

# EU LAW

Text, Cases, and Materials

---

SIXTH EDITION

Paul Craig  
and  
Gráinne de Búrca

OXFORD  
UNIVERSITY PRESS

# DETAILED CONTENTS

<i>Table of Abbreviations</i>	xxxv
<i>Acknowledgements</i>	xl
<i>Table of Cases</i>	xli
<i>Table of Treaties, European Legislative Instruments and National Legislation</i>	xxxvii
<i>Lisbon Table of Equivalences</i>	clvii
<b>1 THE DEVELOPMENT OF EUROPEAN INTEGRATION</b>	<b>1</b>
1 Central Issues	1
2 Nationalism and the Origins of the EU	2
3 From the ECSC to the EEC	3
(a) ECSC: European Coal and Steel Community	3
(b) European Defence Community and European Political Community: EDC and EPC	3
(c) European Economic Community: EEC	4
4 From EEC to the Single European Act	6
(a) Tensions within the EEC	6
(b) Single European Act: SEA	8
5 From the SEA to the Nice Treaty	10
(a) Maastricht Treaty: The Treaty on European Union	10
(b) The Treaty of Amsterdam	14
(c) Nice Treaty	16
6 From Nice to the Lisbon Treaty	17
(a) The Laeken Declaration	17
(b) Constitutional Treaty	17
(c) The Lisbon Treaty	19
(d) Post-Lisbon: The Financial Crisis	22
7 Theories of Integration	23
(a) Neofunctionalism	24
(b) Liberal Intergovernmentalism	25
(c) Multi-Level Governance	25
(d) Rational Choice Institutionalism	26
(e) Constructivism	26
8 Conclusions	27
9 Further Reading	28

2	THE INSTITUTIONS	30
1	Central Issues	30
2	The Commission	31
	(a) President of the Commission	31
	(b) College of Commissioners	32
	(c) Commission Bureaucracy	34
	(d) Powers of the Commission	36
	(e) Downfall of the Santer Commission and Subsequent Reform	38
	(f) Role of the Commission	39
3	The Council	40
	(a) Composition	40
	(b) Presidency of the Council	41
	(c) Committee of Permanent Representatives	43
	(d) Council Secretariat	43
	(e) Powers of the Council	44
	(f) Role of the Council	45
4	The European Council	46
	(a) Composition	46
	(b) Presidency of the European Council	47
	(c) Rationale	47
	(d) Powers	47
	(e) Role of the European Council	48
5	High Representative of the Union for Foreign Affairs and Security Policy	49
	(a) Powers	49
	(b) Role of the High Representative	50
6	European Parliament	50
	(a) Composition and Functioning	51
	(b) Powers	53
	(c) Role of the European Parliament	56
7	Courts	57
	(a) Court of Justice	58
	(b) General Court	59
	(c) Specialized Courts	60
	(d) Reform of the Court System	60
	(e) Advocate General	61
	(f) Procedure Before the Court	62
	(g) Style of the Court's Judgments	62
	(h) Role of the Court	62

8	The Court of Auditors	66
9	EU Advisory Bodies	67
	(a) Economic and Social Committee	67
	(b) Committee of the Regions	68
10	Agencies	69
11	Conclusions	70
12	Further Reading	71
<b>3</b>	<b>COMPETENCE</b>	<b>73</b>
1	Central Issues	73
2	Impetus for Reform	74
3	Lisbon Strategy	75
	(a) Categories and Consequences	75
	(b) Express and Implied Power	75
4	Exclusive Competence	78
	(a) Basic Principles	78
	(b) Area Exclusivity	78
	(c) Conditional Exclusivity	79
5	Shared Competence	83
	(a) Basic Principles	83
	(b) Pre-Emption	84
	(c) Scope and Variation	85
	(d) Shared Competence and Retained Power	85
6	Supporting, Coordinating, or Supplementary Action	86
	(a) Basic Principles	86
	(b) Scope and Variation	86
	(c) Legal Acts, Harmonization, and Member State Competence	87
7	Economic, Employment, and Social Policy	88
	(a) Basic Principles	88
	(b) Category and Legal Consequence	89
8	Common Foreign and Security Policy and Defence	89
9	Broad Treaty Provisions: The 'Flexibility' Clause	90
	(a) Article 308 EC	90
	(b) Article 352 TFEU	91

10	Broad Treaty Provisions: The Harmonization Clause	93
11	Subsidiarity	95
	(a) Pre-Lisbon	95
	(b) Post-Lisbon	96
12	Conclusions	102
13	Further Reading	103
<b>4</b>	<b>INSTRUMENTS AND THE HIERARCHY OF NORMS</b>	<b>105</b>
1	Central Issues	105
2	Instruments	106
	(a) Introduction	106
	(b) Regulations	107
	(c) Directives	108
	(d) Decisions	108
	(e) Inter-Institutional Agreements	109
	(f) Recommendations, Opinions, and Soft Law	109
3	Hierarchy of Norms	110
	(a) Rationale	110
	(b) Treaties and Charter	111
	(c) General Principles	111
	(d) Legislative Acts	113
	(e) Delegated Acts	114
	(f) Implementing Acts	116
	(g) Incomplete Categorization	120
4	Conclusions	121
5	Further Reading	122
<b>5</b>	<b>LEGISLATION AND DECISION-MAKING</b>	<b>124</b>
1	Central Issues	124
2	Legislative Initiative: Principle and Practice	124
3	Legislative Acts: The Ordinary Legislative Procedure	126
	(a) Pre-Lisbon	126
	(b) Ordinary Legislative Procedure	126
	(c) Ordinary Legislative Procedure: Stages in the Process	128
	(d) Ordinary Legislative Procedure: Practical Operation	130

(e) Ordinary Legislative Procedure: Power Dynamics	132
(f) Ordinary Legislative Procedure: Normative Foundations	133
4 Legislative Acts: Special Legislative Procedure	133
5 Legislative Acts: Council Voting Requirements	134
(a) Pre-Lisbon	134
(b) Post-Lisbon	135
6 Delegated Acts: Enactment and Control	137
(a) Pre-Lisbon: The Rationale for Comitology	137
(b) Post-Lisbon Delegated Acts: Demise of Comitology	138
(c) Evaluation	140
7 Implementing Acts: Enactment and Control	142
(a) The Lisbon Schema	142
(b) Evaluation	143
8 Enhanced Cooperation: Conditions and Use	145
9 EU Decision-Making: Process and Reality	146
(a) The Temporal Dimension	146
(b) The Inter-Institutional Dimension	148
10 EU Democracy: Argument and Evaluation	151
(a) The Nature of the Argument	152
(b) Evaluation: The Empirical Frame of Reference	153
(c) Evaluation: The Normative Frame of Reference	154
(d) Evaluation: The Shadow of the Financial Crisis	159
11 Conclusions	159
12 Further Reading	160
<b>6 DECISION-MAKING AND NEW FORMS OF GOVERNANCE</b>	<b>162</b>
1 Central Issues	162
2 Hierarchy, Classic Community Method, and New Governance	163
3 The New Approach to Harmonization	166
4 The Lisbon Agenda and the Open Method of Coordination	167
5 General EU Governance Reform Initiatives	171
(a) Subsidiarity and Proportionality	172
(b) Better Regulation and the Commission's White Paper on governance	174
6 Appraising the Move Towards New Forms of Governance	179
7 Conclusions	182
8 Further Reading	182

<b>7</b>	<b>THE NATURE AND EFFECT OF EU LAW: DIRECT EFFECT AND BEYOND</b>	<b>184</b>
1	Central Issues	184
2	Direct Effect: A Guide	185
3	Direct Effect of Primary Law: Treaty Articles, General Principles, and the Charter of Fundamental Rights	187
	(a) The Foundations: Direct Effect of Treaty Provisions in <i>Van Gend en Loos</i>	187
	(b) The Conditions for Direct Effect: Broadening the Conditions	190
	(c) Treaty Articles: Vertical and Horizontal Direct Effect	192
	(d) General Principles of EU Law	193
	(e) The Charter of Fundamental Rights	196
4	Direct Effect of Secondary Law: Regulations and Decisions	198
	(a) Regulations	198
	(b) Decisions	199
5	Directives: Direct Effect	200
	(a) Direct Effect of Directives	200
	(b) The Vertical/Horizontal Distinction	204
6	Directives: Enhancing Their Legal Effects	206
	(a) A Broad Concept of the State	206
	(b) 'Indirect Effect': Principle of Harmonious Interpretation	209
	(c) Incidental Horizontal Effects	216
	(d) Interaction with General Principles of Law	220
	(e) Regulations Conditional on Compliance with Directives	221
	(f) State Liability in Damages	222
7	Conclusions	222
8	Further Reading	223
<b>8</b>	<b>THE APPLICATION OF EU LAW: REMEDIES IN NATIONAL COURTS</b>	<b>225</b>
1	Central Issues	225
2	The Principles of National Procedural Autonomy, Equivalence, and Practical Possibility	226
	(a) Where No Relevant EU Rules Exist: National Law Determines the Conditions for Enforcement of EU Rights	226
	(b) The Principles of Equivalence and Practical Possibility	227
	(c) No Obligation to Create New Remedies (Unless . . .)	228
3	Emergence of Requirements of Proportionality, Adequacy, and Effective Judicial Protection	229
4	Development of the 'Effectiveness' Requirement	231
	(a) A Strong Initial Requirement	231

(b)	A More Cautious Approach	235
(c)	When Specific Remedies Must Be Made Available	237
5	The Current Approach: Balancing Effective Judicial Protection and National Procedural Autonomy	239
(a)	Effectiveness	239
(b)	Equivalence	246
(c)	The Effect of the Plaintiff's Conduct on the Right to an Effective Remedy	250
6	Summary	250
7	The Principle of (State) Liability for Breach of EU Law	251
(a)	Origins of the Principle	251
(b)	Clarifying and Extending the Principle	253
(c)	The Conditions for State Liability	257
(d)	State Liability and the National Remedial Framework	261
(e)	State Liability as a Residual Remedy?	263
8	Conclusions	264
9	Further Reading	265
9	<b>THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL LAW: SUPREMACY</b>	266
1	Central Issues	266
2	First Dimension: Supremacy from the ECJ's Perspective	266
(a)	Foundations	266
(b)	Ambit	268
(c)	The National Bodies That Must Apply the Supremacy Doctrine	271
(d)	Impact on National Law	272
(e)	Declaration 17 on Primacy	274
(f)	Relation with Direct Effect	276
(g)	Conclusion	277
3	Second Dimension: Supremacy from the Perspective of the Pre-2004 Member States	278
(a)	Germany	279
(b)	Italy	290
(c)	France	292
(d)	The United Kingdom	296
4	Second Dimension: Supremacy from the Perspective of the Post-2004 Member States	304
(a)	Central and East European States	304
(b)	Poland	305
(c)	Czech Republic	307



5	Constitutional Pluralism and National Identity	309
	(a) Constitutional Pluralism	309
	(b) National Identity	312
6	Conclusions	313
7	Further Reading	314
<b>10</b>	<b>EU INTERNATIONAL RELATIONS LAW</b>	<b>316</b>
1	Central Issues	316
2	Introduction: The EU as an International Actor and the General Principles of EU External Action	317
	(a) The EU as an International Actor	317
	(b) The Constitutional Framework and General Principles of EU External Action	318
	(c) The Post-Lisbon Institutions of EU International Action	319
3	External Capacity and EU Competence	321
	(a) International Legal Personality	321
	(b) The Need for a Legal Basis and the Limits of External EU Competence	322
	(c) Express and Implied Competence	324
	(d) Exclusive EU Competence	327
	(e) Shared Competence	333
	(f) Summary	335
4	Four Fields of EU External Action	335
	(a) The Common Commercial Policy (CCP)	336
	(b) Association, Partnership, Cooperation, and Neighbourhood Relations	339
	(c) Development Policy, Technical Cooperation, and Humanitarian Aid	341
	(d) External Dimensions of Other Internal Policies	342
5	The Common Foreign and Security Policy	344
	(a) The Scope of the CFSP	344
	(b) The Constitutional Nature of the CFSP	346
	(c) The CFSP and Economic Sanctions	347
6	The Conclusion of International Agreements by the EU and Other Forms of EU International Practice	349
	(a) EU Procedures for Concluding International Agreements	349
	(b) Mixed Agreements	352
	(c) The Role of the European Parliament	353
	(d) The Member States' Duty of Sincere Cooperation	354
	(e) Cooperation Within International Organizations	355
7	The EU and International Law	355
	(a) International Agreements Concluded by the EU are Binding Upon It and are Part of EU Law	356

(b)	The EU Legal System as an Autonomous Legal Order	356
(c)	The Effect of Other Rules of International Law, and of International Agreements to Which the Member States are Party	358
8	The Legal Effect of International Agreements in the EU Legal Order	361
9	The Role of The CJEU in EU International Relations	369
(a)	Pre-Emptive Jurisdiction: The Advisory Opinion Procedure of Article 218(11)	369
(b)	Jurisdiction of the CJEU over International Agreements under Other EU Treaty Procedures	371
(c)	The CJEU and Mixed Agreements	372
(d)	The CJEU and the CFSP	374
10	Coherence, Consistency, and Cooperation in the Governance of EU International Relations	375
(a)	International Representation and the EU	375
(b)	The Requirement of Coherence across Policies	376
(c)	Coordination Between the Member States and the EU: Cooperation and Compliance	377
11	Conclusions	378
12	Further Reading	379
<b>11</b>	<b>HUMAN RIGHTS IN THE EU</b>	<b>380</b>
1	Central Issues	380
2	Introduction	382
3	The ECJ Discovers the ‘General Principles of EU Law’	383
4	The ECJ Develops the General Principles of EU Law	384
(a)	The ECHR as a Source of Special Significance for the General Principles of EU Law	385
(b)	Other International Human Rights Instruments	386
(c)	National Constitutional Traditions	388
5	Institutional and Policy Developments	390
(a)	The Inclusion of Human Rights in the Treaty Framework	390
(b)	The Fundamental Rights Agency	391
(c)	EU Human Rights Powers and Policies	392
6	The EU Charter of Fundamental Rights	394
(a)	Introduction	394
(b)	Content	396
(c)	The ‘Horizontal’ Clauses	397

7	Human Rights-Based Judicial Review of EU Action	400
	(a) Challenges to EU Legislation	401
	(b) Rights-Based Challenges to EU Administrative Action	406
	(c) Construing EU Legislation In Conformity with Fundamental Rights	408
	(d) Summary	408
8	Human Rights-Based Challenges to Member State Action	409
	(a) Member States as Agents of the EU: Implementing and Applying EU Measures	410
	(b) Member States Derogating From EU Rules or Restricting EU Rights	413
	(c) Other Kinds of Member State Action ‘Within the Scope of EU Law’	415
	(d) Situations Falling Outside the Scope of EU Law	418
	(e) Horizontal Application of the Charter?	419
9	The EU and the ECHR	419
	(a) Accession by the EU to the ECHR	419
	(b) Indirect Review of EU Acts by the ECtHR Prior to Accession	422
	(c) Mutual Influence of the CJEU and the ECtHR Prior to Accession	425
10	Conclusions	427
11	Further Reading	427
<b>12</b>	<b>ENFORCEMENT ACTIONS AGAINST MEMBER STATES</b>	<b>429</b>
	1 Central Issues	429
	2 The Function and Operation of the Infringement Procedure	431
	(a) Nature and Function of the Article 258 Procedure	431
	(b) Operation of the Procedure	434
	3 Relationship Between ‘Public’ and ‘Private’ Enforcement Mechanisms	436
	4 The Commission’s Discretion	436
	5 The Reasoned Opinion	439
	(a) Function	439
	(b) Form and Content	440
	(c) Confidentiality of the Reasoned Opinion	442
	6 Why is an Enforcement Action Admissible After the Breach is Remedied?	443
	7 Types of Breach by Member States of EU Law	444
	(a) Breach of the Obligation of Sincere Cooperation Under Article 4(3) TEU	445
	(b) Inadequate Implementation of EU Law	446
	(c) Breaches Which Interfere with EU External Relations	448
	(d) Systemic and Persistent Breaches or General Practices	449
	(e) Action by the Courts of a Member State	450

8	State Defences in Enforcement Proceedings	450
9	The Consequences of an Article 258 Ruling	453
10	Article 259	453
11	Article 260 TFEU: The Pecuniary Penalty	454
12	Interim Measures	461
13	Conclusions	462
14	Further Reading	462
<b>13</b>	<b>PRELIMINARY RULINGS</b>	<b>464</b>
1	Central Issues	464
2	Foundations: Article 267	465
	(a) Questions That Can Be Referred	466
	(b) Courts or Tribunals Which Can Refer	466
	(c) Courts or Tribunals Which Must Refer	468
	(d) Relationship Between National Courts	469
	(e) National Court Raising EU Law of Its Own Volition	470
3	The Existence of a Question: Development of Precedent	471
	(a) National Law in Breach of EU Law and Prior CJEU Rulings	471
	(b) The Validity of EU Legislation and Prior CJEU Rulings	474
	(c) CJEU Rulings and Legal Certainty	476
	(d) Conclusion	478
4	The Existence of a Question: The ' <i>Acte Clair</i> ' Doctrine	478
	(a) Summary	482
5	The Decision to Refer: The National Court's Perspective	482
6	The Decision to Accept the Reference: The CJEU's Perspective	484
	(a) The Liberal Initial Approach	485
	(b) The CJEU Asserts Authority Over Cases Referred	486
	(c) Cases Where the CJEU has Declined Jurisdiction	490
	(d) Recommendations to National Courts on Preliminary References	494
	(e) Limits of the Power to Decline a Case	494
	(f) Summary	496
7	The Decision on the Reference: Interpretation versus Application	496
8	Development of an EU Judicial System: National Courts and the CJEU	499
	(a) Precedent	499
	(b) <i>Acte clair</i>	500
	(c) Sectoral Delegation	501

9	Development of an EU Judicial System: CJEU, General Court, and National Courts	501
	(a) The Caseload Problem	501
	(b) Limiting the National Courts Empowered to Make a Reference	503
	(c) A Filtering Mechanism Based on the Novelty, Complexity, or Importance of the Question	503
	(d) The National Court Proposes an Answer to the Question	504
	(e) Towards an Appellate System	504
	(f) Creation of Decentralized Judicial Bodies	505
	(g) General Court to Have Jurisdiction to Give Preliminary Rulings	506
10	Conclusions	507
11	Further Reading	507
14	<b>REVIEW OF LEGALITY: ACCESS</b>	509
1	Central Issues	509
2	Article 263(1): Bodies Subject to Review	509
3	Article 263(1): Acts Subject to Review	510
	(a) General Principles	510
	(b) Non-Existent Acts	513
	(c) Limitations on Review	513
4	Article 263(2)–(3): Standing for Privileged and Quasi-Privileged Applicants	514
5	Article 263(4): Standing for Non-Privileged Applicants	515
	(a) Direct Concern	515
	(b) Individual Concern: <i>Plaumann</i>	517
	(c) Individual Concern: Lisbon Treaty Reform	528
	(d) Summary	532
6	Article 267: Indirect Challenge to the Legality of EU Acts	533
	(a) The Rationale for Using Article 267	533
	(b) The Acts That Can Be Challenged Under Article 267	534
	(c) ‘A Complete System of Legal Protection’	535
7	Article 265: Failure to Act	537
	(a) Reviewable Omissions	537
	(b) Procedure	539
	(c) Standing	539
8	Article 277: The Plea of Illegality	539
	(a) The Acts That Can Be Challenged	539
	(b) The Parties Who Can Use Article 277	541

9	Conclusions	542
10	Further Reading	542
<b>15</b>	<b>REVIEW OF LEGALITY: GROUNDS OF REVIEW</b>	<b>544</b>
1	Central Issues	544
2	Lack of Competence	545
3	Infringement of an Essential Procedural Requirement	545
	(a) Right to be Heard	545
	(b) Consultation and Participation	546
	(c) Duty to Give Reasons	548
4	Infringement of the Treaty or Any Rule of Law Relating to its Application	550
	(a) Scope	550
	(b) General Principles of Law: Proportionality	551
	(c) General Principles of Law: Legal Certainty and Legitimate Expectations	558
	(d) General Principles of Law: Non-Discrimination	564
	(e) General Principles of Law: Transparency	567
	(f) General Principles of Law: Precautionary Principle	575
5	Misuse of Power	576
6	The Intensity of Review	577
7	The Consequences of Illegality and Invalidity	579
8	Conclusions	581
9	Further Reading	582
<b>16</b>	<b>DAMAGES ACTIONS AND MONEY CLAIMS</b>	<b>583</b>
1	Central Issues	583
2	Discretionary Acts	583
	(a) The General Test	584
	(b) Legislative and Non-Legislative Discretionary Acts	585
	(c) Superior Rule of Law	585
	(d) Flagrant Violation/Serious Breach	587
	(e) Assessment	590
	(f) Summary	590
3	Non-Discretionary Acts	591
	(a) The General Principle: Illegality, Causation, Damage	591
	(b) Application of the General Principle	591
	(c) The Meaning of Illegality	592
	(d) Summary	593

4	Official Acts of Union Servants	594
5	Valid Legislative Acts	595
	(a) The Nature of the Problem	595
	(b) The Case Law	596
6	Causation and Damage	598
	(a) Causation	598
	(b) Damage	599
7	Joint Liability of the EU and Member States	601
	(a) Procedural Issues	601
	(b) Substantive Issues	601
8	Contract	604
9	Restitution	605
10	Conclusions	606
11	Further Reading	606
<b>17</b>	<b>THE SINGLE MARKET</b>	<b>607</b>
1	Central Issues	607
2	Economic Integration: Forms and Techniques	607
	(a) Forms of Economic Integration	607
	(b) Techniques of Economic Integration	608
3	Pre-1986: Limits of Integration	609
4	Single European Act 1986: The Economics and Politics of Integration	609
	(a) The Economic Dimension: The Commission's White Paper	609
	(b) The Political Dimension: The Politics of Integration	612
5	The Internal Market: Legislative Reform and the SEA	614
	(a) Article 26: The Obligation Stated	614
	(b) Article 27: The Obligation Qualified	615
	(c) Article 114(1): Facilitating the Passage of Harmonization Measures	615
	(d) Article 114(2)-(10): Qualifications to Article 114(1)	618
6	The Internal Market: The New Legislative Approach to Marketing of Products and Harmonization	620
	(a) The Rationale for the New Approach	620
	(b) The Elements of the New Approach	621
7	The Internal Market: Tensions and Concerns	627
	(a) Consumer Interests and Commercial Power	627
	(b) The Single Market, Market Freedom, and Structural Balance	629

(c) The Challenge to Positive Integration	630
(d) Politics, Economics, and the Single Market Enterprise	630
8 The Internal Market: Reconceptualization	632
9 Conclusions	635
10 Further Reading	636
<b>18 FREE MOVEMENT OF GOODS: DUTIES, CHARGES, AND TAXES</b>	<b>638</b>
1 Central Issues	638
2 Articles 28–30: Duties and Charges	639
(a) Duties and Charges: Effect Not Purpose	640
(b) Charges Having an Equivalent Effect: General Principles	641
(c) Charges Having an Equivalent Effect: Inspections and the ‘Exchange Exception’	642
(d) Charges Having an Equivalent Effect: Inspections and Fulfilment of Mandatory Legal Requirements	644
(e) Recovery of Unlawful Charges	646
(f) The Customs Union: The Broader Perspective	646
3 Articles 110–113: Discriminatory Tax Provisions	647
(a) The Purpose of Article 110	648
(b) Article 110(1): Direct Discrimination	648
(c) Article 110(1): Indirect Discrimination	649
(d) Article 110: National Autonomy and Fiscal Choices	650
(e) The Relationship Between Article 110(1) and (2)	652
(f) Article 110(1) and (2): The Determination of Similarity	653
(g) Article 110(2): The Determination of Protective Effect	655
(h) Taxation: The Broader Legal Perspective	657
(i) Taxation: The Broader Political Perspective	658
4 The Boundary Between Articles 28–30 and 110–113	659
(a) Levies Imposed on Importers	659
(b) Imports Taxed But Not Made By the State of Import	660
(c) Selective Tax Refund	661
5 Conclusions	662
6 Further Reading	663
<b>19 FREE MOVEMENT OF GOODS: QUANTITATIVE RESTRICTIONS</b>	<b>665</b>
1 Central Issues	665
2 Directive 70/50 and <i>Dassonville</i>	666



3	Discriminatory Barriers to Trade	668
	(a) Import and Export Restrictions	668
	(b) Promotion or Favouring of Domestic Products	669
	(c) Price Fixing	672
	(d) National Measures versus Private Action	673
	(e) Summary	674
4	Indistinctly Applicable Rules: <i>Cassis de Dijon</i>	674
	(a) Foundations: <i>Cassis de Dijon</i>	674
	(b) Application: The Post- <i>Cassis</i> Jurisprudence	677
	(c) Indistinctly Applicable Rules: Article 35	677
	(e) Indistinctly Applicable Rules: The Limits of Article 34	678
5	Indistinctly and Distinctly Applicable Rules: <i>Keck</i> and Selling Arrangements	681
	(a) <i>Keck</i> : Selling Arrangements	681
	(b) <i>Keck</i> : Static and Dynamic Selling Arrangements	683
	(c) <i>Keck</i> and Selling Arrangements: Two Qualifications	683
6	Indistinctly and Distinctly Applicable Rules: Product Use	687
7	The Current Law: Summary	689
8	The Current Law: Assessment	690
	(a) Market Access as Overarching Principle	690
	(b) Market Access as Slogan	693
	(c) Summary and Choices	695
9	Defences to Discriminatory Measures: Article 36	695
	(a) Public Morality	696
	(b) Public Policy	697
	(c) Public Security	698
	(d) Protection of Health and Life of Humans, Animals, or Plants	699
	(e) Other Grounds for Validating Discriminatory Measures	702
	(f) The Relationship Between Harmonization and Article 36	703
10	Defences to Indistinctly Applicable Rules: The Mandatory Requirements	704
	(a) The Rationale for the Mandatory Requirements	704
	(b) The Relationship Between the Mandatory Requirements and Article 36	705
	(c) The Mandatory Requirements: Consumer Protection	706
	(d) The Mandatory Requirements: Fairness of Commercial Transactions	707
	(e) The Mandatory Requirements: Public Health	707
	(f) Other Mandatory Requirements	709
	(g) Mandatory Requirements and Harmonization	711
	(h) Summary	711

11	Free Movement of Goods and <i>Cassis</i> : The Broader Perspective	712
	(a) The Commission's Response to <i>Cassis</i>	712
	(b) Problems With Realizing the <i>Cassis</i> Strategy	713
	(c) Problems Flowing from the <i>Cassis</i> Strategy	715
12	Conclusions	717
13	Further Reading	718
<b>20</b>	<b>FREE MOVEMENT OF CAPITAL AND ECONOMIC AND MONETARY UNION</b>	<b>721</b>
1	Central Issues	721
2	Free Movement of Capital	721
	(a) The Original Treaty Provisions	721
	(b) The Current Provisions: The Basic Principle	722
	(c) The Current Provisions: The Exceptions	724
3	EMU and the European Monetary System: Early Attempts	726
4	Economic and Monetary Union: The Three Stages	727
	(a) Stage One and the Delors Report	727
	(b) Stage Two and the Maastricht Settlement	727
	(c) Stage Three and the Legal Framework	728
5	EMU: Economic Foundations	729
	(a) The Case for EMU	729
	(b) The Case Against EMU	730
	(c) EMU: Economics, Politics, and Law	731
6	EMU: Monetary Union and the ECB	731
	(a) ECB and ESCB	732
	(b) Monetary Policy	733
	(c) Policy Issues: Central Bank Independence	733
7	EMU: Coordination of Economic Policy	735
	(a) Multilateral Surveillance Procedure	736
	(b) Excessive Deficit Procedure	736
	(c) Policy Issues: Economic Policy Coordination	737
8	Conclusions	741
9	Further Reading	742
<b>21</b>	<b>FREE MOVEMENT OF WORKERS</b>	<b>744</b>
1	Central Issues	744
2	Article 45: Direct Effect	745

3	Article 45: Worker and the Scope of Protection	748
	(a) Definition of ‘Worker’: An EU Concept	748
	(b) Definition of ‘Worker’: Minimum-Income and Working-Time Requirements	749
	(c) Definition of ‘Worker’: Purpose of the Employment	753
	(d) Definition of ‘Worker’: The Job-Seeker	756
	(e) Scope of Protection: New Member States	758
4	Article 45: Discrimination, Market Access, and Justification	758
	(a) Direct Discrimination	758
	(b) Indirect Discrimination	759
	(c) Obstacles to Access to the Employment Market	761
	(d) Internal Situations	762
	(e) Objective Justification	763
5	Article 45(4): The Public-Service Exception	765
	(a) The Meaning Determined By the Court, Not the Member States	766
	(b) The ECJ’s Test for Public Service	766
	(c) Application of the ECJ’s Test	768
	(d) Discriminatory Conditions of Employment within the Public Service are Prohibited	770
6	Directive 2004/38: Right of Entry and Residence of Workers and Their Families	770
	(a) Formal Requirements for Workers	770
	(b) Job-Seekers and the Unemployed	774
	(c) The Right of Permanent Residence	775
	(d) Conditions for Exercise of the Right to Residence	776
7	Regulation 492/2011: Substantive Rights and Social Advantages	776
	(a) Regulation 492/2011	776
	(b) Article 7(2) of Regulation 492/2011	778
	(c) Article 7(3) of Regulation 492/2011 and Educational Rights for Workers	780
	(d) Article 10 of Regulation 492/2011: Educational Rights for Children	781
	(e) Rights of Families as Parasitic on the Workers’ Rights	782
	(f) Family Members in an Internal Situation	784
	(g) Directive 2014/54	785
8	Directive 2004/38: Public Policy, Security, and Health Restrictions	786
	(a) Three Levels of Protection	786
	(b) Article 27: General Principles	786
	(c) Article 28: Expulsion	787
	(d) Article 29: Public Health	790
	(e) Article 30: Notification of Decisions	790
	(f) Article 31: Procedural Safeguards	790
	(g) Articles 32–33: Duration of Exclusion Orders and Expulsion	791

9	Conclusions	791
10	Further Reading	792
<b>22</b>	<b>FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES</b>	<b>794</b>
1	Central Issues	794
2	Differences and Commonalities between the Free Movement of Persons, Services, and Establishment	796
	(a) Comparing the Treaty Chapters	796
	(b) Are the Freedoms Horizontally Applicable?	797
	(c) The 'Official Authority' Exception	799
	(d) The Public Policy, Security, and Health Justifications	800
	(e) Legislation Governing Entry, Residence, and Expulsion	801
3	The Right of Establishment	801
	(a) The Effect of Article 49	802
	(b) The Scope of Article 49	804
	(c) Establishment of Companies	810
	(d) Summary	819
4	Free Movement of Services	820
	(a) The Effect of Article 56 TFEU	822
	(b) The Scope of Article 56	824
	(c) Justifying Restrictions on the Free Movement of Services	832
	(d) Non-Discriminatory Restrictions Under Article 56	839
5	General Legislation to Facilitate Establishment and Services: Recognition of Professional Qualifications	842
	(a) The Initial Sectoral Harmonization/Coordination Approach	842
	(b) Introduction of the Mutual Recognition Approach	843
	(c) Directive 2005/36 on the Recognition of Professional Qualifications	844
	(d) Situations Not Covered by the Legislation	845
6	General Legislation to Facilitate Establishment and Services: The Services Directive	846
7	Conclusions	850
8	Further Reading	851
<b>23</b>	<b>CITIZENSHIP OF THE EUROPEAN UNION</b>	<b>852</b>
1	Central Issues	852
2	Introduction	853
3	The Rights of Free Movement and Residence of EU Citizens	856
	(a) Directive 2004/38 on the Rights of Free Movement and Residence for EU Citizens and their Families	857

4	The Impact of EU Citizenship Law	860
	(a) Article 20 TFEU Created an Autonomous and Directly Effective Right of Movement and Residence	860
	(b) Developments in the Law on ‘Wholly Internal Situations’ Under the Impact of Articles 20 and 21 TFEU	865
	(c) The Impact of Articles 20 and 21 on the Rights of EU Nationals Who Are Neither Economically Active Nor Economically Self-Sufficient	872
	(d) Articles 20 and 21 TFEU Have Enhanced the Rights of EU Citizens to Challenge Restrictive Member State Measures	884
	(e) Summary	887
5	Political Rights of Citizenship	888
6	Conclusions	890
7	Further Reading	891
<b>24</b>	<b>EQUAL TREATMENT AND NON-DISCRIMINATION</b>	<b>892</b>
1	Central Issues	892
2	EU Anti-Discrimination Law: Origins and Context	893
3	Equal Treatment and Non-Discrimination: The Legal Framework	894
4	The Origins: Article 157 TFEU and the Principle of Equal Pay for Women and Men	895
	(a) The Social and Economic Underpinnings of Article 157	896
	(b) The Breadth of Article 157: The Definition of Pay	898
5	Article 19 TFEU and the Article 19 Directives	905
	(a) The Race Directive 2000/43	906
	(b) The Framework Employment Directive 2000/78	908
	(c) The Proposed New Article 19 Directive on Equal Treatment	913
6	The Gender Directives	914
	(a) The ‘Recast’ Equal Treatment Directive 2006/54	914
	(b) The Social Security Directive 79/7	922
	(c) The Pregnancy Directive 92/85	925
	(d) Directive 2004/113 on Access to and Supply of Goods and Services	928
	(e) Parental Leave	930
	(f) Directive 2010/41 on the Self-Employed	931
7	The General Principle of Equal Treatment and Non-Discrimination	932
8	Common Provisions and Concepts of EU Anti-Discrimination Law	935
	(a) Direct and Indirect Discrimination	935
	(b) Exceptions and Justifications	938
	(c) Positive Action	950
	(d) Remedies	955

9	Conclusions	961
10	Further Reading	962
25	<b>AFSJ: EU CRIMINAL LAW</b>	<b>964</b>
1	Central Issues	964
2	Maastricht to Lisbon	965
	(a) Maastricht: Three Pillars	965
	(b) Amsterdam: Three Pillars Modified	966
3	Rationale	966
	(a) Rationale for the Three-Pillar Structure	966
	(b) Rationale for Subject Matter Comprising AFSJ	967
4	Lisbon Treaty: General Principles	972
	(a) Objectives	972
	(b) Treaty Architecture	973
	(c) Competence	973
	(d) Article 67 TFEU	974
	(e) Institutions	974
	(f) Union Courts	976
	(g) UK and the AFSJ	977
5	Criminal Law and Procedure: Pre-Lisbon	979
6	Criminal Law and Procedure: Post-Lisbon	981
	(a) Criminal Law	981
	(b) Criminal Procedure	983
	(c) Crime Prevention	984
	(d) Criminal Investigation and Prosecution	984
	(e) Criminal Prosecution and the European Public Prosecutor	985
	(f) Crime and Police Cooperation	985
7	Criminal Law and Procedure: Objectives	986
8	Criminal Law and Procedure: Challenges	987
	(a) Member State Acceptance	987
	(b) Mutual Recognition	987
	(c) Mutual Recognition and the European Arrest Warrant	990
	(d) Mutual Recognition and the European Evidence Warrant	995
	(e) Substantive Criminal Law	996
9	Conclusions	998
10	Further Reading	999

26	COMPETITION LAW: ARTICLE 101	1001
1	Central Issues	1001
2	Competition Law: Objectives	1001
3	Article 101: The Treaty Text	1002
4	Article 101(1): Undertakings	1003
5	Article 101(1): Agreements, Decisions, and Concerted Practices	1004
	(a) Agreements	1004
	(b) Concerted Practice	1007
6	Article 101(1): Object or Effect of Preventing, Restricting, or Distorting Competition	1012
	(a) Nature of the Problem	1012
	(b) Experience in the United States	1013
	(c) The Academic Debate in the EU	1013
	(d) The Case Law	1015
	(e) Summary	1024
7	Article 101(1): The Effect on Trade Between Member States	1025
8	Article 101(1): The <i>De Minimis</i> Doctrine	1026
9	Article 101(3): Exemptions	1026
	(a) Individual Exemption	1027
	(b) Block Exemption	1029
10	Article 101: Competition and Non-Competition Considerations	1030
	(a) Article 101(1)	1030
	(b) Article 101(3)	1031
11	Article 101: Vertical Restraints	1032
	(a) The Economic Debate	1032
	(b) The Commission and Vertical Restraints	1035
	(c) Exclusive Distribution	1037
	(d) Selective Distribution	1038
	(e) Franchising	1042
	(f) Exclusive Purchasing	1043
	(g) The Block Exemption	1044
	(h) Summary	1048
12	Competition Law: Enforcement	1048
	(a) The Traditional Approach and the Modernization White Paper	1048
	(b) The New Regime	1049

(c) Judicial Review	1051
(d) Damages Actions	1052
13 Conclusions	1053
14 Further Reading	1053
<b>27 COMPETITION LAW: ARTICLE 102</b>	<b>1055</b>
1 Central Issues	1055
2 Dominant Position: Defining the Relevant Market	1056
(a) The Product Market	1056
(b) The Geographic Market	1059
(c) The Temporal Factor	1060
(d) The Commission Notice on Market Definition	1060
3 Dominant Position: Market Power	1061
(a) Single Firm Dominance	1061
(b) Joint Dominance	1066
4 Abuse: Three Problems of Interpretation	1068
(a) Who is Article 102 Designed to Protect?	1068
(b) What Kinds of Behaviour Are Abusive?	1069
(c) Abuse of Which Market?	1069
5 Abuse: Particular Examples	1070
(a) Abuse and Mergers	1070
(b) Abuse and Refusal to Supply	1072
(c) Abuse and Price Discrimination	1077
(d) Abuse and Predatory Pricing	1082
(e) Abuse and Selective Pricing	1084
6 Defences: Objective Justification, Proportionality, and Efficiency	1085
7 Article 102: Reform	1085
8 Conclusions	1087
9 Further Reading	1087
<b>28 COMPETITION LAW: MERGERS</b>	<b>1090</b>
1 Central Issues	1090
2 Merger Control: The Policy Rationale	1091
(a) Arguments Against Mergers	1091
(b) Arguments in Favour of Mergers	1092
3 Regulation 139/2004: Jurisdictional Issues	1093
(a) Concentration: General	1093



(b)	Concentration: Joint Ventures	1094
(c)	Concentrations With an EU Dimension	1095
(d)	The Relation Between EU and National Merger Control	1096
(e)	Residual Role for Articles 101 and 102 TFEU	1098
4	Regulation 139/2004: Procedural Issues	1099
(a)	Prior Notification	1099
(b)	Suspension Pending Investigation	1099
(c)	Investigation	1099
(d)	Investigation and Enforcement	1100
5	Regulation 139/2004: The Substantive Criteria	1101
(a)	Market Definition	1101
(b)	The Test	1101
(c)	Horizontal Mergers: Non-Coordinated Effects	1103
(d)	Horizontal Mergers: Coordinated Effects and Collective Dominance	1107
(e)	Vertical and Conglomerate Mergers: Coordinated and Non-Coordinated Effects	1111
(f)	Concentration and Efficiencies	1112
(g)	Concentrations and Failing Firms	1112
(h)	The Relevance of Non-Competition Considerations	1113
(i)	Remedies	1113
6	Judicial Review	1113
7	Conclusions	1114
8	Further Reading	1115
<b>29</b>	<b>THE STATE AND THE COMMON MARKET</b>	<b>1117</b>
1	Central Issues	1117
2	The State and the Market: General Principles	1117
(a)	The General Principle: The Competition Ethos	1117
(b)	The Qualification: Services of General (Economic) Interest	1118
3	Public Undertakings and Article 106	1120
(a)	Article 106(1)	1120
(b)	Article 106(2)	1125
(c)	Article 106(3)	1127
(d)	Article 106 and National Courts	1128
(e)	Summary	1129
4	The State, Articles 4(3) TEU, 101, 102, and 34 TFEU	1129
5	State Aids: Policy Development and Reform	1130
(a)	Policy Development	1130
(b)	Reform	1132

6	State Aids: The Substantive Rules and Article 107	1133
	(a) Definition of State Aid	1133
	(b) Article 107(2)	1139
	(c) Article 107(3)	1139
	(d) The Block Exemption	1145
7	State Aids: The Procedural Rules and Articles 108 and 109	1145
	(a) Review of Existing State Aids	1145
	(b) The Procedure for New State Aids: Notification and Preliminary Review	1146
	(c) The Procedure for State Aids: Detailed Investigation and Enforcement	1147
	(d) Exceptional Circumstances: Article 108(2), Paragraphs 3 and 4	1148
	(e) Article 109: Implementing Regulations	1148
	(f) Challenge to Commission Decisions	1149
	(g) Aid That Has Not Been Notified	1150
	(h) Recovery of Unlawful Aid	1152
8	State Aids, Market Integration, and Regional Policy	1153
	(a) Policy Foundations	1153
	(b) State Aid and Free Movement	1154
	(c) National and EU Regional Policy	1155
9	Conclusions	1156
10	Further Reading	1156
	<i>Index</i>	1159