and part-time workers covered? - *Levin*
  + Huge gender implications for excluding part-time workers from this
  + …but also true of unpaid work, like care work, though EU hasn't gone there yet; remuneration requirement is exclusive in many respects
* Even if they don't earn enough to support themselves? - *Kempf*

Genuine Economic Activity

* ***Steymann*** - Bhagwan community work in return for shelter, food, and pocket money - Yes in this case; Maybe on similar facts
* ***Bettray*** - rehab program for drug users suited to their capacities and need for rehab rather than to meet an economic need? No
* ***Trojani*** - Salvation Army rehab program; maybe if all elements from Lawrie-Blum are present and it's is 'genuine and effective' economic activity
  + Seems like the difference is just drug users…
* ***Anotnissen***
  + Are job seekers covered? In principle, reasonable period of time if genuinely seeking work
  + Terms set in this case are basically integrated in a later Directive

What restrictions are covered by A45? Can they be justified?

* Direct discrimination - French maritime code case
* Indirect discrimination - e.g., linguistic or residence requirements
* Non discriminatory obstacles? Bosman football transfer fees (citing Keck)
  + Justifications:
    - A45(3) - Public policy, sec, health; proportionate restrictions based on individual conduct posing sufficiently serious threat
      * Van Duyn? And Home Office direct effect case --> justification fails as too broad; UK wouldn't allow Dutch woman to work for Church of Scientology…but they wouldn't forbid their own citizens from working for the Church
    - Legitimate objective/public interest justifications: Can't be economic
    - A45(4) - Employment in public service - “special relationship of allegiance to the State”; involve exercising power conferred by public law and safeguarding general interests of the state
      * This has been narrowed over the years; it really needs this relationship of state allegiance element

What rights are enjoyed by EU workers?

* Freedom of movement and residence
  + Right to social and tax advantages of nationals
* Nondiscrimination/equal treatment in employment
* ‘Parasitic’ rights of residence, employment, equal treatment for listed family members
  + Educational rights for kids; educational rights for worker needs to somehow be connected to employment

Who are the ‘privileged’ family members of an EU worker?

* Spouse - definition of spouse expanded in case law (see **Coman**)
* Partner in registered partnership
* Offspring under age 21 and adult dependents
* Direct ancestors

# 22 - FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES

**Article 49 TFEU: Establishment**

* What does the right of establishment involve?
* *Article 49* → basically covers people, but also “legal persons” (companies and firms)
  + *Within the framework of the provisions set out below*, ***restrictions on the freedom of establishment of nationals*** *of a Member State in the territory of another Member State* ***shall be prohibited****...*
  + *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings,* ***in particular companies or firms.****. under the conditions laid down for its own nationals by the law of the country where such establishment is effected..*
  + It involves the right “to participate, **on a stable and continuous basis**, in the economic life of a Member State other than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities of self-employed persons” (***Gebhard*** case)
    - E.g., a lawyer could be providing services OR be established in the jurisdiction (depending on the amount of time)
    - **Right to do so under the same conditions nationals experience**
  + Issues → Corporate mobility and companies picking a jurisdiction in which there’s light legal regulation (like a Delaware)

**Freedom of Establishment**

* EU law on freedom of establishment is similar to the law on free movement of ***workers***, providing legal regulation of ***the rights of self-employed****,* ***rather than employed persons***.  A worker is someone employed under the direction of another for remuneration, whereas a self-employed person (plumber, doctor, dentist, lawyer etc.) works for themselves. (A difficult/contentious distinction nowadays in the gig economy)
* There are two dimensions to the freedom of establishment:
  + ‘natural persons’ (individuals) vs. ‘legal persons’  (companies.)
* The emphasis in freedom of establishment is the freedom to **settle/set** up a base in a member state other than that of one’s nationality or place of incorporation, with **equality of treatment and without undue restriction**
  + NOT a temporary thing (as opposed to providing services)

**Establishment of natural vs legal persons**

* Natural persons → Main issues are…
  + NOT *who* has the right (as with ‘workers’), or what ‘establishment’ or ‘services’ means,
  + YES, **what kinds of restrictions imposed by MS on an EU national’s right of establishment or to provide or receive services in another MS can or cannot be justified**.
* Legal persons/companies → Main issue is **what ‘establishment’ means in EU law**, and how it relates to the **legal doctrine of ‘incorporation’** has given rise to complex case law: *Daily Mail*, ***Centros***, to *Uberseering*, *Van Koophandel*/*Inspire Art,* *Cartesio* , *Polbud*
* *Incorporation* in a member state is, for a company, similar to possessing the *nationality* of a member state, for a natural person/individual: **it is the legal basis from which the rights and freedoms guaranteed by EU law follow**.

**Article 56 TFEU: Services**

* What does the free movement of services guaranteed by **Art 56** provide?:   “*Within the framework of the provisions set out below,* ***restrictions on freedom to provide services*** *within the Union* ***shall be prohibited*** *in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*”.
  + Restrictions on services prohibited + right to carry out those services under same condition as other nationals
* Note **temporary vs permanent** provision of services is what distinguishes the field of **Art 49 (establishment - permanent) from Art 56 (services - temporary)**
  + The two are *connected* in that a person or company must be established in the EU in order to avail of the freedom to provide services there.
* In both cases (establishment and services), the ‘framework’ referred to in the Treaty, in Arts 56 and 49, refers to the adoption of **legislation to facilitate free movement**.
  + Like in free movement of goods, a lot of ‘harmonizing’ and ‘mutual recognition’ legislation (especially in recognition of qualifications and training)
  + Once there is harmonizing EU legislation, national obstacles/restrictions are harder to justify.
  + Important harmonizing directives: Directive 2005/36 (recognition of professional qualifications), Directive 2006/123 (services), profession-specific Directives (medicine, veterinary, lawyers, financial services etc)

**Free Movement of Services**

* Key Issues: **Mobility.** Services can move and if you’re a service provider you might want to be a service provider in multiple states.
* While the free movement of ***services*** (FMS) has much in common with freedom of ***establishment***, also has much in common with the free movement of ***goods***,  with an emphasis on ensuring **mobility of services**.
  + Sometimes hard to distinguish a ‘service’ from a ‘good’  (eg electricity, digital information)
* Hence FMS is **not just about the freedom of *providers* and *recipients*** of services, but also about the **mobility of the *services* themselves**
* What constitutes a service?
  + (i) **Commercial** nature (healthcare & education cases)
    - It’s CRUCIAL that it’s commercial, but this has been defined broadly.
    - **Remuneration is required**, but it can come from a 3rd party.
  + (ii) relevance of **moral/immoral** nature? (gambling cases, *Jany*-prostitution, *Grogan*-abortion, *Josemans*-marijuana cafes?)
    - Court made the decision to push all moral issues to the “justification” stage.
    - In contentious moral cases, the Court just gives a light touch review and lets state regulate or prohibit the particular services.
    - *Grogan* - Abortion case. Said lack of “commerciality” of abortion meant it didn’t come within EU law. The service in this case wasn’t commercial because they were just handing out fliers about abortion.
  + (iii) **crossborder** dimension necessary (not ‘wholly internal’ to a Member state)
    - Provider, services, recipient has travelled and has touched more than one member state.

**The effect of Articles 49 & 56 TFEU**

* Art 49 & 56 prohibit restrictions which are directly discriminatory  (*Reyners*) as well as indirectly discriminatory (eg *Van Binsbergen* -residence requirements)
* They also prohibits other non-discriminatory ‘obstacles’  (*Gebhard, Alpine Investments,* following *Keck* on free movement of goods, & *Bosman* on workers).
* Note the gradual shift across the four freedoms from initially prohibiting discrimination, to eventually requiring market access
* Most common restrictions/impediments imposed by member states on freedom of establishment of EU nationals
  + Qualifications, professional & vocational requirements
* ‘Reverse’ discrimination → covered by EU law!
  + MS restricting or discriminating against its own nationals) is covered by the Treaty, but a ‘wholly internal situation’ is not.  See also free movement of workers & the *Singh* case)

**Horizontal direct effect of Arts 49 & 56?**

* **To whom do Arts 49 and 56 TFEU apply?**  *Walrave* (int’l cycling assoc), *Laval* &  *Viking Lines (trade unions).*
* **It remains unclear if these will be treated as fully horizontally effective (as was Art 45 TFEU for workers in *Angonese*):**
  + Not quite clear if A49 and A56 apply to private actors. Is it just these powerful private actors that do things collectively?
* ***See Viking*** - Court applied freedom of establishment and services to **trade unions** because trade unions act like lawmakers when it comes to setting up the conditions for work.
  + 61. It follows that Article **[49 TFEU]** must be interpreted as meaning that . . . it may be relied on by a **private undertaking** **against a trade union** or an association of trade unions.
  + 64. …[I]t does not follow from the case-law of the Court . . . that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.
  + 65. There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

**Common rules for workers & individuals exercising freedom of establishment (& service  provision)**

* Directive 2004/38 (on entry and residence requirements for EU citizens and their families), covers not only workers but also self-employed persons exercising rights of establishment.   The same rights of residence and possibilities for expulsion on *public policy, security and health grounds* exist (Art 52 TFEU).  Measures must be proportionate, based on individual conduct & ‘sufficiently serious grounds’  (length of residence is relevant)
* There is also an exception [similar to the ‘public services’ exception for workers in Art 45(4)] for self-employed persons under Article 51 in relation to *activities which are connected to the ‘exercise of official authority*’.  Only those activities which are connected inextricably with the exercise of such authority (and cannot be severed) are covered by the exception
* Article 24 of Dir 2004/38 guarantees *equal treatment* for EU nationals (and their families) exercising the right of establishment in another member state, and the same principle is applied to service providers

**Analysis of restrictions on freedom of establishment or services**

* 1. Do the facts of the case show an exercise of the right to establishment or services under the terms of the Treaty?  (i.e. is this person/company seeking to establish themselves?  Or are they providing/receiving services, ie are they only temporarily resident etc?)
* 2. If so, is the Member State imposing a ‘restriction’ on the exercise of that right?   Is it an absolute (eg prohibition on establishment, denial of residence) or qualified restriction?
* 3. If there is a restriction, can it be justified?
  + (i)Is it applied in a way that is not arbitrarily discriminatory?
  + (ii)Is the objective of the measure legitimate?  (public policy, security health grounds, or another imperative requirement if the measure is indistinctly applicable?)
  + (iii)Is the measure appropriate/suitable for attaining its aim?
  + (iv)Is it proportionate – does it go beyond what is necessary?  Less restrictive alternative?
  + (v)Does the measure restrict or undermine other fundamental rights?

**The example of ‘posted workers’** (we didn’t get to these slides)

* Posted workers are covered not by the law of free movement of workers but the law on free movement of services .  Why?  (temporary provision of labor by a company established in one member state into the territory of another state)
* Why is it a field of contention? Companies are seeking to maintain the coverage of their workers by the law of the *home* rather than *host* state to maintain comparative advantage, while host state is seeking to regulate temporary posted-workers according to all of its own laws (to prevent ‘social dumping’ )
* Long line of case law supplementing the original Posted Workers Directive, leading to two major cases:
  + Laval (2007) and Viking Lines (2007)
  + Why were these cases so controversial?
  + Applying the analysis on the previous slide, what were the controversial steps?

**Freedom of Establishment for Companies** (we didn’t get to these slides)

* In order to have a right of establishment in the EU, a company must – under Article 54 TFEU - be incorporated under the law of a Member State and have its registered head office, central place of administration, or principal place of business *somewhere* in the EU. Then it has the freedom to set up a secondary establishment (or branch, or agency) in any other Member State.
* But each member state has its own body of corporate law, and its own legal requirements to satisfy in order for a company to incorporate there.
* Can a member state restrict the secondary establishment of a company which is established under the law of another member state, if the requirements of incorporation of that other state are less demanding than the first state?

**Case law on Freedom of establishment for companies** (we didn’t get to these slides)

* ***Daily Mail***– in the absence of EU harmonization of national laws governing the ‘connecting’ requirements of incorporation, a member state can prevent a company from moving its seat/central place of admin to another stamte while remaining incorporated in the first state
* ***Centros*** - Once a company satisfies the requirements of incorporation in one member state, it can then conduct business through a branch in another member state; and that second member state cannot require the company to re-incorporate just because its requirements for incorporation are more stringent than the first state’s (like a *Cassis de Dijon* **mutual recognition** principle). This is not an abuse of EU law by the company but an exercise of its right of free movement

**Case law on Freedom of establishment for companies** (we didn’t get to these slides)

* ***Uberseering* & *Inspire Art***: Although a (host) Member State may justify lesser restrictions imposed on the freedom of establishment of a company formed in another (home) member state, such as its regulatory laws on the protection of creditors or investors, these must be proportionate and not go beyond what is necessary
* ***Cartesio****-* Article 54 does not enable a company to move its ‘real seat’ from one Member State (Hungary) to another (Italy) while opting to continue to be governed by the laws of the state of incorporation.
* ***Vale*** *–* ‘mirror’ of *Cartesio*.  Art 54 does not permit a (host) Member State (Hungary) to prevent a company registered in another (home) MS (Italy) from ‘converting’ to a Hungarian company if it does not prohibit domestic companies from converting.  In other words, cross-border conversion of a company cannot be prohibited if domestic conversion is permitted. [Conversion effectively means changing format, switching from one legal entity to another]
* ***Polbud*** *–* Art 54 does not permit a Member State of origin (Poland) in which a company is incorporated to require the company to liquidate itself if it performs a ‘cross-border’ conversion (i.e.  transfers its registered office to Luxembourg, in order to become a company also there )

# 23 - COVID

EU responses to Covid

* No exportation of health equipment, closure of Schengen, since relaxed, relaxation of EU rule on state aid to industry
* Health policy - EU is a bit limited bc it lacks strong health competences
  + Purchase of medical equipment
  + Early steps on warning
  + EU negotiating vaccine portfolio, coordinating vaccine distribution
  + Future responses: conferring new healthcare powers; pandemic coordination powers?
* Economic aid
  + ECB bond purchase, suspension of excessive deficit procedure, financial support for unemployment, ESM credit line for Covid spending, 1.8T recovery fund

Success or Failure, compared to what, etc.

* Success:
  + at noticing something being wrong
  + Shutting down borders
* Failure:
  + Failure of vaccines for its own people
  + EU doesn't have a Defense Production Act
  + MS were trying to be 'resourceful', while the US just blew money on vaccines

# 24 - CITIZENSHIP

**Introduction of the status of EU Citizenship**

* EU Citizenship was first introduced by the Maastricht Treaty in 1993
* With the move from EEC to EU  (‘economic community’ to ‘political union’)
* Like the Charter of Rights in 1999 – was it mainly a symbolic change or one of substance?
  + Charter of RIghts = If we had general principles, did it add anything? Substantively, a lot changed since the introduction of the Charter. A lot of case law was built on it (lots of litigation around the Charter) and this may not have happened had human rights only been based on general principles.
    - Case law evolved to make it not just symbolic, not substantive.
  + Citizenship = We’ll see below; similar trajectory
* Were new rights introduced? Yes, **Art 20 TFEU** lists/summarises various rights and specifies that they “shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder”
* New rights of citizenship
  + (i) Passive and active electoral rights in local and European elections
    - Right to vote in EP elections wherever you are in EU. Right to vote in local elections. (ALEX - I’m confused. Is it right to vote in national local elections or EU local elections?) I think it’s national local elections. So you have a right to vote nationally and in EU.
    - BUT → This right isn’t used as much as it should be. Even though a significant number of people move and reside in other MS, they don’t vote. Probably because of the language barrier.
  + (ii) Consular protection outside of EU
    - Protection as if you were a national of that MS
  + (iii) Citizens’ initiative
    - Idea that a million citizens (across the EU) can put forward a proposal to the Commission for their consideration (although all the Commission has to do is consider it).
    - Gave transnational mobilization to interest groups
    - Remember the Commission is the main initiator of legislation in the EU
    - BUT → It isn’t used as much as it should be.

**Repackaging of existing rights as rights of EU Citizenship**

* ‘Repackaged’ rights of citizenship - Idea of Citizenship gave extra strength to these rights
  + (i) Right to freedom of movement
    - Now introduced as an item of citizenship and not tied to being a worker.
  + (ii) Right of residence
  + (iii) Right to petition European Parliament, contact EU Ombudsperson,
* Combined with **Article 18 TFEU** - Gave extra strength to the right of equal treatments and non-discrimination.
  + “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.
* (iv) Right to non-discrimination on grounds of nationality

**Who is entitled to EU Citizenship?**

* **Art 20 TFEU:** Any person holding the nationality of a member state
  + Hence EU citizenship is both **contingent on** and ‘complementary’/**additional to** national citizenship
* Who decides who qualifies as a Member State national?
  + MS decides who is a national and they can set their own criteria (this is a core exercise of sovereignty)
    - For example, golden passports for people that invest x amount in the MS.
  + Why does it matter how a MS sets the criteria?
    - Paradox of EU membership: MS have a sovereign right to decide, however, there are all kinds of EU-wide-spillover effects of MS getting to decide and the EU has an interest in these spillover effects. So, EU doesn’t set the conditions but EU cares about the conditions.
    - (see **Malta**) - People getting citizenship of Malta to do money laundering (which then has spillover effects throughout the EU).
* Does EU law regulate this?   (soft coordination attempts)
  + BUT → EU gets to decide conditions under which a MS can **revoke** nationality
    - ECJ: Once a MS creates EU citizenship by having a national, revoking falls under EU law because revoking affects that former national’s EU rights. Therefore, revocation decisions need to go through a **proportionality** analysis.
* *Micheletti –* mutual recognition of nationality?
  + Argentine national had Italian and Argentine citizenship. Wanted to set up a business in Spain. His dual nationality was derived from something other than being born and being a resident of Italy.
  + Court: **Cannot second guess nationality**. Nationality is perfectly good for purposes of exercising EU rights.
* *Rottman –* proportionality in revocation of nationality  ( & *Tjebbes –* denaturalization due to non-residence)

**Categories of person under EU law**

* (a) Workers  (full-time, part-time, former etc.)
* (b) Family members of workers  (spouses, - in some circumstances, partners, children, certain dependent relatives) **NB non-EU nationals are covered as family members;** *non-EU nationals may also have status under the long-term residents Directive, or an Association agreement with the EU*)
* (c) Job-seekers
* (d) Students
* (e) Service providers or recipients/ self-employed
* (f) Non-economically active persons
* (g) **EU** **Citizens**  - is it a separate category? A residual category? An umbrella category for (a)-(f) above?
  + Umbrella category = Each one of the above categories = EU citizen → To that extent, it is an umbrella category.
  + BUT → Sometimes having one of the statuses above gives you *more extensive* rights than just being an EU citizen. Citizenship doesn’t eradicate the differences we’ve seen in the EU internal market. Being a worker is at the top of rights (almost as being a national).
    - **Citizen rights enhanced by being one of the above.** There are core EU citizenship rights (including the new mentioned above) and they do adhere by being a citizen alone, but on top of that, each of the other status categories adds a lot more.

**Rights of Movement and Residence**

* **Art 21 (1) TFEU** Every citizen of the Union shall have the right to move and reside freely **within the territory of the Member States**, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
* Q: What does this add to the rights of free movement and residence of the other categories of EU person we have already examined?
* Q: What are the ‘limitations and conditions laid down’ by the treaties and in secondary measures?
* Directive 2004/38 lays down the details governing the exercise of the rights of movement & residence (entry, administrative requirements, entitlement to permanent residence, rights of family members etc)

**Limits on the rights of free movement, residence & non-discrimination for EU citizens**

* **Articles 45 and 52 TFEU:** - **Public policy, security and health** measures (detailed further in Directive 2004/38)   [Also the public service and official authority exceptions for those who are working)
* **Directive 2004/38:** Bottomline: it’s free movement for the non-poor
* Article 7(1)(b) and (c):   citizens must have **sufficient resources** for themselves and their families so as not to become a burden on the social assistance system of the host member state and must have **sickness insurance** (health insurance)
  + Sickness insurance is a requirement but this can’t be disproportionately read.
* Article 24 of the Dir:
  + 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty…
  + 2. By way of derogation from paragraph 1, the host **Member State shall not be obliged** to confer entitlement to **social assistance during the first three months** of residence or, where appropriate, the longer period provided for in Article 14(4)(b) [for jobseekers] ….

**Changes introduced by EU citizenship law**

* (i) An **autonomous right** of free movement and residence not linked to one of the other status grounds:
  + ***Baumbast*** (no comprehensive health insurance) → Couldn’t use the lack of one element (health insurancE) to deny the right of residency.
  + ***Chen***(child) → MS conferred citizenship by being born in that country. Court held that it didn’t matter that mother moved to that MS in order to get citizenship for baby (as long as the MS allowed it). Gave residence rights to the mother (who isn’t an EU national) of a child.
* (ii) Reducing the arbitrariness of the ‘wholly internal situation’?  How important is ‘**movement**’ to the rights of EU citizens?
  + ***Garcia Avello****,****Runevič-Vardyn***(dual nationals) → Restriction on dual nationality impacts your rights (even if there’s no movement of the citizen between MSs)
  + ***Ruiz Zambrano***(EU child with non-EU national parent) → Child born in the EU (and is an EU citizen) that has never left the MS of which he is a citizen. Relied on EU citizenship to have non-EU national parent or caretaker live with them. Parent or caretaker may gain rights of residence derivative of the child, otherwise the child would lose all derivative rights of EU citizenship (because of assumption that child can’t live alone and would therefore have to leave if forced to stay without parent).
    - Big concession from the court → BUT cabined to children only. Was NOT extended to romantic partners because of the assumption that you’re an adult and you can go live elsewhere with you partner (unlike the child).
  + *Sanders* – wholly internal situation  (*Kremzow*) “reverse discrimination”
  + *McCarthy* (EU national with non-EU national spouse) doesn’t have same right of dependence

**Changes introduced by EU citizenship law (2)**

* (iii) Enhanced socio-economic rights for certain categories of EU citizens?
* Non-economically active citizens
  + *Sala*, *Trojani*, *Brey*, *Dano, Alimanovic* – can non-economically active citizens rely on Art 21 TFEU to claim social benefits, or does Dir 2004/38 prevent that?
  + (later cases confirm *Dano* direction)
* Job-seekers
  + *D’Hoop, Collins, Vatsouras* – can jobseekers rely on Art 21 TFEU to claim jobseeker benefits, or does Art 24(2)  of Dir 2004/38 prevent it?
    - If they’re applying for a benefit related to job seeking, then it isn’t “social assistance”
    - Little change, but significant.
  + (NB student benefits have also been enhanced by Art 21 & 18 TFEU, according to the CJEU- *Bidar*,)

**Overall appraisal of the significance of the status of EU citizenship?**

* Mainly symbolic or significant in substance?
  + GdB → not as substantial as people would have hoped. Legal rights gained by citizenship are just **incremental rather than very significant**.
* Political rights vs enhanced legal rights of residence & non-discrim
* Reflections on EU citizenship during the turbulent period of EU integration:   has it stood up to the forces of increased nationalism? Has the Court retrenched? Stabilised? Reinforced and strengthened the rights of EU citizens?
* What of voter repression by (illiberal) member states:  what if anything can the EU do?

# 25 - ANTI-DISCRIMINATION

GdB: Interesting that they created freestanding rights here; a freestanding system committed to political and human rights

* This is one area where they've detached from the economic, market driven bases for the EU → **Protection of these rights in and of themselves, not just because they promote the market**
  + Nationality discrimination has always run through market rules
* Also at a time when other countries are moving in this illiberal direction, often targeted at these groups
* In area of non-discrimination law, EU law has developed earlier and faster than ECHR

**Origins**

* Equal pay for men and women only
  + At France's behest, so that they didn't suffer competitive disadvantage
  + Why has this broadened out into a much broader body of antidiscrimination law?
    - Citizen activism (and political response to that); ratcheting effect in that the rationale for equal pay applies to these other categories; NGO/international mobilization
* Lots and lots of measures dealing with gender equality in particular; nothing explicit on transgender issues yet

**Widening EU anti-discrimination law via Amsterdam Treaty changes (1999)**

* A19 TFEU
  + Unanimous Council, after Parliament's consent, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation
    - **Introduces a power for EU to act**
* How does this differ from A157?
  + This is not directly effective, whereas 157 is directly effective (**Defrenne**) →  this grants competence and is not self-executing since it doesn't ban discrimination on X grounds alone
* GdB: Far more surprising is that they did adopt legislation: D2000/43 and D2000/78; meant to show that they wouldn't stand for a racist government coming to power
  + Race Directive - 2000/43
    - Broad but weak
  + Framework Employment Equality Directive - 2000/78
    - Somewhere in the middle of strong/narrow and broad/weak
* Why is there reluctance to harmonizing these laws? And even though we've had these directives on the books, there are very few racial discrimination case?
  + Maybe part of it is the lack of harmony in cultures and problems in each state; market conservatism; ignorance
  + It took several goes for the Race directive cases that have been brought (CHEZ Roma electric meter case)

**Charter of Fundamental Rights**

* A21 - non-discrimination
  + More and broader grounds; and allowance for more broadening with 'such as' these grounds (could be more grounds)
  + It also has 'shall be prohibited' …and yet this has hardly figured in case law
    - Why?
      * Charter is deceptive because you read these, and it seems quite powerful, but there's a limiting part at the end of the Charter - they only apply when MS are implementing (= 'in the scope of') EU law
      * A21 is a superimposed layer of protection within other areas of the scope of EU law
    - GdB: still underused, but there's still a lack of clarity as to when it adds value
* See e.g. **Coman case**
  + Marital status is still seen as coming from States
  + Can't discriminate on grounds of sexual orientation, but you have to respect State decisions on marriage to an extent
    - Once you treat registered partnerships the same as hetero marriages in one respect, then you can't discriminate
  + Legislature clearly recognized that States could move at their own pace (can only bring your spouse when the partnership is recognized in the State you're moving to)
    - Because the first provision on 'spouse' is unqualified, but second provision on registered partnerships isn't, once you incorporate gay marriage into the 'spouse' definition, the States can't second guess that
      * **A spouse recognized as such by one MS needs to be recognized by other MS, even if they have different ideas of marriage**

**General Principles of EU law**

* Residual principles, GdB - not sure how much they pop up really
  + (look at slide)

**Scope of Anti-discrimination Directives**

* Personal Scope: not restricted only to EU citizens, but some limits on protection afforded to non-EU nationals
  + You could use directives to challenge racial discrimination, but maybe not national discrimination
    - Court did hold that 'no foreigners need apply' was a proxy for race
* Material Scope
  + Race Directive: employment and social security, health and education, access to public services including housing
  + Gender equality: employment, services
  + Framework Employment Directive - age, disability, sex orientation, religious belief in employment) as in gender directive

**Common Structure of EU anti-discrimination directives**

* Prohibition on:
  + **Direct** discrimination: where person is treated less favorably than another on prohibited ground - Chez case (electricity siting); discrimination for "a reason related to" prohibited ground
    - In Chez, direct because higher electric meters only applied in this one area
  + **Indirect** - where apparently neutral provision would put people having these grounds at a particular disadvantage compared with others (unless objective justification) - Chez, Achbita, Bougnaoui
  + **Harassment** - unwarranted conduct related to prohibited ground with purpose or effect of violating dignity and creating hostile environment
  + **Instruction to discriminate**

**Justifications for discrimination**

* Narrower set of exceptions/justifications available for direct:
  + Legitimate and genuine occupational qualification exception - all grounds (like language)
  + Affirmative action - all grounds
* Wider set of exceptions for indirect discrimination, including general objective justification - always subject to proportionality

**Occupational Qualification Exception**

**Achbita & Bougnaoui**

1. Was there direct discrimination?
   1. Court doesn't think so, but in Achbita this seems to have been reactive to her action
   2. And Bougnaoui - even worse, this was reactive to a customer being Islamophobic
2. Indirect discrimination?
   1. Court kicks back in both cases, but sure seems indirect
   2. GdB: it seems crazy that we'd let bigoted customers dictate rights; Bougnaoui at least starts to suggest that customer bigotry isn't a legitimate aim, but it's still murky

**Anti-Discrimination**

* **We’re dealing with grounds of discrimination OTHER than nationality**. Internal market doesn’t deal with these much at all. Connection b/w internal market and anti-discrimination is a thin one.

EU anti-discrimination law

* We’ll talk about origins, sources, scope, common elements, justifications/exceptions, headscarf cases

The origins of EU anti-discrimination law

* Early Origins Equal pay provision goes back to 1956
  + Why was this included when there were no pretentions of European integration at that stage?
    - At France’s behest because they thought they would suffer a disadvantage if they passed equal pay and other MS did not. Labor market advantage over France. To equalize conditions of competition. It had a market origin, it wasn’t like a moral thing.
* Although Court had role in shaping equal treatment law, this isn’t one of the areas (like direct effect, etc.) the EU legislature also took an active role.

Equal Pay as the first Step

* Still confined to the workplace, but it’s not just pay anymore, it’s equal treatment, training, etc.
* Art 157 (**workplace**) – prohibits MS from allowing unequal pay
  + (1) equal pay for equal work
  + (2) legislative
  + (3) positive action provision (affirmative action) – an explicit provision for this

Widening

* Article 119 (**general/broad**) allows the council to take appropriate action to combat discrimination
* Difference b/w A157 and A19?
  + Covers all these other different grounds
  + A157 is very much in the workplace
  + A119 is a much more general idea. Not just workplace.
  + **A157 is very precise (and maybe directly effective) and A119 is more general (and therefore maybe not directly effective)**
    - A157 is much stronger
* Haider Affair – widening A7 mechanism and introducing anti-discrimination law when far right party (zenophobic, racist, neo-nazi) in Austria in 1990s. EU panicked and did a number of things. Introduced diplomatic sanctions. They also took a draft that an NGO had prepared and had been lobbying the Commission to pass on race discrimination. Commission enacted it into law very quickly and was meant to show that they wouldn’t stand for racist power in Austria and the EU would invoke. Although it never got invoked.
  + **Race Directive (adopted under A119)** – **BROADER** than the employment context. Intended to be more radical and comprehensive.
* **Equality Directive (adopted under 119)** – looked kind of similar to the Race Directive. Broadened to sexual orientation, religion, etc.
* Now we have **weird hierarchy of discrimination law. Some very strong some not some in the middle depending on what law they fall under.** Why are they so disparate?
  + An attempt has been made by the Commission to bring these measures in conformity with each other. Proposal has been sitting on the table for a decade or more.
  + Why is there reluctance to harmonize all the laws instead of arbitrarily giving different groups different protection?
    - Different states + vested interests/inertia
    - Market conservatism
  + Even if we have had these Directives since 2000, there are very few cases on racial equality. Lots on gender, age, disability. Why?
    - Groups having resources and incentives to litigate.
    - Denial that racism is a thing in European society.
    - All kinds of barriers to cases coming
* **These 2 directives recognize that these cases that come from groups that get discriminated against need institutional support. Encourage MS to give NGOs a role in assisting litigation.**
  + The few cases that have come have all been brought by these kinds of NGOs.
* Case – moving electricity meters higher in majority Roma communities because assumption that they get tampered more by Roma communities.

**Charter of Fundamental Rights**

* A21 Non-Discrimination – “shall be prohibited” seems like a self-executing provision that doesn’t require further legislation. This looks very BROAD and STRONG. It’s kind of clear (not a lot of exceptions), but it hardly figures at all in the case law.
  + Why? **Lawyers are deterred from using it because lack of clarity of added value beyond the Directives.**
* Coman – Same sex couple.
  + Was A21 of the Charter invoked? Yes, litigants referred to it. But court determined issue in relation to freedom of movement.
  + Why not decided as a sexual orientation issue? Probably easier to follow existing caselaw than charting new law. They don’t highlight it and they don’t make this the legal ground.

Scope (personal and material)

* If you’re not an EU national, you can’t get same rights as EU national.
* But as a non-EU national you can rely on these to challenge racial discrimination against you (that is not just about you being from another MS).