EUROPEAN UNION LAW

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European Union Law

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Contents

Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question EU principles in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have also published a Q&A book providing you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks.

This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding for this module. However, it is recommended that you compliment it with the further reading suggestions provided at the end of each topic, as well as read the cases themselves for more in-depth information. The book provides an analysis of the basic principles of modern European Union Law. The following is a summary of the book content:

- An introduction to the historical evolution of the integration of the European Union;
- The sources of EU Law;
- The relationship between EU Law and national Law;
- The internal principles of EU Law ;
- The main rights enshrined by EU Law;

The aim of this book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in EU Law.
- To provide a framework to consider EU Law within the context of examinations.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and Independent Critical Thought skills.
- Promote the practice of problem solving skills.
- To establish a platform for students to gain a solid

understanding of the basic principles and concepts of EU Law, this can then be expanded upon through confident independent learning.

Through this book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles of EU Law.
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of EU Law.
- Apply their knowledge when writing a formal assessment.
- Present a reasoned argument and make a judgment on competing viewpoints.
- Make use of technical legalistic vocabulary in the appropriate manner.
- Be responsible for their learning process and work in an adaptable and flexible way.

Studying EU Law

EU law governs approximately 80% of the economic Law of its member-states. Therefore, it is vital that a student successfully pass this subject to become a lawyer. Even after Brexit, the UK will still count on the EU as one of its closer commercial partner. Hence, a good knowledge of EU Law remains needed for a British lawyer.

The primary method by which your understanding of the EU Law will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

Tackling Problems and Essay Questions

There are various ways of approaching problem questions and essay questions. We have provided students with an in-depth analysis with suggested questions and answers at the end of each chapter.

Chapter 1 - The Treaties and the Historical Development of the EU

The General Ideology

Why and how did the EU come about? This question points precisely to the problem of *definition* and *identity* of the EU law and of Europe generally. *Functionalists* embraced a federalist concept based on two ideas in particular emerged as possible solutions to the wars that had so long plagued Europe:

(1) building cooperation among countries through the integration of one or more highly important economic function shared by all of them (functionalism); and

(2) directly establishing a European political federation (federalism). Both functionalist and federalist models, therefore, came into play at the earliest stages of discussion.

"The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims." *Schuman Declaration, 9 May 1950.*

The European construction started just after WW2. It was initially based on an intention to bring the countries of the old continent together to avoid such atrocities from reoccurring. In Europe, millions of people died during the WW2 because neighbouring countries had been at war. Winston Churchill, speaking at Zurich University in September 1946, said:

"We must build a kind of United States of Europe……freely joined together for mutual convenience in a federal system. We must re-create the European Family in a regional structure called, it may be, the United States of Europe. Therefore I say to you: let Europe arise!"

This echoed the voice of the neo-federalists. Few years later, the declaration of the French Minister for Foreign Affairs Robert Schuman (1950) was a turning point in the European integration. It basically tells us that the political reconciliation of European countries needs to be pragmatic and should result on an economic cooperation. Consequently the European Coal and Steel Community (ECSC) was established the next year. The idea is to bind states to such a point that war becomes inconceivable. And it will be made by regulating the commerce of the main resources needed for a war: coal and steel. As Schuman put it "[t]he solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible." From then on, a progressing economic collaboration became the solution to maintain peace in Europe. But foreign countries also influenced the economic collaboration. In this respect, George Marshall, Secretary of State in the US, introduced the European Recovery Programme, aiming "to achieve a common programme of recovery". The Marshall Plan required European states to cooperate together to distribute the wealth and, even more importantly, to progressively remove trade barriers between themselves.

Nevertheless, in the aftermath of the Second World War, the ECSC is not the only international organization to be established to maintain peace. Slightly earlier, discussions started to rename the League of Nations by the United Nations (24th of October 1945). Closer in Europe, the Council of Europe was created in 1949, and it is very important to distinguish it from the European Union. This institution was created in response to Winston Churchill call for a united Europe with a European Assembly and a Court of Human Rights (Congress of Europe at The Hague, 1948). Indeed, the Council of Europe is a completely separated international organization with its own founding treaties and its own institutions. The major difference with the EU is that it focuses only on the promotion of Human Rights and the maintenance of peace whereas the former has been further in the integration. While the EU is geographically centralized in Wester-Europe with its 28 member-states, the Council of Europe *rationae loci* is broader with 47 members-states. It includes Russia or Turkey for

example. Moreover, these two institutions have two different Courts that should not be confused the Council of Europe has the European Court of Human Rights (ECtHR) while the Court of Justice of the European Union (CJEU) is the main judicial organ of the European Union.

Finally, there were other attempts by European countries to develop economic harmonisation. The Benelux nations (Netherlands, Belgium and Luxembourg) signed a customs convention to remove internal trade barriers on 5 September 1944 and resulted in trade barriers between the states being removed by 1956.

Why does the EU keep Expanding?

The European Union is *sui generis* organization that has unique features. It is very different from the traditional approach of international organizations. Some theories are discussed below.

Intergovernmental

Intergovernmentalism is an alternative theory of political integration, where power in international organizations is possessed by the member-states and decisions are made by unanimity. Independent appointees of the governments or elected representatives have solely advisory or implementational functions. Intergovernmentalism is used by most international organizations today. An alternative method of decision-making in international organizations is supranationalism.

Intergovernmentalism is also a theory on European integration which rejects the idea of neo-functionalism. The theory, initially proposed by Stanley Hoffmann and refined by Andrew Moravcsik suggests that governments control the level and speed of European integration. Any increase in power at supranational level, he argues, results from a direct decision by governments. He believed that integration, driven by national governments, was often based on the domestic political and economic issues of the day. The theory rejects the concept of the spill over effect that neo-functionalism proposes. He also rejects the idea that supranational organisations are on an equal level (in terms of political influence) as national governments.

Supranational

Supranationalism is a method of decision-making in political communities, wherein power is held by independent appointed officials or by representatives elected by the legislatures or people of the member states. Member-state governments still have power, but they must share this power with others. Because decisions are taken by majority votes, it is possible for a member-state to be forced by the other member-states to implement a decision. Unlike a federal state, member states fully retain their sovereignty and participate voluntarily, being subject to the supranational government only while remaining members.

Neo-Functionalist

Neo-functionalists argue that the supranational institutions of the European Union themselves have been a driving force behind European integration; reinterpreting agreed results from Intergovernmental Conferences in order to expand the mandate of EU legislation into new and more diverse areas. The theory of neo-functionalism is felt by some to be important as it may explain much of the thinking behind the early proponents of the European Union, such as Jean Monnet, who saw increased European integration as the most important precursor to a peaceful Europe. Neo-functionalism assumes a decline in importance of nationalism and the nation-state; it sees the executive power and interest groups within states to be pursuing a welfarist objective which is best satisfied by integration of EU states. The thinking behind the neo-functionalist theory can be best described by considering the three mechanisms which neo-functionalists see as key to driving the process of integration forwards. These are positive spill over, the transfer of domestic allegiances and technocratic automaticity:

- Positive spill over is the concept that integration between states in one economic sector will quickly create strong incentives for integration in further sectors; in order to fully capture the benefits of integration in the original sector.

- The mechanism of a transfer in domestic allegiances can be best understood by first noting that an important

assumption within neo-functionalist thinking is of a pluralistic society within the relevant nation states. Neo-functionalists claim that, as the process of integration gathers pace, interest groups and associations within the pluralistic societies of the individual nation states will transfer their allegiance away from national institutions towards the supranational European institutions. They will do this because they will, in theory, come to realise that these newly formed institutions are a better conduit through which to pursue their material interests than the pre-existing national institutions.

- Finally, technocratic automaticity describes the way in which, as integration hastens, the supranational institutions set up to oversee that integration process will themselves take the lead in sponsoring further integration as they become more powerful and more autonomous of the member states.

An historical overview of the European Treaties:

1951	ECSC: EUROPEAN COAL AND STEEL COMMUNITY Treaty of Paris
1957	EEC: EUROPEAN ECONOMIC COMMUNITY Treaty of Rome
1957	EURATOM: EUROPEAN ATOMIC ENERGY COMMUNITY Treaty of Rome
1965	MERGER TREATY Amalgamated institutions of the three Communities (in force 1967)
1973	FIRST TREATY OF ACCESSION UK, the Republic of Ireland, Denmark
1975	BUDGETARY TREATY Increased power of the Parliament

1979	SECOND TREATY OF ACCESSION Greece
1986	THIRD TREATY OF ACCESSION Spain, Portugal
1992	SINGLE INTERNAL MARKET In force 1 Jan 1993 – A result of the Single European Act 1986
1993	TREATY ON EUROPEAN UNION (TEU) (Maastricht) In force 1 Nov 1993
1994	FOURTH TREATY OF ACCESSION Austria, Finland, Sweden
1997	THE TREATY OF AMSTERDAM (ToA) In force 1 May 1999
2000	THE TREATY OF NICE In force 1 February 2003
2005	TREATY ESTABLISHING A CONSTITUTION FOR EUROPE rejected by France and the Netherlands by referendum
2005	FIFTH ACCESSION TREATY Ten new members
2007	Accession of Romania & Bulgaria
2007	THE TREATY OF LISBON Signed 13 December 2007 Ratified by 24 Member States (at the time of writing)

The treaties establishing the European Communities

In the 1950s the creation of three European Communities marked the birth of the European Union's predecessor. The European Communities refer to the ESCS, the EEC and EURATOM.

- The European Coal and Steel Community (ECSC): established by the Treaty of Paris (1951).

The ESCS owes its origins in the Schuman declaration. However, if the declaration has been made by Robert Schuman, his main collaborator on the "Schuman Plan", Jean Monnet (a French economist and statesman) is usually forgotten. The idea, placing economic cooperation as its core, included to remove these vital wartime industries from the control of the national governments to confer them to a supranational entity, in the hope of providing a sounder foundation for peace and stability in Europe. The pioneers thought that opening a common market between European countries on the two wartime necessities would prevent the rise of new wars between them. Another reason of this political reconciliation lies on a wish to limit the development of communism in Western Europe (very strong at the time in France and Italy).

Initially, the pioneers only envisaged France and West Germany, but Schuman invited their close neighbours to join. As a result, France, West Germany, Italy and the three countries members of the Benelux signed the Paris Treaty and became the 6 founding members of the ESCS. The UK was invited for the negotiations but quickly left the negotiating table. This example shows that, from the beginning of the European construction, the UK was reluctant to participate.

To achieve its objective, the 6 founding members established several institutions. The High Authority, a sort of ancestor of the committee of ministers representing the member-states and taking the main decisions, was accompanied of an Assembly and a Court of Justice in charge of reviewing the legality of the acts of the High Authority. At that time, having such integrated institutions was a great progress in terms of development of international organizations.

The main concrete measure was achieved by 1954, which marked the removal of all trade barriers in coal and steel. The ESCS expired in 2002, after the ending of a 50 years term.

- The European Economic Community (EEC): created by the Treaty of Rome (1957).

The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), came into force on 1 January 1958. One of its instigators is the Belgium prime minister delivering a famous speech in Messina (1956). The idea was to focus on a greater harmonisation of the economy, above the mere areas of coal and steel. The 6 states agreed to integrate their economies, first by becoming a customs union to progressively move to a common market.

- The European Atomic energy community (EURATOM): established by Treaty signed in 1957.

This third Treaty dealt with cooperation in the domain of atomic energy. France strongly insisted for its conclusion. Even if EURATOM focused on an important but very specific industry, the EEC had a much broader scope.

If the three communities were provided with independent institutions to which different degrees of sovereign power was ceded by the Member States, it was agreed that the Assembly and the Court of Justice (initially established by the EEC) would be common to all three. However, each community had its own Commission and its own Council of Ministers. But this system changed for a greater centralisation with the conclusion of the Merger Treaty (1965) that provided for a single Commission and a single Council of Ministers to be shared by the communities.

More importantly in terms of Treaties deeper amendment of the European Communities; the Single European Act (SEA) was signed in 1986. The SEA increased the material scope of the EEC and laid the foundation for an internal market. In addition to this, it brought democratic and institutional changes to strengthen the accountability of the communities. The Assembly was renamed European Parliament as a symbolic progress towards integration.

Finally, a Court of First Instance was established to relieve an overwhelmed Court of Justice.

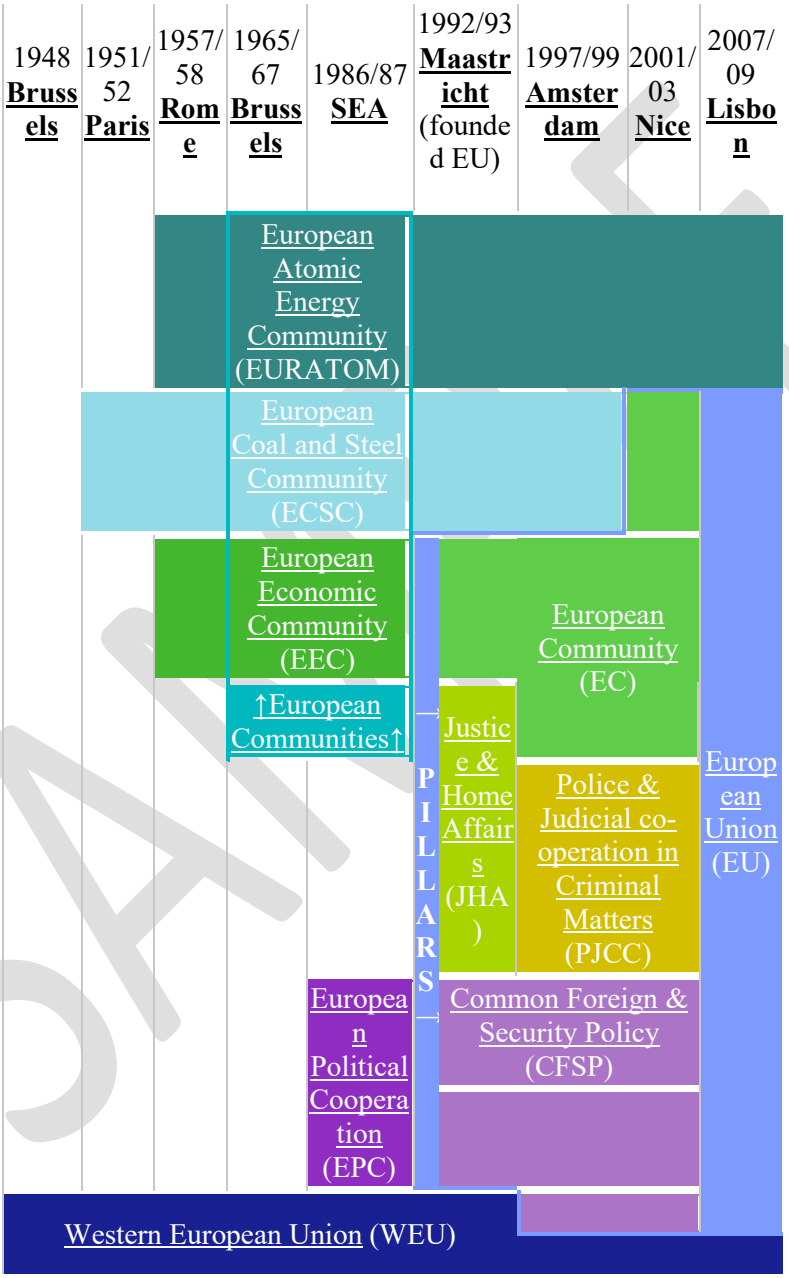
The birth of the European Union

The European Union officially replaced the European Communities in 1993, date of the entry into force of the well-known Treaty of Maastricht (1992). The so-called Treaty on the European Union (TUE) sought to enlarge the scope of intergovernmental cooperation beyond the economic sphere. The intention of the Member States was clearly to find a common political agenda. For that purpose, they established the three pillars of the EU:

- **Pillar I** was constituted by the European Community; a single institution regrouping the former EEC, ESCS and Euratom.

- **Pillar II** established the Common foreign and security policy (CFSP); an intergovernmental collaboration of police and border services.

- **Pillar III** provided a framework for cooperation in justice or home affairs.


1948 Brussels
1951/52 Paris
1957/58 Rome
1965/67 Brussels
1986/87 SEA
1992/93 Maastricht (founded EU)
1997/99 Amsterdam
2001/03 Nice
2007/09 Lisbon
European Atomic Energy Community (EURATOM)
European Coal and Steel Community (ECSC)
European Economic Community (EEC)
↑European Communities↑
European Community (EC)
PILLARS
Justice & Home Affairs (JHA)
Police & Judicial co-operation in Criminal Matters (PJCC)
European Union (EU)
European Political Cooperation (EPC)
Common Foreign & Security Policy (CFSP)
Western European Union (WEU)

More importantly, the TUE created a monetary union between the Member States by the introduction of the euro as the common currency monitored by a European Central Bank (ECB). Nevertheless, it also marked the first concession for Member States to break the integration process with the "opt-out clauses". Indeed, the first ones to use it, The UK and Denmark, decided to keep their respective currencies while remaining in the EU. Finally, the Treaty of Maastricht also established a "social chapter" which dealt with workers' rights and other social issues. Once again, the UK managed to negotiate an opt-out exception.

The progressive amendments of the European Union

- The Treaty of Amsterdam (1997) resulted in two principal reforms. Firstly, it tried to make the existing structure of the Treaties more comprehensible. To that end, it completely renumbered the EC Treaty and the TEU. Secondly, the Treaty of Amsterdam reorganized the 1st and 3rd Pillars for a deeper cooperation in criminal matters.

- The main concern of the Treaty of Nice (2001) was to prepare the enlargement of the EU to more than ten members. The candidates were mainly from Eastern and Central Europe. This extension went ahead three years later.

- The Treaty of Lisbon (signed in 2007) entered into force in 2009. It is certainly the most important Treaty for the EU in terms of fundamental changes. The debate started with a declaration of the European Council (EU's institution) stating that along with an increasing integration and more sovereign powers attributed to the EU by its Member States; the organization needed to be more democratic, more transparent and more efficient. The Council even mentioned that it would have to come along with the adoption of a Treaty of a constitutional nature. Consequently, the Convention on the future of Europe, chaired by the former French president (Valéry Giscard

d'Estaing), was established. The Convention was composed of members of national parliaments and governments but also representatives from the EU (Commission and Parliament). The meeting resulted on the draft of a Treaty Establishing a Constitution for Europe that was supposed to replace the existing Treaties. It was signed by the Member States in 2003 but the ratification process was never completed. Perhaps too ambitious at the time, the Constitutional Treaty was rejected in France and the Netherlands, and the project was later abandoned.

- Nevertheless, the Member States thought that there was still a pressing need of reform. In order to reassure the nationalists worried about the rise of a European State, the word Constitution has been removed and the existing Treaties were not replaced. Instead, the EC Treaty was renamed Treaty on the Functioning of the European Union (TFEU), and the Euratom incorporated in the Treaty of Lisbon. Finally, the Treaty of Lisbon merged the three pillars into a single structure, abolished the EC as a separate entity bust most importantly consolidated the distribution of the competences between the Member States and the EU in favour of the latter.

Accessions and evolution of the list of EU members

In order to become member of the EU, States have historically concluded accessions treaties between them and the EU. However membership is subjected to several conditions called *acquis communautaires* that States have generally to comply with, unless arrangements for a transition period are made. For example, a candidate State will have to present an economic, judicial and political system able to be integrated with those of the existing Member States.

However, if membership is usually enshrined by an accession Treaty, it is not always the case. For instance, East Germany automatically joined the EU after the reunification of Germany in 1990. Since the three initial communities of the 19950s were formed by France, West Germany, Italy, the Netherlands, Belgium

and Luxembourg the following countries have also joined:

- The United Kingdom, Ireland and Denmark in 1973; the EU was then composed of 9 Member States.
- Greece in 1981; the EU was then composed of 10 Member States.
- Spain and Portugal in 1986; the EU was then composed of 12 Member States.
- Austria, Sweden and Finland in 1995; the EU was then composed of 15 Member States.
- The Czech Republic, Slovakia, Slovenia, Poland, Lithuania, Latvia, Estonia, Hungary, Cyprus and Malta in 2004; the EU was then composed of 25 Member States.
- Bulgaria and Romania in January 2007; the EU was then composed of 27 Member States.
- Croatia in July 2013; The EU is now comprised of 28 Member States.

Nevertheless, in 2017, can we say that the EU is still comprised of 28 Member States, or does the recent Brexit change the counting?

Some territories have decided to withdraw from the European Communities in the past. This was the case of Algeria, in 1962, right after having gained independence. Algeria was part of the European Communities because it was at that time a French colony. The *rationae loci* of the Communities have always automatically integrated the overseas territories of the Members.

In addition to this, the other principal territory to withdraw was Greenland that is part of Denmark and therefore joined the Communities in 1973 when the latter got member. After having been granted significant autonomy to make its own choices, the Greenland People decided to not be part of the European

Communities anymore in a referendum. They withdrew in 1985 after a negotiating process with the Member States. However, these few examples occurred in the era of the European Communities, is it that simple with Brexit?

Brexit

As we have seen it before, the relationship between the UK and the EU was special from the beginning. Throughout its membership, many politicians, the media or the wider public expressed scepticism or even hostility towards the EU. The first referendum on whether or not to stay a member was held in 1975. At this time, a majority of British citizens voted in favour to remain.

In 2013, the UK Prime Minister, David Cameron, promised another referendum on the EU issue if he was re-elected. After having been victorious in 2015, Cameron had to act in accordance to his commitment and started re-negotiating with the EU to achieve certain reforms. However, unsatisfied by the concessions made by the EU, the Prime Mister held a referendum on June 23rd last year. This time, a majority of 52% voted to leave. Even though the referendum was not legally binding in itself, it put political pressure on the UK executive to trigger article 50(2) of the TEU. It is the formal requirement that compels a Member State to officially inform the European Council of a wish to withdraw from the Treaties. This operation has been ordered by the new Prime Minister, Theresa May, in March 2017.

However, even though article 50 has been triggered by the UK, it remains a Member for now. Thus, the EU is still comprised of 28 Member States. Article 50 stipulates that the parties have to find an agreement for the withdrawal under negotiations that have to last at least 24 months, if no agreement is concluded before, and that can be extended by the parties.

The issue of the UK membership to the Council of Europe is not legally affected by Brexit. However, withdrawing from the Council of Europe is part of the Conservative political agenda. Actually, it was announced by Theresa May in 2016 while campaigning. Fortunately for the protection of Human Rights in the UK, the Conservative manifesto released few weeks ago,

declared that they would be too busy with Brexit and would remain in the Council of Europe for the next legislature.

EU Law's major influence on UK Law after Brexit

Walker (Appellant) v Innospec Limited and others (Respondents) [2017] UKSC 47

Facts: John Walker, the appellant in these proceedings worked for the respondent, Innospec Ltd, from 1980 until his retirement in 2003. In 2006 Mr Walker asked Innospec to confirm that, in the event of his death, they would pay the spouse's pension, which the scheme provides for, to his civil partner. Innospec refused, because his service predated 5 December 2005, the date that civil partnerships were introduced in the UK, and any discriminatory treatment is therefore permitted under paragraph 18 of Schedule 9 to the Equality Act 2010. If Mr Walker was married to a woman (or indeed if he married a woman in the future) she would be entitled on his death to a "spouse's pension" of about £45,700 per annum. As things stand at present, Mr Walker's husband will be entitled to a pension of about £1,000 per annum (the statutory guaranteed minimum).

Preliminary question before the Court: Does paragraph 18 of Schedule 9 to the Equality Act 2010, permitting an employer to discriminate against employees based on their sexual orientation while attributing a survivor's pension, is compatible with EU Law?

Preliminary Ruling: According to the judgement gave by Lord Kerr, the UK provision is incompatible and EU Law should prevail: "paragraph 18 of Schedule 9 to the Equality Act 2010 is incompatible with EU law and must be dis-applied and (ii) Mr Walker's husband is entitled on his death to a spouse's pension, provided they remain married."

Application: This case underlines several major principles of EU Law in its relation with national Law such as supremacy or direct effect. In addition to this, the UK government just declared that after Brexit it would repeal the current national legislation on discrimination based on sexual activity to upgrade it to EU standards of protection. This demonstrates that even after Brexit, some parts of EU Law will still remain guidance for the UK courts.

Chapter 3: EU Law and National Law: Supremacy.

Supranationalism and the origins of supremacy

Supremacy is a legal principle involving that, in areas where EU Law is relevant to a case that presents a conflict of norms; EU Law should prevail over national Law. It is one of the key principles created by the ECJ that ensure the enforceability of the European legal order. Supremacy comes along with direct effect, indirect effect and State liability (topics covered in Chapter 4).

Supremacy is rooted in supranationalism. Supranationalism is a method of decision-making by a community of States, wherein officials are representing their Member States. Unlike federalism Member States remain sovereign because they decided voluntarily to be part of the organization and are free at any time to leave it. However, Member States are delegating some of their sovereign powers to the community. They might, for instance, be forced to implement a decision that they did not consent with, as far as decisions are taken by majority votes.

The principle of supremacy is not written in the founding treaties, yet is considered to be a fundamental principle of the European Union. It is linked to the doctrine of autonomy, which implies that EU's institutions are independent from its Member States, and creates an external source of Law despite being created by the Member States themselves. Supremacy's main consequence on the EU legal order is to reinforce its autonomy. The importance of supremacy in the integration of the European construction was highlighted by Cruz at the time of the European Communities, which he claimed: "without supremacy community law ceases to be *communataire*".

The rise of the new European legal order

While supremacy is about the relationship between national Law and EU Law, it is necessary to present the different approaches of international Law within the different Member States. On this issue, European States have adopted two different conceptions:

monism or dualism. The monistic conception, on the one hand, provides that international accords, which through ratification bind a country in international law, are considered to be part of the internal legal system without the need for specific measures to incorporate them. The principle of monism is well known in many EU countries, such as France for example, and has been accepted quite early by the Court of Justice.

The dualistic conception, on the other hand, implies that international accords do not become part of the internal legal system at the moment of ratification but only if and to the extent that they are specifically incorporated into national law. This approach is normally taken by the United Kingdom. In addition to this, the particular importance attributed to the sacred parliamentary sovereignty worsens the compliance with the principle of supremacy.

The development of EU Law created much more problem within dualist States. At first it appears to be conflicting with the main principles regulating the European legal order: supremacy, direct effect and indirect effect. Supremacy is also known as "primacy of EU law", from the French *primauté du droit de l'Union.* The reasons of its development by the Court are various. First of all, while the main objective of the Communities was to create a single Market, Law had to be harmonized through a uniform application of EU Law within the Member States.

In addition to this, the whole structure of Europe was already based on supranationalism which implies that the interests of the community prevail over national interests. Therefore, supremacy was a necessary component of uniformity and consistency across the Union. The recognition of EU supremacy has two major consequences on the competences of national institutions, often referred to as the doctrine of pre-emption:

- It places the CJEU above the national Courts in case of conflict of interpretation of EU Law.
- It prevents legislative bodies in the Member States from enacting legislation that might be incompatible with EU Law.

The European construction has been going on for more than 60 years and there is still a debate about supremacy. This is probably because it touches one of the most delicate areas of EU Law because it is related to sovereignty. The nationalists' biggest fear is to lose sovereignty to the benefits of the community. Unionists would rather qualify it as a mere transfer of sovereignty.

While nothing in the founding treaties was expressly mentioning EU supremacy, the closest the pioneers tackled this issue was this so-called "duty of loyalty" enshrined by Article 10 EC (now replaced by article 4(3) TUE) which stipulates: *"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".*

The abandoned Treaty Establishing a Constitution for Europe (TECE) included a special provision on supremacy. Instead, declaration 17 of the Lisbon Treaty merely mentions the "primacy", making reference to the CJEU's case law. However, the recognition of EU supremacy is mostly due to an intense legislative activism of the ECJ, which has built the principle throughout a range of cases.

The Court, in its case law, before going into a detailed definition of supremacy, acknowledged the "specificity" of the EU legal order that has a "special and original nature" (**ECJ Costa v ENEL** (Case 6/64) [1964]). This is why supremacy is referred as the rise of a new legal order. The EU is a *sui generis* entity, it is unique and it differs from the traditional models of national or international law.

The famous case affirming the specificity of EU Law is **Van Gend en Loos.** Nevertheless, it mainly concerns the principle of direct effect of EU Law, another crucial pillar of EU Law enforceability, and will therefore be more fully discussed in the next Chapter.

General principle: The EU must be regarded as a unique legal order distinct from either national or international Law.

Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) [1963] ECR 1
Facts: The case was related to the introduction of a Dutch law on taxes, relatively increasing the duty payable and resulting on a loss suffered by the claimant that which claimed an incompatibility with European Law. The importer was charged 8% tax on importation of chemicals from Germany, placing him at a disadvantage over domestic sellers.
Preliminary Ruling: *"The Community constitutes a new legal order in international law for whose benefits the states have limited their sovereign rights, albeit within limited fields".*
Application: The EEC Treaty that was at stake in the case was not an ordinary international Treaty because Members agreed to limit their sovereignty rights. **Van gend en Loos** does not give a complete definition of supremacy. However, by declaring that the Treaty had established a new legal order in which Member States had limited their sovereign rights, the judgment paved the way for the establishment of this principle of EU law.

General principle: National law cannot override EU law.

Flaminio Costa v ENEL (Case 6/64) [1964] ECR 585
Facts: ENEL was an electric company that has been put under state ownership by the Italian government. Costa, a shared owner of the company before its nationalisation, has suffered a loss attributable to the Italian Government. He argued before its national Courts that the Italian law nationalizing the industry was incompatible with EC monopoly laws. The case was referred to the ECJ. Throughout the procedure, the Italian government claimed that national law should prevail as it was enacted after the law ratifying the EC Treaty.
Preliminary question before the Court: Whether or not a national law, enacted after the law ratifying the founding treaties of the Communities, could contravene to its main objectives?
Preliminary Ruling: The answer of the Court is clearly negative; incompatible domestic provisions cannot override Community law, regardless whether or not they were enacted after the ratification of the founding treaties.

The ECJ based its reasoning on the framework of **Van Gend en Loos** but extended it: *"By creating a Community of limited duration having (...) a transfer of powers from the states to the community, the member states (...) have thus created a body of law which binds both their nationals and themselves".* Thus, according to the Court, the supremacy of EU law logically stems from the Member Stats' transfer of power that created an independent body of law. **Application:** This case defines and develops the principle of the supremacy of EU law justifying it by the "special and original" nature its legal order.
A clear conclusion can be made about the inputs of **Costa and Van Gend en Loos.**
The Member States have transfer certain of their sovereign powers to the Community in order to make law that would bind them and their individual. As a result Member States cannot introduce new national laws that would contradict EU Law.

General principle: No provision of national law, of any nature whatsoever, can override EU Law.

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970) Case 11/70
Facts: A regulation required the introduction of export licences in respect of certain agricultural products falling under the Common Agricultural Policy (CAP). Another requirement of this regulation involved the transfer of a deposit that would be forfeited if no exportations were realized during the period of the licence, and this is how the applicant suffered a loss. The applicant claimed that this EU regulation was incompatible with the German Constitution for having contravened with the right to run a business freely. The unconstitutionality was acknowledged but the German Court was uncertain about the consequences of such a decision.
Preliminary question before the Court: The German Court used Article 177 to ask the ECJ whether or not national constitutional law prevails over EC law?
Preliminary Ruling: The Court simply replies: *"The validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights, as formulated by the constitution of the state or the principles of a national constitutional structure".*
Application: Internationale Handelsgesellschaft enlarges the

scope of the supremacy principle: no provisions of national law, of any nature whatsoever, can override EU Law. In the event of any conflict or inconsistency between any provisions of national law, regardless its nature, and EU law, the domestic courts have an absolute requirement to give effect to EU Law.

General principle: When national law conflicts with EU law, national law should immediately be set aside by national Courts.

Amministrazione delle Finanze v Simmenthal SpA (1978) Case 106/77
Facts: Simmenthal, a company importing beef into Italy from France, was required to pay a tax at the border, which clearly contradicts the EC provisions on freedom of good at the time.
Preliminary question before the Court: After acknowledging the incompatibility, the Italian Court referred the case to the ECJ to know if EU Law had to be applied directly of if it should wait for the traditional constitutional Court procedure to strike it down for incompatibility to higher norms?
Preliminary Ruling: The Court mentions in its Judgement that any EC provision *"renders automatically inapplicable every conflicting provision of current national law".*
Application: The effect of EU Law supremacy is immediate, there is no need to wait for national procedures to strike down the impugned law, and it is rendered automatically inapplicable.

General principle: All incompatible domestic law shall be repealed.

Case 167/73, Commission v France (Re French Merchant Seamen) [1974] ECR 359
Facts: A French statutory provision required that certain of crew on French registered merchant ships had to be French. This provision was violating the rules of freedoms of worker under article 45. The French government argued that its domestic Courts were no longer giving effect to this provision and that nothing in the Treaty required repeal.
Preliminary question before the Court: Do Member States have to repeal every out-dated incompatible law, even though their Courts are to giving them effect anymore?

Preliminary Ruling: The mere existence of such provision was creating uncertainty that was unacceptable in the pursuit of harmony.
Application: All previous domestic law that appears incompatible to EU Law, regardless whether or not it is still applied by domestic courts shall be repealed by Member States.

Finally, the supremacy of laws taken at the international level is not a revolution in itself. Actually, it is generally accepted by States in Public International Law (Treaties and Customs prevail over national law). However, the particularity of EU supremacy lies on two points. Firstly, this principle is effectively enforceable in practice. And this is quite rare in the international order that a Court has the courage and the resources to go against the States' will. Secondly, as it has been mentioned in the case previously presented, the Member States have transferred powers to the Union, so that they can be forced to implement decisions for which they were in disfavour. This is certainly why the supremacy issue is so controversial. Conversely, in Public International Law nothing, except for the exception of the *jus cogens*, no rules can be imposed on States if they did consent to them.

The impact of supremacy on UK Law

The UK compliance with supremacy was probably the most far-reaching of the EU. Partly because dualist states are generally not designed to integrate international orders implying any sort of supremacy. According to Dicey's traditional definition of Parliamentary sovereignty, it makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation. Parliamentary sovereignty is the most important part of the UK constitution.

However, the CJEU case-law on supremacy requires national Courts to suspend operations, declare as invalid and dis-apply acts of Parliament. This approach is completely opposed to the UK conception of the role of Judges. The United Kingdom being a dualist system allowed EC law to get an automatic incorporation through the European Communities Act 1972(ECA). Section 2(1) of this act particularly conveyed how the UK limited its sovereign rights in favour of the EC. However section 2(4) limited the EU's

sovereignty over domestic law by ensuring that all domestic enactments had effect only subject to directly applicable rules of community law. The ECA 1972 had two major consequences on the traditional UK system: overriding the usual presumption that any later enactment overruled prior law inconsistent with it and clearly terminates any effect of acts of Parliament purporting to contradict EU Law. UK judges took the following positions:

E Coomes (Holdings) Ltd v Shields [1978] IRLR 263 CA,
Facts: Miss Shields was employed as a counterhand in the appellants bookmakers' shop in Sussex Street, London, on an hourly rate of 92p, whereas her men colleagues were significantly paid better for the same job. UK law appeared to be incompatible with EU Law.
Question before the Court: In case of conflict between UK and EU Law, which provisions should prevail?
Ratio: Lord Denning stated that "By the 1972 Act, parliament enacted that we should abide by the principle as laid down by the European Court".

English judges have not always reacted in this manner and there has inevitably been a controversy that arose from the case **Mcarthys v Smith.**

Macarthys Ltd v Smith (No.2) [1980] EWCA Civ 7 (17 April 1980)
Facts: This case involved a claim about equal pay based on EC Law that appeared to be contradicting with the Westminster's Equal Pay Act 1970.
Question before the Court: In case of conflict between UK and EU Law, which provisions should prevail?
Ratio: Lord Denning adopted a constructive approach that was contradicting EU supremacy, he says "*If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought it would be the duty of our courts to follow the stature of our Parliament*." Justice Cumming-Bruce in his dissenting judgement took position of EU supremacy.

Garland v British Rail Engineering Ltd. [1982] 2 WLR 918
Facts: There was a dispute between an employee and her company, another case relating to equal pay. The employee claiming discrimination alleged to be suffered by female employees who on retirement no longer continue to enjoy travel facilities for their spouses and dependent children although male employees continue to do so.
Question before the Court: Should the construction approach be applied when Parliament deliberately passes an Act with the intention to act inconsistently with EU Law?
Ration: Lord Denning's construction approach was applied in this case and EU Law has been set aside. This gave rise to a significant controversy as being incompatible with Van Gend en Loos (1963).

General principle: UK constructive approach is overruled and the supremacy of EU Law reaffirmed.

R (Factortame Ltd) v Secretary of State for Transport (Case C-213/89) 1990 ECR 1-2433
Facts: The case involved companies registered in the UK but mainly owned by Spanish nationals. The Merchant Shipping Act 1988 required a certain percentage of UK national ownership for the registration of a vessel. This provision expressly violated the "non-discrimination on nationality" principle of Article 12. The Divisional Court granted an interim relief suspending the operation of the impugned law. The House of Lords then made a reference to the ECJ arguing than nothing neither in the UK Constitution nor in EC Law permitted such interim.
Preliminary question before the Court: Does the incompatibility of an act of Parliament, enacted after accession to the Treaties and expressly introducing inconsistencies to EC Law, permits judges to suspend the legal effect of the domestic provision?
Preliminary Ruling: The Court firmly recalls that any act of Parliament, even enacted after the accession Treaties, that would be inconsistent with EU Law cannot override it.
In addition to this, national Courts being confronted to inconsistencies or incompatibilities with EU Law are required to do everything necessary to set aside the impugned law.
Application: The UK constructive approach is overruled and the supremacy of EU Law is affirmed. There is now an external body competent to make laws affecting the United Kingdom, which are

applied by the English Courts irrespective of the wishes of Parliament.

This brought about academic debate on the concept of parliamentary sovereignty. Authors such as **Wade** stated that the fact of dis-applying an act of Parliament for an allegedly incompatibility with a superior source meant that "something drastic had happened to the traditional doctrine of parliamentary sovereignty". He claimed that this was revolutionary on the grounds that the Courts were no longer prepared to uphold absolute parliamentary sovereignty. Alternatively **Craig and De Burca** argued that sovereignty remained intact. Parliament itself voluntarily decided to set the limits of its sovereignty. The ECJ just used the competence it has been attributed by the Member States. On the other hand **McCormick** argued that in the modern world it was no longer realistic to speak in terms of absolute sovereignty due to the inter-dependence of economies.

However many English Lawyers, did not accept the European Court's view. They contended that European law overruled English domestic law only because parliament had chosen to make it so, and that parliament could change its mind at any time. A balance is thus preserved between the supremacy of EU law in matters of substantive law, and the proper supremacy of the UK parliament in establishing the legal framework within which EU law operates. The recent events that led the UK to trigger article 50 TFEU support this last argument. Brexit has shown that the UK Parliament voluntarily transferred some powers to the Union and was entitled to take them back at any time.

Another act is finally enacted in 2011, The European Union Act, by the coalition government that makes a number of statutory qualification about the future relationship between the EU and the UK. A very interesting provision related to the issue of supremacy can be found in section 18 of the act. The latter subjects the UK membership to the continuing will of Parliament. A simple act of Parliament is all that is needed to exit from the EU.

The impact of supremacy on other Member States

In France, accepting EU supremacy did not raise such controversies. It can certainly be explained by the fact that it has a monist approach of international Law. At quite an early stage, the Court of *Cassation* in the case **Von Kempis v Geldof** (1976) 2 CMLR 462, acknowledged the recent CJEU case law in declaring that EU Law takes precedence over French legislation.

However, the UK is not the only country to presented difficulties with supremacy in their national jurisdiction. It was also the case in other European Union member states such as Germany and Poland. For example in Germany, the reluctance to accept supremacy was based on a fear of potential violation of Human Rights contained in the German Constitution.

Solange I judgment, German Constitutional Court (BVerfGE 37, 271) [1974] 2 CMLR 540
Facts: The case involved an A German import/export company for which an export deposit of DM17,026.47 was declared to be forfeited after the firm had only partially used an export licence gran-ted to it for 20,000tons of ground maize.
Preliminary Ruling: The German Constitutional Court complained about the legal uncertainty left by the lack of a codified catalogue of fundamental rights and held that the fundamental rights guaranteed under the West German constitution would prevail over EEC law for so long as this situation continued.

The German Constitutional Court finally abdicated in the case **Wunsche Hendelsgesellchaft (1987)** 3 CMLR 225 provided that the EU Law could guarantee as least an equivalent protection. On the issue of sovereignty, the German Constitutional Court always maintained a stable position: Germany remains the only sovereign. In the case **Brunner v The European Treaty** (1994) 1 CMLR 57, the Court states: "Germany is one of the 'Masters of the Treaties' … Germany thus preserves the quality of a sovereign state in its own right".

Endnote

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