Advanced EU law

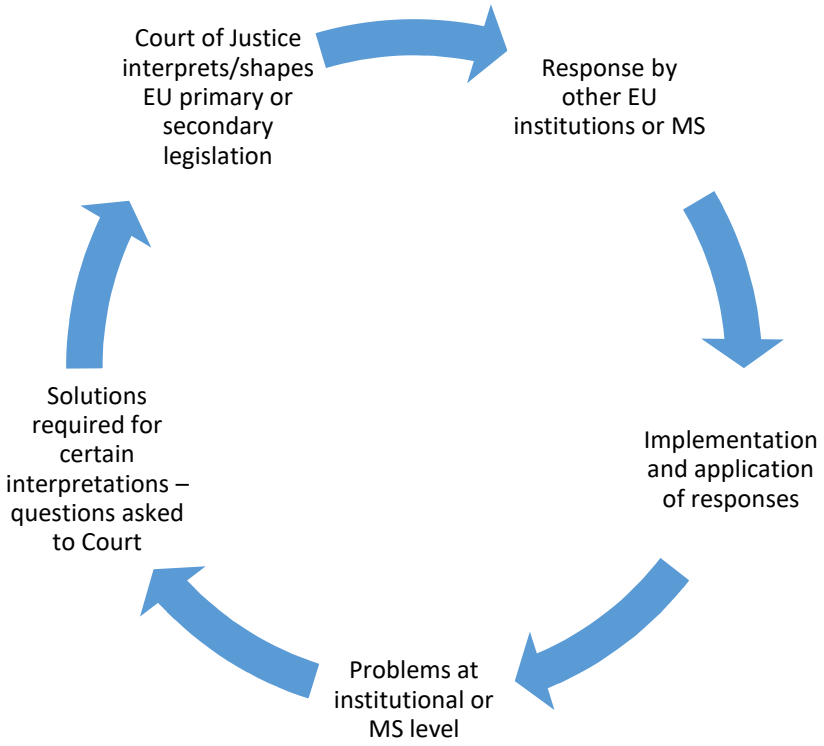
Prof. dr. Pieter Van Cleynenbreugel

Purpose of the course

- Advanced reflection on themes in EU law
  - Internal market law – how to make market integration work better?
  - EU institutional law – how to make institutions work better?
    - + guest lecture on sovereignty within EU law – prof. T. Eijsbouts – 10/11

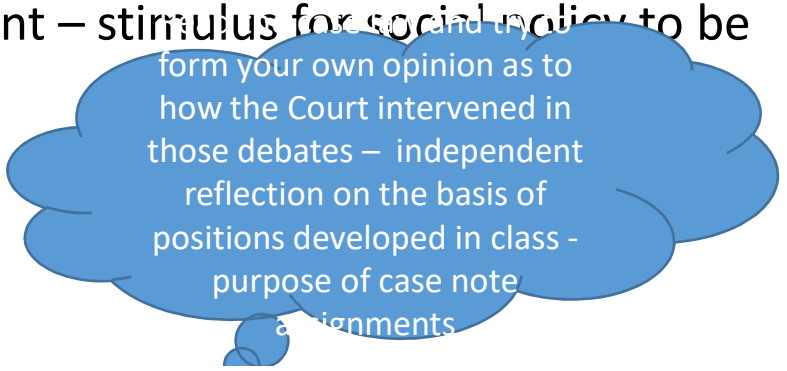
- Introduction to themes not covered generally in introductory EU law courses
  - Economic and Monetary Union – introductory session + Academic Workshop in Brussels – 12/12
  - Brexit

Approach: the politics of EU law



Approach

- Interactions between Court of Justice and other actors
  - Horizontal application of free movement law
    - limited recognition by Court (collective interest) – further development by legislator??
  - Social protection/social rights against the background of EU fundamental freedoms/economic rights
    - free movement as a starting point – social policy objectives can be a limit to free movement – stimulus for social policy to be developed at EU level



First class

- The politics of law:
  - Stage 1: Court of Justice of the European Union came up with
    - direct effect – *Van Gend & Loos*
    - primacy of supranational law over all provisions of Member States' laws – *Costa/ENEL* + *Internationale Handelsgesellschaft*
  - Stage 2: individuals and Member State judges could start to use European Union law as an *instrument* to get annoying national rules or practices out of the way
    - problem: imperfect instrument if you can use it to get rid of Member States' fundamental rights protection ➔ judicial recognition of fundamental rights as principles of EU law
  - Stage 3: confronted with the imperfectness of the EU legal order, new « démarches » are necessary to perfect the legal order (P. Pescatore)
    - Charter of Fundamental Rights
  - Stage 4: new instruments are once again interpreted by the Court of Justice, which may necessitate further legislative or other steps to be taken
  - …

Second class

- Politics of law applied to EU internal market law
  - Horizontal application of free movement law
    - Personal scope of fundamental freedoms of movement not defined in the EU Treaties
    - Court swiftly recognises the *vertical direct effect* – free movement rights invocable against all kinds of public authorities…
    - Also applicable in horizontal relationships between private persons?
      - Not possible in the context of Directives!! – but what concerning Treaty provisions (EU primary law)
      - Gradual extension
        - Private sports associations – regulate in the collective interest - Walrave – Bosman
        - Professional orders and trade unions – associations – regulate in collective interest – Viking and Laval
        - Private standardisation organisations – Fra.Bo
        - Private employers when setting conditions that amount to regulation in the collective interest – Angonese and Raccanelli
      - Beyond this – no acceptance by Court, but willingness by EU legislator to do so: Services Directive and geo-blocking proposed Regulation

Third class

- Politics of law applied to EU internal market law
  - Economic freedoms versus social protection within the EU
    - EU fundamental freedoms serve above all to promote movement across Member States, which results in the abolition of obstacles to such movement – traditionally conceived social rights (right of association – right of trade union assistance – right to social assistance) are falling within the scope of Member States' law or of trade unions established in EU Member States : can those powers be maintained in light of on-going EU market integration?
    - Court says that balancing is necessary in this regard:
      - Right of association – Schmidberger – Charter of Fundamental Rights allows for such balancing
      - Trade union actions – Viking and Laval: certain blockade actions deemed disproportionate in this regard – EU legislation necessary to guarantee social protection and to avoid the race to the bottom
      - Social assistance – Dano – EU legislator intervened and limited possibilities to receive rights
    - Clear illustrations of the dynamics outlined in the previous classes …

Today

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework…
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of law in guaranteeing data protection

Data protection as part of EU internal market law

- Internal market = area without obstacles to free movement of goods, persons, services and capital
  - promoting movement
  - easier to also allow movement of personal data (information on health, preferences, past, background of individuals) ➔ inherently related to privacy as an individual fundamental right
    - in EU law, problem of division of powers between EU and Member States

Data protection as part of EU internal market law

- Internal market = area without obstacles to free movement of goods, persons, services and capital

  - Article 114 TFEU – legal basis to harmonise discrepancies in the EU internal market – protection of personal data, as the commercial pendant of the right to privacy – Court recognises fundamental rights as general principles of EU law – balancing free movement and fundamental rights

  - Directive 95/46 as a direct response – EU itself making this balance and taking this away from judges on a case-by-case basis

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1995: the EU legislator intervenes

- Framework text in force = Directive 95/46
  - Complemented by e-privacy Directive 2002 in relation to electronic communications, most notably telecommunications – enhancing security in public telecommunications networks (FYI)
  - Adopted in the pre-Facebook and –Google age: before rise of the internet and online platforms – targeting all traders potentially exchanging data in cross-border settings

1995: the EU legislator intervenes

- Article 1
  - 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
  - 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.
    - Privacy never a justification for free movement restriction to go beyond the level of protection offered by the Directive

1995: the EU legislator intervenes

- What is processing data?
  - Article 2(a): ‘personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity
  - Article 2(b): 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction

1995: the EU legislator intervenes

- Article 4: obligation for Member States to apply the directive where:
  - (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
  - (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
  - (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

1995: the EU legislator intervenes

- Article 6: Personal data must be:
  - (a) processed fairly and lawfully;
  - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
  - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
  - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
  - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

1995: the EU legislator intervenes

- Article 7: processing can take place only if
  - (a) the data subject has *unambiguously given his consent*; or
  - (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
  - (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
  - (d) processing is necessary in order to protect the vital interests of the data subject; or
  - (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
  - (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

1995: the EU legislator intervenes

- Guarantees available to ‘data subjects’
  - Information obligations – Art. 11
  - Establishment of independent national authority – Art. 28
  - Liability of processors – Art. 23
  - Limits on transferring data to third countries when no adequate level of protection can be ensured there – Art. 25

1995: the EU legislator intervenes

- Specific rights available to ‘data subjects’
  - Art. 12: every data subject can obtain from the controller:
    - (a) without constraint at reasonable intervals and without excessive delay or expense:
      - Confirmation, communication and knowledge of the logic involved in any automatic processing of data concerning him;
    - (b) as appropriate the rectification, *erasure or blocking of data the processing of which does not comply with the provisions of this Directive*, in particular because of the incomplete or inaccurate nature of the data;
    - (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

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Towards a new regulatory framework?

- Charter of Fundamental Rights

- Court of Justice intervention calling for a more detailed regulatory framework
  - Right to be forgotten
  - Exchange of data with third countries

Towards a new regulatory framework?

- Article 8 Charter of Fundamental Rights of the European Union:
  - 1. Everyone has the right to the protection of personal data concerning him or her.
  - 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
  - 3. Compliance with these rules shall be subject to control by an independent authority.

Towards a new regulatory framework?

- Court of Justice, Case C-131/12 – the right to be forgotten

Towards a new regulatory framework?

- The Directive applies to
  - the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference
    - This must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data
  - the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d)

Towards a new regulatory framework?

- As a result,
  - the operator of a search engine is *obliged to remove* from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

  - however, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

Towards a new regulatory framework?

- Court of Justice, Case C-362/14 – Schrems

Towards a new regulatory framework?

- Facebook is to be considered as a processor of personal data,
  - Established a subsidiary in Ireland
  - Its servers are located in the United States
  - Data are processed in the United States
  - Data processed and/or available in the United States
  - U.S. public authorities, including its National Security Agency (NSA) engage in surveillance activities (e.g. the PRISM programme)
  - International safe harbor principles

Towards a new regulatory framework?

- Mr. Schrems, a lawyer, realised that the transfer of his data to such authorities could take place in contravention of Directive 95/46, as the EU had adopted Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission found that the U.S. ensured an adequate level of protection

  - Complaint in Ireland to contest this
  - Complaint rejected
  - High Court nevertheless raised question of compatibility of Decision with Article 8 Charter and Directive 95/46/EC

Towards a new regulatory framework?

- Article 25(6) of Directive 95/46/EC […], read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, *from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.*

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The 2016 Regulation

- Regulation 2016/579: art. 99 §2, only applicable from 25 May 2018
  - Why?
  - Recitals 6-7:
    - Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. […]
    - These developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market.
    - Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced.

The 2016 Regulation

- Same definitions of data, processing, controller

- Extraterritorial reach
  - Article 3, §1 and 3:
    - controller or processor established in the European Union, regardless of whether the processing takes place in the Union or not
    - MS law applies by virtue of public international law

  - NEW: processing of personal data of *data subjects who are in the Union*
    - By a controller or processor not established in the Union
    - Where processing relates to offering of goods or services to such data subjects
    - Monitoring of behaviour taking place in the Union

The 2016 Regulation

- Principally consent-based regime
  - Article 5: data processing for specified, explicit and legitimate purposes…
  - Article 6: consent, which can be withdrawn (Art. 7)
    - No consent when necessary for the purposes of the *legitimate interest pursued by* a private *controller or by a third party*
    - Consent: any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her

The 2016 Regulation

- Article 9: some data cannot be processed unless *explicit* consent has been given or vital interests need to be protected…
  - Processing of personal data shall be prohibited when they reveal
    - racial or ethnic origin
    - political opinions
    - religious or philosophical beliefs
    - trade union membership
    - the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person
    - data concerning health
    - data concerning a natural person's sex life
    - sexual orientation.

The 2016 Regulation

- More enhanced obligations imposed on data controllers
  - Article 7: data controller has to prove consent
  - Article 24: implementation of measures facilitating compiance with Regulation
  - Article 25: data protection by design and by default
  - Article 27: obligation to designate a representative in the European Union
  - Article 30: obligation to keep records
  - Article 32: security obligation
  - Article 35: impact assessment obligation
  - Article 37: designation of a data protection officer

The 2016 Regulation

- More and new rights granted to data subjects
  - Article 12: transparency obligation
  - Article 13: information to be provided
  - Article 14: information to be provided when data obtained from a third party – not the data subject
  - Article 15: right of access
  - Article 16: right to rectification
  - Article 17: right to be forgotten
  - Article 18: right to restriction of processing
  - Article 20: right to data portability
  - Article 21: right to object against data processing in the legitimate interest of a private controller; controller would then have to demonstrate compelling legitimate grounds for the processing, which override the interests, rights and freedoms of the data subject
  - Article 22: the right not to be subject to a decision based solely on automated processing, unless authorised and surrounded by sufficient safeguards
  - Article 23: in relation to public and criminal law investigations, rights outlined in the Regulation may be limited

The 2016 Regulation

- Specific new right – right to be forgotten – Article 17
  - + Article 25 – design by default

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Data retention as a complementary data protection legislative instrument

- Data processed also often are stored somewhere
  - Useful for law enforcement purposes, not necessarily marketing
  - How long can they be stored? For how much time?
  - EU law initiative: Directive 2006/24/EC – annulled by the Court in Digital Rights Ireland

Data retention as a complementary data protection legislative instrument

- *Digital Rights Ireland*
  - Interference with fundamental rights, needs to be justified
  - Para 51: an objective of general interest, however fundamental – such as the fight against serious crime – does not in itself suffice to make any data retention measure justifiable
  - Para 58: the Directive *applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy*
  - No criteria on access, no limitation on persons having access…

Data retention as a complementary data protection legislative instrument

- *Digital Rights Ireland*
  - In relation to the fundamental right to data protection in particular,
    - Para 66:
      - no sufficient safeguards effectively to protect the data and risk unlawful use or access
      - attention to sufficient level of security and protection appears lacking
      - control by independent data protection authority is lacking…

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The role of law in ensuring data protection

- Contrary to previous weeks, EU legislation from the very start strikes a balancing framework between free movement and the privacy of data subjects => already in 1995

- Court intervenes, filling certain gaps in order to point out limited adaptedness of legislation to new developments
  - Importance of fundamental rights in the Court's case law!

- EU legislator, willing to establish a digital single market intervenes again…

- Court will nevertheless have to clarify many of the new rights and obligations mentioned in the new Regulation…

Questions?

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Advanced EU law

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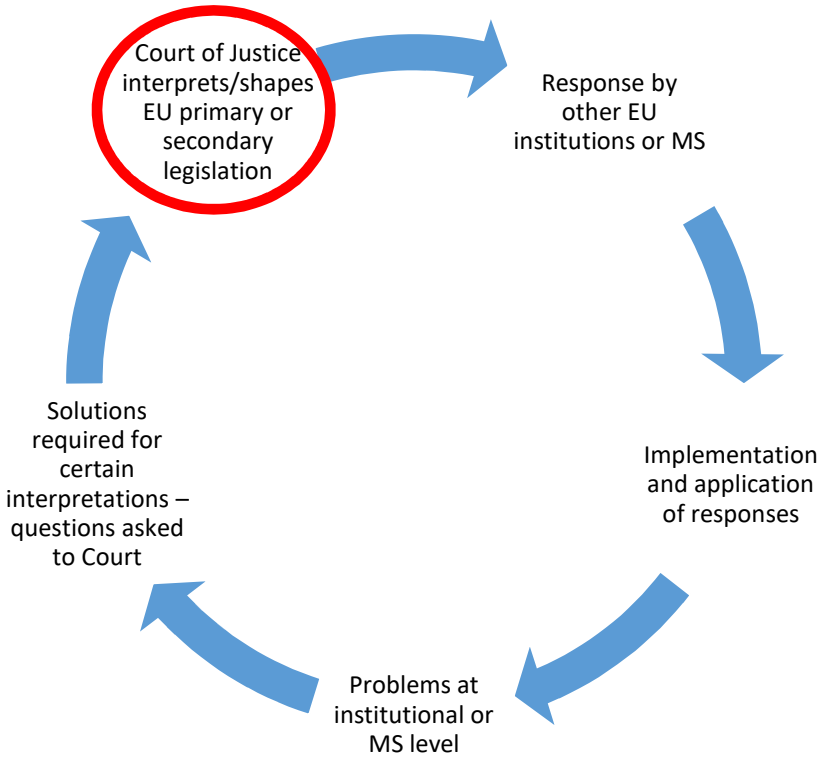
Planning

- 27 October: *submission case note 1* (on topics relating to lectures 1-4)
- 27 Oct : class on Transparency
- Week of 6 November: Feedback I => see eCampus next week for registration
- 10 November: class on sovereignty – guest lecture prof. Eijsbouts
- 17 November: class on Fundamental rights
- 22 November: visit to the Court of Justice – see eCampus
- 23 November – Jean Rey lecture on Brexit – 18.30 (604) – M. Barnier
- 24 November: *submission case note 2* (on topics relating to transparency or fundamental rights) – **NO CLASS**
- 1 December – class on EMU – basic principles and problems
- Week of 4 December: Feedback II => see eCampus for registration
- 8 December – **NO CLASS**
- Tuesday 12 December 13.00-18.00: Academic Workshop on ECB and EMU – Brussels (presence required, transport costs reimbursed (GoPass)
- 15 December – last class – Brexit: general and specific problems – Q&A

Approach: the politics of EU law: past weeks



Approach: the politics of EU law

From substantive to institutional law

- EU law constantly in motion: interaction between Court of Justice and EU legislator
  - Last weeks: internal market law
  - Today: EU institutional law

- EU institutions accompany substantive law initiatives
  - Institutions not part of a super-imposed master plan, but growing out of needs throughout the EU integration process
  - Commission – Council – Court of Justice of the European Union
  - European Parliament
  - Court of Auditors
  - European Central Bank

Institutional law

- EU institutions are part and parcel of the EU legal order and have to function within that legal order
  - Adopting EU law
  - Subjected to general principles of EU law and EU primary law
  - Functioning of institutions is overseen by Court of Justice of the European Union

- EU institutions have to respect more fundamental principles, which structure the institutional framework of the European Union
  - Accountability principles – including open and transparent decision-making
  - Fundamental rights as founding elements of the EU legal order
  - Member States' autonomy within the EU legal order - sovereignty

Transparency in decision-making at EU level

Today's lecture

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework

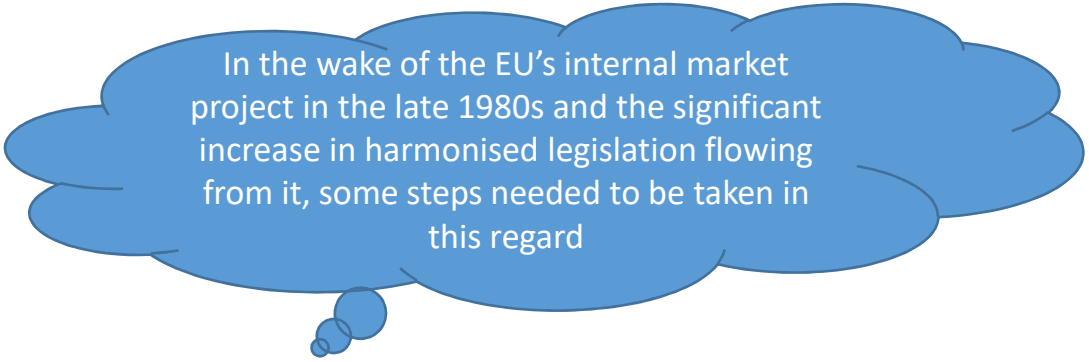
Transparency from practice to individual right

- Transparency – why important?
  - Directly related to ‘accountability’
  - Accountability related to legitimacy
  - Helps legitimise the actions taken by the European Union institutions

- The Rome Treaty did not foresee anything on transparency except for publication of EU legislative measures
  - What about documents/studies/other information that guided legislators in making policy choices and in drafting legislation?

Transparency from practice to individual right

We are not talking about access to documents concerning one individual's case before an administration, but access to documents of a general or individual nature in another person's case that may also be of interest to the general public or other individuals!!



Transparency from practice to individual right

- How to ensure transparency?
  - Making available all kinds of information prior to decisions being adopted – ex ante transparency
  - Making public, once the decision adopted, information that has informed decision-making by institutions – ex post transparency
  - Communicating as clearly as possible about what has been done – ex post transparency
  - Giving individuals the right to ask for access to documents made available previously to policymakers – ex post access to documents

Transparency from practice to individual right

- Earliest appearences: public procurement law – Member States' authorities have to be transparent in relation to tenders for public works

- Maastricht Treaty 1992 – Creation of European Union – TEU

  - Article 1 TEU – still Article 1 TFEU today (after Amsterdam, Nice and Lisbon Treaties)

    - Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen

  - Legal value of Article 1 TFEU??

Transparency from practice to individual right

- Calls/early initiatives favouring more transparency
  - Declaration 17 to the Maastricht Treaty (1992)
    - *Transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions*
  - Commission Communication 93/C 156/05 concerning public access to the institutions' documents, [1993] O.J. C 156/5
  - Communication 93/C 166/04 on openness in the Community, [1993] O.J. C 166/4
  - Code of Conduct concerning public access to Council and Commission documents, [1993] O.J. L 340/37
  - Council Decision 93/731/EC on public access to Council documents, [1993] O.J. L 340/43

Transparency from practice to individual right

- Calls/early initiatives favouring more transparency:

  - Commission Decision 94/90/ECSC, EC, EURATOM on public access to Commission documents, [1994] O.J. L 46/58
  - European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, [1997] O.J. L 263/27

Transparency from practice to individual right

Transparency from practice to individual right

- Establishment of European Ombudsman – Maastricht Tr
  - Own initiative investigation powers – see Article 228 TFEU
    - Inspired by Scandinavian traditions – Sweden, Finland…
  - 1995-1997 investigation into transparency in EU decision-making
  - 1997 recommendation – non binding advice from Ombudsman

    - Access to documents is an important tool to enhance legitimate and accountable governance

    - "it is important to recognize that an information strategy is not a substitute for rules about what to do when citizens take the initiative by asking for documents that have not been put in the public domain. In particular, citizens have a legitimate interest in the organisation and functioning of institutions and bodies that are paid for from public funds. This may lead to requests for administrative documents, which are not usually covered by an information strategy"

Transparency from practice to individual right

- Treaty of Amsterdam (1997): Article 255 TEC:
  - 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have ***a right of access to European Parliament, Council and Commission documents***, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
  - 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
  - 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.
- Provision does not have direct effect, but requires secondary legislation to be made effective – General Court, Case T-191/99, *Petrie et al*, EU:T:2001:284, para 35.

Transparency from practice to individual right

- Charter of Fundamental Rights of the European Union:
  - Article 42 - Right of access to documents
    - Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.
  - Article 43 – European Ombudsman
    - Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Today's lecture

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework

Regulation 1049/2001

- Preambles
  - (2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union

  - (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty

Regulation 1049/2001

Aim = to ensure the widest possible access to documents

Widest possible does not equal full access to all documents!

However, exceptions to full access need to be justified and be known in advance

Regulation 1049/2001

- Obligations imposed on institutions
  - Article 11: obligation to set up a register of publicly accessible documents
  - Article 14: obligation to make accessible to the public Commission proposals and Council and European Parliament's common positions in legislative procedures
  - Article 15 - administrative practice in the institutions
    - 1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by the Regulation.
    - 2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Regulation 1049/2001

- Article 2(1)
  - Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation
    - Only European Parliament, Council and Commission
    - Exceptions nevertheless exist, yet only those recognised by this Regulation
  - Court of Justice, Court of Auditors and European Central Bank?
  - European Council – only institution since 2009?

Regulation 1049/2001

- What is a document?
  - Article 3 (a):
    - any content whatever its medium
      - written on paper or stored in electronic form
      - a sound, visual or audiovisual recording
    - concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility
  - Article 2(3): documents held by an institution = documents drawn up or received by it and in its possession, in all areas of activity of the European Union

Regulation 1049/2001

- Procedure for obtaining access to documents – Article 6
  - Applications for access to a document shall be made in any written form, including electronic form, in one of the languages of the EU and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.
  - If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.
  - In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

Regulation 1049/2001

- Procedure for obtaining access to documents – Article 7
  - An application for access to a document shall be handled promptly.
    - acknowledgement of receipt shall be sent to the applicant.
  - Within 15 working days from registration of the application, the institution shall
    - either grant access to the document requested and provide access
    - or, in a written reply, state the reasons for the total or partial refusal.
  - In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position
    - obligation to inform the applicant of his or her right to make a confirmatory application
    - same 15 working days for confirmatory application – can be doubled in case of long or complex document

Regulation 1049/2001

- How is access made possible? – Article 10
  - either by consulting them on the spot
  - or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference.
    - to be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference

- The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies.
  - Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.
    - If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - *categorical* exceptions: the institutions *shall refuse* access to a document where disclosure would undermine the protection of:
    - (a) the public interest as regards:
      - public security,
      - defence and military matters,
      - international relations,
      - the financial, monetary or economic policy of the Community or a Member State;
    - (b) privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data (see last week!! + Regulation 45/2001)

Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - exceptions where the institution has to justify that no other overriding public interest requires the disclosure of the document(s) concerned
    - protection of commercial interests of a natural or legal person, including intellectual property
    - protection of court proceedings and legal advice
    - protecting the purpose of inspections, investigations and audits
    - documents drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution
  - In practice, three stages, see Case C-350/12 P, *In 't Veld*, para 96

Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
  - A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - Access to a document containing ***opinions for internal use as part of deliberations and preliminary consultations*** within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure
    - Case C-280/11 P, *Access Info Europe*

Regulation 1049/2001

- Court of Justice, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, [2008] ECR I-04723, para 34; Case C-266/05 P, *Sison v Council*, [2007] ECR I-01233, para 63:
  - exceptions need to be interpreted strictly as they derogate from the idea of granting the *widest possible access to documents* held by EU institutions
  - at the same time, however, does this also mean that every request for documents has to be assessed individually without the possibility to per se exclude certain categories of documents from ever being granted access to?

Regulation 1049/2001

- Cases C-280/11 P, *Access Info Europe* and C-350/12 P, *In ‘t Veld*

  - if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying.

  - In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical

Regulation 1049/2001

- Cases C-280/11 P, *Access Info Europe*
  - Para 72: As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature
  - Para 73: in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001

Regulation 1049/2001

- Difference between legislative processes and administrative procedures!
  - Access Info Europe, para 74: such considerations not sufficient in context of legislative procedures
  - particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights

  - Only refusal of access if a genuine risk that the interest protected by the Regulation in Article 4 would be undermined

Regulation 1049/2001

- Nevertheless, in administrative procedures
  - documents relating to restrictive anticompetitive behaviour (Case C-365/12 P*, Commission v EnBW*, EU:C:2014:112, para 65)
  - concentration control (Case C-404/10 P, *Commission v Éditions Odile Jacob*, EU:C:2012:393, para ; Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, para 59)
  - State aid proceedings (Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-05885, para 53)
  - documents relating to pre-litigation infringement procedures based upon Article 258 TFEU (Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, para 55)
- Can be presumed *confidential*
- Mere reference to the fact that those documents belong to one of those categories would seem to suffice rather than having to point out in detail as to why they cannot be accessed

Regulation 1049/2001

- Case T-677/13, *Axa Versicherung v Commission*
- 50. It is true that, when describing the scope of the second request, the Commission stated that its services had found, at an earlier and provisional stage of dealing with the request, that the 3 948 documents concerned fell within four different categories, based on the applicants' own classification (point 2.2 of the contested decision).
- 51 However, when it subsequently assessed that request, the Commission did not reproduce the categories previously identified by its services, but instead considered, in essence, that the general presumption which it had decided to rely on covered all of the categories of documents to which the request related, all of the documents in each of those categories and each of those documents in their entirety.
- 52 In any event, it made no difference whether the 3 948 documents in question fell within one or other of the categories drawn up by the Commission's services, since the case-law allowed that institution to base itself, as it did in the contested decision, on a single general presumption applicable to all of the documents, regarded for the purpose of applying the presumption as falling within a single category (see, to that effect and by analogy, judgments in *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 61, and *LPN and Finland* v *Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 64), without first carrying out an individual and specific examination of each document.

Regulation 1049/2001

- According to the Court, the presumption of confidentiality is rebuttable
  - Specific example: the context of *leniency documents* in EU competition law
    - Case T-677/13, *Axa Versicherung v Commission*
      - Applicant has to bring specific arguments as to why the general presumption of confidentiality could not be applied here…
        - Impossible for an applicant to do this??
        - Para 75
      - Not all documents are leniency documents

Regulation 1049/2001

- What about international relations?
  - Case C-350/12 P, *In ‘t Veld*
    - recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing’
    - Council = > exceptions of international relations and legal advice
      - General rule that differences in position between EU institutions cannot as such be made transparent? ➔ No, see Para 56

Regulation 1049/2001

- Article 5 Regulation:
  - if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
  - exceptions shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years.
  - in case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Regulation 1049/2001

- Interim conclusion
  - Widest possible access needs to be nuanced
  - Exceptions exist, to be assessed on a case-by-case basis
    - No balancing analysis required for some exceptions
    - Balancing interests of disclosure and non-disclosure
  - In addition,
    - Court accepts ‘safe zones’ = categories of documents that are safe from disclosure relying on a general presumption
      - Mostly in the realm of competition law and infringement proceedings
    - Presumption is rebuttable nevertheless
      - Example of leniency documents maintained at Commission level

Today's lecture

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework

Article 15 TFEU

- Regulation 1049/2001 based upon Article 255 EC Treaty

- Provision has been upgraded in light of the Lisbon Treaty and has been replaced by Article 15 TFEU

Article 15 TFEU

- 1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

- 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

Article 15 TFEU

- 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.
  - General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
  - Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.
  - The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.
  - The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

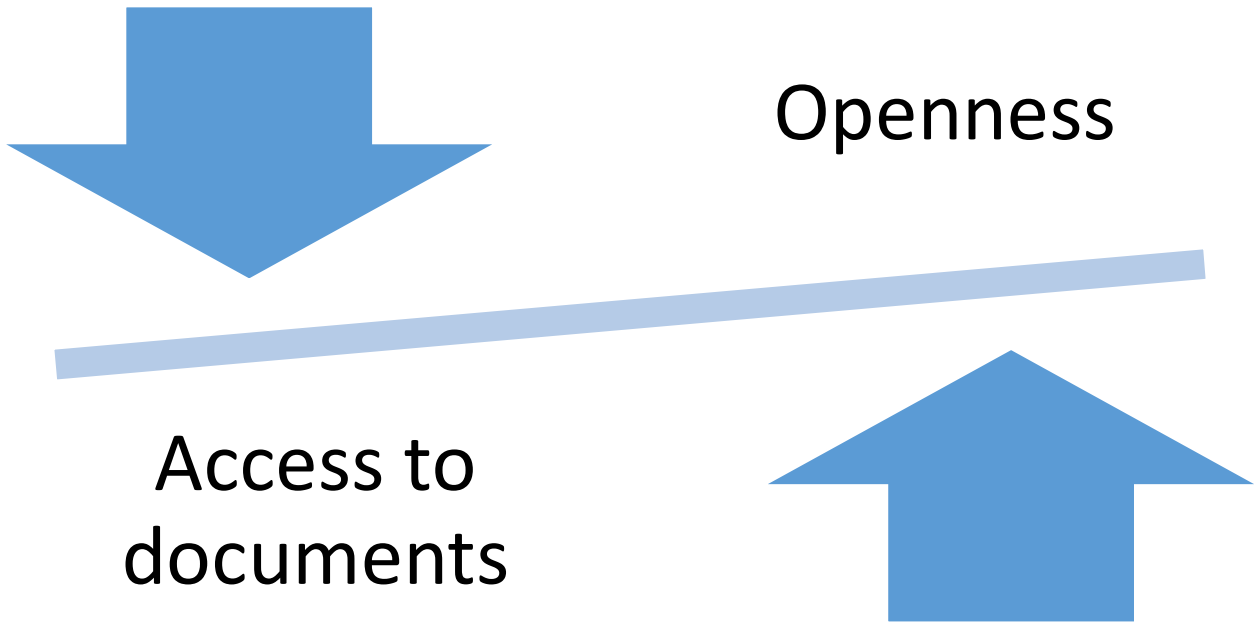
Article 15 TFEU

- Two complementary principles enshrined in one Treaty provision
  - Openness in decision-making
  - Access to documents
- How to ensure transparency?
  - Making available all kinds of information prior to decisions being adopted – ex ante transparency
  - Making public, automatically once the decision adopted, information that has informed decision-making by institutions – ex post transparency
  - Communicating as clearly as possible about what has been done – ex post transparency
  - Giving individuals the right to ask for access to documents made available previously to policymakers – ex post access to documents

Article 15 TFEU

- How to balance openness and access?
  - Absence of any balance? Two distinctive principles
  - Living apart together – different kinds of obligations imposed on EU institutions
  - Communicating vessels – more openness, less access or vice versa

Article 15 TFEU



Today's lecture

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- Limits of the EU's transparency framework

Transparency limits

- Article 15(3) TFEU
  - The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject [the obligation to give access to their documents] only when exercising their ***administrative tasks***.
  - What are administrative tasks?

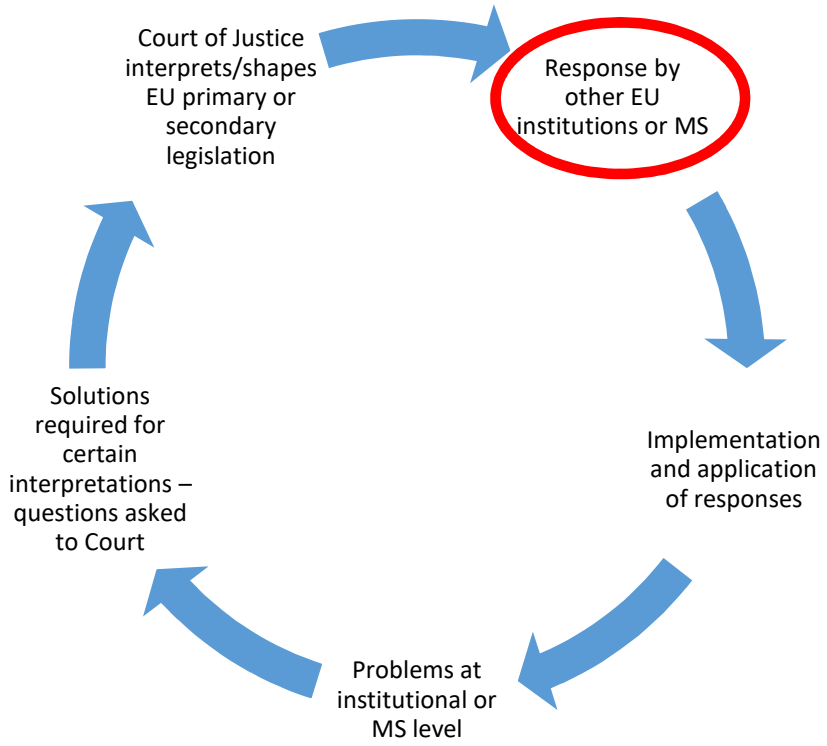
Transparency limits

- Access to Court of Justice documents?
  - Decision of 11 December 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions
  - No definition of administrative documents…

Transparency limits

- Access to Court of Justice documents?
  - Access to a document drawn up by the Court of Justice of the European Union for internal use or received by it, which relates to a matter on which the decision has not been taken by it, shall be refused if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union.
  - Access to a document containing opinions for internal use as part of deliberations and preliminary consultations carried out within the Court of Justice of the European Union or outside thereof if the Court has participated in them shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union

Approach: the politics of EU law



Questions

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Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

Practicalities

- 17 November: class on Fundamental rights
- 22 November: visit to the Court of Justice – see eCampus – 5.00 AM departure!! XX août – next stop Guillemins at 5.15 AM– be on time! – meetings with AG M. Wathelet (CJ) and Judge P. Nihoul (GC)
- 23 November – Jean Rey lecture on Brexit – 18.30 (604) – M. Barnier
- 24 November: *submission case note 2* (on topics relating to transparency or fundamental rights, or other previous topic of your choice – ask for authorisation via email) – **NO CLASS**
- 1 December – class on EMU – basic principles and problems
- Week of 4 December: (optional) Feedback II => see eCampus for registration in week of 27 November
- 8 December – **NO CLASS**
- Tuesday 12 December 13.00-18.00: Academic Workshop on ECB and EMU – Brussels (presence required, transport costs reimbursed (GoPass) – programme on eCampus
- 15 December – last class – Brexit: general and specific problems – Q&A

Practicalities

- Exam – oral exam – two questions
  - Dates proposed
    - Friday 12 January
    - Friday 19 January
    - Wednesday 24 January
  - Registration via ecampus in the first week of December

Today: fundamental rights in the European Union

Legal status – invocability – relationship between EU and EC(t)HR

Fundamental rights

- From nothing to a Charter of Fundamental Rights
- The application of the Charter of Fundamental Rights
  - Scope of application ratione materiae – within the domain of EU law
  - Scope of application ratione personae – horizontal application of fundamental rights
  - Relationship with European Convention on Human Rights and Fundamental Freedoms
- The future? The EU as a party to the ECHR
  - Proposals made
  - The Court of Justice's position

Fundamental rights

- From nothing to a Charter of Fundamental Rights

- The application of the Charter of Fundamental Rights
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  - Proposals made
  - The Court of Justice's position

From nothing to Charter

- EEC Treaty contained only scarce references to fundamental rights
  - Fundamental economic freedoms
  - Non-discrimination on the basis of nationality (now Article 18 TFEU, Article 7 EEC)
  - Non-discrimination on the basis of sex in the context of work(now Article 157 TFEU, Article 119 EEC)

- No reference to other fundamental values deemed essential in a democratic society as found traditionally in Member States' constitutions
  - Freedom of expression, right to life, principles of democratic decision-making, good administration, right to a fair trial, privacy…

From nothing to Charter

- Absence of fundamental rights catalogue became problematic in light of the *Costa / ENEL* and *Internationale Handelsgesellschaft* judgments:
  - 6/64, Costa: principle of primacy/supremacy of EU law – cannot be set aside by a posterior measure of national law
  - 11/70, IHG, para 3: *RECOURSE TO THE LEGAL RULES OR CONCEPTS OF NATIONAL LAW IN ORDER TO JUDGE THE VALIDITY OF MEASURES ADOPTED BY THE INSTITUTIONS OF THE COMMUNITY WOULD HAVE AN ADVERSE EFFECT ON THE UNIFORMITY AND EFFICACY OF COMMUNITY LAW . THE VALIDITY OF SUCH MEASURES CAN ONLY BE JUDGED IN THE LIGHT OF COMMUNITY LAW . IN FACT, THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, CANNOT BECAUSE OF ITS VERY NATURE BE OVERRIDDEN BY RULES OF NATIONAL LAW, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED IN QUESTION . THEREFORE 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 THAT STATE OR THE PRINCIPLES OF A NATIONAL CONSTITUTIONAL STRUCTURE .*

From nothing to Charter

- Reaction at Member States' level – most notably *Solange* judgments, German Constitutional Court (BVerfG)
- Article 24 Grundgesetz: The Federation may by a law transfer sovereign powers to international organisations.
- Case *Internationale Handelsgesellschaft* - 29 May 1974, BVerfGE 37, 271, English translation at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588
- The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks
  - a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level;
  - in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the sub-stance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights gene-rally binding in the Community is adequate in the long term measured by the standard of the Ba-sic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exce-ding the limitation indicated, set by Article 24 of the Basic Law.

From nothing to Charter

- Case is often referred to as Solange I
  - ***As long as*** this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration pro-cess, which is still in flux and which will end with the pre-sent transitional phase.

  - Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

From nothing to Charter

- Responses at EU level: avoiding conflict (I)
  - Court of Justice
    - 14 May 1974, *Nold*, 4/73:
      - F*UNDAMENTAL RIGHTS FORM AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW, THE OBSERVANCE OF WHICH IT ENSURES .*
      - *IN SAFEGUARDING THESE RIGHTS, THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES, AND IT CANNOT THEREFORE UPHOLD MEASURES WHICH ARE INCOMPATIBLE WITH FUNDAMENTAL RIGHTS RECOGNIZED AND PROTECTED BY THE CONSTITUTIONS OF THOSE STATES .*
      - *SIMILARLY, INTERNATIONAL TREATIES FOR THE PROTECTION OF HUMAN RIGHTS ON WHICH THE MEMBER STATES HAVE COLLABORATED OR OF WHICH THEY ARE SIGNATORIES, CAN SUPPLY GUIDELINES WHICH SHOULD BE FOLLOWED WITHIN THE FRAMEWORK OF COMMUNITY LAW*
    - *17 December 1979, Hauer, 44/79*
      - Para 15: *THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES , SO THAT MEASURES WHICH ARE INCOMPATIBLE WITH THE FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTIONS OF THOSE STATES ARE UNACCEPTABLE IN THE COMMUNITY*
  - Other institutions?
    - European Parliamentary direct elections

From nothing to Charter

- Solange 2, BVerfG, 22 October 1986, BVerfGE 73, 339:
  - In view of those developments it must be held that, ***so long as*** the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer re-view such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) for that purpose are therefore inadmissible.

From nothing to Charter

- Avoiding conflict (II):
  - Additional question – how do CJEU interventions in the realm of fundamental rights fit the framework set up by the Council of Europe and the ECHR?
    - ECHR only addressed to States
    - EU not a party to the ECHR
    - States would be responsible for fundamental rights infringements committed by the EU – another international organisation to which those States belong
    - Potential for conflict looming…

From nothing to Charter

- ECtHR, Bosphorus (45036/98, 30 June 2005) case law
  - para 155: State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides […]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued […]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
  - para 156: If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
    - rebuttable presumption!

From nothing to Charter

- More developed response: an EU fundamental rights catalogue: the Charter
  - Maastricht, Amsterdam and Nice Treaties
  - 2000: proposal for a Fundamental Rights catalogue
  - Not binding as such, however containing an overview of principles recognised as fundamental or general in the Court's case law
  - Only binding by virtue of Article 6 TEU, following entry into force of Lisbon Treaty

From nothing to Charter

- Charter
  - Title I: Dignity
    - Right to human dignity (Article 1)
    - Right to life (Article 2)
    - Right to integrity of the person (Article 3)
    - Prohibition of torture (Article 4)
    - Prohibition of slavery (Article 5)
  - Title II: Freedoms
    - Right to liberty and security (Article 6)
    - Respect for private life (Article 7)
    - Right to protection of personal data (Article 8)
    - Right to marry (Article 9)
    - …

From nothing to Charter

- Charter
  - Title II: Freedoms
    - Freedom of thought (Article 10)
    - Freedom of expression (Article 11)
    - Freedom of assembly (Article 12)
    - Freedom of the arts and the sciences (Article 13)
    - Right to education (Article 14)
    - Freedom to choose an occupation (Article 15)
    - Freedom to conduct a business (Article 16)
    - Right to property (Article 17)
    - Right of asylum (Article 18)
    - Protection in the event of expulsion or removal (Article 19)

From nothing to Charter

- Charter
  - Title III: Equality
    - Equality before the law (Article 20)
    - Non-discrimination (Article 21)
    - Cultural, religious and linguistic diversity (Article 22)
    - Equality between women and men (Article 23)
    - Rights of the child (Article 24)
    - Rights of the elderly (Article 25)
    - Integration of persons with disabilities (Article 26)
  - Title IV: Solidarity
    - Workers' right to information (Article 27)
    - Right to collective bargaining (Article 28)

From nothing to Charter

- Charter
  - Title IV: Solidarity
    - Right of access to placement services (Article 29)
    - Protection in case of unjustified dismissal (Article 30)
    - Fair and just working conditions (Article 31)
    - Prohibition of child labour (Article 32)
    - Family and professional life (Article 33)
    - Social security and social assistance (Article 34)
    - Health care (Article 35)
    - Access to services of general economic interest (Article 36)
    - Environmental protection (Article 37)
    - Consumer protection (Article 38)

From nothing to Charter

- Charter
  - Title V: citizens' rights
    - Right to vote EP (Article 39)
    - Right to vote municipal elections (Article 40)
    - Right to good administration (Article 41)
    - Right of access to documents (Article 42)
    - European Ombudsman (Article 43)
    - Right to petition (Article 44)
    - Freedom of movement/residence (Article 45)
    - Diplomatic and consular protection (Article 46)
  - Title VI: justice
    - Effective remedy (Article 47)
    - Presumption of innocence (Article 48)
    - Principle of legality – criminal offences and penalties (Article 49)
    - Non bis in idem (Article 50)

Fundamental rights

- From nothing to a Charter of Fundamental Rights
- The application of the Charter of Fundamental Rights
  - Scope of application ratione materiae – within the domain of EU law
  - Scope of application ratione personae – horizontal application of fundamental rights
  - Relationship with European Convention on Human Rights and Fundamental Freedoms
- The future? The EU as a party to the ECHR
  - Proposals made
  - The Court of Justice's position

Scope of application

- Article 51 CFREU:
- 1. The provisions of this Charter are addressed to
  - the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, and
  - to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

- 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Scope of application ratione materiae

- When are Member States implementing EU law?
  - Applying a Regulation or Decision or norm of EU primary law
  - Transposing a Directive
  - Applying national law resulting from the transposition of a Directive?
    - CJEU, C-617/10, *Fransson*: yes
  - Applying national law related to transposed directives – e.g. national criminal sanctions adopted for VAT evasion?
    - CJEU, C-617/10, *Fransson*: yes

Scope of application ratione materiae

- *Fransson*:
  - Article 51(1) of the Charter 'confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union' (para. 18)
  - The requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (para 20).
  - Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation ***falls within the scope of European Union law***, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter (para 21).

Scope of application ratione materiae

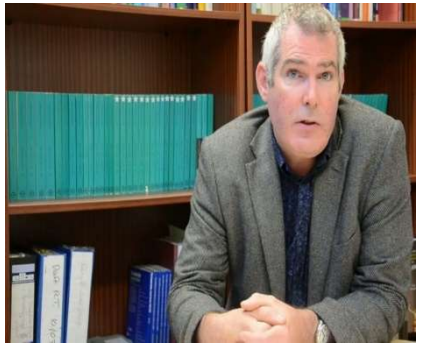
- *Fransson*: Implementation in Article 51 = acting within the scope of European Union law

  - The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is *designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union* (Para 28).

Scope of application ratione materiae

When acting within the scope of EU law, can Member States still maintain stricter or more stringent fundamental rights protection standards?

The exact scope of EU law remains unclear – Court assesses on a case-by-case basis – Problem! (see also M. Dougan – Article on e-campus)



Scope of application ratione materiae

- Article 52(4) CFREU: In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted *in harmony with* those traditions.
- Within the scope of EU law, Article 53 CFREU:
  - Nothing in this Charter shall be interpreted as *restricting or adversely affecting* human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

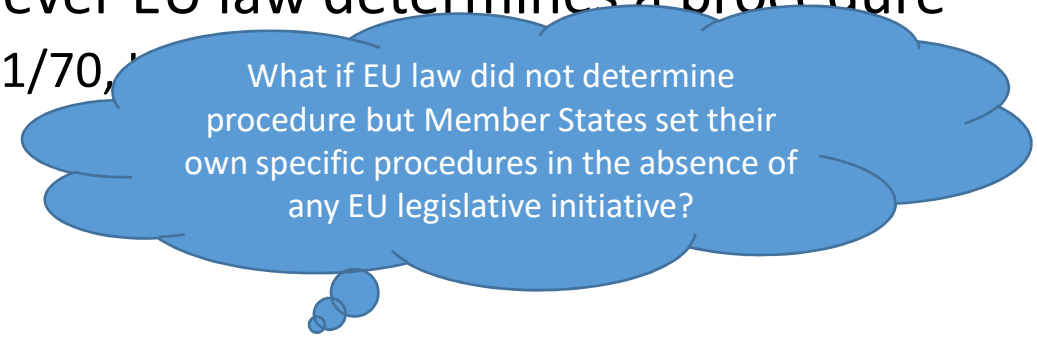
Scope of application ratione materiae

- Nevertheless, C-399/11, *Melloni*
  - *Extradition to Italy, where criminal law does not tolerate a retrial when condemned in absentia*
  - *No retrial is against right to a fair trial as interpreted in Spanish constitutional law*
  - *European Arrest Warrant: EU secondary legislation does not allow Spain to invoke this ground, as that law is in conformity with interpretation of same right to fair trail in the context of EU law – Article 47 Charter + Article 6 ECHR*

- The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.
- Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered *in absentia* subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

Scope of application ratione materiae

- C-399/11, *Melloni*
  - Such actions would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision (para 63)
  - Primacy, unity and effectiveness call for a common standard whenever EU law determines a procedure
    - See already 11/70,



Scope of application ratione materiae

- Any action falling within the scope of EU law falls within the scope of the Charter (*Fransson*)
  - Charter rights are then invocable before national courts to the extent that they are sufficiently clear, precise and unconditional (direct effect)
  - AND
    - In case EU law provides for procedures – such as extradition under European arrest warrant – promoting some kind of '(free) movement' within the EU legal order ➔ national constitutions may not, by virtue of primacy, unity and effectiveness, move beyond the Charter level of protections! (*Melloni*)
    - In the absence of EU procedures – yet still within the scope of EU law – Fransson situation – it is not excluded that Member States offer more stringent protection, e.g. regarding non bis in idem ➔ national constitutions may apparently still offer more stringent protection…
      - unclear in what types of situations this would be a possibility still…

Fundamental rights

- From nothing to a Charter of Fundamental Rights
- The application of the Charter of Fundamental Rights
  - Scope of application ratione materiae – within the domain of EU law
  - Scope of application ratione personae – horizontal application of fundamental rights
  - Relationship with European Convention on Human Rights and Fundamental Freedoms
- The future? The EU as a party to the ECHR
  - Proposals made
  - The Court of Justice's position

Scope of application ratione personae

- Institutions, bodies, offices, agencies and Member States when implementing EU law

- What about private individuals acting within the scope of EU law?
  - Trade Unions
  - Employers
  - Private businesses
  - …

Scope of application ratione personae

- Recognition of horizontal effect of principle of non-discrimination on the basis of
  - Sex – *Defrenne*
  - Age – *Mangold*
  - Nationality - *Angonese*

- Charter does not add anything to that case law, but also does not modify it…
  - See also Article 52(2) CFREU: 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

Fundamental rights

- From nothing to a Charter of Fundamental Rights
- The application of the Charter of Fundamental Rights
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  - Scope of application ratione personae – horizontal application of fundamental rights
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  - Proposals made
  - The Court of Justice's position

Relationship with ECHR

- Article 52(3) CFREU:
  - In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.
    - EU confirmation of Bosphorus case law
  - This provision shall not prevent ***Union law*** providing more extensive protection
    - But see *Melloni* when EU [illegible] a more effective or united law enforcement framework

Different status of fundamental rights recognised in ECHR and the ones in Member States' consitutions?

Fundamental rights

- From nothing to a Charter of Fundamental Rights
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- The future? The EU as a party to the ECHR
  - Proposals made
  - The Court of Justice's position

Accession to ECHR: proposals

- European Convention of Human Rights
  - Within the framework of the Council of Europe – another international organisation
    - ECHR – 47 Member States
    - ECtHR as supranational court
  - Only States could be parties to the agreement, not international organisations such as the European Union

Accession to ECHR: proposals

- Earlier attempts for the EU to join considered impossible by the Court of Justice of the EU
  - Opinion 2/94: EU is not competent to accede to ECHR
    - Para 34: Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Accession to ECHR: proposals

- Changes brought about by the Lisbon Treaty…
  - Article 6(2) TEU: 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 competences as defined in the Treaties.

- … and Protocol 14 attached to the ECHR
  - International organisations can accede to the ECHR

Accession to ECHR: proposals

- Protocol No 8 to TEU-TFEU - Draft agreement permitting accession prepared
- Article 3(6): In proceedings to which the [EU] is a co-respondent, if the [Court of Justice] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of the provision of [EU] law, sufficient time shall be afforded for the [Court of Justice] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].
  - Opinion asked to Court of Justice: Opinion 2/13

Fundamental rights

- From nothing to a Charter of Fundamental Rights
- The application of the Charter of Fundamental Rights
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  - Proposals made
  - The Court of Justice's position

Opinion 2/13

- Para 157: As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.

- Para 158: The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

Opinion 2/13

- Para 166: as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65)

- Para 167: These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

Opinion 2/13

- Para 168: This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

- Para 170: The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU .

- Para 171: As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

Opinion 2/13

- Para 174: In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

- Para 176: In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

Opinion 2/13

- According to the Court, at least two problems with this framework and its integration in the ECHR legal system
  - Constitutional problems of primacy, unity and effectiveness
  - Practical problems to maintain the preliminary reference mechanism in place

Opinion 2/13

- Constitutional problems: the *Melloni* issue
  - Para 187: it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.
  - Para 188: The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).

Opinion 2/13

- Constitutional problems: the *Melloni* issue
  - Para 189: In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.
  - Para 190: However, there is no provision in the agreement envisaged to ensure such coordination.

Opinion 2/13

- Constitutional problems: the *Melloni* issue

- Para 192: when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.
- Para 193: The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

Opinion 2/13

- Constitutional problems: the *Melloni* issue
  - Para 194: In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

  - Para 195: However, the agreement envisaged contains no provision to prevent such a development.

Opinion 2/13

- Practical problems, level 1:
  - Para 196: Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

  - Para 198: it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

Opinion 2/13

- Practical problems, level 2 – prior involvement of CJEU before ECtHR:
  - Para 246: f the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

Opinion 2/13

- Consequences of the Opinion – para 258
- In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:
- – it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- – [it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR];
- – it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- – [it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body].

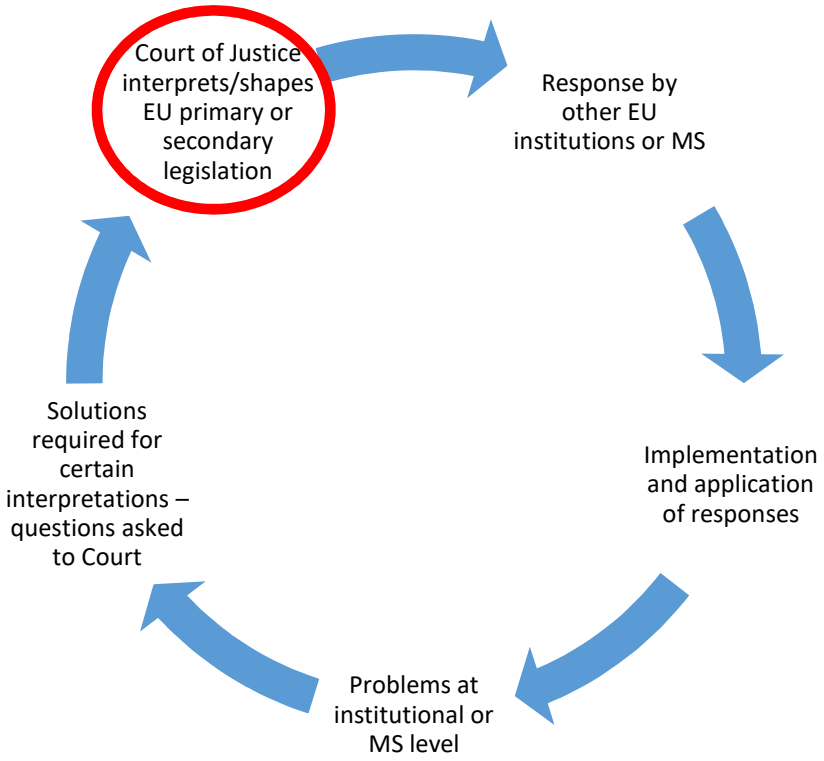
Where are we now?

- No new agreement is being redrafted currently
- Interinstitutional discussions (not: negotiations!) remain ongoing
- Finding an equilibrium between two courts – if so, how?
  - Two supreme fundamental rights courts in Europe?
  - Complemented by national courts

Where are we now?

- Paradox: CJEU reasons in the same way as the German BVerfG (or other constitutional courts for that matter) in relation to an external jurisdiction overseeing its law of the land

The politics of EU fundamental rights law



Questions

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Economic and Monetary Union (EMU)

Advanced EU law

Prof. Dr. Pieter Van Cleynenbreugel

Practicalities

- 8 December – **NO CLASS – Leçons inaugurales**
- Tuesday 12 December 13.00-18.00: Academic Workshop on ECB and EMU – Brussels (presence required)
- Week of 11 December: (optional) Feedback II => see eCampus for registration in week of 27 November
  - Thursday 14 December
  - Friday 15 December
- 15 December – last class – Brexit: general and specific problems – Q&A

Practical remarks

- Exam – registration organised at Faculty level
  - contact me with scheduling problems

- EMU academic seminar in Brussels
  - why?
  - programme available on eCampus
  - SNCB GoPasses available – practical information will follow – assistant responsible: Ms. Nathalie Defossé – message will follow next week

Overview: Economic and Monetary Union (EMU)

- 1. Foundations of the EMU
  - before crisis
    - political and historical developments
    - legal principles
  - after crisis?

- 2. Institutions of the EMU
  - before crisis
    - European Central Bank
  - after crisis
    - European Central Bank: new powers
    - European Stability Mechanism

Foundations

- I. Foundations
  - A. The gradual emergence of an EMU
  - B. Founding legal principles
  - C. Responses in the wake of crisis

Foundations

- I. Foundations
  - A. The gradual emergence of an EMU
  - B. Founding legal principles
  - C. Responses in the wake of crisis

A. Gradual emergence

- Historical background: Werner Report and early initiatives

  - the dream of a European currency Union

  - from dream to reality in the context of the European Economic Community

    - why a monetary Union?
    - 1970 Werner Report
    - monetary Snake tying currencies together
    - 1989 Delors Report

A. Gradual emergence

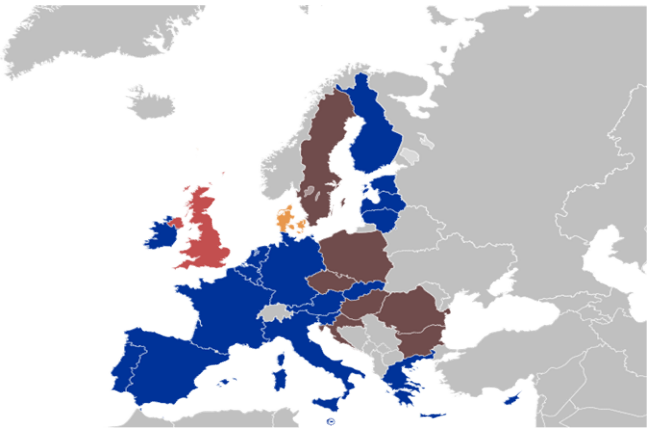
- The Maastricht Treaty
  - Part III, Title VI inserted in the EC Treaty
    - economic Policy: broad economic policy guidelines (art. 103 EC), no bail-out clauses (art. 104 EC)
    - monetary Policy: price stability (art. 105 EC) , institutional organisation of Monetary Union

A. Gradual emergence

- Three stages envisaged by Maastricht Treaty
  - first stage: liberalisation of the movement of capital, from 1 January 1990 onwards
    - direct effect of free movement of capital!!
  - second stage: convergence of the Member States' economic policies, from 1 January 1994 onwards
    - gradual converging of economic policies through broad EU-wide guidelines
    - 'convergence criteria': art. 109j + protocols on Convergence Criteria and Excessive Deficit Procedure
      - ensures economic convergence and lays foundations for integrated monetary union
  - third stage should begin by the latest on 1 January 1999 with the creation of a single currency and the establishment of a European Central Bank.

A. Gradual emergence

- A common currency for those respecting convergence criteria + joining the monetary Union
  - 1 January 1999: B, Nl, Lux, It, France, D, Austria, Finland, Ireland
  - 1 January 2001: Greece



Foundations

- I. Foundations
  - A. The gradual emergence of an EMU
  - B. Founding legal principles
  - C. Responses in the wake of crisis

B. Founding legal principles

- What is an Economic and Monetary Union?
  - Economic Union = internal market + customs union + convergence of economic policies
  - Monetary Union = single currency
    - theory of optimal currency
      - labour mobility
      - fiscal transfers
      - capital movements
      - similar ‘business cycles’ – interacting economies

B. Founding legal principles

- Legal translation in EU law: Article 119 TFEU

  - Member States remain autonomous in determination of their economic – i.e. taxing and spending – policies, in compliance with the objectives of the EU internal market

  - monetary policy – i.e. regulating price stability through devaluation or other inflation or deflation-based policies – is now an exclusive EU competence for Eurozone Member States

  - dividing lines between economic and monetary policy remain undefined

B. Founding legal principles

- Economic policy coordination

  - Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2).
    - Council guidelines, proposed by Commission, discussed in European Council
    - may lead to (public) warning to non-complying Member States
    - EU-wide financial assistance to MS possible (art. 122 TFEU)
    - in practice…

  - Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

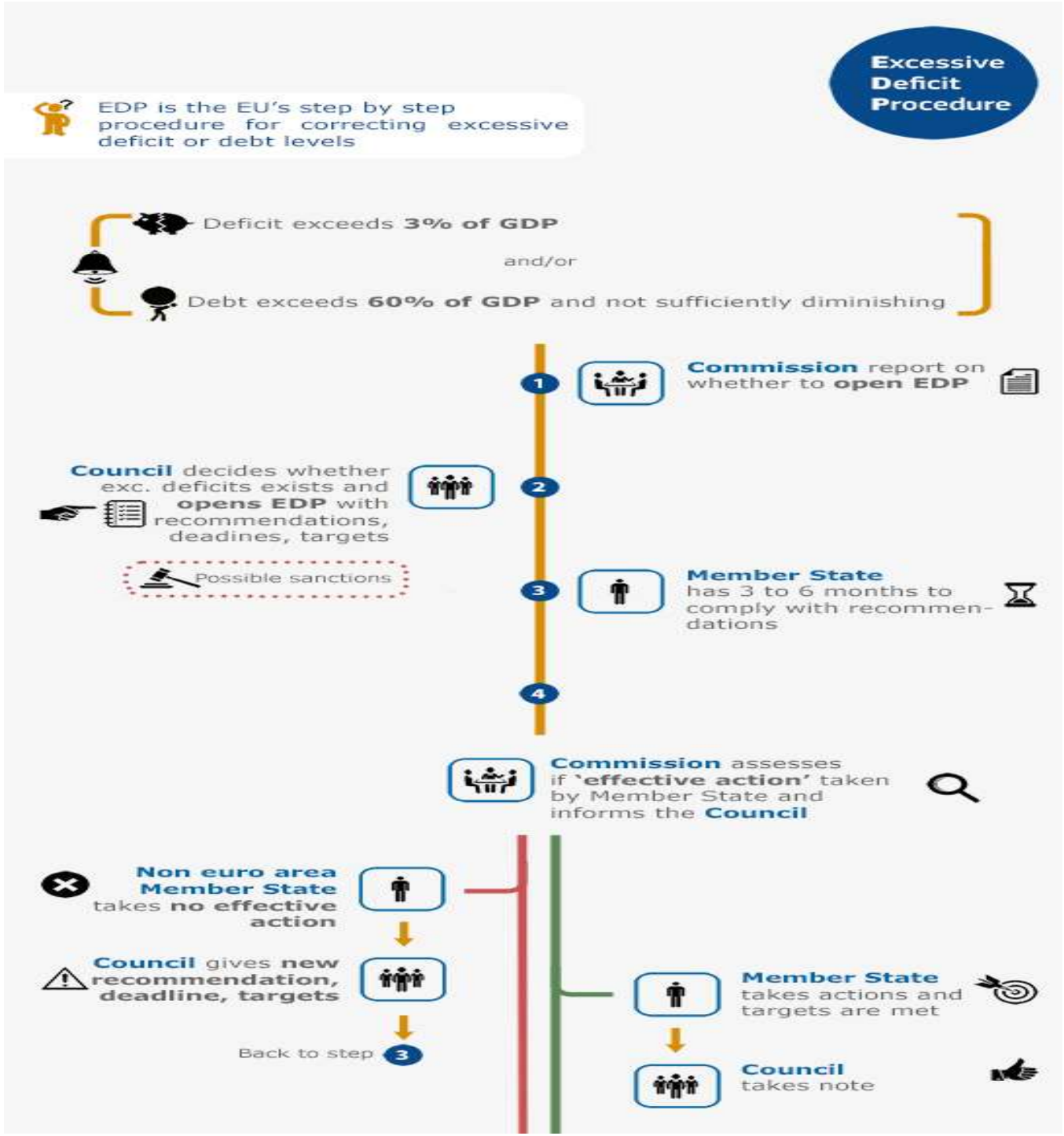
B. Founding legal principles

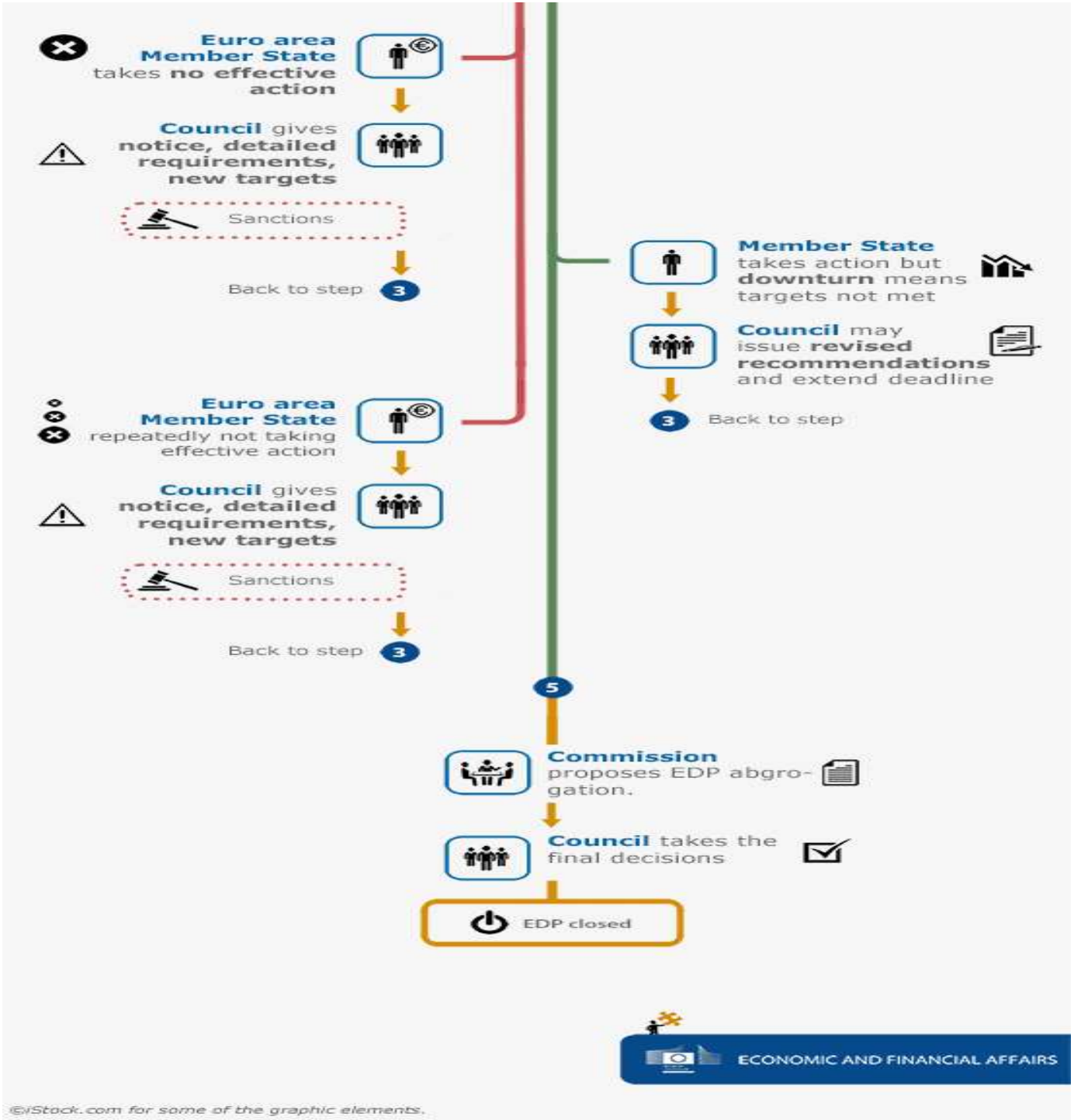
- Assistance to Member States in distress?
  - exceptionally at EU level – art. 122 TFEU

  - no bail out: art. 125 TFEU
    - Union not liable for MS deficits
    - a Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State
    - without prejudice to mutual financial guarantees for the joint execution of a specific project.
  - neither overdraft facilities for MS governments within the EU law framework nor direct purchases by ECB or NCB of debt instruments – art. 123 TFEU

B. Founding legal principles

- Excessive deficits need to be avoided in a converging economy
  - article 126 TFEU and Protocol No 12
    - i. Limited household consumer index inflation fluctuation
    - ii. Member States' budget deficit may not exceed 3%
    - iii. Member States' budget deficit may not exceed 60% of gross domestic product, "unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace" (B currently: 107 %)
    - iv. Stability of exchange rates prior to joining Eurozone – *obligatory ERM II participation*
    - v. Long-term interest rates cap
  - legal value of criteria?
    - Article 126 TFEU – excessive deficit procedure: preventive and dissuasive limbs
    - UK not subject to dissuasive limb of procedure (Protocol 15)
    - Member States 'with a derogation' cannot vote on EDP concerning Eurozone MS
    - Case C-27/04, *Commission v Council*


Excessive Deficit Procedure
EDP is the EU's step by step procedure for correcting excessive deficit or debt levels
Deficit exceeds 3% of GDP
and/or
Debt exceeds 60% of GDP and not sufficiently diminishing
1
Commission report on whether to open EDP
2
Council decides whether exc. deficits exists and opens EDP with recommendations, deadines, targets
Possible sanctions
3
Member State has 3 to 6 months to comply with recommen-dations
4
Commission assesses if 'effective action' taken by Member State and informs the Council
Non euro area Member State takes no effective action
Council gives new recommendation, deadline, targets
Back to step 3
Member State takes actions and targets are met
Council takes note


Euro area Member State takes no effective action
Council gives notice, detailed requirements, new targets
Sanctions
Back to step 3
Euro area Member State repeatedly not taking effective action
Council gives notice, detailed requirements, new targets
Sanctions
Back to step 3
Member State takes action but downturn means targets not met
Council may issue revised recommendations and extend deadline
3 Back to step
5
Commission proposes EDP abgro-gation.
Council takes the final decisions
EDP closed
ECONOMIC AND FINANCIAL AFFAIRS
©iStock.com for some of the graphic elements.

B. Founding legal principles

- Monetary policy coordination
  - Article 127 TFEU: price stability as the main aim
  - Article 128 TFEU: The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

B. Founding legal principles

- Specificities of the EMU
  - mandatory ‘convergence’ minimum standards to be attained – and maintained? – prior to accession to monetary union regime
  - Treaty opt-out to second stage in relation to monetary policy: United Kingdom
  - exception-regime in relation to monetary policy: Denmark (popular vote)
  - the curious case of Sweden…
  - other Member States?

Foundations

- I. Foundations
  - A. The gradual emergence of an EMU
  - B. Founding legal principles
  - C. Responses in the wake of crisis

C. Responses in the wake of crisis

- When crisis struck…

- Crisis began as banking crisis ➔ banks were rescued by Member States, taking over (parts of) their debts
- Member States faced significant amount of debt
  - fear they could no longer repay their loans
  - if one Eurozone Member State fails, what would the value of the Euro as a currency still be?

  - framework in place had to be relied on
  - Treaty changes after Constitution and Lisbon Treaty?
    - two ways forward:
      - setting up rescue funds and mechanisms largely outside the Treaty framework – see part II of this lecture on institutions
      - tightening rules within which Member States can design and structure their budgets – European Semester

C. Responses in the wake of crisis

- European Semester
  - six pack:
    - Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area
    - Regulation 1174/2011 on enforcement action to correct excessive macroeconomic imbalances in the euro area
    - Regulation 1175/2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies
    - Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances
    - Regulation 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure
    - Directive 2011/85/EU on requirements for budgetary frameworks of the Member States

C. Responses in the wake of crisis

- European Semester
  - two pack:
    - Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability
    - Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area
      - obligation to submit budget to the European Union

Overview: Economic and Monetary Union (EMU)

- 1. Foundations of the EMU
  - before crisis
    - political and historical developments
    - legal principles
  - after crisis?

- 2. Institutions of the EMU
  - before crisis
    - European Central Bank
  - after crisis
    - European Central Bank: old + new powers
    - European Stability Mechanism

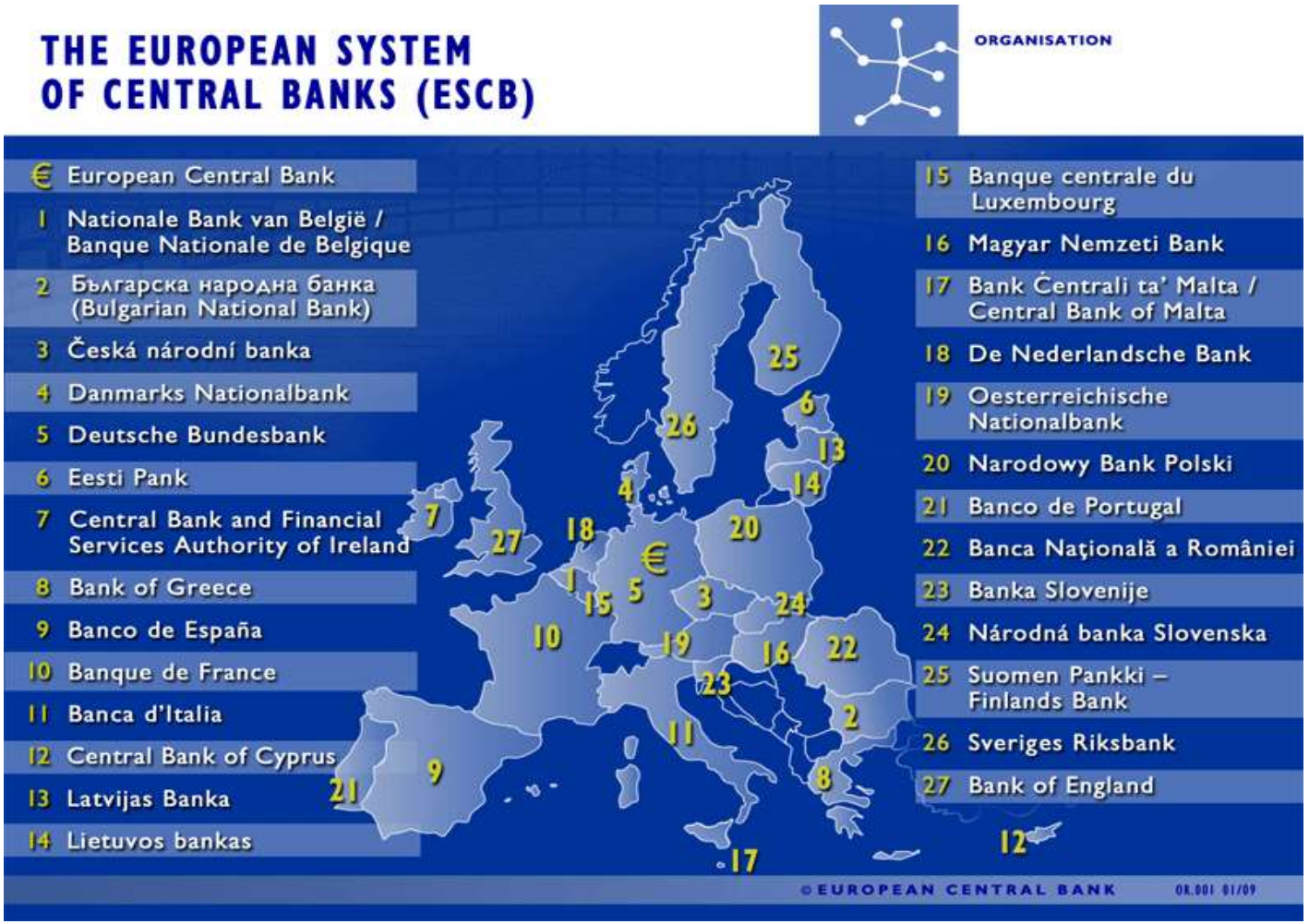
Institutions

- Before the crisis:
  - A. the European System of Central Banks
  - B. the European Central Bank

- After the crisis:
  - C. the European Central Bank: new powers
  - D. the European Stability Mechanism
  - …

A. European System of Central Banks

- European Central Bank and 28 MS central banks



B. The European Central Bank

B. The European Central Bank

- EU institution
  - monetary policy function:
    - lender of last resort in the Eurozone
    - monetary policy guarantor, taking over role of national central banks, which only play a subsidiary role

B. The European Central Bank

- ECB organs (in monetary policy) – Protocol No 4
  - Governing Council comprising members of the executive board and all governors of NCBs
  - Executive Board comprising the President and Vice-President and four other full-time members from Eurozone Member States
  - President: M. Draghi
  - Vice-President: V. Constâncio

B. The European Central Bank

- Decision-making – Protocol no 4 ECB
  - Governing Council defines monetary policy
    - Voting modalities: one (wo)man, one vote, rotating system governors NCBs (max 15 at the same time)
  - Executive Board implements monetary policy and prepares meetings Governing Council
  - binding decisions or non-binding recommendations can be adopted
    - if binding effect, subject to judicial review before the EU courts

B. The European Central Bank

- Confidentiality and transparency
  - principle: monetary policy is highly confidential and classified and should not be made transparent
- Access to ECB proceedings and documents
  - Decision 2004/258/EC
    - no access, in principle, to monetary policy documents and minutes of proceedings
    - alternative: development of a clear communications strategy
      - press releases
      - press conferences

B. The European Central Bank

- Accountability of the ECB
  - hearings before the European Parliament
  - annual Report
  - communication strategies
  - monetary dialogue…

Institutions

- Before the crisis:
  - A. the European System of Central Banks
  - B. the European Central Bank

- After the crisis:
  - C. the European Central Bank: new powers
  - D. the European Stability Mechanism
  - …

C. ECB: powers after crisis

- 1. Enlarged interpretation of ‘monetary policy’ mandate

- 2. ECB as banking supervision body – Single Supervisory Mechanism (SSM)

C. ECB: powers after crisis

- 1. Enlarged interpretation of ‘monetary policy’ mandate

- 2. ECB as banking supervision body – Single Supervisory Mechanism (SSM)

1. Monetary policy enlarged

- Confronted with sovereign debt crisis
  - Member States could no longer repay their debt
  - faith in Euro down ➔ downward spiral…
  - what can the ECB do to keep the Eurosystem afloat?
    - « whatever it takes » - outright monetary transactions = buying Member States' bonds (loans) directly on the market
  - can it interfere with Member States' economic policy powers?
    - within the scope of Article 127 TFEU?
    - Article 123 TFEU?

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - *C-62/14, Gauweiler*
    - German Members of Federal Parliament (Bundestag), including Mr. Peter Gauweiler asked whether the ECB had the mandate to do so
    - argument: this is economic policy, for which the Member States are competent
      - ECB cannot do this unless Member States have transferred powers to it – in that case, MS constitutional procedures have to be followed
        - in Germany, Bundestag would have to vote on the matter

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - Procedure before BundesVerfassungsgericht (Solange?)
      - reference for a preliminary ruling to the Court of Justice
      - Court:
        - is this monetary policy and therefore falling within the exclusive competence of the ECB?
          - compatible with Article 119 and 127 TFEU?
        - is this a matter of economic policy falling within the competence realm of the Member States?
          - acceptable despite Article 123 TFEU prohibiting buying MS financial instruments?

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - para 35: EU has exclusive competence in monetary policy matter
    - para 50: The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - para 51: The fact that a programme such as that announced in the press release might also be capable of contributing to the stability of the euro area, which is a matter of economic policy
    - yet, para 52: a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - In violation of Article 123 TFEU?
      - para 94: it is clear from its wording that Article 123(1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments
      - yet, para 95: it follows that that provision prohibits all financial assistance from the ESCB to a Member State (but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.
        - Conditions need to be fulfilled for this…

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - para 112: in that regard, it must be borne in mind, first, that the programme provides for the purchase of government bonds only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as those objectives are achieved.
    - para 113: that limitation on the ESCB's intervention means (i) that the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on secondary markets and (ii) that the programme in question cannot be implemented in a way which would bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation.

1. Monetary policy enlarged

- Confronted with sovereign debt crisis:
  - C-62/14, *Gauweiler*
    - Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank must be interpreted as permitting the European System of Central Banks (ESCB) to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release to which reference is made in the minutes of the 340th meeting of the Governing Council of the European Central Bank (ECB) on 5 and 6 September 2012.

C. ECB: powers after crisis

- 1. Enlarged interpretation of ‘monetary policy’ mandate

- 2. ECB as banking supervision body – Single Supervisory Mechanism (SSM) as part of a newly established Banking Union

2. SSM – banking union

- Previously, banks were controlled by their home state banking supervisor
  - different resources, different working methods, sometimes too limited to control global banks
    - e.g. Belgium - Fortis
  - in the wake of crisis, calls were made for a more streamlined and europeanised banking supervision model

2. SSM-Banking Union

- European Banking Authority

- Within the Eurozone, single supervisory mechanism – Regulation 1024/2013
  - European Central Bank replaces national supervisory authorities – supervisory board
  - can give licenses to banks – supervises their books – can adopt sanctions
  - accompanied by a single resolution mechanism – allows to remove banks from economy when no longer able to meet their solvency requirements

Institutions

- Before the crisis:
  - A. the European System of Central Banks
  - B. the European Central Bank

- After the crisis:
  - C. the European Central Bank: new powers
  - D. the European Stability Mechanism
  - …

D. European Stability Mechanism

- Crisis began as banking crisis → banks were rescued by Member States, taking over (parts of) their debts
- Member States faced significant amount of debt
  - fear they could no longer repay their loans
  - if one Eurozone Member State fails, what would the value of the Euro as a currency still be?
- no financial assistance rescue fund available to Member States
  - only option was *International Monetary Fund* (IMF)

D. European Stability Mechanism

- Proposal to introduce, via simplified Treaty amendment procedure, Article 136(3) TFEU
  - “3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

D. European Stability Mechanism

- Creation, by international Treaty of a European Stability Mechanism
  - grants financial assistance to Member States
  - located in Luxemburg
  - conditionality: adds conditions to the granting of such assistance
    - now also to banks

D. European Stability Mechanism

- Could Member States do this – creating financial assistance mechanism outside formal Treaty framework?
  - C-370/12, *Pringle* – full court case
    - para 124: the referring court asks whether the conclusion and ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty is not intended to circumvent the prohibition laid down in Article 123 TFEU since those Member States may not, either directly or through intermediary bodies created or recognised by them, derogate from European Union law or condone such a derogation.
    - para 125: in that regard, it must be held that Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition

D. European Stability Mechanism

- Could Member States do this – creating financial assistance mechanism outside formal Treaty framework?
  - C-370/12, *Pringle* – full court case
    - para 135: it is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy
    - para 137: Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.
      - importance of conditions attached to financial assistance

D. European Stability Mechanism

- Could Member States do this – creating financial assistance mechanism outside formal Treaty framework?
  - C-370/12, *Pringle* – full court case
    - Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded at Brussels on 2 February 2012, or the ratification of that treaty by those Member States

LIÈGE université

Questions?

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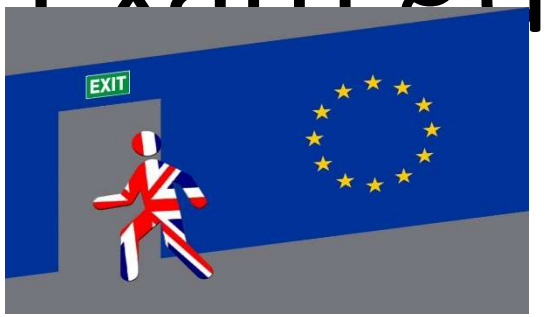
Brexit – Exam guidance –



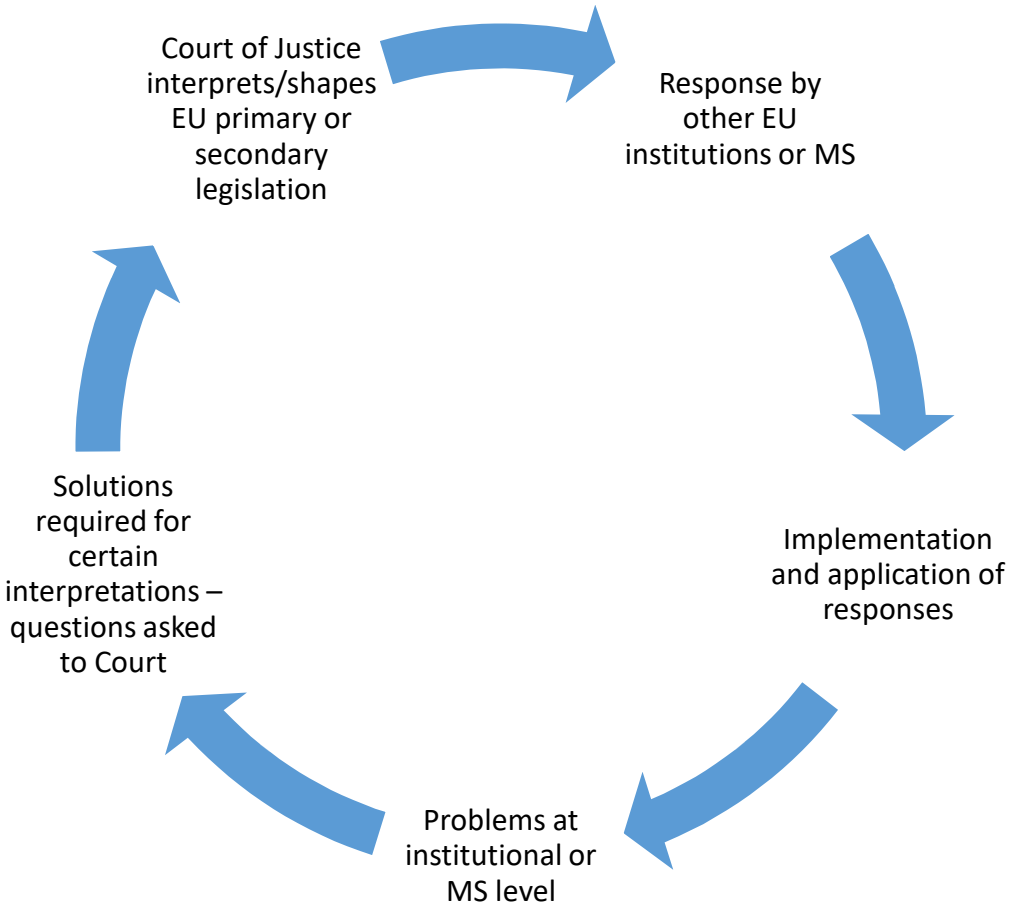
Advanced EU law

Prof. Dr. Pieter Van Cleynenbreugel

Approach: the politics of EU law

- (on purpose) not your traditional 'black-letter law' course
  - not all answers are offered in class
    - rather showing problems and pointing at difficulties, inviting you to discover them in more detail in writing assignements and exam preparation, in order to be able to discuss them
    - US-style of teaching
    - in real (professional) life, not all answers are given either, so preparation in that sense as well
  - class sessions are meant as a way to stimulate further reflection
    - thinking about the law in action
    - [what you have shown to be capable of in the written case note assignments]
    - showing what academics tend to do
    - stimulus to reflect on different themes and on the ways in which EU law intervenes in those contexts
  - enhancing writing skills by means of case note assignments

Approach: the politics of EU law



Approach: the politics of EU law

- Internal market
  - horizontal application of EU internal market law
  - economic v. social rights
  - data protection
- EU's institutional functioning
  - access to documents and transparency
  - sovereignty
  - fundamental rights
- EMU
  - financial assistance and ECB interventions
- Brexit

Practical remarks

- Exam – what to expect
  - oral exam – 2 questions to prepare within 30 minutes
  - you can bring your Treaties and Cases&Materials, which may be annotated with references to other cases and key words
  - exam will last for 20 minutes
    - questions prepared will constitute the starting point for a discussion on topics also discussed in class
    - focus will be on law – how did the Court or EU legislator interpret the law, what choices did it make and what is the impact of those choices

Practical remarks

- Exam – what to expect
  - not a classical Bachelier course's exam where testing whether you have acquired knowledge and some skills is the primary criterion
  - knowledge is only the starting point
    - you have to know how the Court ruled in a certain case
    - you have to understand the legal concepts we have discussed in class – up to the point that they have been discussed
  - skills
    - can you write clearly in English (case notes)?
    - can you show that you understand and have reflected about the different subject-matters? – What are the stakes of a debate? – in light of class discussion and case notes

Practical remarks

- Exam – what to expect
  - grading outside EMU questions
    - perfect knowledge-based answer: 13-14 out of 20
    - putting your answer in context of EU law framework and linking it to other course themes: 14-16 out of 20
    - > 16 out of 20?

Practical remarks

- Exam – what to do with EMU and ECB Workshop?
  - see message sent 13 December 2017
    - knowledge: elements discussed in class 1 December 2017 (see slides + Article on eCampus providing background): 13-14 – presence at workshop taken into consideration!
    - > 13-14: bring forward some knowledge about
      - the different accountability mechanisms in place at the ECB level
      - the *Ledra* judgment – a copy of which is available on eCampus
      - the role of the ECB in financial assistance
    - > 16:
      - additional topics discussed during Workshop + personal opinion

Practical remarks

- Exam – how to study for this course?
  - starting point: your course notes, accompanied by course slides
  - CJEU case law: reread cases in light of class presentations and try to fit the case within the broader legal framework (as you did in your case note assignments)
  - link the different cases to the ‘politics of EU law’ framework and explain where the case fits that framework

Practical remarks

- Exam

Q&A

Brexit

Brexit: overview

- What happened in the United Kingdom?
- How does the procedure work at EU level – Article 50 TEU
- Where are we now? – What thorny issues remain?

Brexit: overview

- What happened in the United Kingdom?
- How does the procedure work at EU level – Article 50 TEU
- Where are we now? – What thorny issues remain?

Brexit: what happened?

- The United Kingdom and the European Economic Community/European Community/European Union: a love-hate affair

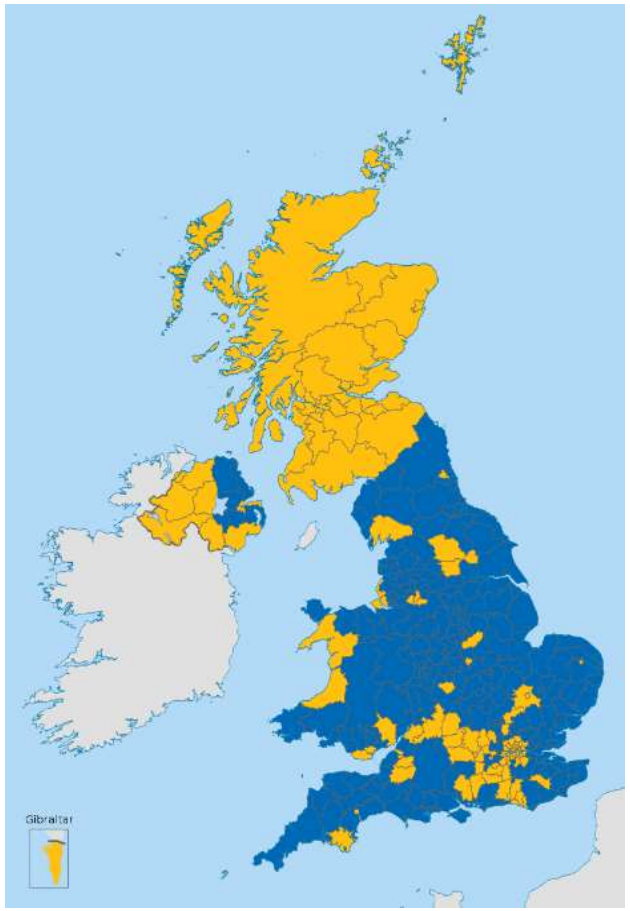
Keep Britain in Europe

Brexit: what happened?

- *European Union Referendum Act 2015*
  - *"Should the United Kingdom remain a member of the European Union or leave the European Union?"*
- Background: negotiation of a UK deal with EU institutions

Brexit: what happened?

- 23 June 2016: referendum : 51.9% voted leave; 48.1% remain
  - in 1975; 67.2% remain



Brexit: what happened?

- Results of the referendum:
  - referendum act did not state that results would be binding
    - Government shifts; would like to proceed with Brexit
  - in order to end Membership of the EU, both procedures at EU level (Article 50 TEU, see next part) and Member State level had to be respected
    - at Member State level:
      - withdrawal from an international Treaty => can be done by government
      - accession to EU by means of European Communities Act 1972 = Act of Parliament
        - can UK government decide to repeal Act of Parliament without Parliamentary vote? ➔ NO
        - does existence of this Act imply that Parliament should also approve government's intent to withdraw from international Treaties establishing the European Union?

Brexit: what happened?

- does existence of this Act imply that Parliament should also approve government's intent to withdraw from international Treaties establishing the European Union?
  - <-> Crown prerogative to withdraw from Treaties under UK constitutional law

- Miller case before the High Court of Justice and the UK Supreme Court
  - High Court, 3 November 2016: 1972 Act has special constitutional status; Parliament has to approve any changes – also indirect ones – made to it
  - Supreme Court, 24 January 2017, ***R (Miller) v Secretary of State for Exiting the European Union*** [2017] UKSC 5 confirms High Court

Brexit: what happened?

- UK Supreme Court:
  - §86: the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist.

  - §101: accordingly, we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course

Brexit: what happened?

- Consequences of the *Miller* judgment
  - Government asked Parliament, on 26 January, to approve a bill that would allow it to withdraw from the EU Treaties
  - Parliament eventually voted in favour, bill received royal assent on 16 March 2017
    - 2017 Act to Confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU
    - with this Act, the UK Government could start the EU procedure to withdraw from the Union

Brexit: overview

- What happened in the United Kingdom?
- How does the procedure work at EU level – Article 50 TEU
- Where are we now? – What thorny issues remain?

Brexit and EU law: procedure

- Article 50 TEU: Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements – four steps
  - step 1: A Member State which decides to withdraw shall notify the European Council of its intention
    - 29 March 2017 – letter sent by T. May to D. Tusk, president of the European Council
    - legal consequences?
      - Article 50(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
      - UK automatically withdraws from EU Treaties on 29 March 2019 at 23:59

Brexit and EU law: procedure

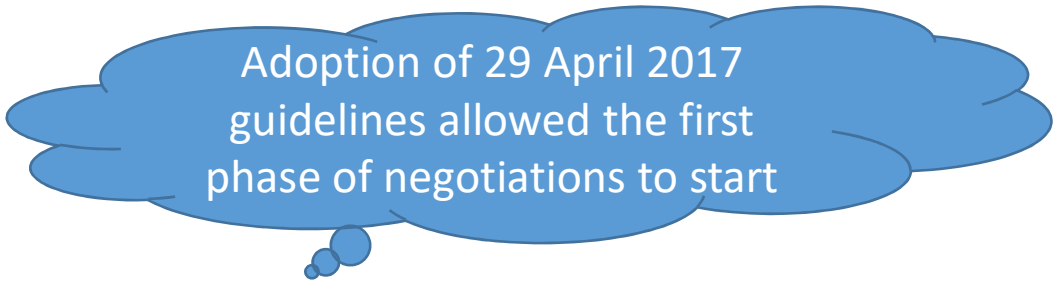
- step 2: once notification has been given, European Council shall set out guidelines for withdrawal negotiations
  - European Council guidelines of 29 April 2017
    - the main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change.
    - negotiations under Article 50 TEU will be conducted in transparency and as a single package. In accordance with the principle that ***nothing is agreed until everything is agreed***, individual items cannot be settled separately. The Union will approach the negotiations with unified positions, and will engage with the United Kingdom exclusively through the channels set out in these guidelines and in the negotiating directives.

Brexit and EU law: procedure

- step 2: European Council guidelines of 29 April 2017
  - two-phased negotiations:
    - phase 1: provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union; settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State.

Brexit and EU law: procedure

- step 2: European Council guidelines of 29 April 2017
  - two-phased negotiations:
    - phase 2:
      - negotiation of actual divorce agreement, against background of more intensive reflection on the future relationship between the European Union and the United Kingdom
      - developing transitional arrangements to avoid a hard Brexit



Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Article 50 TEU:
    - that agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.
      - the Commission shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
      - confirms informal agreement between Member States of 15 December 2016 that European Commission will take the lead on the EU's side – it will conduct negotiations on behalf of the Council
        - M. Barnier designated as Chief Negotiator

Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Article 50 TEU:
    - Council adopted Decision authorising negotiations on 22 May 2017, with negotiation directives attached
    - Commission takes lead and will report back to the Council and European Parliament regularly
  - 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.
    - withdrawing Member State shall not be included in calculation of qualified majority votes
    - Member States do not have to approve and ratify this agreement – EU exclusively competent for its conclusion
  - taking future relationship already into account
    - yet, only in second phase of negotiations

Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Council 22 May 2017 negotiating directives
    - 8. the Agreement should set a withdrawal date which is at the latest 30 March 2019 at 00:00 (Brussels time), unless the European Council, in agreement with the United Kingdom, unanimously decides to extend this period in accordance with Article 50(3) of the Treaty on European Union. The United Kingdom will become a third country from the withdrawal date.

    - 10. the present set of negotiating directives is intended for the first phase of the negotiations. In line with the aim established for the first phase of the negotiations by the European Council, these negotiating directives prioritise some matters which, at this stage, have been identified as necessary to ensure an orderly withdrawal of the United Kingdom from the Union. Other matters not covered by this set of negotiating directives, such as services, will be part of subsequent sets of negotiating directives.

Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Council 22 May 2017 negotiating directives– obtaining clarity and a compromise on four key points:
    - 11. safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations because of the number of people directly affected and of the seriousness of the consequences of the withdrawal for them. The Agreement should provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens' rights, including the right to acquire permanent residence after a continuous period of five years of legal residence and the rights attached to it.
    - 12. settling the financial obligations resulting from the whole period of the UK membership in the Union.

Brexit and EU law: procedure

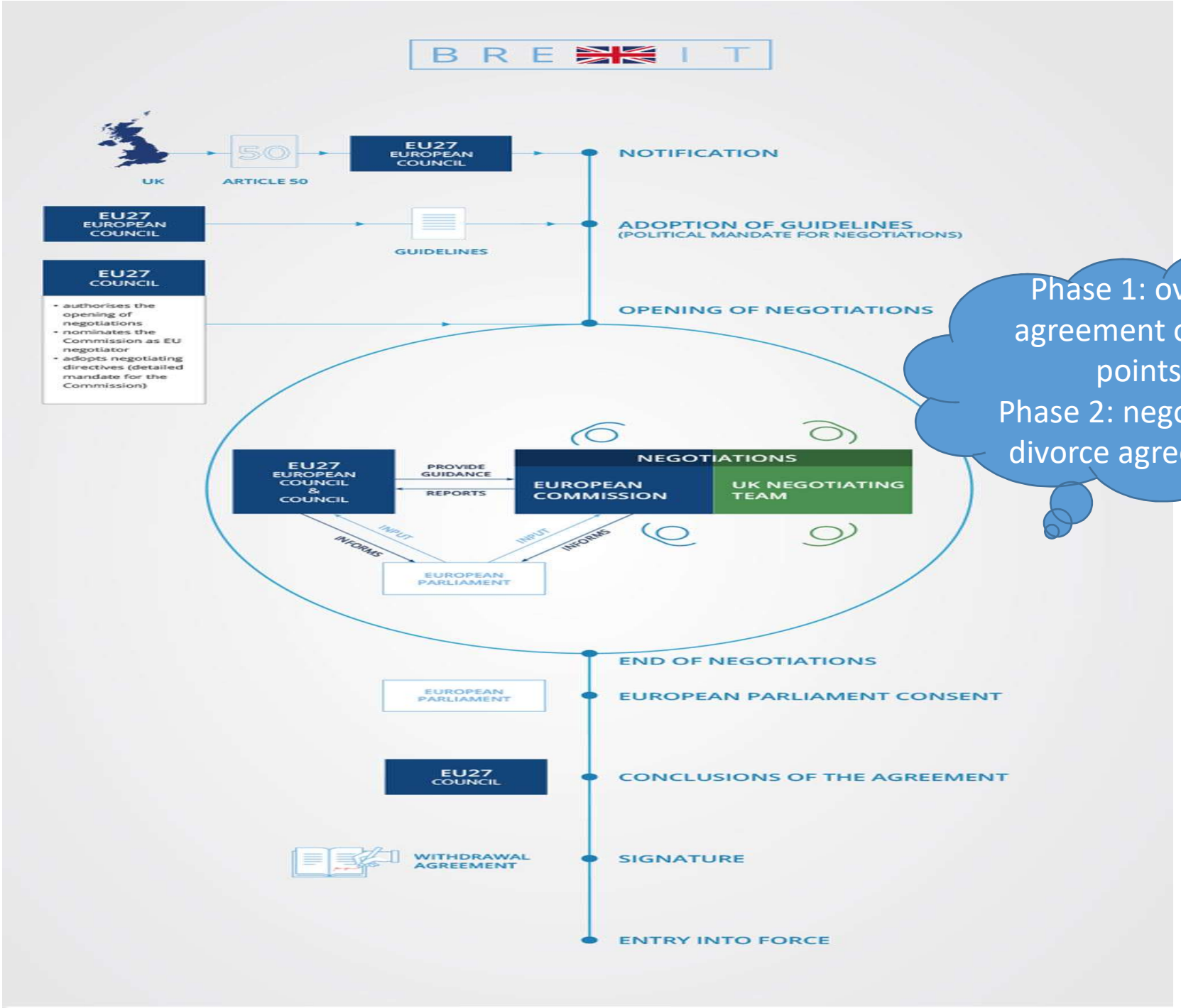
- step 3: negotiating a divorce arrangement
  - Council 22 May 2017 negotiating directives– obtaining clarity and a compromise on four key points:
    - 13. clarify the situation of goods placed on the market before the withdrawal date as well as role of CJEU and administrative bodies in relation to situations predating withdrawal
    - 14. Irish situation and border with Northern Ireland
      - similarly situation of military bases on Cyprus
      - NOT: Gibraltar

Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Council 22 May 2017 negotiating directives– obtaining clarity and a compromise on four key points:
    - 18. a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, by which the United Kingdom remains bound, as well as on the method to ensure that the United Kingdom honours these commitments.

Brexit and EU law: procedure

- step 3: negotiating a divorce arrangement
  - Council 22 May 2017 negotiating directives– obtaining clarity and a compromise on four key points:
    - 19. As soon as the European Council decides that sufficient progress has been achieved to allow negotiations to proceed to the second phase, there will be new sets of negotiating directives. In this context, to the extent necessary and legally possible, matters that should be subject to transitional arrangements (i.e. bridges towards the foreseeable framework for the future relationship) and which are in the interest of the Union, will be included in those future sets of negotiating directives in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply. This approach will allow an efficient allocation of the limited time that Article 50 of the Treaty on European Union imposes for the conclusion of the Agreement by avoiding the need to address the same matter several times at different phases of the negotiations.



Phase 1: overall agreement on key points
Phase 2: negotiating divorce agreement

Brexit and EU law: procedure

- step 4: defining a future relationship
  - Article 50 TEU:
    - 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.
    - 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.

Brexit and EU law: procedure

- step 4: defining a future relationship
  - after withdrawal? – Article 50 TEU remains silent
    - may require the conclusion of a new Treaty outlining the ways in which EU and UK will cooperate
      - Norwegian model
      - Swiss model
      - Canadian model
      - sui generis model?
      - likely a mixed agreement – Member States will have to approve and ratify the agreement as well
        - long-winding process can be expected!

Brexit: overview

- What happened in the United Kingdom?
- How does the procedure work at EU level – Article 50 TEU
- Where are we now? – What thorny issues remain?

Brexit: where are we now?

- Timeline
  - UK notifies European Council on 29 March
  - European Council conclusions of 29 April – negotiation guidelines
  - Council mandates Commission to start negotiations – 22 May 2017 – negotiation directives
    - Commission Taskforce Article 50 TEU set up
    - working as transparently as possible

Brexit: where are we now?

- Timeline
  - negotiations have taken place, focusing on key points in first stage of negotiations
    - six rounds of negotiations between June and November 2017
    - political agreement reached 8 December 2017
      - joint agreement made public by Commission and UK negotiators – see eCampus
    - sufficient progress according to D. Tusk – European Council decides today!!
      - if so, second stage negotiations can be started… and future relationship can be determined

Brexit: where are we now?

- Contested issues and compromises:
  - some progress on citizens' rights, Irish border and financial settlement
  - some issues such as customs-related matters not even discussed yet
  - according to joint statement UK – Commission of 8 December 2017, remaining difficulties regarding
    - Euratom-related (nuclear specific) issues
    - ***ensuring continuity in the availability of goods placed on the market under Union law before withdrawal - §90***
    - judicial cooperation in civil and commercial matters
    - police and judicial cooperation in criminal matters
    - ***ongoing Union judicial procedures - §93***
    - ongoing Union administrative proceedings
    - issues relating to the functioning of the Union institutions, agencies and bodies.

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - §10. Union citizens who in accordance with Union law legally reside in the UK, and UK nationals who in accordance with Union law legally reside in an EU27 Member State by the date of withdrawal, as well as their family members as defined by Directive 2004/38/EC who are legally resident in the host State by the specified date, fall within the scope of the Withdrawal Agreement
    - §11. any discrimination on grounds of nationality will be prohibited in the host State and the State of work in respect of Union citizens and UK nationals, and their respective family members covered by the Withdrawal Agreement;

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - §12. right to join EU or UK citizen in host state even after withdrawal of UK and when not living in that state yet, for as long as right to reside of citizen is valid
      - all family members: partner or spouse, direct ascendants and descendants
      - children born after withdrawal date when parents are both protected by the Withdrawal Agreement or where one parent is protected by the Withdrawal Agreement and the other is a national of the host State
      - children under sole custody of citizen concerned

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - §15. frontier workers also remain covered by the agreement
    - §17. procedures can be put in place to obtain specific residence documents
      - conversion of existing EU documents into specific EU-UK agreement documents

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
  - it remains possible to obtain permanent residency:
    - §21. the conditions for acquiring the right of permanent residence under the Withdrawal Agreement are those set out in Articles 16, 17 and 18 of Directive 2004/38/EC, with periods of lawful residence prior to the specified date included in the calculation of the conditions set out in Articles 16 and 17 of Directive 2004/38/EC

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - §28: social security: time worked in EU or UK in the past counts towards calculation of social security (e.g. pension) benefits
    - §31: equal treatment for workers, self-employed, students and economically inactive citizens with respect to social security, social assistance, health care, employment, self-employment and setting up and managing an undertaking, education (including higher education) and training, social and tax advantages.

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - adoption of legal instruments to guarantee citizens' rights
    - important: §38: role of Court of Justice
      - the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date.

Brexit: where are we now?

- Contested issues and compromises
  - the status of EU citizens in the UK and vice versa
    - Important: §38: role of the Court of Justice
      - §39: the Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the new legal instrument implementing the points agreed in into law

      - §40: consistent interpretation of the citizens' rights Part should further be supported and facilitated by an exchange of case law between the courts and regular judicial dialogue. In the same vein, it is envisaged to give the UK Government and the European Commission the right to intervene in relevant cases before the CJEU and before UK courts and tribunals respectively.

Brexit: where are we now?

- Contested issues and compromises
  - the Irish border
    - §49:
      - the United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship.
      - should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.

Brexit: where are we now?

- Contested issues and compromises
  - the Irish border
    - §52: both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.

Brexit: where are we now?

- Contested issues and compromises
  - the Irish border
    - §54: both Parties recognise that the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (Common Travel Area), while fully respecting the rights of natural persons conferred by Union law. The United Kingdom confirms and accepts that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland's obligations under Union law, in particular with respect to free movement for EU citizens.

Brexit: where are we now?

- Contested issues and compromises
  - financial settlement
    - §59 and §62: UK continues to contribute to EU budget until 2020, as agreed previously

Brexit: where are we now?

- Today, 15 December 2017
  - European Council is on-going
  - deciding on whether sufficient progress on the contested issues has been made to move to the second stage of the negotiations
    - political agreement between EU and UK dd. 8 December
      - at UK level: increased role forParliament in Brexit deal??
    - ready to reflect about and look towards future relationship?
    - New negotiation guidelines (European Council) and directives (Council) will have to be adopted
  - do-able by 29 March 2019??

Questions?

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